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

ERIC STEWARD, et al., *Plaintiffs*	§ § §	
v.	§	Case No. 5:10-CV-1025
RICK PERRY, Governor of the State of Texas, THOMAS SUEHS, Executive Commissioner of the Texas Health and Human Services Commission, CHRIS TRAYLOR, Commissioner of the Texas Department of Aging and Disability Services, *Defendants*	§ § § § § § § § §	

DEFENDANTS' RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO INTERVENE

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TO THE HONORABLE JUDGE ORLANDO L. GARCIA:

Defendants Rick Perry, Governor of The State of Texas, Thomas Suehs, Executive Commissioner of the Texas Health and Human Services Commission, and Chris Traylor, Commissioner of the Texas Department of Aging and Disability Services (collectively, "Defendants") hereby respond as follows in opposition to the Partial Consent Motion By The United States Of America To Intervene And Memorandum In Support Thereof [Doc. 53] ("Motion to Intervene"):

INTRODUCTION

Plaintiffs, six individuals (as parents or guardians) and two organizations, filed this lawsuit on December 20, 2010, asserting claims under the Title II of the Americans with Disabilities Act ("ADA" or "Title II") and the *Olmstead* Supreme Court decision, Section 504 of the Rehabilitation Act of 1973 ("Rehab Act"), several sections of Title XIX of the Social Security Act ("Medicaid Act"), and the 1987 Nursing Home Reform Amendments to the

Medicaid Act ("NHRA"). [Doc. #1]. On March 8, 2011, Defendants filed a Motion to Dismiss [Doc. ## 30, 32], to which Plaintiffs responded on April 18 [Doc. # 40], and Defendants replied on June 1, 2011. [Doc. # 51]. On May 5, 2011, the United States, through the Department of Justice ("DOJ"), filed a Statement of Interest in the case, notifying the Court of its interest in addressing three issues raised in Defendants' Motion to Dismiss.[1] [Doc. # 43] Defendants responded in opposition on June 8, 2011. [Doc. # 52]. The Motion to Dismiss remains pending.

On June 1, 2011, without any prior discussion with Texas officials to advise the state of the United States' concerns with Texas's ADA and Rehab Act compliance, DOJ notified Defendants by letter of its intention to intervene in this lawsuit "to remedy Texas' violations of [Title II of the ADA and Section 504 of the Rehab Act]." Ex. 1.1, p. 1. In its brief letter, DOJ declared that, based on a review of unspecified "evidence," the United States had predetermined that "Texas' administration of its programs results in the unnecessary segregation of individuals with developmental disabilities in nursing facilities in violation of [Title II of the ADA and Section 504 of the Rehab Act]," and that in its intervention, it would allege that "Texas fails to administer services, programs, and activities in the 'most integrated setting' appropriate to the needs of individuals with disabilities in violation of the ADA and Section 504 of the Rehabilitation Act (as interpreted in *Olmstead v. L.C.*, 527 U.S. 581 (1999))." *Id*. Although the letter made clear DOJ's intent to intervene, DOJ nevertheless represented it was "open to resolving this case at this juncture through a Consent Order with the State," the nature and content of which it did not provide. Ex. 1.1, p. 2. DOJ gave the State ten days in which to advise whether the State would consent to the intervention.

[1] Only one of the three issues is a live one that relates to the ADA or Rehab Act: whether enforcement of the Medicaid Act is limited to federal action to terminate funds. Doc. # 43, pp. 1–2.

On June 10, 2011, Defendants responded by letter, noting that DOJ's June 1 letter failed to indicate anything specific to which the State could substantively respond. Wishing to explore the matters further and provide a meaningful response, but unable to do so based on the ineffectual letter of June 1, Defendants invited DOJ to provide the draft complaint in intervention and/or more detailed information concerning the alleged violations and the remedies the United States might seek so that the State could substantively evaluate its position on intervention and determine whether there were any grounds for further discussion. Ex. 1.2.

DOJ replied on June 15, offering little more information than the June 1 letter, again providing only generalized, conclusory,[2] and redundant statements, such as: "Plaintiffs who are currently confined to nursing homes…want to live in integrated settings and are appropriate for placement in integrated settings….However, they remain confined in institutions." Ex. 1.3, p. 1. DOJ again advised that it must "promptly move for intervention…and thus will move forward with intervention," and indicated that although the United States "stands ready to discuss resolution of these issues with the State of Texas," such discussions were irrelevant for purposes of the decision to intervene; the intervention was going forward.[3] *Id*.

