

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DAVID BARNETT,¹ LAURENCE)
DILWORTH, WILLIE COCHRAN,)
CAROLYN REED, and ELBERT DAVIS,)
)
Plaintiffs,)
) No. 2:04-cv-73152
and)
) THE HON. ROBERT H. CLELAND
THE UNITED STATES OF AMERICA,) MAGISTR. JUDGE R. STEVEN WHALEN
)
Applicant for Intervention,)
)
5.)
)
CITY OF DETROIT,)
)
Defendant.)
)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
THE UNITED STATES' MOTION TO INTERVENE OF RIGHT
OR, ALTERNATIVELY, TO INTERVENE BY PERMISSION

¹ The United States understands that on March 17, 2005, the plaintiffs filed a motion to dismiss without prejudice David Barnett's claims in this action and a motion to amend the complaint to reflect Mr. Barnett's removal from the case.

STATEMENT OF THE ISSUES

The United States files this Memorandum of Points and Authorities in Support of its Motion to Intervene in this action for injunctive and declaratory relief and compensatory damages to remedy alleged violations of title II of the Americans with Disabilities Act (“title II” and “ADA”), 42 U.S.C. §§ 12131 et seq., and section 504 of the Rehabilitation Act of 1973 (“section 504), 29 U.S.C. § 794. The action stems from the alleged failure of the defendant, the City of Detroit, to provide qualified individuals with disabilities with equal access to the services, programs, and activities of the City’s public transportation system. The United States requests leave to intervene of right, or, alternatively, to intervene by permission, pursuant to Rule 24 of the Federal Rules of Civil Procedure.

ISSUES AND AUTHORITY

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

Fed. R. Civ. P. 24(a)(2);
United States v. Tennessee, 260 F.3d 587 (6th Cir. 2001);
Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000);
Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997).

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

Fed. R. Civ. P. 24(b)(2);
Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000);
Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997).

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Exhibit 1: Proposed Complaint in Intervention

Introduction

The United States files this Memorandum of Points and Authorities in Support of its Motion to Intervene in this action for injunctive and declaratory relief and compensatory damages to remedy alleged violations of title II of the Americans with Disabilities Act (“title II” and “ADA”), 42 U.S.C. §§ 12131 et seq., and section 504 of the Rehabilitation Act of 1973 (“section 504”), 29 U.S.C. § 794. The action stems from the alleged failure of the defendant, Detroit City, to provide qualified individuals with disabilities with equal access to the services, programs, and activities of the City’s public transportation system. The United States requests leave to intervene of right, or, alternatively, to intervene by permission, pursuant to Rule 24 of the Federal Rules of Civil Procedure. Intervention of right is warranted in this case because the United States has a significantly protectable interest in the enforcement of title II and section 504 which is not adequately represented by the existing parties and which may as a practical matter be impaired if intervention is denied. See Fed. R. Civ. P. 24(a)(2). Alternatively, the United States moves for permissive intervention because its claims against the defendant have questions of law and fact in common with the main action, and the main action involves the interpretation of statutes which the Attorney General is entrusted by Congress to administer. See Fed. R. Civ. P. 24(b)(2).²

² The United States is aware that, pursuant to the Court’s direction, the parties have met, and continue to meet, to discuss the possibility of settling this matter. The United States’ arguments in support of intervention, and the factors relevant to that determination, are equally applicable should this case be resolved short of trial. It is the Department’s policy to work towards an equitable and judicious resolution of all cases in which we intervene. Should our motion be granted, we believe that our participation in settlement discussions would facilitate the possibility of such a resolution in this case.

