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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAULA LANE, *et al.*,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as the Governor of Oregon, *et al.*,

Defendants.

Case No. 3:12-cv-00138-ST

THE UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE

The United States respectfully moves to intervene in this action in order to remedy violations of the State of Oregon's obligations under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq*.[1] As explained below, intervention should be granted as of right — or in the alternative, by permission — because the United States has significant interests in this matter that may, as a practical matter, be impeded by disposition of this case, its motion is timely, and the other parties cannot adequately represent the United States' interests.

[1] Title II and Section 504 both prevent the unnecessary segregation of persons with disabilities. *See Olmstead v. L.C.*, 527 U.S. 581, 591 (1999).

BACKGROUND

The United States' proposed Complaint in Intervention[2] alleges that the State of Oregon unnecessarily segregates individuals with intellectual and developmental disabilities in sheltered workshops, where they have little to no interaction with the general population, by failing to provide or make available supported employment services that would allow for their integration into the community.

Congress enacted the ADA in 1990 "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In enacting the ADA, Congress found that "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." *Id.* § 12101(a)(2). For these reasons, Congress prohibited discrimination against individuals with disabilities by public entities, including discrimination in the form of unnecessary segregation and isolation. *Olmstead,* 527 U.S. at 588-89, 596.

Congress furthermore sought "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), and expressly 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 . . . ." *Id.* § 12101(b)(3). Accordingly, the Attorney General is authorized to bring legal action to prevent discrimination that is prohibited by the ADA. *See id.* § 12133 (incorporating 42 U.S.C. § 2000d-1).

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[2] Attached as Ex. 1.

The United States 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 the integration mandate of Title II of the ADA as interpreted by *Olmstead*. The United States also has a substantial interest in ensuring that recipients of federal financial assistance, such as the State of Oregon, do not violate Section 504 of the Rehabilitation Act's similar prohibition against disability discrimination, including unnecessary segregation.

The private named plaintiffs commenced this lawsuit on January 25, 2012, and filed an amended complaint on May 29, 2012. On August 6, 2012, this Court certified a class of "all individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops and who are qualified for supported employment services." *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012) (internal quotation marks omitted).

On October 11, 2011, the United States began an investigation into the State's system of providing employment and vocational services to persons with intellectual and developmental disabilities. (Letter from Max Lapertosa to John Dunbar, Oct. 11, 2011, attached as Ex. 2) On June 29, 2012, following its investigation, the United States issued a letter of findings that notified the State of its failure to comply with the ADA and the minimum steps the State would need to take to meet its obligations under the law. (United States' Letter of Findings, Jun. 29, 2012, attached as Ex. 3) Following this letter, the United States and the Plaintiffs commenced settlement negotiations with the State in an effort to reach an amicable resolution. During these negotiations, the parties did not take oral discovery and engaged in only limited written

discovery.[3] On March 7, 2013, the United States notified the State that it had determined that voluntary compliance was not possible and that it would be initiating legal action. (Letter from Eve Hill to John Dunbar, Mar. 7, 2013, attached as Ex. 4)

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.

I. Intervention As of Right

Rule 24(a)(2) provides that, upon timely application, anyone shall be permitted to intervene in an action who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

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

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)); *see also Zelpro Assembly Solutions,*

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[3] Under the Court's April 3, 2012 scheduling order, the deadline for joining parties and completing fact discovery is April 1, 2013. (ECF No. 28) On March 15, 2013, Plaintiffs filed a motion to extend these and other case deadlines. (*See* Pl.'s Mot. Amend Case Sch. and Extend Deadlines, ECF No. 79) A telephonic hearing on this motion is scheduled for April 16, 2013. (*See* ECF No. 81)

LLC v. Stingl Prods., LLC, No. CV-11-519-ST, 2011 U.S. Dist. LEXIS 98960, at *6 (D. Or. Aug. 5, 2011).

In determining whether to grant intervention, "[c]ourts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Moreover, courts must be "guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *Alisal Water*, 370 F.3d at 919; *see also Yorkshire v. IRS*, 26 F.3d 942, 944 (9th Cir.), *cert. denied*, 513 U.S. 989 (1994). As shown below, the United States satisfies each of the requirements for intervention as of right under Rule 24(a).