On Friday, June 17, 2011, DOJ's counsel inquired by email "whether there was anything further that the State would like to discuss at this time" and "whether the State opposes intervention by the United States." Ex. 1.4. Defendants' counsel responded immediately that she was consulting with her clients regarding these matters. Ex. 1.4.

[2] Such nonspecific and conclusory statements include: "We determined that the State of Texas unnecessarily institutionalizes individuals with developmental disabilities in nursing facilities and places individuals with developmental disabilities who live in the community at risk of placement in nursing facilities" and "The State's failure to make reasonable modifications to its programs to serve individuals with developmental disabilities in the most integrated setting appropriate to their needs…constitutes discrimination …." Ex. 1.3, p. 1.

[3] That the intervention was a foregone conclusion was confirmed by DOJ counsel in her email of June 21. Ex. 1.5.

After close of business on Tuesday, June 21, DOJ's counsel sent Defendants' counsel an email advising that "we are moving forward with intervention," and gave a deadline of noon on June 22 to advise "whether the state consents" to the motion to intervene. Ex. 1.5. When Defendants received that message the morning of June 22, they again asked for the proposed motion to intervene, but the United States refused to provide it. Ex. 1.6; Ex. 1.7. Accordingly, Defendants advised that they did not consent to the intervention. Ex. 1.7. The United States filed its Motion to Intervene on June 22, 2011.

ARGUMENTS and AUTHORITIES

This Court should deny DOJ's Motion to Intervene for the following reasons. ***First***, DOJ is not entitled to intervene under any provision of Rule 24 because it failed to satisfy the statutory prerequisites to suit. Specifically, DOJ failed to give Texas meaningful notice of the basis for its intervention and made no real effort to determine whether Texas's compliance could be secured by voluntary means before filing its Motion to Intervene. ***Second***, the United States is not entitled to intervene as a matter of right under Rule 24(a). Not only is the United States' interest in this matter not the type of interest contemplated by Rule 24(a), but its interest is already adequately represented by the existing parties. ***Third***, the Court should deny permissive intervention under Rule 24(b) because the United States' interests are already adequately represented and an ability to launch a fullscale enforcement action after intervention, unbridled by the statutory requisites of prior notice and a conciliation process, would unduly alter this litigation and greatly prejudice the defendants. ***Fourth***, that intervention should be denied is illustrated by the United States' attempt to improperly join the State of Texas as a party to this suit, despite the fact that the State has never been served with process or appeared in this matter, and the State of Texas is not a proper party to a section 1983 claim seeking injunctive relief.

I. The United States May Not Intervene Under Any Part of Rule 24 Because It Failed to Satisfy Statutory Prerequisites to Suit.

A. Prerequisites to DOJ suit to enforce Title II of the ADA and the Rehab Act.

Title II of the ADA incorporates the remedies, procedures and rights set forth in the Rehab Act,[4] which in turn incorporates the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq*.[5] Title VI provides that—

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity ... is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability .... Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement ... or (2) by any other means provided by law: *Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means*.

42 U.S.C. § 2000d-1 (emphasis added). Thus, both Title II and the Rehab Act allow for enforcement through the termination or refusal to grant federal funding, or by "any other means provided by law[.]" 42 U.S.C. § 2000d-1. Courts interpret "any other means provided by law" to authorize DOJ enforcement via federal court action. *U.S. v. Arkansas*, No. 4:10CV00327 JLH, 2011 WL 251107 at *2 (E.D. Ark. Jan. 24, 2011); *Smith v. City of Philadelphia*, 345 F.Supp.2d 482, 490 (E.D. Penn. 2004). However, prior to DOJ using "any other means provided

[4] *See* 42 U.S.C. § 12133 (ADA) ("[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

[5] 29 U.S.C. § 794a(a)(2) (Rehab Act) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) 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."). Thus, the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

by law" (such as intervention under Rule 24) to effect compliance with Title II of the ADA, it must first "advise[] the appropriate person or persons of the failure to comply with the requirement and … determine[] that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1(2). These prerequisites to suit embody both a notice requirement and a determination requirement. *See id*.

