IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LYNN E., by her guardian, Barry Ellsworth; KENNETH R., by his guardian, Tri-County CAP, Inc./GS; SHARON B., by her guardian, Office of Public Guardian, Inc.; AMANDA D., by her guardian, Louise Dube; AMANDA E., by her guardian, Office of Public Guardian, Inc.; and JEFFREY D., on behalf of themselves and all others similarly situated, Plaintiffs, v. JOHN H. LYNCH, Governor of the State of New Hampshire; NICHOLAS A. TOUMPAS, Commissioner New Hampshire Department of Health and Human Services; NANCY L. ROLLINS, Associate Commissioner, New Hampshire Department of Health and Human Services, Community Based Care Services; MARY ANN COONEY, Deputy Commissioner, New Hampshire Department of Health and Human Services, Direct Programs/Operations; ERIK G. RIERA, Administrator, New Hampshire Bureau of Behavioral Health, Defendants.	)	1:12-CV-53-LM
THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW HAMPSHIRE, Defendant.	)	**UNITED STATES' MEMORANDUM IN SUPPORT OF ITS ASSENTED-TO MOTION TO INTERVENE**

MEMORANDUM IN SUPPORT OF THE UNITED STATES' ASSENTED-TO MOTION TO INTERVENE

The United States files this memorandum in support of its assented-to motion to intervene in this matter to remedy the State of New Hampshire's failure to comply with 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 ("Rehabilitation Act"), 29 U.S.C. § 794.[1]

The United States' proposed Complaint-in-Intervention alleges that the State of New Hampshire discriminates against individuals with mental illness by unnecessarily institutionalizing them in segregated, restrictive settings such as the State's psychiatric hospital, New Hampshire Hospital ("NHH"), and the State's nursing facility for persons with mental illness, the Glencliff Home ("Glencliff"), and by creating a serious risk of institutionalization for individuals with mental illness due to the State's failure to provide them with sufficient community services. *See* United States' proposed Complaint-in-Intervention, attached as Exhibit 1. The United States alleges, therefore, that the State fails to provide services in the most integrated setting appropriate to the needs of persons with mental illness in violation of the ADA and Section 504 of the Rehabilitation Act.

[1] Title II of the ADA was modeled closely on Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in federally-conducted programs and in all of the operations of certain entities, including public entities that receive federal financial assistance. In all ways relevant to this discussion, the ADA and Section 504 of the Rehabilitation Act are generally construed to impose the same requirements. *See Lesley v. Hee Man Chie*, 250 F.3d 47, 54 (1st Cir. 2001) ("Section 504 of the Rehabilitation Act 'is interpreted substantially identically to the ADA'") (quoting *Katz v. City Metal Co.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996)); *accord Yeskey v. Commw. of Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3d Cir. 1997) (""[A]ll the leading cases take up the statutes together, as will we."), *aff'd*, 524 U.S. 206 (1998).

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It 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 … [this includes discrimination in] such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(2) and (3).

For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities: "[N]o 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.

The United States Department of Justice is the federal agency with primary regulatory and enforcement responsibilities under Title II of the ADA. As a result, the Department has a significant interest in enforcing and interpreting Title II and ensuring that the integration mandate, set forth by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), is met. The United States also has a substantial interest in ensuring that recipients of federal financial assistance, such as the State of New Hampshire, do not violate Section 504 of the Rehabilitation Act's similar prohibition of disability discrimination. The instant case directly implicates these interests.

As set forth below, the United States' motion to intervene is timely, the United States has a substantial legal interest in the instant litigation, intervention is necessary to protect the United States' interest, the United States' interest is not adequately represented by the existing parties,

and the United States' claims against the State of New Hampshire share common questions of law and fact with the claims of the private Plaintiffs; as a result, the United States' motion satisfies the requirements for intervention in this matter, whether as a matter of right or through permissive intervention, pursuant to Rule 24 of the Federal Rules of Civil Procedure. The existing parties assent to the United States' intervention in this case. Therefore, the United States respectfully requests intervention as a plaintiff.

