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

ERIC STEWARD, *et al.*, *Plaintiffs*, v. CHARLES SMITH, in his official capacity as the Executive Commissioner of Texas' Health and Human Services Commission, *et al.*, *Defendants*.	§ § § § § § § § §	Case No. 5:10-CV-1025-OLG
THE UNITED STATES OF AMERICA, *Plaintiff-Intervenor*, v. THE STATE OF TEXAS, *Defendant*.	§ § § § § §	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In its Motion for Summary Judgment, Texas for the third time seeks to block the United States' involvement in this lawsuit by resurrecting arguments that this Court already has considered and rejected. Seven years ago, the State argued that the United States should not be permitted to intervene in this litigation, in part because Texas was not a proper party to this suit. The Court rejected this argument and permitted the United States to intervene. Four years later, the State reframed its argument, contending that the United States could not assert the claims at issue in this litigation. The Court properly rejected this argument and denied the State's motion

to dismiss. Just four months before trial, the State now unearths both of these arguments without identifying any change in fact or law that might justify reconsideration.

The Court's analysis was correct in granting the United States' motion to intervene and denying the State's motion to dismiss, and it is equally applicable here. The United States brought suit under the same statutes as Plaintiffs,[1] the United States' claims arise out of the same case or controversy as Plaintiffs', and the United States is seeking the same relief as Plaintiffs. Accordingly, the Court properly permitted the United States to intervene and, in denying the State's motion to dismiss, the Court found that the United States, as an intervenor, did not need to demonstrate an independent basis to pursue its claims. ECF 136 at 1; ECF 286 at 2-5. The issues the State raises here have thus been decided.

Further, even if the Court reached the Title II question and ruled in the State's favor, the United States could still pursue the relief it seeks under Section 504 of the Rehabilitation Act. In addition, there is no motion to dispose of any of Plaintiffs' claims, so Plaintiffs' claims under Title II and the Rehabilitation Act will proceed in any event. Accordingly, this motion will not eliminate any party or dispose of any issue in the case. For all these reasons, the Court should deny the State's motion.

II. LEGAL STANDARD

The State seeks judgment against the United States under Rules 12(c) and 56. The purpose of a motion under Rule 12(c) is to test the sufficiency of the complaint when material facts are not in dispute. *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). "The standard for dismissal under Rule 12(c) is the same as that for

[1] The United States and Plaintiffs both brought suit under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. Plaintiffs brought additional claims under the Medicaid Act and the Nursing Home Reform Amendments, which are not at issue in the instant motion.

dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). If discovery will not help the court to resolve the motion, a Rule 12(c) motion should be brought sooner to avoid the expense of further discovery. *See Marsilio v. Vigluicci*, 924 F. Supp. 2d 837, 847 (N.D. Ohio 2013).

Under Rule 56, summary judgment may be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When assessing whether a dispute to any material fact exists, the court should consider all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (citations omitted).

III. PROCEDURAL HISTORY

The Court has twice ruled in favor of the United States on the issues raised in the State's motion. Seven years ago, in 2011, the State opposed the United States' motion to intervene. The State asserted that the United States' interests were adequately protected by the other plaintiffs in the litigation. Resp. in Opp'n to Mot. to Intervene, ECF 56 at 13-16. According to the State, "the United States and the *Steward* party plaintiffs assert parallel claims under the ADA and Rehab Act, and seek the same relief" and "both the Plaintiffs and the United States assert the same ultimate broad objective" in ensuring that the State complies with *Olmstead*. *Id*. at 14. The State also argued that it was not a proper party to this litigation: "Further, the proper party to a section 1983 claim seeking injunctive relief is the state official in charge of enforcement of the relevant law, sued in their official capacity, not the State of Texas, in general. DOJ has not cited

any authority permitting this Court to exercise personal jurisdiction over the State of Texas, as it is not a party to this suit, has not been served with process, and has not made a voluntary appearance." *Id*. at 19-20 (citations omitted). The Court rejected both of these arguments and granted the United States' motion to intervene. ECF 136 at 1.