A. Statutory and Regulatory Background

The proposed Complaint in Intervention, attached as Exhibit 1, generally alleges that the defendant violated title II of the ADA and section 504 of the Rehabilitation Act when, on the basis of disability, it discriminated against persons with disabilities and excluded such persons from participation in, and denied such persons the benefits of, the City's public transportation system. Title II and section 504 require that public entities provide accessible transportation to people with disabilities. Title II of the ADA has two parts: Part A contains general provisions that apply to all public entities, while Part B specifically addresses public transportation services and required the Secretary of Transportation to promulgate regulations for carrying out that part, 42 U.S.C. §12164. Thus, public transportation entities are governed by Department of Transportation ("US DOT") regulations implementing title II, 49 C.F.R. Parts 37 and 38, Department of Justice regulations implementing title II, 28 C.F.R. Part 35, and US DOT regulations implementing section 504, 49 C.F.R. Part 27.

1. Applicable Provisions of Title II

Title II of the ADA prohibits discrimination against individuals with disabilities by public entities, the definition of which includes local governments such as the City of Detroit. See 42 U.S.C. § 12131(1)(A) and (B) (defining "public entity" under the ADA). Part A of title II contains provisions that apply to all public entities, and states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

The title II regulations promulgated by the Department of Justice include additional nondiscrimination provisions stating that it is prohibited discrimination to deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service of the public entity, and to afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service of the public entity or recipient that is not equal to that afforded others. 28 C.F.R. §§ 35.130(b)(1)(i) and (ii). The regulations further prohibit a public entity from providing a qualified individual with a disability with an aid, benefit, or service of the public entity that is not as effective in affording equal opportunity to obtain the same result or gain the same benefit as that provided to others. 28 C.F.R. § 35.130(b)(1)(iii). A public entity may not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination, or which have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's programs with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(i) and (ii). Reasonable modifications in policies, practices, or procedures must be made when necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). And all services, programs, and activities of the public entity must be administered in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d). These regulations were based on the regulations implementing section 504.

Part B of title II contains provisions that apply to public entities that operate public

transportation services. 42 U.S.C. §§ 12141-12165. The US DOT regulations implementing Part B have a general nondiscrimination provision requiring accessibility in transportation services and prohibiting the denial of service to individuals with disabilities. 49 C.F.R. § 37.5(a) and (b). Other regulations relevant to the provision of nondiscriminatory fixed route bus service, such as at issue in this case, include, but are not limited to, those establishing specifications relating to wheelchair lifts, ramps, wheelchair locations, wheelchair securement devices, accessible entrances to and within the vehicles, vehicle door widths, external signage on vehicles, maintenance of bus lifts, procedures when a bus lift is broken, times for boarding and disembarking, and training of personnel regarding respectful treatment of and assistance to persons with disabilities. See, e.g., 49 C.F.R. §§ 37.161, 37.163, and 37.173.

2. Applicable Provisions of the Rehabilitation Act

Section 504 of the Rehabilitation Act states that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794(a). As the defendant receives federal financial assistance for its public transportation services, it is subject to section 504. The Rehabilitation Act was enacted in 1973, and US DOT promulgated regulations implementing section 504 in 1979. The section 504 regulations, which predated and formed the basis for the ADA regulations, mandate similar nondiscrimination obligations to ensure that qualified individuals with disabilities are not excluded from, denied the benefits of, or otherwise discriminated against by recipients of federal funds. See 49 C.F.R. § 27.7.

B. Factual Background

On August 17, 2004, the named plaintiffs instituted this suit against the City of Detroit for violations of title II of the ADA and section 504 of the Rehabilitation Act through discrimination in the provision of services, programs and activities of the City's public transportation system.³ Each of the named plaintiffs is a person with a disability under the ADA and the Rehabilitation Act, and, more specifically, each is substantially limited in the major life activity of walking and uses a wheelchair for mobility. As alleged in the plaintiffs' Complaint, the plaintiffs, individually, rely on Detroit's public transit system for transportation to activities central to daily living, including work, medical appointments, church, shopping, and visiting friends and family. Each of the plaintiffs alleges that on numerous occasions, when attempting to access Detroit's public bus system, he or she has encountered inoperable or inaccessible buses and was made to endure long waits, at times for hours in Detroit's winter weather, that non-disabled transit riders did not have to endure. The plaintiffs allege that the defendant's conduct evidences and reflects an ongoing and systemic failure to provide equal access to its fixed route public bus lines, which discrimination has resulted in isolation, pain and suffering, and economic loss.

