UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and
PATRICK HAMACHER,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS, AND SCIENCE,

Defendants,

and,

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDACE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISES MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, and CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Proposed Defendant-Intervenors.
_____/

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

48

#39

OPINION AND ORDER
DENYING PROPOSED INTERVENORS' MOTION FOR RECONSIDERATION

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on OCT 27 1998

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This matter is currently before the Court on proposed intervenors' motion for reconsideration of this Court's July 7, 1998 opinion and order in which the Court denied proposed intervenors' motion to intervene as of right pursuant to FED. R. CIV. P. 24(a)(2), or in the alternative, for permissive intervention pursuant to FED. R. CIV. P. 24(b)(2). Proposed intervenors, seventeen African-American and Latino individuals, all of whom intend to seek admission to the University of Michigan ("University") and Citizens for Affirmative Action's Preservation ("CAAP"), sought to intervene in a lawsuit challenging the constitutionality of the University's present admissions policy.[1] In support of their motion, proposed intervenors contend that the Court's opinion:

> relegates to the sidelines the only people who will be fundamentally and irrevocably affected by the decision in this case. This result is plainly inconsistent with Sixth Circuit and Supreme Court law, and, more fundamentally, fails to take account of the broader social importance of the issues in this case.

(Mot. Rec. at 1). On a more specific note, proposed intervenors argue that the opinion is deficient in that the Court:

> (1) failed to consider, in determining whether Proposed Intervenors had a legal interest in this suit, the practical effect on African Americans and Latinos of a ruling

[1]The lawsuit is premised upon plaintiffs' claim that the University's admissions policy impermissibly utilizes race as a factor in determining admissions in violation of 42 U.S.C. §§ 1981 and 1983, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

> abolishing affirmative action at the University of Michigan; (2) misread Proposed Intervenors' interest in this lawsuit as involving a legal right to race-conscious admission programs rather than an interest in ensuring their legality; (3) failed to adhere to the dictates of Sixth Circuit and Supreme Court law regarding the minimal standard necessary for showing inadequacy; and, (4) did not consider, in evaluating inadequacy of representation, the specific arguments and evidence that Proposed Intervenors would introduce to show the practical and legal necessity for affirmative action at the University of Michigan.

(Mot. Rec. at 2). To the aforementioned perceived deficiencies in the Court's opinion, plaintiffs have elected not to respond and instead rely upon their previously filed motion in opposition to proposed intervenors' motion to intervene.[2]

E.D. MICH. L.R. 7.1(h)(3) provides:[3]

> (3) **Grounds**. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Therefore, in order for proposed intervenors to succeed on a motion for reconsideration, they must not only identify a "palpable defect" in the Court's opinion, but they must ultimately show that a different disposition of the case would result from the Court's cognizance of such a defect. For the following reasons, the Court does not believe that an application of the standard set forth in L.R.7.1(h)(3) to the arguments advanced by proposed intervenors, necessitates a different disposition of proposed intervenors' motion to intervene.

---

[2]Letter from Kirk O. Kolbo, Esq. to The Honorable Patrick J. Duggan, 8/5/98 at 1.

[3]On September 8, 1998, minor changes were made to this rule, and its designation was changed to L.R. 7.1(g)(3).

As the proposed intervenors' first two arguments essentially address the Court's finding that proposed intervenors lack a substantial legal interest in the subject matter of the litigation, the Court will address these claims together. Proposed intervenors contend that the implication of the Court's decision to deny intervention is a "devastating effect" on African American and Latino admissions to the University of Michigan. Proposed intervenors then commence with citation from a litany of sources of statistical data in support of the proposition that minority enrollment will suffer if plaintiffs are successful in obtaining a ruling that the University's present admissions policy is unconstitutional. In addition, proposed intervenors contend that the Sixth Circuit does not require the proposed intervenors to demonstrate a "legal right" to the University's voluntarily enacted admissions policy. Instead, proposed intervenors argue that the standard is satisfied where they identify "a legally significant interest in preserving the University's option to adopt and maintain such a program." (Mot. Rec. at 7).

The Court notes that proposed intervenors advanced similar arguments in support of their original motion to intervene as of right, and for permissive intervention. In its opinion, the Court held, "proposed intervenors do not have the same 'significantly protectable' interest because proposed intervenors do not have any legally enforceable right to have the existing admissions policy continued." *Gratz v. Bollinger, et. al.*, No. 97-CV-75231, slip op. at 9 (E.D. Mich. July 7, 1998). In support of its position, the Court noted that if defendants voluntarily ceased the administration of the present admissions policy, proposed intervenors could not claim the deprivation of a legally protected interest. Proposed intervenors now assert that if the University were to cease application of the current program, "proposed intervenors would have a legal claim that the program violates Title VI." (Mot. Rec. at 7).