A. *The United States Has a Significant Protectable Interest in This Litigation*

"The requirement of a significantly protectable interest is generally satisfied when the interest is protectable under some law, and there is a relationship between the legally protected interest and the claims at issue." *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quotation and alteration marks omitted). "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a practical, threshold inquiry, and no specific legal or equitable interest need be established." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (quotation and alteration marks omitted).

In granting intervention as of right, Ninth Circuit courts have recognized that government agencies have significant protectable interests in cases involving the application of statutes the agency is tasked with enforcing. *See, e.g., Smith v. Pangilinan*, 651 F.2d 1320, 1324-25 (9th Cir. 1981) (United States Attorney General "is charged with administration and enforcement of the

laws relating to immigration" and therefore had interest of sufficient magnitude to warrant inclusion in the action in case involving interpretation of territorial laws permitting holders of territorial certificates to enter United States without restriction); *Dep't of Fair Empl. & Hous. v. Law Sch. Admission Council Inc.*, No. C-12-1830-EMC, 2012 U.S. Dist. LEXIS 150413, at *3 (N.D. Cal. Oct. 18, 2012) (granting United States' motion to intervene in "suit directly implicat[ing] the United States' interest in enforcing Titles III and V of the ADA, and its ability to craft clear, strong, consistent, enforceable standards in implementing the statute and its regulations as directed by Congress") (internal quotation marks omitted);[4] *Alturas Indian Rancheria v. Cal. Gambling Control Comm'n*, No. Civ. S-11-2070 LKK/EFB, 2011 U.S. Dist. LEXIS 124611, at *6-7 (E.D. Cal. Oct. 26, 2011) (granting United States' motion to intervene where it had "protectable interest in protecting the orderly system Congress has established for challenging the assessment or collection of federal taxes").

The United States has a significant, protectable interest in this litigation. As the federal agency with primary regulatory and enforcement responsibilities under Title II of the ADA, the Department of Justice has been charged by Congress with drafting regulations implementing the act, including the integration regulation upon which *Olmstead* was decided. The Department therefore has a substantial interest in enforcing and interpreting Title II and ensuring that its integration mandate is consistently met. *Olmstead*, 527 U.S. at 597-98 ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect.") (citation omitted); *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1117-18 (9th Cir. 2011). Accordingly, courts have allowed the United States to intervene in actions to

[4] The decision further states: "A governmental agency has a significant protectable interest . . . in ensuring that the interpretation of the statutes and regulations it is charged with enforcing are accurately presented to the Court in the course of litigation." *Id.*

enforce *Olmstead*,[5] and the United States has also brought or participated in numerous other such actions across the country.[6]

In enacting the ADA, 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 . . . ." *Id.* § 12101(b)(3).[7] The central issues of this case are critical to the Department of Justice's efforts to advance national goals of community integration and enforce the civil rights of persons with disabilities as required by the ADA. Thus, the United States meets this requirement for intervention as of right under Rule 24(a).

B. Disposition of this Case May Impede the United States' Interests

The United States' ability to protect its substantial legal interest would, as a practical matter, be impaired absent intervention. Federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. The outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns that warrant the United States' intervention. *See Day v. Apolonia*, 505 F.3d 963, 965 (9th Cir. 2007) (intervention was necessary to protect state intervenor's interest where case might "have a precedential impact

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[5] *See Steward, et al. v. Perry, et al.*, No. 5:10-CV-1025 (W.D. Tex. Sept. 20, 2012); *Lynn E. v. Lynch*, No. 1:12-CV-53-LM (D.N.H. March 27, 2012).

[6] *E.g., United States v. North Carolina*, No. 5:12-cv-557 (E.D.N.C. filed Aug. 23, 2012); *United States v. Virginia*, No. 3:12CV059 (E.D. Va. filed Jan. 26, 2012); *United States v. Delaware*, No. 11-CV-591 (D. Del. filed July 6, 2011); *United States v. Georgia*, No. 10-CV-249 (N.D. Ga. filed Jan. 28, 2010).