The United States' proposed Complaint in Intervention alleges discrimination in the City's public transportation system in violation of title II and section 504, focusing on specific

³ The plaintiffs' lawsuit as initially filed also named the United States Department of Transportation as a defendant. On October 4, 2004, pursuant to a stipulated request by the plaintiffs and the United States Department of Transportation, this Court dismissed the Department of Transportation from the lawsuit.

regulations relevant to the City's conduct in this matter. Through intervention, the United States seeks to ensure that the City's public transportation system is accessible to the named plaintiffs and all other disabled individuals with mobility impairments that seek to use the system.

C. Argument

1. The United States Is Entitled to Intervention of Right.

Federal Rule of Civil Procedure 24(a) provides that upon timely application anyone shall be permitted to intervene in an action:

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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

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

United States v. Tennessee, 260 F.3d 587, 591-92 (6th Cir. 2001); see also Purnell v. City of Akron, 925 F.2d 941, 945 (6th Cir. 1991) (characterizing the core inquiry, after timeliness, as:

“(1) does the applicant claim an interest relating to the property or transaction that is the subject of the action; (2) is the applicant so situated that disposition of the lawsuit may as a practical matter impair or impede his ability to protect that interest; and (3) is the applicant's interest adequately represented by existing parties.”). “Rule 24 should be ‘broadly construed in favor of potential intervenors.’” Stupak-Thrall v. Glickman, 226 F.3d 467, 472 (6th Cir. 2000) (quoting Purnell, 925 F.2d at 950). The United States meets the prerequisites for intervention of right.

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

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

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

Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989), quoted in Tennessee, 260 F.3d at 592. “The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.” Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990), quoted in Tennessee, 260 F.3d at 592. At issue is not, primarily, the time of intervention, but rather what substantive progress has occurred in the litigation, and whether, in light of all circumstances, the application should be considered timely. Id. (citing Stupak-Thrall, 226 F.3d at 475).

Applying these factors in the instant case, the United States' application for intervention is timely. The plaintiffs filed this suit in August, 2004, and the Department of Justice (“Department”) learned of the litigation shortly thereafter. Consistent with the Department's administrative policies, the Department undertook a careful investigation and deliberative evaluation of whether intervention by the United States would be appropriate in this case. The Department's decision to seek intervention reflects the central role that transportation plays in daily living, and the importance of ensuring that all individuals have equal access to the programs, services, activities, and opportunities afforded by public transportation.

With regard to substantive proceedings, the litigation in this case is at an early stage. Formal discovery has been stayed while the parties engage in settlement discussions. While the

Court recently appointed a mediator to facilitate those discussions, the parties have not yet met with the mediator or begun the mediation process. Thus, the United States' intervention would not prejudice the original parties. And finally, the Department's extensive experience with the statutes at issue militates in favor of intervention as this expertise would likely increase efficiency throughout the litigation. In light of these facts, the United States' application for intervention of right should be deemed timely.

(b) The United States Has a Substantial Legal Interest in the Action.

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

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

Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999), quoted in Tennessee, 260 F.3d at 595.

See also Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987) ("This court has acknowledged that 'interest' should be construed liberally."). "[C]lose cases should be resolved in favor of recognizing an interest under Rule 24(a)." Miller, 103 F.3d at 1247.

The United States' interest in the pending litigation merits intervention of right. As the federal agency charged with enforcing the ADA, the Department has a substantial interest in the subject matter of the pending litigation. Underlying enactment of the ADA was Congress' intent

to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” 42 U.S.C. § 12101(b)(1). Congress sought “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(2), and explicitly stated that one of the purposes of the ADA was “to ensure that the Federal Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities” 42 U.S.C. § 12101(b)(3). The United States’ prominent enforcement role is reflected in the statutory authorization given the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133.