The Court does not agree. Presumably, proposed intervenors' reference to "Title VI" is intended to refer to Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d, which provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Initially, the Court would point out that proposed intervenors' argument is premature in the sense that if the University's present policy is deemed unconstitutional, only then will the University have to determine the criteria upon which it will predicate a new policy. The Court is unable to discern how proposed intervenors can claim that some future policy of the University will violate Title VI when they do not have any idea what the terms and provisions of the new policy will contain. Therefore, proposed intervenors cannot, in this Court's opinion, claim a substantial legal interest in the present lawsuit on account of a hypothetical claim that some future policy of the University may violate Title VI.

Proposed intervenors next assert that an interest "in preserving the University's option to adopt and maintain" an affirmative action program is sufficient to establish a "legally significant interest." In support of this proposition, proposed intervenors rely on the Sixth Circuit's decision in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), the Eleventh Circuit's decision in *Meek v. Metropolitan Dade Cty.*, 985 F.2d 1471 (11th Cir. 1993), and this Court's decision in *Citizens for Legislative Choice v. Miller*, No. 97-CV-73777-DT (E.D. Mich. Oct. 15, 1997). Proposed intervenors claim that the interests advanced by them in the affirmative action program under consideration in the instant case mirror those interests which the courts have previously found

sufficient in *Michigan*, *supra*, *Meek*, *supra*, and *Citizens*, *supra*. The Court finds proposed intervenors' reliance on these cases unavailing for the following reasons.

The Sixth Circuit in *Miller* permitted the Michigan Chamber of Commerce to intervene in a lawsuit challenging the constitutionality of legislation regulating campaign contributions from labor union members. In deciding to sanction intervention, the court was persuaded by the Chamber's status as:

> (1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments . . . , (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.

Miller, 103 F.3d at 1240. The Chamber's "substantial legal interest" in that litigation derived from its active participation in the political process that led to the adoption of the amendment and the fact that it is an entity regulated by some of the statutory provisions contained in the amendment. In the case at bar, proposed intervenors consist of African-American and Latino students and CAAP, an organization premised upon supporting diversity in higher education. While these groups share an interest in preserving race as an admissions preference, their interest is not analogous to the Chamber of Commerce's interest in *Miller*. The Court does not believe that the process leading up to the University's decision to enact an affirmative action program in its admissions guidelines is akin to the legislative process through which new legislation is enacted. The legislative process is distinct in that those individuals who campaign for or against a particular piece of legislation ultimately face the prospect of governance under it following enaction. If the University declined to continue its

present policy, proposed intervenors would not be foreclosed from admissions to the University, nor would they face any heightened criteria.

The decisions in *Meek*, *supra*, and *Citizens*, *supra*, similarly involved litigation in which legislative enactments were under challenge and the individuals seeking to intervene were affected by the legislation's passage. In *Meek*, four individuals sought to intervene in a challenge to Dade County's electoral system for county commissioners. The Eleventh Circuit, in determining the intervenors had a substantial legal interest, concluded "intervenors sought to vindicate important personal interests in maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered." *Meek*, 985 F.2d at 1480. On a related issue, this Court in *Citizens* permitted an organization, active in placing a term limits proposal on the ballot and promoting its passage, to intervene in legislation challenging its constitutional validity. *See Citizens*, slip op. at 4 ("Because these proposed intervenors were active in the adoption of § 54, the Court concludes that they have a sufficient legal interest to intervene in this action.") In contrast, the Court declined to allow U.S. Term Limits[4] to intervene in *Citizens* and rejected that organization's stance that its "support[] [for] local term limits initiatives nationwide" and its "litiga[tion] [of] the constitutionality of term limit legislation in other courts" constituted an interest sufficient to entitle it to intervene as of right. *Id.* The Court opined that "[b]ecause U.S. Term Limits only has a generalized interest on the topic of term limits. . . . " *Citizens*, slip op. at 4, it did not possess a "substantial legal interest" in the subject matter of the litigation. In sum, the Court believes that an individual's or an organization's interest in vindicating legislation through the

[4]U.S. Term Limits is a non-profit organization that has been involved in state and local campaigns for term limit legislation across the country.

legislative process is markedly different from proposed intervenors' interest in continuing the University's gratuitously enacted affirmative action program.