ARGUMENT

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

A. Intervention of Right

Rule 24(a)(2) provides that, upon a timely motion, the court must permit anyone to intervene who:

> [C]laims 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 First Circuit, an applicant for intervention is entitled to intervention as a matter of right when:

> (i) its motion is timely; (ii) it has an interest relating to the property or transaction that forms the foundation of the ongoing action; (iii) the disposition of the action threatens to impair or impede its ability to protect this interest; and (iv) no existing party adequately represents its interest.

Ungar v. Arafat, 634 F.3d 46, 50 (1st Cir. 2011); *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 544-45 (1st Cir. 2006). These requirements should be read "not discretely,

but together," and the rule should be applied with "an eye toward the 'commonsense view of the overall litigation.'" *Ungar v. Arafat*, 634 F.3d at 51; *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). The United States' intervention request satisfies the requirements of Rule 24(a)(2).

1. *The United States' Motion for Intervention Is Tim*ely

The First Circuit has identified several factors relevant to determining whether a request for intervention is timely:

> (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii) the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention.

R & G Mortg. Corp. v. Fed. Home Loan Mortg., 584 F.3d 1, 7 (1st Cir. 2009); *Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992). Timeliness is not based on an absolute measure. The Supreme Court has emphasized that "[t]imeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also R & G Mortg. Corp. v. Fed. Home Loan Mortg.*, 584 F.3d at 7 ("The timeliness inquiry is inherently fact-sensitive and depends on the totality of the circumstances.").

In conducting a timeliness analysis, the status of the litigation at the time of the request for intervention is "highly relevant." *R & G Mortg. Corp. v. Fed. Home Loan Mortg.*, 584 F.3d at 7. A motion to intervene is timely if it is filed promptly after a movant obtains actual or constructive notice that a pending case threatens to jeopardize his rights. *Id.* at 8. The more advanced the litigation though, the more searching the scrutiny the motion must withstand, as one of the core purposes of the timeliness requirement is to prevent disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence. *Banco*

Popular de P.R. v. Greenblatt, 964 F.2d at 1231; *R & G Mortg. Corp. v. Fed. Home Loan Mortg.*, 584 F.3d at 7, 9; *see also R & G Mortg. Corp. v. Fed. Home Loan Mortg.*, 584 F.3d at 7 (motions to intervene that will have the effect of reopening settled cases are regarded with "particular skepticism").

Applying these factors to the instant case, the United States' application for intervention is timely. The proceedings are at a very early stage. The Plaintiffs just filed their complaint on February 9, 2012, and the Defendants have yet to file an answer. The Court has not yet entered a scheduling order, and, accordingly, discovery has not commenced. In addition, the United States' proposed Complaint-in-Intervention does not expand the claims already pending in this litigation.[2] As a result, the United States' intervention will not cause any prejudice through delay of the proceedings.

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

[2] The United States' proposed Complaint-in-Intervention names the State of New Hampshire as a Defendant in this case. The State of New Hampshire may be joined as a Defendant because the right to relief asserted against the State and the existing Defendants (State officials sued in their official capacities) is joint and several and contains common questions of law and fact in compliance with Rule 20(a)(2) of the Federal Rules of Civil Procedure.

2. *The United States Has a Substantial Legal Interest in this Litigatio*n

A party seeking intervention of right must state a claim that bears a "sufficiently close relationship to the dispute between the original litigants," and the claimed interest must be direct and "significantly protectable." *Ungar v. Arafat*, 634 F.3d at 51; *see also Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d at 205 (a putative intervenor must show at a bare minimum that it has a "significantly protectable interest" that is "direct, not contingent").

The United States has a direct, substantial, and legally protectable interest in this litigation. As the federal agency with primary regulatory and enforcement responsibilities under Title II of the ADA, the Department of Justice has significant interests in enforcing and interpreting Title II and ensuring that its integration mandate, 28 C.F.R. § 35.130(d), as interpreted by *Olmstead*, is met. Accordingly, the Department has recently initiated or intervened in *Olmstead* litigation in a number of different states.