[7] 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 Implementation and Enforcement of Nondiscrimination Laws*, 3 C.F.R. 298 (1980), *reprinted in* 42 U.S.C. § 2000d-1, note.

regarding the availability of an enforceable right of action"); *City of Los Angeles*, 288 F.3d at 400 (*amicus curiae* status may be insufficient to protect rights of applicant for intervention "because such status does not allow [applicant] to raise issues or arguments formally and gives [applicant] no right of appeal"); *Smith*, 651 F.2d at 1325 ("In appropriate circumstances, . . . *stare decisis* may supply the requisite practical impairment warranting intervention of right."). As such, intervention is necessary to protect the United States' substantial interest in this litigation.

C. *The Application for Intervention Is Timely*

In the Ninth Circuit, three factors are weighed in determining whether a motion for intervention is timely: "(1) the stage of the proceeding in which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (citing *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)). "Mere lapse of time alone is not determinative." *Id.* Rather, as the Supreme Court has emphasized, "[t]imeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also Day*, 505 F.3d at 966 (granting state intervenor's motion where it could not "be said that the state ignored the litigation or held back from participation to gain tactical advantage[,]" and noting that "all the circumstances of the case must be considered in ascertaining whether or not a motion to intervene is timely[.]") (quoting *Legal Aid Soc'y of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980)).

In this case, all three prongs of the timeliness analysis weigh in favor of granting the United States' intervention motion. First, this motion is being filed at a sufficiently early stage of the proceeding because the district court has not yet "substantively — and substantially —

engaged the issues in [the] case." *League of United Latin Am. Citizens v. Wilson* (*LULAC*), 131 F.3d 1297, 1303 (9th Cir. 1997). Here, the Court granted a motion by Defendants to dismiss, but it did so with leave to amend, which Plaintiffs did, and the issues briefed in connection with that motion are now moot. Discovery has not progressed extensively due to the settlement negotiations between the United States and the parties, which did not reach impasse until earlier this month. Thus far, there has been only one set of written discovery requests served by Plaintiffs, and no depositions or other discovery beyond the class certification stage. *See Vosk Int'l Co. v. Zao Gruppa Predpriyatij OST*, Case No. C11-1488RSL, 2012 U.S. Dist. LEXIS 151685, at *4-5 (W.D. Wash. Oct. 19, 2012) (intervention granted "in the midst of the discovery stage," one year after commencement of case) (citing *LULAC*, 131 F.3d at 1303). Accordingly, on March 15, 2013, private Plaintiffs filed a motion to extend the current April 1, 2013 discovery deadline by another year. (ECF Nos. 79, 80.) The case has not reached the dispositive motions stage,[8] let alone trial, and "the real substance of this litigation has not been engaged . . . ." *Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D. 647, 651 (N.D. Cal. 2004).

Second, the existing parties in this case will not be prejudiced if the United States' motion is granted. "Prejudice can . . . be shown where there will be a loss of evidence, a loss of settlement offers in expectation of no further claims being made, or a need to revisit previously adjudicated matters." *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845 LKK/JFM, 2007 U.S. Dist. LEXIS 81636, at *35 (E.D. Cal. Oct. 16, 2007). Here, none of these factors is present: there is no loss of evidence, no loss of settlement offers (indeed, the

[8] Unlike in the instant case, courts have typically found intervention to be untimely when it is sought after the filing of dispositive motions. *See LULAC*, 131 F.3d at 1303 (intervention motion untimely when filed after district court had already ruled on motion for preliminary injunction and motion for summary judgment); *Smith v. Marsh*, 194 F.3d 1045, 1050 (9th Cir. 1999) (intervention motion untimely when filed after district court had already ruled on motions for summary judgment and motion to bifurcate trial).

parties have already made an extensive attempt to settle) and no need to revisit previously adjudicated matters. Although the United States' intervention would not delay adjudication of this case, delay alone would not cause prejudice, but is instead an ordinary consequence of intervention. *See id.* ("A mere delay in the proceedings does not suffice to show that intervention will prejudice the parties."); *see also LULAC*, 131 F.3d at 1304 ("We recognize, of course, that additional delay is not alone decisive (otherwise *every* intervention motion would be denied out of hand because it carried with it, almost by definition, the prospect of prolonging the litigation).") (emphasis in original).[9]

