CHERYL J. HOPWOOD, DOUGLAS CARVELL, KENNETH ELLIOTT, and DAVID ROGERS, Plaintiffs, v. STATE OF TEXAS and REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, Defendants.

CIVIL NO. A-92-CA-563-SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

1994 U.S. Dist. LEXIS 21546

January 19, 1994, Decided
January 20, 1994, Filed

DISPOSITION: [*1] Motion of Thurgood Marshall Legal Society and Black Pre-Law Association to Intervene as Defendants DENIED without prejudice to seeking leave to participate as amicus curiae.

COUNSEL: For CHERYL J. HOPWOOD, plaintiff: Terral R. Smith, Small, Craig & Werkenthin, Steven W. Smith, Law Offices of Steven W. Smith, Austin, TX.

For CHERYL J. HOPWOOD, plaintiff: Michael P. McDonald, Vincent A. Mulloy, Michael E. Rosman, Center for Individual Rights, Washington, DC.

For CHERYL J. HOPWOOD, plaintiff: R. Kenneth Wheeler, Wallace, Harris, Sims & Wheeler, Richmond, VA.

For CHERYL J. HOPWOOD, plaintiff: Joseph A. Wallace, Paul J. Harris, Harris & Bush, Elkins, WV.

For CHERYL J. HOPWOOD, plaintiff: Walter J. Scott, Jr., Gibson, Dunn & Crutcher LLP, Dallas, TX.

For DOUGLAS CARVELL, KENNETH ELLIOTT, DAVID . ROGERS, consolidated plaintiffs: Steven W. Smith, Law Offices of Steven W. Smith, Austin, TX.

For DOUGLAS CARVELL, KENNETH ELLIOTT, DAVID . ROGERS, consolidated plaintiffs: R. Kenneth Wheeler, Wallace, Harris, Sims & Wheeler, Richmond, VA.

For DOUGLAS CARVELL, KENNETH ELLIOTT, DAVID . ROGERS, consolidated plaintiffs: Joseph A. Wallace, Paul J. Harris, Harris & Bush, Elkins, [*2] WV.

For DOUGLAS CARVELL, KENNETH ELLIOTT, DAVID . ROGERS, consolidated plaintiffs: Michael E. Rosman, Center for Individual Rights, Washington, DC.

For DOUGLAS CARVELL, consolidated plaintiff: Walter J. Scott, Jr., Gibson, Dunn & Crutcher LLP, Dallas, TX.

For STATE OF TEXAS, BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM, THOMAS O. HICKS, MARIO E. RAMIREZ, ROBERT M. BERDAHL, UNIVERSITY OF TEXAS SCHOOL OF LAW, MARK G. YUDOF, STANLEY M. JOHANSON, defendants: Harry M. Reasoner, Betty R. Owens, Vinson & Elkins, L.L.P., Houston, TX.

For STATE OF TEXAS, BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM, THOMAS O. HICKS, MARIO E. RAMIREZ, ROBERT M. BERDAHL, UNIVERSITY OF TEXAS SCHOOL OF LAW, MARK G. YUDOF, STANLEY M. JOHANSON, defendants: Javier Aguilar, Special Asst. Attorney General, Samuel Issacharoff, University of Texas School of Law, R. Scott Placek, Skelton Woody & Arnold, Austin, TX.

For STATE OF TEXAS, BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM, defendants: Harley M. Clark, Vinson & Elkins, LLP, Beverly G. Reeves, Vinson & Elkins, Austin, TX.

For STATE OF TEXAS, BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM, ROBERT M. BERDAHL, [*3] UNIVERSITY OF TEXAS SCHOOL OF LAW, MARK G. YUDOF, STANLEY M. JOHANSON, defendants: Charles Alan Wright, The University of Texas Law School, Austin, TX.

For STATE OF TEXAS, BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM, defendants: Kathleen Bone Spangler, Vinson & Elkins, L.L.P., Houston, TX.

For THOMAS O. HICKS, MARIO E. RAMIREZ, ROBERT M. BERDAHL, UNIVERSITY OF TEXAS SCHOOL OF LAW, MARK G. YUDOF, STANLEY M. JOHANSON, defendants: Barry D. Burgdorf, Vinson & Elkins, Austin, TX.

For BERNARD RAPOPORT, ELLEN . TEMPLE, LOWELL . LEBERMANN, PETER CONEWAY, ROBERT . CRUIKSHANK, ZAN HOLMES, TOM LOEFFLER, MARTHA SMILEY, consolidated defendants: Javier Aguilar, Special Asst. Attorney General, Charles Alan Wright, The University of Texas Law School, Austin, TX.

JUDGES: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: SAM SPARKS

OPINION

ORDER

Before the Court is the Motion of Thurgood Marshall Legal Society and Black Pre-Law Association to Intervene as Defendants. [1] The Court, having reviewed the motion, accompanying brief and documents, and the parties' responses, concludes the motion should be denied. [2]

1 The Thurgood Marshall Legal Society, a chapter of the National Black Law Students Association, is a recognized student organization at the University of Texas School of Law. Its membership is comprised of law students, predominantly African-American, currently in attendance at the law school. One of the goals of the organization, according to the affidavit of the organization's current president, is to encourage the admission of greater numbers of African-American students to the law school.