Subsequently, in 2015, the State filed a motion to dismiss the United States' claims, asserting that the United States did not have "standing" to bring suit under Title II of the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act. Texas asserted that Congress had not authorized the United States, through the Attorney General, to sue under Title II of the ADA or under the Rehabilitation Act. Mot. to Dismiss, ECF 242 at 1. The State argued: "Because the Attorney General can cite no language in Title II of the ADA that confers standing on the federal government, no authority to initiate enforcement actions exists." *Id*. at 4. The State additionally challenged the United States' authority to bring actions under the Rehabilitation Act, based on a novel interpretation of Title VI of the Civil Rights Act. *Id*., § II. The State argued: "Title VI of the Civil Rights Act does not, standing alone, authorize federal enforcement actions. Accordingly, such actions are not among the 'remedies, procedures, and rights' authorized by Title II of the ADA or by the Rehabilitation Act." *Id*. at 13.

The Court denied the State's motion, holding that the State's argument about Article III standing failed "because the United States, as an intervenor who seeks no relief beyond that sought by the Plaintiffs in this case, need not possess Article III standing to proceed." ECF 286 at 2-5. The Court continued: "Provided that such a case or controversy exists, it is immaterial to the court's jurisdiction whether an intervening party, proceeding alone, could have satisfied the requirements of Article III." *Id*. at 4. The Court also rejected any argument based on prudential standing:

> As noted above, this is not a case in which the relief sought by the United States exceeds the scope of relief sought by the original Plaintiffs. This is, however, a case in which the original Plaintiffs' claims, and the defenses asserted by the State of Texas and the other Defendants, arise from a statutory and regulatory regime that the Attorney General has been charged by Congress with administering. . . . The interests of the United States in the enforcement of Title II and the Rehabilitation Act provide a sufficient basis for the United States to raise claims that do not exceed the scope of the original Plaintiffs' complaint. It has done so. At this juncture, the Court need not consider whether the United States could go further.

Id. at 5 (internal citations omitted).

Now, two years after the Court's order denying its motion to dismiss, the State has brought a new motion, based on the very same argument it raised in its motion to dismiss. The State again argues that "the United States lacks statutory authority to bring a claim under Title II of the ADA or under the Rehabilitation Act." Mot. for Summ. J., ECF 477 at 2. However, this argument is no more meritorious than it was when the Court denied the motion to dismiss. In fact, as this Court previously noted, Texas itself already conceded that the United States can bring an action to enforce Title II of the ADA. ECF 286 at 5 n.1; *see also* Resp. in Opp'n to Mot. to Intervene, ECF 56 at 12 ("Nothing about the instant suit precludes DOJ from bringing an enforcement action on the public's behalf arising out of the same subject matter as this suit."); *id.* at 5.

In addition, the State again asserts in its summary judgment motion that Texas is not a proper party, arguing that the United States "has no authority to bring a *new* Title II claim against a *new* defendant." Mot. for Summ. J. at 2. The State contends that the United States "went beyond the scope of the original action in which it intervened and brought a new Title II claim against a new defendant – the State of Texas." *Id*. This position contradicts both the State's previous assertions, *see* Resp. in Opp'n to Mot. to Intervene, ECF 56 at 14, and settled law that a case against a state official in his or her official capacity is the same as a case against the state.

see Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Ultimately, the instant motion is simply an attempt by the State to relitigate the same issues the Court has already considered and rejected. Therefore, the motion should be denied.

IV. ARGUMENT

a. As this Court Has Already Held, the United States Intervened in this Case and Does Not Need to Demonstrate an Independent Basis to Pursue a Cause of Action

The State's primary argument – that the United States does not have the statutory authority to enforce Title II of the ADA – is the very same argument it raised in its 2015 motion to dismiss.[2] The Court has already rejected that argument on the grounds that the United States as an intervenor who is not seeking relief beyond that sought by Plaintiffs does not need to demonstrate independent authorization to sue. ECF 286 at 3-6. Moreover, as the Court recognized, this is a case in which the plaintiffs' claims and the defendants' defenses "arise from a statutory and regulatory regime that the Attorney General has been charged by Congress with administering," making permissive intervention under Rule 24(b)(2) particularly appropriate. ECF 286 at 5. The Court's analysis denying the motion to dismiss was correct at the time, and it remains correct now.

The United States and Plaintiffs have brought claims under the same statutes, arising out of the same case or controversy, and seeking the same relief. As this Court recognized: "The United States' complaint in intervention seeks injunctive relief and declaratory relief that is substantially the same ultimate relief sought by the original Plaintiffs in this case." ECF 286 at

[2] The State contends that the Court does not have jurisdiction over the United States' claims. Mot. for Summ. J. at 13-15. However, whether the United States has a statutory cause of action – which is what Texas disputes here – does not implicate the Court's jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1387 n.4 (2014) (quotation omitted).