When considering whether DOJ has complied with the notice requirement, a court will consider who made the communication, to whom the communication was made, and what the contents of the communications were. *See, e.g.*, *Arkansas*, 2011 WL 251107 at *7; *see also Smith*, 345 F.Supp.2d at 490. Correspondence from DOJ to a state's governor that indicates it will investigate that state for possible ADA violations and later provides "detailed, written findings and identify[ies] the minimum measures ..." believed to be necessary to remedy any violations is not sufficient to comply with the statutory pre-suit notice requirement. *Arkansas*, 2011 WL 251107 at *6 (quoting from DOJ letter to Arkansas Governor Beebe).[6] On the other hand, a DOJ letter to a state's governor that indicates that the Civil Rights Division performed an investigation, lists with substantial detail the findings of that investigation in over 50 pages, and describes measures that DOJ recommends the state take to remedy the identified violations of Title II does meet the notice requirement. *Id*. However, such a letter would constitute notice only in regard to the facility that was subject to the investigation and findings set out in that letter and cannot be used to constitute notice of alleged violations at other facilities. *Id*. Nor is a state's mere awareness that DOJ will file a complaint alleging violation of the ADA enough to

[6] In *Arkansas*, the DOJ "concede[d] that it is required to comply with the statutory prerequisites stated in 42 U.S.C. § 2000d-1" prior to bringing an enforcement action under Title II of the ADA. *Arkansas*, 2011 WL 251107. After the district court dismissed the United States' suit against Arkansas for failure to demonstrate compliance with these mandatory prerequisites, the DOJ did not appeal. Thus, it is apparent that the instant suit presents the DOJ with the opportunity to blatantly circumvent what it has itself conceded are mandatory prerequisites to enforcement actions. Such an effort should be rejected. The DOJ should not be permitted to conjure up an enforcement action by intervention when it could not—by its own admission—maintain such an action in its own right.

meet the notice requirement. *Id*. In order to meet the determination requirement of § 2000d-1, DOJ must put forth a "concerted effort" to secure a violating state's compliance before determining that such voluntary compliance cannot be secured. *Arkansas*, 2011 WL 251107 at *7; 28 C.F.R. § 50.3(C). DOJ does not fulfill its obligation by merely making a hollow "determination" that such compliance cannot be voluntarily secured. *Arkansas*, 2011 WL 251107 at *7.

B. DOJ failed to meet the statutory prerequisites to suit.

The United States' proposed Complaint in Intervention [Doc. # 53-1] makes a point of advising the Court that it "sent notice to counsel for the State … that [the State] has failed to comply with the requirements of the [ADA and the Rehab Act]" and that it "advised the State of its intention to intervene … to remedy the violation." Doc. #53-1, ¶ 61. The United States further asserts that it "provided the State additional factual information regarding its determination that the State is in violation of the [ADA and the Rehab Act] …." *Id*., ¶ 62. Finally, the U.S. announces that DOJ "has determined that the State's compliance with the [ADA and the Rehab Act] cannot be secured by voluntary means at this point." *Id*., ¶ 63. This assertion of compliance with the requirements of 42 U.S.C. § 2000d-1 is baseless and misleading. DOJ's so-called "notice" was inadequate and its "determination" was after-the-fact and without justification.

1. DOJ failed to give Texas adequate notice.

DOJ knows how to give a state "notice" of alleged violations of the ADA and it knows what real "evidence" of a violation is, and how to advise a state of such evidence and perceived violations, as required under 42 U.S.C. § 2000e-1. For example, in letters sent to the Governor

of Virginia,[7] the Governor of Delaware,[8] and the Attorney General of New Hampshire,[9] DOJ outlined in great detail the specific evidence it asserts shows violations of the ADA, its specific findings, and specific means of remedying such violations, that is, "the steps [the state] needs to take to meet its obligations under the law."[10] Each of those three letters is over 20 pages long, and each addresses *only one facility*. In contrast, DOJ's cursory letters of June 1 and June 15—which purport to address the United States' pursuit of *all* of Texas's alleged ADA and Rehab Act violations related to persons with developmental disabilities, statewide, in *all* nursing facilities, and *all* issues related to that population's access to Texas's "array of community-based . . . residential and habilitation services"[11]—offer nothing more than generalized assertions and boilerplate language that leave Texas guessing as to exactly what violations of the ADA the United States has found and what precise remedies it seeks. *See* Ex. 1.1; Ex. 1.3.

Rather than providing a meaningful notice of alleged violations and necessary remedial measures for compliance, DOJ's pre-intervention communications were nothing more than notices of intent to intervene. This is apparent from the first communication, which made clear that intervention was a foregone conclusion and DOJ simply wanted to know, for certificate of conference purposes, whether Texas would "consent." *See* Ex. 1.1.