This case directly implicates the United States’ interest in enforcing title II of the ADA to ensure the “clear, strong, consistent, enforceable standards” envisioned by Congress. And while the United States has an interest in the elimination of all forms of disability discrimination, that interest is arguably heightened in this case given the important nature of the public service at issue. The United States also has a substantial interest in ensuring that recipients of federal financing, such as the defendant, do not violate section 504’s similar prohibition of disability discrimination. Accordingly, the United States’ significant protectable interests in ensuring that this case results in clear, consistent, enforceable standards, both substantive and remedial, supports intervention of right. *Cf., e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992) (collecting cases, and finding, in insurer’s suit against employee for reimbursement of advance payments, that the interest of the federal director of the Office of Workers’ Compensation Programs in “consistent application of . . . a statutory scheme he is charged with

administering” was sufficient to support intervention as of right); Nuesse v. Camp, 385 F.2d 694, 700-01 (D.C. Cir. 1967) (discussing liberalization of Rule 24(a) under 1966 amendment, and finding that state government official charged with administering a banking law had interest in advocating particular construction of the law that was sufficient to support intervention of right).

Additionally, because the alternative to the United States’ intervention in the plaintiffs’ lawsuit is a separate action including the United States’ title II and section 504 claims, the efficiency goals implicit in Rule 24(a) are furthered if intervention is permitted here. As noted previously, the Department plays a central role in enforcing the title II regulations at issue in this case, see 42 U.S.C. § 12133, and plays the primary role in coordinating the implementation and enforcement of section 504 among federal agencies, see Executive Order 12250, 45 Fed. Reg. 72995 (1980), reprinted in 42 U.S.C. § 2000d-1. Through this regulatory and enforcement work, the Department has accumulated significant experience in guiding public entities in amending policies, practices, and procedures to conform to the mandates of title II and section 504. The Department’s unique experience and familiarity with the statutes and regulations at issue will facilitate the efficient litigation of this dispute and promote a resolution which provides the clear, consistent, enforceable standards contemplated by Congress.

(c) Intervention is Necessary to Protect the United States’ Interest.

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

decisis effect to the detriment of the applicant. Id.

Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. An unfavorable disposition of this case may, as a practical matter, impair the United States' interest in eliminating disability discrimination in public transportation. Moreover, the Sixth Circuit has not yet addressed the application of title II or section 504 to a city's provision of public bus services. Thus, the outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns which support intervention of right. See Miller, 103 F.3d at 1247 (finding impairment factor implicated in First Amendment case where the applicant, the Michigan Chamber of Commerce, asserted that "the precedential effect of an adverse ruling in the district court could hinder its own efforts to litigate the validity of Michigan's system for regulating campaign finance both in currently ongoing cases and in future challenges"). See also United States v. City of Los Angeles, Cal., 288 F.3d 391, 400 (9th Cir. 2002) (holding that amicus status may be insufficient to protect the rights of an applicant for intervention "because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal").

(d) The United States' Interest is Inadequately Represented by Existing Parties.

The fourth and final element to justify intervention of right is inadequate representation of the United States' interest by existing parties to the litigation. The burden to show inadequate representation "is minimal because the movant need not prove that the representation will in fact be inadequate, but only that it 'may be' inadequate[.]" Jordan v. Mich. Conference of Teamsters Welfare Fund, 207 F.3d 854, 863 (6th Cir. 2000) (quoting Miller, 103 F.3d at 1247); see also

Stupak-Thrall, 266 F.3d at 472 (“[W]e have recently gone so far as to say that ‘proposed intervenors need only show that there is a *potential* for inadequate representation.’”) (quoting Grutter, 188 F.3d at 400) (emphasis in original). Jordan, 207 F.3d at 863. “[I]nterests need not be wholly ‘adverse’ before there is a basis for concluding that existing representation of a ‘different’ interest may be inadequate.” Jansen, 904 F.2d at 343, quoted in Purnell, 925 F.2d at 950. “[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor’s arguments.” Miller, 103 F.3d at 1247. But see Bradley, 828 F.2d at 1192 (“A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation.”).

