**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**Western Division – Cincinnati**

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| ALEEHA DUDLEY,<br><br>Plaintiff,<br><br>v.<br><br>MIAMI UNIVERSITY and DR. DAVID C. HODGE, in his official capacity as President of Miami University,<br><br>Defendants. | Case Number: 1:14-cv-038<br><br>Judge Susan J. Dlott<br><br>Magistrate Judge Stephanie K. Bowman |

**PLAINTIFF-INTERVENOR UNITED STATES'**
**MOTION TO INTERVENE**

The United States of America respectfully moves pursuant to Federal Rule of Civil Procedure 24 to intervene as a plaintiff in this action. Intervention is warranted as of right because the United States' interest in enforcing Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, cannot be fully represented or protected by plaintiff Aleeha Dudley, and this interest will be impaired if the United States is not permitted to intervene. *See* Fed. R. Civ. P. 24(a)(2). In the alternative, the United States should be granted leave to intervene because: (1) the United States' claims against Miami University share with this action common questions of law and fact; and (2) this action involves the interpretation of the ADA, a statute that Congress has entrusted to the Attorney General to administer. *See* Fed. R. Civ. P. 24(b)(1), (2).

Before filing this Motion, counsel for the United States conferred with counsel for all parties. Counsel for Ms. Dudley have represented that they consent to the United States' intervention. Counsel for defendants have represented that they do not consent.

For the reasons discussed herein and in the accompanying Memorandum of Law, the United States respectfully requests that the Court grant the United States' Motion to Intervene in this matter. The United States attaches a proposed Complaint in Intervention and a proposed order.

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

The United States respectfully submits this Memorandum of Law in support of its Motion to Intervene in this action filed by plaintiff Aleeha Dudley against defendants Miami University and Dr. David C. Hodge. The United States moves pursuant to Federal Rule of Civil Procedure 24 to intervene as of right, or alternatively, by permission, to assert claims against Miami University under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq*.

## PRELIMINARY STATEMENT

Ms. Dudley, a former student of Miami University who is blind, alleges that Miami University denied her an equal opportunity to participate in and benefit from its services, programs, and activities by failing to provide her with timely and adequate access to course assignments, handouts, textbooks, websites, and other curricular and co-curricular materials appropriate to her vision disability. Pursuant to its authority under the regulation implementing Title II of the ADA, 28 C.F.R. pt. 35, the United States Department of Justice ("Department") investigated Miami University's compliance with Title II of the ADA and found that Miami University has used technologies that are inaccessible to individuals with hearing, learning, vision, and other disabilities, and has failed to use other means to provide these individuals with equally effective access to Miami University's educational and co-curricular benefits.

The Department is charged by Congress to enforce the ADA and its implementing regulation, and has a substantial interest in ending disability discrimination, remedying past discrimination, preventing future discrimination, and ensuring that the proper interpretation and application of Title II of the ADA is presented in this lawsuit. Because the Department's investigation has identified violations of the ADA that affect not just individuals who are blind,

but individuals with other disabilities—including learning and hearing disabilities—the United States has an interest in comprehensively resolving Miami University's failure to provide individuals with various disabilities equal access to its curricular and co-curricular offerings. This interest, and the United States' broader interest in ensuring the proper application and interpretation of the Department's regulation implementing Title II of the ADA, 28 C.F.R. pt. 35, cannot be represented by the present parties to this lawsuit. They do not speak for the United States nor represent the interests of individuals who have disabilities other than vision disabilities.[1]

## FACTUAL BACKGROUND

On April 7, 2014, the Department notified Miami University that it had initiated an investigation to review Miami University's compliance with Title II and its implementing regulation. 28 C.F.R. § 35.172. During its compliance review, the Department investigated Miami University's use of various web-based and digital technologies to determine whether individuals with disabilities could equally participate in and benefit from Miami University's curricular and co-curricular services, programs, and activities.