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[7] *See* Ex. 3 http://www.ada.gov/olmstead/documents/virginia_findings.pdf (DOJ letter to Governor Robert McDonnell of Virginia dated 2/10/11). DOJ's letter to the Governor of Virginia was 20 pages long.
[8] *See* Ex. 4 http://www.ada.gov/olmstead/documents/delaware_findings.pdf (DOJ letter to Delaware Governor Jack Markell dated November 9, 2010). DOJ's letter to Governor Markell was 21 pages long.
[9] *See* Ex. 5 http://www.ada.gov/olmstead/documents/new_hampshire_findings.pdf (DOJ letter to New Hampshire Attorney General, Michael A. Delaney dated April 7, 2011). DOJ's letter to Attorney General Delaney was 27 pages long.
[10] *See, e.g.*, Ex. 3, p. 1, 18–20 (specific "recommended remedial measures").
[11] Ex. 1.3, p. 2.

2. DOJ's determination that Texas's compliance could not be secured by voluntary means is baseless.

DOJ had no basis for its "determination" that the ADA and the Rehab Act "cannot be secured by voluntary means at this point." Doc. # 53-1, ¶ 63. First, as discussed above, DOJ has yet to provide Texas adequate notice of any alleged violations. *See* Ex. 1.1. Second, it refused to provide more detailed information when explicitly asked to do so. *See* Ex. 1.2; Ex. 1.3. Third, although Defendants advised that they were formulating a response to the June 15 letter, DOJ gave Defendants less than a day's time to respond regarding consent to the intervention. *See* Ex. 1.5. In short, DOJ failed to offer anywhere near the level of information sufficient for the State to understand the alleged violations, much less any proposed options for "voluntary compliance."

In contrast, in communications with other states, DOJ has outlined specific alleged violations and proposed remedial steps and has directly stated—

> We are obligated to advise you that, in the unexpected event that we are unable to reach a resolution regarding our concern, the Attorney General may initiate a lawsuit pursuant to the ADA once we have determined that we cannot secure compliance voluntarily, 42 U.S.C. § 2000d-1 ….

Ex. 3, p. 20; *see also* Ex. 4, p. 21. Here, DOJ gave Texas no such notice, warning, or adequate opportunity to remediate prior to initiating its suit. Indeed, DOJ's pre-suit investigation and conciliation efforts here are just as meager, if not more so, than those recently found to be wholly insufficient by the federal district court in *U.S. v. Arkansas*—a determination that DOJ did not appeal. *Arkansas*, 2011 WL 251107. Given its course of conduct, it is obvious that DOJ had no intention of engaging in meaningful discussions with Texas before intervening.[12] Under the

[12] Rather, the timing of the intervention on June 22, 2011 appears to have been tied to a DOJ media event commemorating the anniversary of the *Olmstead* decision. *See* Ex. 2 (http://www.justice.gov/opa/pr/2011/June/11-crt-825.html) (subtitled "Announcement [of *Steward* Intervention] Comes on the 12th Anniversary of the Olmstead

circumstances of this case, DOJ has failed to satisfy the prerequisites to suit set out in 42 U.S.C. § 2000d-1.

II. The United States is Not Entitled to Intervene as a Matter Of Right Under Rule 24(a).

A. Standard for intervention as a matter of right under Rule 24(a).

A party seeking to intervene as a matter of right must satisfy all four of the following requirements: (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *Sierra Club v. Espy*, 18 F.3d 1202, 1204 -1205 (5th Cir. 1994). Here, the United States has failed to satisfy the second, third and fourth elements.

B. The United States' "interest" in this matter is not one contemplated by Rule 24(a).

While the United States has an "interest" in Title II of the ADA, Rule 24(a)(2) does not refer to "interests" generally, but instead makes clear that the interest must relate to "the property or transaction that is the subject of the action." FED. R. CIV. P. 24(a)(2). Generally, a potential intervenor establishes an interest in a "property or transaction" under Rule 24(a) by showing that its interest is "direct, substantial, and legally protectable." *Diaz v. So, Drilling Corp*., 427 F.2d 1118, 1124 (5th Cir. 1970). Courts have held that the potential intervenor's interest must be a "legal interest," that there must be a tangible threat to that legally cognizable interest, and that

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Decision"). The same day, DOJ also launched a new webpage, *see* http://www.ada.gov/olmstead ("Olmstead: Community Integration for Everyone," noting the *Steward* intervention); http://www.ada.gov/ (noting that "Olmstead: Community Integration for Everyone" was new as of June 22, 2011), and introduced its new ADA/*Olmstead* guidelines, *see* http://www.ada.gov/olmstead/q&a_olmstead.htm.

the interest must be recognized as one belonging to the proposed intervenor. *See Edwards v. City of Houston,* 78 F.3d 983, 1004 (5th Cir. 1996).