Moreover, as previously stated, the Court continues to believe that while the proposed intervenors argue that elimination or modification of the present policy may adversely affect minority interests, proposed intervenors simply do not have a "right" to have those policies continued by the University. In reaching this decision, the Court afforded great deference to the Sixth Circuit's opinion in *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990) in which the Sixth Circuit found that a class of African-American applicants and African-American employees of the Division of Fire of the City of Cincinnati had a substantial legal interest in a lawsuit challenging the validity of a consent decree establishing an affirmative action program governing hiring and promotion decisions. Specifically, the Sixth Circuit held, "as parties to the consent decree, the proposed intervenors have a significant legal interest in its interpretation." *Jansen*, 904 F.2d at 342. In permitting intervention in *Jansen*, the Sixth Circuit commented at length about the nature of proposed intervenors' interest in the consent decree:

> The consent decree governs hiring and promotion decisions in the Division of Fire by setting goals for minority hiring and timetables for achieving racial integration. At stake in this litigation is the proposed intervenors' interest in continuing affirmative action under the consent decree. . . . The subject matter of the litigation requires an interpretation of the consent decree negotiated by proposed intervenors and the City when they were in the midst of an adversarial relationship.

Id.

In contrast to the proposed intervenors in the case *sub judice*, the proposed intervenors in *Jansen* had actively participated in the negotiation and implementation of the consent decree. The existence of the affirmative action program under consideration in *Jansen* was predicated upon the parties' entry into a consent decree. The Sixth Circuit explicitly stated in its holding that the proposed

intervenors' substantial interest emanated from the proposed intervenors' status as parties to a consent decree. *Jansen*, 904 F.2d at 342. In the instant case, while proposed intervenors' claim an "interest" in maintaining the status quo of the University's present admissions policy, such a generalized interest in a voluntarily enacted policy, without more, is simply insufficient to support a finding of a "substantial legal interest" necessary to entitle one to intervention of right.

Proposed intervenors next assert entitlement to reconsideration on the grounds that the Court held them to an inappropriately heightened standard with respect to adequacy of representation of proposed intervenors' interest by defendants. Specifically, proposed intervenors claim that the Court's decision "subjects Proposed Intervenors to a higher burden of showing inadequacy than is required by Sixth Circuit and Supreme Court law." (Mot. Rec. at 8). In support, proposed intervenors propound that the Court inappropriately relies on *Hopwood v. State of Texas*, 21 F.3d 603, 605 (5th Cir. 1994) which proposed intervenors assert "conflicts with Sixth Circuit law on the applicability of the *Trbovich*[5] standard in cases involving government agencies." *Id.* Further, the proposed intervenors again assert that the University will not make all of the necessary arguments in support of the continued utilization of race as a factor in admissions. Proposed intervenors also espouse that the University will not "present evidence that race and ethnicity should be considered as a factor in order to mitigate the discriminatory effects of its own admissions practices . . . " nor do proposed intervenors believe that defendants will provide "evidence on the need for affirmative action to mitigate racial and ethnic bias in standardized tests, and the limitations of these tests in predicting

[5]The Supreme Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 636 n. 10, 30 L. Ed. 2d 686 (1972) held "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal. . . ." The Court believes that the standard set forth by the Sixth Circuit in *Miller*, and applied by the Court in its opinion, is in accord with the standard set forth by the Supreme Court in *Trbovich*.

future performance of students." (Mot. Rec. at 10). In sum, proposed intervenors argue that the Court held them to an inappropriately heightened standard in assessing the adequacy of representation and failed to consider those arguments which the University may not assert in defense of its present admissions policy.

At the outset, the Court notes that proposed intervenors misapprehend the Court's application of the appropriate standard to the adequacy of representation prong of the intervention analysis. In summing up plaintiffs' argument with respect to the adequacy of representation, the Court noted plaintiffs' citation to the *Hopwood* decision and their advocacy of the heightened standard on which the Fifth Circuit relied in denying intervention to the student interest groups in that case. However, the Court, in the next paragraph following the summation of plaintiffs' argument, cited to the Sixth Circuit's decisions in *Jansen* and *Miller* for the appropriate standard applicable to requests for intervention in the Sixth Circuit and explicitly acknowledged the "minimal nature of proposed intervenors' burden at this stage. . . ." *Gratz*, slip op. at 11. In the opinion, the Court noted that it "finds the Fifth Circuit's reasoning in *Hopwood* persuasive *in that the Court does not believe in the instant case that the proposed intervenors have sufficiently articulated the existence of a separate interest on which the defendants will not adequately represent them.*" *Gratz*, slip op. at 12 (emphasis added). The Court relied on the *Hopwood* decision to the limited extent that it similarly found deficiencies in proposed intervenors' ability in *Hopwood* to establish the existence of a separate defense which the University of Texas would not or could not assert. In addition, the Court cited the *Hopwood* decision for the proposition that proposed intervenors failed to assert a separate defense of the affirmative action plan that defendants had failed to assert. *Gratz*, slip op. at 13. Contrary to proposed intervenors' assertion in the motion for reconsideration, the Court plainly did not hold proposed intervenors to any heightened standard, applicable to a governmental entity, set forth by the