On June 25, 2014, the Department notified the parties of its finding that Miami University had violated Title II of the ADA and its implementing regulation, 28 C.F.R. pt. 35. Based on its investigation, the Department found that Miami University has:

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[1] On April 22, 2014, Ms. Dudley moved for leave to file an amended and supplemental complaint. (*See* Mot. for Leave to File an Amended & Supplemental Complaint, Doc. 21 at PageID 174-176.) Ms. Dudley sought, *inter alia*, to add the National Federation for the Blind ("NFB") as a plaintiff. (*See id.*) While this action has been stayed pending settlement discussions, the Court denied Ms. Dudley's motion without prejudice to refiling. (*See* Order of Nov. 19, 2014, Doc. 24 at PageID 216.) On March 23, 2015, counsel for Ms. Dudley and the NFB notified counsel for the United States of their intention to again seek to add the NFB as a party.

- Used technologies that are inaccessible to individuals with disabilities, including those with learning, hearing, and vision disabilities. Miami University's use of such technologies has denied individuals with disabilities the opportunity to equally participate in and benefit from Miami University's curricular and co-curricular services, programs, and activities. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130.

- Failed to ensure, through the provision of appropriate auxiliary aids and services, that communications with individuals with disabilities are as effective as communications with others. *See* 28 C.F.R. § 35.160.

- Failed to reasonably modify its policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7).

The Department also notified the parties that it intended to seek to intervene in this action. But before seeking to intervene, the Department first engaged in the parties' efforts to mutually resolve the action. (*See* Order of Apr. 23, 2014 at 1, Doc. 22 at PageID 214 (tolling deadlines for all responsive pleadings to permit efforts at extrajudicial resolution).) Since that time, the Department has participated in resolution discussions with the parties. However, to preserve the United States' rights and to avoid prejudice to the United States and the parties, the United States now seeks to intervene in this action.

## ARGUMENT

### I. The United States Should Be Permitted to Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) provides that a court must permit intervention on timely application by anyone: (1) who "claims an interest relating to the property or transaction that is the subject of the action," and (2) whose interest may be "impair[ed] or impede[d]" by disposition of the action, "unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). This Rule is "broadly construed in favor of potential intervenors," who must be permitted to intervene if: "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately

represent the applicant's interest." *Ohio State Conference of NAACP v. Husted*, 588 F. App'x 488, 490 (6th Cir. 2014) (citation omitted); *see Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999) (same). The United States meets each of these requirements for intervention as of right.

**A. <u>The United States' Motion is Timely.</u>**

The timeliness of an application for intervention is evaluated "in the context of all relevant circumstances," including:

> (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 intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

*Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990); *see United States v. City of Detroit*, 712 F.3d 925, 930-31 (6th Cir. 2013) (same).

Here, the case is still at the earliest stage. Miami University and Dr. Hodge have neither answered nor moved to dismiss Ms. Dudley's Complaint, as the Court has tolled all deadlines for responsive pleadings to permit the parties to "focus their efforts on resolution and not briefing." (*See* Order of Apr. 23, 2014 at 1, Doc. 22, PageID 214.) No scheduling order has been entered. No factual or legal issues have been litigated. And the parties will not be prejudiced by the United States' intervention: The Department notified them in June 2014 of its intent to seek intervention, and has engaged in resolution discussions with them since that time. Further, the Department's extensive experience and expertise with the ADA and its implementing regulation will aid in the proper resolution of this litigation, not hamper it—a circumstance that militates in favor of the United States' intervention.

### B. The United States Has a Substantial Legal Interest in the Subject Matter of This Case.

The United States Court of Appeals for the Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Grutter*, 188 F.3d at 398 (citation omitted); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("'[I]nterest' is to be construed liberally."). No specific legal or equitable interest is required, *see Grutter*, 188 F.3d at 398, and even "close cases" should be "resolved in favor of recognizing an interest under Rule 24(a)," *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

This litigation directly implicates the United States' interest in enforcing Title II of the ADA. Effectuating Congress' desire to "ensure that the Federal Government plays a central role in enforcing the . . . [ADA] on behalf of individuals with disabilities," 42 U.S.C. § 12101(b)(3), the ADA directs the Attorney General of the United States to promulgate regulations implementing Title II, *see id.* § 12134(a), and it authorizes the Attorney General to commence legal actions to remedy violations of the ADA, *see id.* § 12133. This authority warrants the United States' intervention as of right in this case. *Cf. Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (State of Ohio entitled to intervene as of right where it had an interest in "defending the validity of Ohio laws and ensuring that those laws are enforced"); *Gillie v. Law Office of Eric A. Jones, LLC*, No. 13-cv-212, 2013 WL 4499955, at *4 (S.D. Ohio Aug. 21, 2013) (Ohio Attorney General asserted substantial legal interest for intervention of right because lawsuit "implicate[d] the construction of the statutes and agreements he administers"); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203-04 (5th Cir. 1992) (Director of Office Workers' Compensation Programs' interest in the "consistent application of . . . a statutory scheme he is charged with administering" was sufficient to support intervention as of right).