The United States' interest in this litigation does not satisfy Rule 24(a). While the Motion to Intervene makes reference to a general interest in the enforcement of the ADA and Rehab Act and in advancing DOJ's own interpretation of *Olmstead*, DOJ has identified no tangible threat to this alleged interest, nor explained how this interest specifically "belongs to" or is "owned by" DOJ. *Contra Edwards*, 78 F.3d at 1004 (party could intervene to contest consent decree based on showing that its members would be bound by the decree, which had direct, negative effect on its members' employment opportunities). This litigation does not directly interfere with DOJ's ability to enforce the ADA as it sees fit, and DOJ has not shown how the fact-specific claims made here will have a preclusive effect on non-parties to this suit.

The cases DOJ cites in support of its claimed "interest" are distinguishable. In *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416 (5th Cir. 2002), the FDIC was allowed to intervene in a case in which its regulatory decision to grant insurance to a bank was effectively being collaterally attacked by the plaintiff in the suit. *Id*. at 424. In *Sierra Club v. City of San Antonio*, 115 F.3d 311, 314 (5th Cir. 1997), the State of Texas was allowed to intervene because the Sierra Club was seeking an injunction that would have materially altered the State's administration of the Edwards Aquifer Act. *Id.* Finally, in *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202-04 (5th Cir. 1992)—a suit by a private party intended to recoup payments made to a longshoreman after a hearing determined that his injuries were not work related—the court allowed the Director of the Office of Workers' Compensation Programs to intervene on behalf of the longshoreman because under the governing statute and regulations, the Director was vested with authority ''to ensure the fair and adequate compensation of injured employees.'" *Id*. at 1201 (citing *Ingalls*

Shipbuilding Div., Litton Sys., Inc. v. White, 681 F.2d 275, 286 (5th Cir. 1982)). Thus, intervention was permitted in these matters because—unlike here—the intervening party had a *direct*, tangible interest that could have been materially affected by the outcome of the litigation.

To the extent the United States' alleged "interest" in this litigation is the manner in which this Court interprets the "*Olmstead* integration mandate," that is an interest so attenuated as to be meaningless. Under such a theory, every party affected in some unspecified manner by the interpretation of a law at issue in a suit would satisfy Rule 24(a)'s "interest" test. Put simply, DOJ has no "interest" sufficient to satisfy Rule 24(a), and its motion to intervene should be denied on this basis alone.

C. The United States' intervention is not necessary to protect its interest in this matter.

DOJ need not intervene here to protect its interest in enforcing the *Olmstead* integration mandate. Rather, as the entity with the authority to enforce ADA compliance, DOJ has an unfettered ability to protect this claimed interest by initiating *proper*, pre-suit enforcement procedures against any state that it believes it is violating the ADA. Nothing about the instant suit precludes DOJ from bringing an enforcement action on the public's behalf arising out of the same subject matter as this suit.[13] Rather, the real obstacle to DOJ's protecting its claimed interest in the "*Olmstead* integration mandate" is its *own* failure to engage in the requisite pre-suit investigation and conciliation procedures.

[13] *Cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (private employee's mandatory arbitration agreement with employer did not preclude EEOC from invoking enforcement authority to bring suit against employer to vindicate employee's rights under the ADA); *United States v. Fountain View Apts., Inc.*, 2009 WL 1905046(M.D. Fla.) (in Fair Housing Act case, holding that Attorney General is not "precluded from bringing suit on behalf of victims of discrimination, even if one of those victims could not sustain a private lawsuit"). DOJ's status as an authority capable of bringing (properly initiated) enforcement actions for broad relief distinguishes the cases concerning *stare decisis* cited in support of intervention on pages 10 to 11 of the Motion to Intervene because those cases all involved interventions by private parties who had no independent ability—as the DOJ does here—to seek broad relief in a later-filed government enforcement action.

Further, DOJ's representations to this Court regarding the necessity of intervention are entirely belied by its own actions in the other, "sixteen different states" in which it admits it has become involved in private-party *Olmstead* litigation. *See* Doc. 53, p. 9. In those matters, DOJ has adequately represented its interests at the merits stage by either filing an amicus brief or a "statement of interest," as it has *already* done in this matter.[14] *See* Doc. # 43. DOJ can provide no plausible explanation as to why—contrary to its course of action in numerous, other pending *Olmstead* cases—this suit demands that the United States be allowed to intervene.