The Black Pre-Law Association, an organization of African-American undergraduate students currently attending the University of Texas, is comprised of students who have applied or who may apply to law school. A central goal of the organization, according to the affidavit of the current president, is to promote African-American students' interest in the law and to assist them in the application and admission process.

[*4]

2 Not surprisingly, the Plaintiffs are opposed to the intervention; the Defendants are not.

This is a lawsuit in which four individuals contend they were denied admission to the University of Texas School of Law because of a racially discriminatory admission policy. The initial lawsuit was filed in September 1992. A somewhat lengthy and strongly argued debate on the issues of standing and ripeness soon ensued, which culminated in this Court's denial of the Defendants' motions for summary judgment by order dated October 28, 1993. In November 1993, because of some confusion by the parties regarding the posture of the cause and because of the Court's concern with efficiently moving the cause to trial, the Court set deadlines for pleading and motion filings, as well as for discovery. Of consequence to the motion now before the Court are the deadlines of March 11, 1994, for a final pretrial status conference to address pretrial issues and set a trial date; of April 1, 1994, for the completion of discovery; and of April 15, 1994, for a joint pretrial order to be filed. Now, with only a little over [*5] two months to go before the completion of discovery, which has already been a contentious process and evidently involves a multitude of documents, two new entities wish to become parties to the litigation.

The prospective intervenors seek intervention both under *Federal Rule of Civil Procedure 24(a)*, which provides for intervention as a matter of right, and under *Federal Rule of Civil Procedure 24(b)*, which provides for permissive

intervention. In seeking intervention, the prospective intervenors basically claim they have a substantial interest in protecting the law school's affirmative-action admissions program that will not be adequately protected the Defendants.

For intervention under *Rule 24(a)*, the movant must meet the following requirements: (1) the motion must be timely; (2) the movant must have an interest relating to the transaction that is the subject of the ongoing action; (3) the movant must be so situated that the disposition of the action may impair or impede the movant's ability to protect its interest in the litigation; and (4) the movant's interest is not adequately represented by the existing parties to the litigation. *See Fed. R. Civ. P. 24(a)*; *Bush v. Viterna, 740 F.2d 350, 354 (5th Cir. 1984)*. [*6] If a prospective intervenor fails to meet any one of the requirements, it cannot intervene as a matter of right. *Bush, 740 F.2d at 354*.

The prospective intervenors contend their specific interest in promoting the legal education for African Americans is not adequately represented by the Defendants, who have historically acted in a manner adverse to the interests of the proposed intervenors. However, as a practical matter, the prospective intervenors and the Defendants have the same ultimate objective in this lawsuit -- the preservation of the admissions policy and procedure currently used by the law school.

When a prospective intervenor "has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Id. at 355* (citation omitted). While the presumption of adequate representation may be rebutted on a relatively minimal showing, the prospective intervenors must "produce something more than speculation as to the purported inadequacy." *Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979)*. [*7] Further, the potential obstruction and delay that may be caused by allowing intervention fully justifies a requirement that a clear showing rather than a mere allegation that prospective intervenors' interests will not be adequately represented by an existing party be made. *United States v. Int'l Tel & Tel. Corp., 349 F. Supp. 22, 27 n.4 (D.C. Conn. 1972)*, *aff'd sub nom. Nader v. United States, 410 U.S. 919, 35 L. Ed. 2d 582, 93 S. Ct. 1363 (1973)*.

The Court finds the prospective intervenors have not overcome the presumption of adequate representation. Further, the Defendants have demonstrated they have sufficient motivation and ability to defend vigorously the current admissions policy. Because this Court finds the prospective intervenors have failed to overcome the fourth test for intervention, inadequate representation by the Defendants, the prospective intervenors are not entitled to intervene as a matter of right.

In making a determination of whether to allow permissive intervention under *Rule 24(b)*, a court must determine if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; [*8] and (3) the movant's claim or defense and the main action must have a question of law or fact in common. *Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989)*, *aff'd sub nom. Venegas v. Mitchell, 495 U.S. 82, 109 L. Ed. 2d 74, 110 S. Ct. 1679 (1990)*. Additionally, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." *See Fed R. Civ. P. 24(b)*.

The prospective intervenors contend that, because they seek to raise defenses sharing common factual and legal questions with the main action, they are entitled to permissive intervention. However, the existence of a common question of law or fact will not automatically entitle a movant to intervene; the district court has the discretion to determine the fairest and most efficient method of handling the lawsuit. *Venegas, 867 F.2d at 530*; *see also Bush, 740 F.2d at 354* (permissive intervention wholly discretionary even if common question of law or fact or requirements of *Rule 24(b)* otherwise satisfied). Further, as discussed above, the Court has found the interests of the prospective intervenors [*9] are adequately represented by the Defendants; adding the prospective intervenors as defendants at this juncture in the lawsuit would needlessly increase cost and delay disposition of the litigation. [3]

3 The Court believes the appropriate role for the prospective intervenors, if any, in this lawsuit is as *amicus curiae*. However, the prospective intervenors have not requested *amicus curiae* status.

Accordingly, the Court enters the following order:

IT IS ORDERED that the Motion of Thurgood Marshall Legal Society and Black Pre-Law Association to Intervene as Defendants is DENIED without prejudice to seeking leave to participate as *amicus curiae*.

SIGNED this the 19th day of January 1994.

SAM SPARKS

UNITED STATES DISTRICT JUDGE