The United States' interest is particularly strong here because Miami University's alleged conduct goes to the heart of the ADA's prohibitions in an area of specific concern to Congress: the ability of individuals with disabilities to compete independently and on an equal basis to pursue an education and its consequent vocational opportunities. *See* 42 U.S.C. § 12101(a)(3), (6) (finding that "education" is an area in which individuals with disabilities have historically faced discrimination and are "severely disadvantaged"). Miami University's failure to make its digital- and web-based technologies accessible to individuals with disabilities, or to otherwise take appropriate steps to ensure effective communication with such individuals, places them at a great disadvantage, depriving them of equal access to Miami University's educational content and services. The denial of educational opportunities is precisely the type of discrimination that Congress sought to end, and which the ADA entrusts to the Attorney General to redress. *See* 42 U.S.C. §§ 12101(a)(7), (8) (ADA was enacted to ensure "equality of opportunity" and "full participation" for individuals with disabilities; such individuals are otherwise denied "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous").[2]

**C. <u>Intervention in this Case is Necessary to Protect the United States' Interest.</u>**

Under the third intervention prong, "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. "This burden is minimal," and can be satisfied if a determination in the action may result in "potential stare decisis effects." *Id.*; *see also Citizens for Balanced Use v. Mont.*

[2] Because the alternative to intervention in this lawsuit is a separate action by the United States, the efficiency goals implicit in Federal Rule of Civil Procedure 24 are furthered by intervention. *Cf.* S.D. Ohio Civ. R. 3.1(b) (requiring identification of related cases upon initiating a lawsuit to provide for the orderly division of Court business).

*Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) ("[I]ntervention of right does not require an absolute certainty that a party's interest will be impaired").

The disposition of this case impacts the United States' interest in eliminating disability discrimination effected through the use of inaccessible technologies in higher education. This is an area of great public importance because educational institutions are increasingly using various technologies in their educational programs. A federal decision interpreting and applying the ADA's provisions and the Department's implementing regulation accordingly may have a significant impact on the United States' enforcement efforts. *See Miller*, 103 F.3d at 1245, 1247-48 (finding impairment of interest where Michigan Chamber of Commerce argued that "the precedential effect of an adverse ruling . . . could hinder its own efforts to litigate the validity of Michigan's system for regulating campaign finance"); *Ceres Gulf*, 957 F.2d at 1204 ("[D]enying intervention impairs, if not prevents, [the Director of Office of Workers' Compensation's] ability to provide his interpretation of the law he is charged with administering and would be harmful in allowing a precedent, reached without his input, on an important . . . issue.").

**D. <u>The Existing Parties Cannot Protect the Interest of the United States.</u>**

The United States carries a minimal burden to show that the existing parties to this litigation inadequately represent the United States' interests. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). A potential intervenor "need not prove that the [existing parties'] representation will in fact be inadequate, but only that it '*may* be' inadequate." *Id.* (citations omitted) (emphasis added); *see also Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 495 (6th Cir. 2014) ("The proposed intervenor need show only that there is a *potential* for inadequate representation.") (citation omitted) (emphasis in original). The United States satisfies this burden.