3. The State conceded as much in its opposition to the United States' motion to intervene. Although the State in the interim took discovery, including receiving contention interrogatory responses from both Plaintiffs and the United States, it has not identified any material difference in the relief the United States and Plaintiffs are seeking. Just as the State previously conceded, it remains true that "the United States and the *Steward* party plaintiffs assert parallel claims under the ADA and the Rehab Act, and seek the same relief." *See* Resp. in Opp'n to Mot. to Intervene, ECF 56 at 14 (*comparing* paragraphs of Pls.' Compl. *to* U.S.'s Compl. in Intervention).

There is no requirement that intervenors have an independent basis for standing when they are seeking the same relief as existing plaintiffs. "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." ECF 286 at 3 (quoting *Ruiz v. Estelle*, 161 F.3d 814, 829-30 (5th Cir. 1998)); *see also Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006) ("[T]here is no Article III requirement that intervenors have standing in a pending case . . . ."). Accordingly, the Court held that "the United States, as an intervenor who seeks no relief beyond that sought by the Plaintiffs in this case, need not possess Article III standing to proceed." ECF 286, at 3.[3]

[3] The Supreme Court's ruling in *Town of Chester v. Laroe Estates, Inc.*, which held that "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests," does not suggest a different conclusion. 137 S. Ct. 1645, 1651 (2017). Unlike the putative intervenor in *Town of Chester*, the United States was granted permissive intervention, not intervention as of right, and here, the United States seeks no relief beyond that which Plaintiffs request. *Cf. Guideone Elite Ins. Co. v. Mount Carmel Ministries*, No. 2:17-CV-37-KS-MTP, 2017 WL 2908866, at *2 n.2 (S.D. Miss. July 7, 2017) (affirming the continued validity of the Fifth Circuit's holding in *Ruiz* after *Town of Chester* in holding that intervenor did not need to establish Article III standing since the relief sought by the intervenor was the same as that sought by the original plaintiffs).

Instead of addressing, or even acknowledging, this caselaw, the State revives its previously rejected argument that Texas is not a proper defendant in this case because it is a "new" defendant added by the United States, and that, accordingly, the United States' claims against Texas should not be permitted to go forward. This is the very same argument the State raised in opposing the United States' motion to intervene, ECF 56 at 19-20, and which this Court rejected. Nonetheless, the State persists in arguing that by suing Texas, "the scope of the relief sought [by the United States] is necessarily greater than what had existed" when Plaintiffs sued state officials in their official capacity. Mot. for Summ. J. at 11.

As noted, this contention is at odds with the State's earlier admission, and this Court's ruling, that the relief that Plaintiffs and the United States seek is the same. Further, this contention is devoid of substance. Plaintiffs' claims against state officials in their official capacities are the same – in both practice and effect – as a claim against the state. *See Will*, 491 U.S. at 71; *Nelson v. Univ. of Texas at Dallas*, 535 F.3d 318, 320 (5th Cir. 2008). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71 (citations omitted). Regardless of the official's position or seniority, an official capacity suit is considered the same as a suit against the state itself. *Nelson*, 535 F.3d at 320 ("Because Nelson sued Daniel in his official capacity as head of [the University of Texas at Dallas], Nelson's suit is treated as one against the State of Texas . . . .") (citing *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (internal quotation omitted)).[4]

[4] Accordingly, it is of no import that the Governor has been dismissed from Plaintiffs' complaint, because the remaining defendants in Plaintiffs' case are state officials sued in their official capacities. *See Nelson*, 535 F.3d at 320.

The State does not address the *Ex Parte Young* doctrine that suits against state actors in their official capacities are tantamount to suits against the State, and that, consequently, the identical relief can be sought from either defendant. Rather, the State invokes a 1978 opinion, *Alabama v. Pugh*, in which the Supreme Court held that private parties were barred by the Eleventh Amendment from suing the State. 438 U.S. 781 (1978). *Alabama v. Pugh* has no bearing on whether the United States is permitted to sue a state under the Eleventh Amendment, or whether the United States, as an intervenor, must have an independent basis for bringing suit against Texas, where private plaintiffs have brought the same claims against state officials in their official capacity and are seeking the same relief.[5] Because the United States and Plaintiffs have brought claims arising out of the same case or controversy and are seeking same relief, the Court should reject the State's argument.