D. The existing parties adequately represent any legitimate DOJ interest.

A party seeking intervention as of right has the burden of demonstrating its interests are not adequately represented by the existing parties. *Espy*, 18 F.3d at 1207. While this burden has been called "minimal," "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984). Accordingly, "'[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance.'" *Id*. (citing *Internat'l Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 968 (5th Cir. 1978)). DOJ has made no demonstration of inadequate representation that would justify its intervention in this matter.

The United States identifies its interest in this lawsuit as "enforcing the ADA and Section 504 of the Rehabilitation Act to advance the public interest in eliminating discrimination in the

[14] *See* "Participation by the United States in Olmstead Cases" *available at* http://www.ada.gov/olmstead/olmstead_cases_list2.htm#amicus (listing DOJ involvement in other private party Olmstead cases). DOJ intervened at the *remedy* stage of a matter styled *Disability Advocates, Inc. v. Paterson* , No. 03-CV-3209 (E.D. NY 2009), which is now pending in the Second Circuit Court of Appeals, and attempted to intervene in a matter in Florida. *Jones v. Arnold*, No. 09-CV-1170 (M.D. Fla. 2010). However, that latter suit was dismissed by agreement of the parties before the court could rule on the motion to intervene. Accordingly, the instant matter is the only one in the referenced "sixteen different states" in which DOJ is active in which it is attempting to intervene.

form of unjustified institutionalization." Dkt. # 53, pp. 11–12. Without saying *why* it is so, DOJ baldly asserts that "[t]he existing parties to this litigation cannot adequately represent the United States' interests." *Id*., p.11. But the United States cannot demonstrate inadequate representation because both the Plaintiffs and the United States assert the same ultimate broad objective: the State's compliance with the *Olmstead* integration mandate with respect to persons with developmental disabilities living in, or about to be placed in, nursing facilities. Indeed, the organizational plaintiffs purport to represent such persons statewide.[15] Furthermore, the United States and the *Steward* party plaintiffs assert parallel claims under the ADA and Rehab Act, *compare* Doc. #53-1, p. 1, ¶¶ 24–60, 64–68 *to* Doc. # 1, ¶¶ 74–112, 120–124, 210–224, and seek the same relief . *Compare* Doc. #53-1, p. 17 *to* Doc. # 1, p. 54, Prayer at ¶ 1(a), p. 55 at ¶ 1(d).

Further, Disability Rights Texas[16] has been Texas's designated Protection and Advocacy ("P&A") agency for individuals with developmental disabilities, as provided by federal law,[17] since 1977.[18] The very purpose of the federal law establishing the P&A system is to "provide for allotments to support a protection and advocacy system ... in each State to protect the legal and

[15] The organization plaintiffs represent that they may advocate for this compliance on behalf of all affected Medicaid recipients. Plaintiff Arc of Texas describes itself as a statewide organization "dedicated to ensuring that *all* citizens with developmental disabilities in Texas are afforded appropriate services and supports in the most integrated, home-like setting possible . . . ," Doc. # 1, ¶ 17 (emphasis added), and Plaintiff Coalition of Texans with Disabilities, Inc., describes itself as a "statewide cross-disability advocacy organization" having "over 80 member organizations representing some 3 million unduplicated individuals with all types of disabilities, including developmental disabilities . . . ." *Id*. ¶ 19. *See generally id*. , ¶¶ 16–21.

[16] Advocacy, Inc. adopted the name "Disability Rights Texas" in March 2011, in order to better align itself with the larger National Disability Rights Network, the nonprofit membership organization for the federally mandated P&A systems and client assistance programs. *See* Doc. #26.

[17] The federal government provides funding to states that establish a system to protect and advocate for the rights of persons with mental illness and developmental disabilities. *See* 42 U.S.C. §§ 10801-10851 (1994 & Supp. V 1999) (the Protection and Advocacy for Mentally Ill Individuals Act, or "PAMII Act"); 42 U.S.C. §§ 15041-15045 (the Developmental Disabilities Assistance and Bill of Rights Act, or "DD Act").

[18] Under both the PAMII Act regulations and the DD Act regulations, a state P&A system is designated by the governor or state legislature. *See* 42 C.F.R. § 51.5(a) (PSMII Act) (referencing DD Act); 45 U.S.C. §§ 1386.19, .20 (DD Act). Advocacy, Inc. was designated by Governor Dolph Briscoe in 1977 to serve as the state's P&A system. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977), which may be found at http://www.lrl.state.tx.us/scanned/govdocs/Dolph%20Briscoe/1977/DB-33A.pdf.

human rights of individuals with developmental disabilities ….” 42 U.S.C. § 15041. Accordingly, Disability Rights Texas has federal statutory authority to, among other things—

> . . . pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements . . . .

42 U.S.C. § 15043(2)(A)(i). Because of this federally-created scheme designed explicitly for the protection of persons with developmental disabilities, Disability Rights Texas claims the authority to carry out the United States’ stated goal of “enforcing the ADA and Section 504 of the Rehabilitation Act to advance the public interest in eliminating discrimination in the form of unjustified institutionalization.” Doc. #53, pp. 11–12.

The statute cited by the DOJ in its Motion to Intervene, 28 U.S.C. § 517, which grants it authority to attend to the interests of the United States, does not exclude the possibility that another party might have the same interests as the United States in litigation, and DOJ has made no colorable assertion here that its interests are not aligned with the Plaintiffs. Doc. #53, p. 11. Nor do the DOJ’s cited cases—none of which are precedential here—support intervention. *Id*., p. 12. *Southwest Ctr. for Biological Diversity v. Berg* is inapplicable because it concerned a petition in intervention by a *private party* who claimed interests that diverged from the government. *See* 268 F.3d 810, 817, 823 (9th Cir. 2001) (concluding that the municipal and federal governmental defendants likely would not adequately represent the for-profit construction entities in a suit to challenge a city’s land management plan). In *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancharia v. U.S.*, the Ninth Circuit found that “the City's tax and regulatory concerns are sufficient ... to establish a protectable interest in the Indian Bands' action and to allow intervention by the City.” 921 F.2d 924, 927 (9th Cir. 1990). Here, the United States offers no explanation of any such unique protectable interest. The cited Tenth

Circuit case, *San Juan County v. U.S.*, was a quiet-title action brought by San Juan County, Utah, against the United States and various federal agencies ("federal defendants"). 503 F.3d 1163 (10th Cir. 2007). There, the court held that the interests of the federal defendants and the conservation group seeking intervention as of right as a defendant were sufficiently aligned that the federal defendants would adequately represent the conservation group's interest. *Id*. at 1206 (thereby precluding intervention). Rather than citing to the majority opinion in *San Juan County*, however, DOJ cites only to the dissent, which noted that a conflict of interest existed which permitted intervention. No such conflict of interests has been shown here. *See id*. at 1230, 1228–31, 1231 (noting the "historical hostility" between the United States and [the conservation group]). Indeed, the United States has shown no "adversity of interest, collusion, or nonfeasance" whatsoever with regard to the Plaintiffs. *See Bush v. Viterna*, 740 F.2d at 355.

In summary, the United States offers no persuasive argument or authority for the proposition that Plaintiffs—who are represented by a nationally-active organizationand Texas's P&A agency for persons with developmental disabilities—cannot adequately represent its interests in this lawsuit. Thus, the United States has failed to satisfy the fourth requirement of intervention as of right and its motion should be denied.

III. The United States is Not Entitled to Permissive Intervention Under Rule 24(b).

A. Standard for permissive intervention under Rule 24(b).

Permissive intervention is a two-stage process. First, the court must determine whether one of the grounds under Rule 24(b) applies. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977). Second, if this threshold is met, the court must exercise its discretion to determine if permissive intervention should be allowed. *Id*.; FED. R. CIV. P. 24(b)(3). As a

general matter, however, permissive intervention should be denied if it will "unduly delay or prejudice the adjudication of the original parties' rights." *Id.*

Under Rule 24(b)(1), the intervenor must demonstrate that it has (1) an independent ground for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that has a question of law or fact in common with the main action. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 130 (S.D. Tex. 2005). Under Rule 24(b)(2), the intervenor must demonstrate that (1) it has a timely motion, (2) it is a federal agency, and (3) its proposed claim is based on a statute administered by that federal agency. FED. R. CIV. P. 24(b)(2)(A).[19] Further, in exercising its general discretion over a permissive intervention motion, the court may consider, among other things, whether the would-be intervenor's interests are adequately represented by other parties. *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 472 (5th Cir. 1984).

B. The Court should deny the United States permissive intervention.

Regardless of whether DOJ can satisfy Rule 24's permissive intervention requirements, it is wholly within this Court's discretion to disallow permissive intervention even where those requirements are met. *Kneeland v. Nat'l Collegiate Athletics Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987); FED. R. CIV. P. 24(b)(3). This Court should exercise its discretion to deny DOJ permissive intervention, for several reasons. First, DOJ egregiously failed to comply with the statutory prerequisites to suit, in defiance of express congressional intent. *See* discussion *supra* at pp. 2–10. Furthermore, the United States' interests are adequately represented by the other parties in this litigation. *See* discussion *supra* at pp. 13–16.