Fifth Circuit in *Hopwood*.[6] In fact, conspicuously absent from the Court's opinion, is any reference, outside of the summation of plaintiff's argument, to the heightened standard on which the Fifth Circuit relied in *Hopwood*. The Court, therefore, rejects proposed intervenors' argument that it held proposed intervenors to a heightened showing on the adequacy of representation prong necessary to entitle one to intervention of right.

Moreover, proposed intervenors continue to fail to demonstrate any defense of the University's admissions policy which the University will not assert on its behalf. While the proposed intervenors argue that the University will confine the focus of its defense on what they characterize as an interest in "promoting academic freedom," instead of "present[ing] evidence regarding the need for race conscious programs to decrease racial inequality and promote the full inclusion of Latinos and African-Americans," the Court does not believe that such "speculations" are sufficient to demonstrate the University's inability to adequate defend its programs. In the original opinion, the Court expressed its belief that, "The University, having voluntarily enacted the affirmative action policy in its admissions, has a strong interest in preserving the validity of its admissions program and will vigorously defend the continued utilization of race as a factor in admissions." *Gratz*, slip op. at 12. Further, proposed intervenors have failed to "overcom[e] the presumption of adequacy of

---

[6]The Court specifically did not apply *Hopwood's* heightened standard to the instant case for the very reason identified by proposed intervenors in their motion for reconsideration. Not only did the Court's research fail to reveal the Sixth Circuit's countenance of any "heightened standard," applicable to challenged action on behalf of a government entity, but in the *Hopwood* decision the State of Texas was a named defendant in the action whereas in the instant case, the State of Michigan is not a party to the action. In contrast, however, the Court notes that the Fifth Circuit's articulation of a heightened standard for a governmental entity was applied by Judge Friedman in *Grutter v. Bollinger*, No. 97-CV-75928-DT, slip op. at 6 (E.D. Mich. July 6, 1998) ("As the court noted in *Hopwood*, 'where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required.' The proposed intervenors have made no showing of inadequacy of representation, to say nothing of the 'much stronger showing' required in this case.") (internal citations omitted).

representation that arises when the proposed intervenor and a party to the suit . . . have the same ultimate objective." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (quoting *Wade v. Goldschmidt*, 673 F.2d 182, 186 n. 7 (7th Cir. 1982) (per curiam)).[7] Plainly, the University, in enacting an admissions policy that considers race as a factor has among its objectives its continued utilization in not only creating a diverse student body, but in seeking to "equalize" those factors that may otherwise attribute a preference to a non-minority student. In this regard, the Court believes that the interests of the proposed intervenors in the maintenance of the affirmative action policy and those of the University in defending the policy converge. Accordingly, the Court believes that proposed intervenors have once again failed to meet their burden in establishing that defendants cannot adequately defend proposed intervenors' interest in the subject matter of this litigation.

Conclusion

In sum, proposed intervenors have failed, in this Court's opinion, to establish a palpable defect in this Court's decision to deny proposed intervenors the opportunity to intervene in this litigation. Accordingly, the Court denies proposed intervenors' motion for reconsideration.

---

[7]In *Bradley*, two organizations and sixty individuals sought to intervene as of right in the advanced remedial stage of the desegregation of the Detroit public schools. The Sixth Circuit, in denying intervention of right, noted:

> An applicant for intervention fails to meet his burden of demonstrating inadequate representation "when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in the fulfillment of his duty."

Bradley, 828 F.2d at 1192 (quoting *Wade v. Goldschmidt*, 673 F.2d 182, 186 n. 7 (7th Cir. 1982) (per curiam)). In the instant case, proposed intervenors have failed to make any showing of any collusive conduct on the part of defendants, nor have they shown that defendants have an interest adverse to proposed intervenors or failed in any manner to defend against the merits of plaintiffs' claims.

IT IS ORDERED that proposed intervenors' motion for reconsideration is hereby **DENIED**.

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Kerry L. Morgan, Esq.
Kirk Kolbo, Esq., David F. Herr, Esq.
Michael E. Rosman, Esq., Michael P. McDonald, Esq., Hans F. Bader, Esq.
John Payton, Esq., Jane Sherburne, Esq.
Leonard M. Niehoff, Esq.
Godfrey J. Dillard, Esq., Milton R. Henry, Esq.