*First*, the United States has an interest in enforcing the ADA to advance the public interest in ending disability discrimination effected through the use of inaccessible technologies in higher education. This interest is inadequately represented by the existing parties, for only the Attorney General and her designees can attend to the interests of the United States. 28 U.S.C. § 517 ("[A]ny 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 . . . ."); *see Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 424 (5th Cir. 2002) ("[i]t cannot be assumed that the existing [private] parties to the litigation would protect the FDIC's and the public's interest" in the proper regulation of the federal deposit insurance system). The existing parties cannot represent the United States' views on the proper interpretation and application of the ADA, and are not able to make all of the arguments the United States could make upon intervention. *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); *Orrand v. Hunt Constr. Grp., Inc.*, Nos. 13-cv-481, 13-cv-489, 13-cv-556, 13-cv-900, 2014 WL 3895555, at *5 (S.D. Ohio Aug. 8, 2014) (NLRB's interest was not adequately represented by private parties; the NLRB "represents and enforces the public interest" and has expertise that will "provide the court with legal arguments and authorities which might not be forthcoming in the parties' briefs"); *Wilkins v. Daniels*, No. 12-cv-1010, 2012 WL 6015884, at *4 (S.D. Ohio Dec. 3, 2012) (potential intervenor's interests were inadequately represented; the state defendants "represent the general public as a whole," while the potential intervenor "has more specialized goals in mind").

*Second*, the interest of the United States extends to current, former, and potential students and members of the public with all types of disabilities who have been subjected to

discrimination, not just individuals with vision disabilities. Ms. Dudley is blind, and potential plaintiff National Federation for the Blind represents the interests of individuals with vision disabilities. As such, intervention is necessary to protect the United States' interest in enforcing the ADA to eliminate discrimination against individuals with a variety of disabilities.

Based on these and similar grounds, federal district courts throughout the country have granted the United States' applications to intervene in cases alleging claims under the ADA. *See, e.g.*, Electronic Order, *Nat'l Fed'n of the Blind v. HRB Digital LLC*, No. 1:13cv10799 (D. Mass. Dec. 10, 2013) (granting the United States' motion to intervene in action under Title III of the ADA); Civil Minutes, *Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council Inc.*, No. 3:12-cv-1830-EMC (N.D. Cal. Oct. 12, 2012) (same); Minutes of Proceedings, *Lane v. Brown*, No. 3:12cv138 (D. Or. May 22, 2013) (granting the United States' motion to intervene in Title II action). This Court should do the same.

## II. Alternatively, the United States Should Be Allowed to Intervene By Permission

The United States may also be granted leave to intervene by permission. Rule 24(b)(2) permits intervention on timely motion by a governmental officer or agency where "a party's claim . . . is based on: (A) a statute . . . administered by the officer or agency; or (B) any regulation [or] requirement . . . issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). The Court may likewise permit intervention by anyone 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). "In exercising its discretion," a court "must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The same substantial interests that give the United States a right to intervene in this case under Rule 24(a)(2) support permissive intervention under Rule 24(b):

*First*, for the reasons detailed in Section I(A), *supra*, the United States' Motion to Intervene is timely. *Second*, if required to file a separate action to protect the United States' interests, *see* Section I(D), *supra*, the United States would assert that Miami University uses inaccessible technologies and has failed to use other means to ensure effective communication with individuals with disabilities—thus denying them an equal opportunity to participate in and benefit from Miami University's curricular and co-curricular services, programs, and activities in violation of Title II and the Department's implementing regulation. These assertions would require the Court to resolve questions of fact and law that are common to—and in some instances, identical to—questions raised by the existing parties. *Third*, as discussed in Section I(B), *supra*, the Department plays a central role in enforcing and implementing the ADA and the Department's Title II regulation, which is at issue in this case. *Fourth*, because this case is at the earliest stage (no responsive pleading has been filed), the United States' intervention will not delay or prejudice the adjudication of any party's rights.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant the United States' Motion to Intervene.

Dated: May 12, 2015

Respectfully submitted,

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## CERTIFICATE OF CONSULTATION

In consideration of S.D. Ohio Civ. R. 7.3(b), I, William F. Lynch, certify that I conferred with and sought the consent of counsel for all parties to the filing of this Motion to Intervene. Counsel for plaintiff Aleeha Dudley have represented that they consent, and counsel for defendants Miami University and Dr. David C. Hodge have represented that they do not consent.

s/ William F. Lynch
William F. Lynch
Trial Attorney

Dated: May 12, 2015

## CERTIFICATE OF SERVICE

I, William F. Lynch, certify pursuant to L.R. 5.2 that I filed the foregoing Motion and Memorandum of Law and accompanying proposed Complaint in Intervention and proposed order with the Electronic Case Filing system established by the U.S. District Court for the Southern District of Ohio, and by filing these documents with the CM-ECF system, provided notice of filing to all counsel of record listed below:

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