In addition, the Court's prior ruling is now the law of the case. When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (quotations omitted). As the Court has already decided the issues in denying the State's motion to dismiss, it need not reconsider those issues here. Furthermore, the State's motion is both successive and untimely. *See Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 45-46 (1st Cir. 2012) (purpose of 12(c) motion is to avoid needless discovery); *Fisher v. Dallas Cty.*, No. 3:12-CV-3604-D, 2014 WL 4797006, at *9 (N.D. Tex. Sept. 26, 2014) (denying motion as successive where defendant was "simply attempting by

[5] The United States is not barred by the Eleventh Amendment from suing a state. *United States v. Texas,* 143 U.S. 621, 646 (1892); *United States v. Texas Tech Univ.*, 171 F.3d 279, 293 (5th Cir. 1999) (citing *Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 785 (1991)). There is no suggestion in *Pugh* that its holding extends to suits brought by the United States. Nor does the State cite any law suggesting that the Eleventh Amendment, or the analysis in *Pugh*, would apply to suits by the federal government, rather than suits by private parties.

his second Rule 12(c) motion to obtain relief regarding the same amended complaint that he was unable to secure in his first motion"); *Duffie v. Wichita Cty.*, No. 7:13-CV-0032-O, 2014 WL 5796837, at *9 (N.D. Tex. Nov. 6, 2014) (denying 12(c) motion as untimely where discovery was complete). The State filed its second motion for judgment on the pleadings over *seven years* into the case and months after the completion of discovery. The sole new piece of information that the State cites is an out-of-circuit district court opinion that held that the United States did not have authority to enforce Title II. Mot. for Summ. J. at 14 (citing *C.V. v. Dudek*, 209 F. Supp. 3d 1279 (S.D. Fla. 2016), *appeal docketed*, No. 17-13595-BB (11th Cir. Aug. 8, 2017)). The State does not even acknowledge that a different district court within the Fifth Circuit more recently came to the opposite conclusion. *United States v. Harris Cty.*, No. 4:16-CV-2331, ECF 53 at 1-3 (S.D. Tex. Apr. 26, 2017). Regardless, *Dudek* is not grounds for reconsidering the State's Title II argument. *Cf. Abecassis v. Wyatt*, 7 F. Supp. 3d 668, 671 (S.D. Tex. 2014) (finding that rulings outside the Fifth Circuit did not materially change the court's analysis or justify granting second motion for judgment on the pleadings where court had extensively considered the issues in the first motion).

b. The Court Need Not Reach the Question Whether the United States Has the Authority to Bring Suit Under Title II of the ADA and Section 504 of the Rehabilitation Act, But the United States has that Authority

In deciding the State's 2015 motion to dismiss, the Court found it did not need to reach the question whether the United State is authorized to sue under Title II of the ADA and Section 504 of the Rehabilitation Act. Because the same analysis applies here as with the State's unsuccessful motion to dismiss, the Court again need not reach the question. Nevertheless, as the United States set forth in its opposition to the State's motion to dismiss, the United States has the authority to enforce Title II of the ADA and Section 504 of the Rehabilitation Act. *See*

generally U.S. Resp. to Mot. to Dismiss, ECF 260; *see also* Br. for United States, *A.R. v. Sec'y, Fla. Agency for Health Care Admin.*, No. 17-13595-BB (11th Cir. Oct. 18, 2017); Reply Br. for United States, *A.R. v. Sec'y, Fla. Agency for Health Care Admin.*, No. 17-13595-BB (11th Cir. Mar. 1, 2018). *See also United States v. Harris County*, No. 4:16-CV-2331, ECF 53 at 1-3 (S.D. Tex. Apr. 26, 2017) (denying motion to dismiss and holding that United States has authority to enforce Title II).