Through explicit designation to the United States Attorney General, Congress carved out a prominent role for the United States Department of Justice with regard to ADA matters. 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 so directed the Attorney General to issue regulations implementing Title II of the ADA, 42 U.S.C. § 12134. Thereafter, the Attorney General promulgated the ADA regulations as required by Congress. 28 C.F.R. pt. 35 (July 26, 1991). Among other things, the ADA regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.103(d).

Moreover, Congress explicitly stated that one of its purposes was "to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on

behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3). The United States' prominent enforcement role is reflected in the authorization given the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133; 28 C.F.R. pt. 35, subpts. F, G.

The Department of Justice, therefore, has a unique role in enforcing and interpreting the ADA and its implementing regulations on behalf of the broad public interest. This case directly implicates the United States' interest in enforcing Title II of the ADA, and the Department's goal of ensuring that Title II's integration mandate, 28 C.F.R. § 35.130(d), as interpreted by *Olmstead*, is met. Similarly, the Department has authority to coordinate the implementation and enforcement of Section 504 of the Rehabilitation Act. Exec. Order No. 12,250, *Leadership and Coordination of Nondiscrimination Laws*, 3 C.F.R. 298 (1980 Comp.), *reprinted in* 42 U.S.C. § 2000d-1, note.

The central issues of the instant case are critical to the Department's efforts to advance national goals on community integration and to vindicate the civil rights of persons with disabilities. Thus, the United States' interest in the pending litigation merits intervention of right.

3. *Intervention Is Necessary to Protect the United States' Interest*

The United States' ability to protect its substantial legal interest would be impaired absent intervention. Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the ADA are an important enforcement tool. Further, because there has not been significant case law developed under the Supreme Court's decision in *Olmstead*, an unfavorable disposition of this case may, as a practical matter, impair the United States' ability to enforce the integration mandate. The outcome of this case, including the

potential for appeals by existing parties, implicates *stare decisis* concerns that warrant the United States' intervention. *See Daggett v. Comm'n on Gov't Ethics and Election Practices,* 172 F.3d 104, 110-11 (1st Cir. 1999) (impairment of intervenors' interest includes adverse collateral impact of judicial decision); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (impairment of an intervenor's interest includes "the *stare decisis* effect of the district court's judgment"). As such, intervention is necessary to protect the United States' substantial interest in this litigation.

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

The final requirement for intervention as a matter of right is that the interest is inadequately represented by the existing parties to the litigation. Although the applicant for intervention bears the burden of demonstrating inadequate representation, the burden is "minimal" and is satisfied if the applicant shows that representation of his interest may be inadequate. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d at 545. The putative intervenor need only offer "an adequate explanation as to why" it is not sufficiently represented by the named party. *Id.* at 546. Differences in interest in kind or degree, including asymmetry in the intensity of interest, can be enough to show inadequate representation. *Id. See also Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998) (stating that "without a perfect identity of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party"); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001) ("It is sufficient for Applicants to show that, because of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants.").

The existing parties to this litigation cannot adequately represent the United States' interests. Only the Attorney General can attend to the interests of the United States. 28 U.S.C. §

517 ("[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.")

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

B. Permissive Intervention

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

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

The First Circuit has concluded that this is a "low threshold." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999).

In addition, the Rule provides that a federal officer or agency may be permitted to intervene, upon timely motion, in an action if an existing party's claim or defense is based upon "a statute or executive order administered by the officer or agency; or … any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). For all requests for permissive intervention, the "court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The United States should be granted permissive intervention pursuant to Rule 24(b).

As discussed above in conjunction with the Rule 24(a) analysis, the United States' application for intervention in this litigation is timely and the United States' participation would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties. In addition, the United States' claims against the State of New Hampshire – namely, that the State unnecessarily segregates persons with mental illness in institutions and places them at serious risk of placement therein – share common questions of law and fact with the private Plaintiffs' claims.

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

23, 2009) (permitting intervention by the United States under Fed. R. Civ. P. 24(b)(2) in an action based on the ADA and the integration mandate). Accordingly, the United States meets the requirements for permissive intervention.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' assented-to motion to intervene and order its intervention in this action (1) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, in the alternative, (2) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. A proposed order and proposed Complaint-in-Intervention accompany this motion and memorandum.

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Respectfully submitted,

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