[19] The United States seeks permissive intervention under Rule 24(b)(1)(B) and 24(b)(2(A) only. *See* Doc. # 53, p. 12. Accordingly, only these two sections of Rule 24(b) are addressed here.

Most importantly, permitting DOJ to intervene in the instant matter without requiring that it first engage in the requisite pre-suit investigation and conciliation process will prejudice the Defendants. It is well-settled that pre-suit conciliation procedures reflect the legislature's preference that matters be resolved via voluntary compliance instead of court action. *Cf., EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 168 (5th Cir. 2011) (collecting cases recognizing Congressional preference for voluntary resolution of Title VII claims via similar pre-suit conciliation process). By allowing DOJ to intervene in this action without first engaging in proper, pre-suit conciliation, the State will be deprived of proper notice of alleged ADA violations and an adequate opportunity to voluntarily remedy its alleged noncompliance, as contemplated by 42 U.S.C. § 2000d-1. Once achieving full party status in the lawsuit, the United States could use the discovery process to unleash a wide-ranging government enforcement action of whatever scope it deems necessary to satisfy its stated interest in "advanc[ing] the public interest in eliminating discrimination in the form of unjustified institutionalization," Doc. # 53, pp. 11–12, without the limitations on scope, and the notice and determination requirements, imposed by the required pre-suit conciliation process. The United States has made clear that this is not a case in which the intervening party seeks to simply "piggyback" on the facts asserted by existing parties. For example, DOJ's letter of June 15, 2011, hinted at—but offered no concrete details about—the United States' thirst for launching a frontal attack on Texas's Medicaid waiver programs. *See, e.g.*, Ex. 3, p. 1. Its proposed Complaint in Intervention also targeted Texas's waivers, *see* Doc. 53-1, ¶¶53–56, whereas Plaintiffs' Complaint lacks this focus, *see* Doc. #1. Allowing this intervention would prejudice the Defendants by, among other things, allowing DOJ to improperly expand the scope of discovery, the facts in dispute, and the length of any possible trial in violation of the Congressionally-imposed limitations on its enforcement

powers. Denial of a permissive intervention motion is warranted in such circumstances. *See, e.g., SEC v. Stanford Int'l Bank, Ltd*., 2011 WL 1758763 (5th Cir. June 20, 2011) (affirming denial of permissive intervention on basis that it would have "add[ed] another layer of litigation" to the matter); *Taylor Communs. Group, Inc. v. Southwestern Bell Tel. Co*., 172 F.3d 385, 389 (5th Cir. 1999) (possibility that permissive intervention could result in litigation of facts unrelated to underlying suit would cause "undue delay" and justified denial of permissive intervention).

IV. The United States' Motion To Intervene Improperly Seeks To Join Non-Party State Of Texas To This Suit.

This suit is brought against three state officials only. Yet, DOJ's complaint in intervention seeks to bring suit solely against an entirely new defendant: the State of Texas. *See* Doc.# 53-1, ¶ 4. DOJ cannot conflate its attempt to intervene in an existing suit with the involuntary joinder of an entirely new party to that suit. Among other things, joinder is governed by completely different rules than intervention, and DOJ has cited to no authority that would permit it—as a non-party to this suit—to seek joinder of the State of Texas to this suit. *See, e.g., Thompson v. Boggs*, 33 F.3d 847, 858 (7th Cir. 1994) (noting inability to locate any case in which "a court granted a motion to join made by a non-party to the lawsuit"). Further, the proper party to a section 1983 claim seeking injunctive relief is the state official in charge of enforcement of the relevant law, sued in their official capacity, not the State of Texas, in general. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001). DOJ has not cited any authority permitting this Court to exercise personal jurisdiction over the State of Texas, as it is not a party to this suit, has not been served with process, and has not made a voluntary appearance. This attempted sleight-of-

hand by DOJ is simply another example of why its attempt here to make an end run around its pre-suit investigation and conciliation process must be rejected.

CONCLUSION

For all of the reasons set forth above, Defendants respectfully request that this Court deny the United States' Motion to Intervene.

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I certify that a true and correct copy of *Defendants' Response In Opposition To The United States' Motion To Intervene* was served by CM/ECF system on July 19, 2011, upon the following individuals at the listed addresses:

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