In this case, the United States’ interest in enforcing the ADA and section 504 to advance the public interest in ending illegal disability discrimination with regard to access to public transportation is inadequately represented by the existing parties. Given the complexity of the statutory and regulatory scheme governing public transportation, the United States’ participation is necessary to ensure that the defendant meets its obligations to provide equal access to the City’s public bus system for persons with disabilities. Moreover, the Department’s interest, on behalf of the public, in a clear and consistent interpretation and application of relevant title II and section 504 provisions cannot be adequately represented by the parties in this case. The Department brings to this action the Civil Rights Division’s unique familiarity with the statutes at issue, and extensive experience in investigating and litigating disability discrimination complaints, including complaints relating to the provision of public transportation. Such experience and expertise will be necessary in order to litigate this case to advance the United

States' interests on behalf of the public.

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

2. The United States Should Be Granted Permissive Intervention.

Rule 24(b) states, in part:

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

Fed. R. Civ. P. 24(b). See also Stupak-Thrall, 226 F.3d at 472 (discussing standard, and noting that after timeliness and common question factors are established, the court will balance remaining factors in exercising its discretion to grant or deny the application); Miller, 103 F.3d at 1248 (noting, in dicta, that where the district court “permitt[ed an organization] to participate in briefing and oral argument as amicus curiae, it is difficult to see how granting intervention would have materially increased either delay or prejudice”).

As discussed above in conjunction with the Rule 24(a) analysis, herein incorporated, the United States' application for intervention is timely. See Velsicol Chem. Corp. v. Enenco, Inc., 9 F.3d 524, 531 (6th Cir. 1993) (clarifying that timeliness is threshold inquiry in Rule 24(b) permissive intervention analysis). The United States' claims against the defendant share common questions of law and fact with those in the pending litigation. As do the plaintiffs, the United States would assert as a common question of law whether the defendant's conduct with regard to the provision of public bus services violates title II and section 504, and the relevant implementing regulations. The basis for the factual allegations in the United States' proposed

Complaint in Intervention is, essentially, the same basis for the plaintiffs' allegations of discrimination by the City. And, as discussed with regard to intervention of right, the United States' participation as intervenor would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties.

Furthermore, the Department's involvement in this case would fall squarely within that contemplated by the language of Rule 24(b). See Fed. R. Civ. P. 24 advisory committee's note (explaining that subsection (b) was amended in 1946 to include explicit reference to governmental agencies and officers in order to avoid exclusionary construction of the rule, and citing, with approval, cases in which governmental entities were permitted to intervene). The Department has a central role in administering and enforcing title II, and has developed experience and familiarity with section 504 requirements from reviewing, pursuant to Executive Order 12250, all such regulations relating to disability discrimination for all federal agencies. The Department's extensive regulatory work further evidences the United States' vital interest in enforcing the statutes and regulations at issue on behalf of the public interest in ending illegal disability discrimination. See, e.g., Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 92 (3d Cir. 1979) (en banc) (permitting United States to intervene based on its enforcement of federal statute and regulations protecting individuals with developmental and cognitive disabilities, and noting therein, "Large amounts of federal funds flow to Pennsylvania from the federal government, and the United States is vitally interested in the enforcement of the conditions on which those grants are made.>"). And, as discussed above, that interest is paramount where at issue are critically important public services such as the City's provision of public transportation.

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

Conclusion

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

Respectfully submitted, this 17th day of March, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2005, I electronically filed the following with the Clerk of the Court using the Electronic Case Management System: (1) the United States' Motion to Intervene of Right, or, Alternatively, to Intervene by Permission; and (2) the Memorandum of Points and Authorities in Support of the United States' Motion to Intervene of Right, or, Alternatively, to Intervene by Permission.

I further certify that copies of both filings were mailed by Federal Express Overnight Delivery to the following non-ECF participants:

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