Third, the United States has compelling reasons for filing this motion at this time, rather than immediately after the initiation of Plaintiffs' lawsuit. For the past nine months, the United States has engaged in good faith settlement negotiations with the parties in an effort to reach an amicable pre-suit resolution of the United States' and Plaintiffs' claims. These settlement negotiations began after the United States completed its investigation of the State's system of providing employment services to persons with intellectual and developmental disabilities. The negotiations did not reach impasse until earlier this month.[10]

Accordingly, this Court should find that the United States' motion to intervene is timely.

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

The final requirement for intervention as of right is that the proposed intervenor's interest is not adequately represented by the existing parties to the case. "The [proposed intervenor's]

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[9] In fact, the Department's involvement will benefit the effective resolution of this case due to the Department's extensive experience with issues involving *Olmstead* enforcement. Furthermore, by avoiding multiple lawsuits and coordinating discovery, intervention will lend efficiency to the proceedings.

[10] As a result of these efforts as well as the United States' June 29, 2012 letter of findings (Ex. 3), Defendants are substantially aware of the United States' claims in intervention, thus further demonstrating the lack of prejudice to Defendants.

burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Three factors are relevant: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)).

The existing parties cannot adequately represent the United States' interests. The United States Attorney General is charged by Congress with the duty to enforce Title II of the ADA. 42 U.S.C. §§ 12133-34 (incorporating 42 U.S.C. § 200d-1). No private party may adequately represent the United States' sovereign interest in enforcing federal civil rights laws. "[T]he United States has an interest in enforcing federal law that is independent of any claims of private citizens." *United States v. E. Baton Rouge Sch. Dist.*, 594 F.2d 56, 58 (5th Cir. 1979); *see also EEOC v. Pemco Aeroplex*, 383 F.3d 1280, 1291 (11th Cir. 2004) ("Quite simply, it is so unusual to find privity between a governmental agency and private plaintiffs because governmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party."), *cert. denied*, 546 U.S. 811 (2005). Furthermore, the United States seeks to vindicate the rights of individuals, including youth, who are at risk of placement in segregated sheltered workshops. (*See, e.g.*, Ex. 1 at ¶¶ 70-75); *M.R.*, 663 F.3d at 1116, 1118. Without intervention, the United States' interest in protecting these individuals' rights would not be adequately represented. Accordingly, the United States meets this requirement for intervention.

II. Permissive Intervention

In the alternative, the United States should be permitted to intervene under Fed. R. Civ. P. 24(b), which provides that the Court may permit a federal officer or agency to intervene 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). As the agency charged with enforcing Title II of the ADA, the United States' intervention falls squarely within the language of Rule 24(b)(2). *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2009 U.S. Dist LEXIS 109394, *6-7 (E.D.N.Y. Nov. 23, 2009) ("claims [that] are based on the 'integration mandate' found in the Attorney General's regulations implementing Title II" are "the exact situation specifically contemplated by Rule 24(b)(2)…"), *vacated sub nom. on other grounds, Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living*, 675 F.3d 149 (2d Cir. 2012).

Second, Rule 24(b)(1)(B) states, in relevant part, that "[o]n 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." Fed. R. Civ. P. 24(b)(1)(B). Here, as discussed above, the United States' application for intervention is timely. Furthermore, there are common questions of law and fact between the United States' claims in intervention and Plaintiffs' existing claims, in that both contend that the State unnecessarily segregates individuals with developmental disabilities in sheltered workshops. Although Rule 24(b)(3) instructs courts to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights[,]" as discussed above, the United States' participation would not cause undue delay or prejudice.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant its Motion to Intervene (a) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (b) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Dated: March 27, 2013

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify that on March 27, 2013, I filed the foregoing document, including all attachments, via the Court's CM/ECF system, which shall send notice to all counsel of record via electronic mail.

s/ Max Lapertosa