In any event, even if the State's arguments as to Title II of the ADA were correct, this would not dispose of the claims in this case, because the United States still has a live Rehabilitation Act claim.[6] Although the State challenges the Attorney General's authority to bring a Rehabilitation Act claim, it acknowledges that contractual assurances of compliance under the Rehabilitation Act "provide a basis for the Federal government to sue to enforce compliance." *See* Mot. for Summ. J. at 10. The State admits that it receives federal funds under the Medicaid Act and does not contest that it is subject to suit by the United States under the Rehabilitation Act. *See* Def.'s Answer to U.S.'s Compl. in Intervention, ECF 143 ¶5 ("The State of Texas admits that one or more agencies of the State have been 'recipients' of 'federal financial assistance' in the form of Medicaid funds related to the claims in this lawsuit, and that such agencies as receive such Medicaid funds are subject to the Rehabilitation Act in connection with the use of such funds."); *see also United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1049 (5th Cir. 1984) (holding that receipt of Medicare and Medicaid payments subjects an entity "to appropriate federal action under Section 504 of the Rehabilitation Act"). Accordingly, the State's argument is both without merit, and in the instant matter, without import as to the

[6] Additionally, Plaintiffs also have the same Title II and Rehabilitation Act claims.

disposition of this case, since the United States could proceed on at least one statutory ground against Texas.

V. CERTIFICATION FOR INTERLOCUTORY APPEAL IS UNWARRANTED

The State seeks, in the alternative, certification for an interlocutory appeal to the extent the Court enters an order rejecting the State's motion. A denial of the State's motion, however, would not raise an issue that meets the test for certification for interlocutory review.

The decision to permit an appeal under 28 U.S.C. § 1292(b) is firmly within the district court's discretion. *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006). Section 1292(b) allows a district court to certify interlocutory review of an order when the order (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) when an immediate appeal from the order may materially advance ultimate termination of the litigation. 28 U.S.C. § 1292(b). The Fifth Circuit construes the requirements of Section 1292(b) strictly, and such appeals are granted only in exceptional cases. *United States v. Garner*, 749 F.2d 281, 286-87 (5th Cir. 1985); *United States v. La. Generating LLC*, No. 09-100-JJB, 2012 WL 4588437, at *1 (M.D. La. Oct. 2, 2012). Additionally, courts in this Circuit have cautioned that "§ 1292(b) is not a vehicle to question the correctness of a district court's ruling or to obtain a second, more favorable opinion." *Ryan*, 444 F. Supp. 2d at 722 (citing *McFarlin v. Conseco Serv., LLC*, 381 F.3d 1251, 1256 (11th Cir. 2004)).

The hypothetical order that would be at issue simply would not meet this test. There is no controlling question of law as required under 28 U.S.C. § 1292(b). Whether a question is controlling depends on its potential to have some impact on the course of litigation. *Tesco v. Weatherford Intern., Inc.*, 722 F. Supp. 2d 755, 766 (S.D. Tex. 2010) (citing *Klinghoffer v. S.N.C. Achille Lauro Ed Altri–Gestione Motonave Achille Lauro in Amministrazione*

Straordinaria, 921 F.2d 21, 24 (2d Cir. 1990)). A question is generally controlling if reversal would terminate the action. *Id.* This litigation has been going on for more than seven years, fact and expert discovery is complete, and this case is less than four months before trial. Even if an appeal was certified and the Fifth Circuit ruled for the State on the Title II claim, that decision would not terminate the action or even alter the course of the litigation. All claims in this case would still proceed, since Plaintiffs are pursuing claims under both Title II and the Rehabilitation Act, and the United States would still have a live Rehabilitation Act claim. And all parties (including the United States and Texas, both individually and through its officials) would remain in the case.

Nor would an appeal "materially advance the ultimate termination of the litigation." This requirement is focused on judicial efficiency. *Coates v. Brazoria Cty. Tex.*, 919 F. Supp. 2d 863, 867 (S.D. Tex. 2013). The district court may consider if an immediate appeal will eliminate the need for trial, eliminate complex issues so as to simplify the trial, or eliminate issues to make discovery easier and less costly. *Id.*; *Tesco Corp.*, 722 F. Supp. 2d at 767 ("A key concern consistently underlying Section 1292(b) decisions is whether permitting an interlocutory appeal will speed up the litigation."). Here, an appeal would not eliminate the need for trial, simplify the issues for trial, or otherwise promote judicial economy for the reasons noted above.

Finally, there are no substantial grounds for difference of opinion. Mere disagreement with a district court's ruling is insufficient to establish substantial grounds for difference of opinion. *Prop. One, Inc. v. USAgencies, L.L.C.*, 830 F. Supp. 2d 170, 182 (M.D. La. 2011) (citation omitted). That one district court outside of the Fifth Circuit has come to a particular conclusion in a different case does not meet this requirement. As the State does not meet any of the requirements for certification, its alternative request should be denied.

VI. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny both the State's motion for summary judgment and its alternative request for certification of an interlocutory appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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