No. 01-3203

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LAW SCHOOL ADMISSION COUNCIL,
Defendant-Appellee

THOMAS E. SCHERER,
Applicant in Intervention-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLANIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court has jurisdiction pursuant to 42 U.S.C. 12188(b)(1)(B), 28 U.S.C. 1331, and 28 U.S.C. 1345. The district court denied the Appellant's motion to intervene on August 7, 2001, and the Appellant filed a timely notice of appeal on August 10, 2001. This Court has jurisdiction under 28 U.S.C. 1291 to consider the denial of a motion to intervene as of right, *Development Finance Corp.* v. *Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 158 (3d Cir. 1995), and to consider a claim that a district court abused its discretion in denying a motion for permissive

intervention, *Philadelphia Electric Co.* v. *Westinghouse Electric Corp.*, 308 F.2d 856, 859 (3d Cir. 1962) ("[I]n those situations where the law grants the trial court discretion to permit or deny intervention in the interest of the fair and efficient administration of justice, it is held that an appellate court has no jurisdiction to review a denial of leave to intervene, except upon the issue of alleged abuse of discretion.").

STATEMENT OF RELATED CASES

The United States is not aware of any related cases. This is the first appeal stemming from the underlying law suit to be heard by this Court.

ISSUE PRESENTED

Whether the district court erred in denying the Appellant's motion to intervene.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On December 6, 1999, the Department of Justice filed the underlying action against the Law School Admission Council (LSAC). The amended complaint alleges that LSAC has engaged in a pattern or practice of discrimination against certain named individuals who have physical disabilities and other similarly aggrieved individuals by failing to grant them reasonable testing accommodations during the administration of the Law School Admission Test (LSAT) in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the

implementing regulations, 28 C.F.R. Part 36 (R. 3, Amended Complaint).[1] Most law school applicants are required to take the LSAT in order to be eligible for admission (R. 3 at 2). Entities that offer "examinations * * * related to applications * * * for secondary or postsecondary education" are subject to the requirements of the ADA, 42 U.S.C. 12189, and the implementing regulations promulgated by the Department of Justice, 28 C.F.R. 36.309.

On February 20, 2001, Thomas E. Scherer filed an action pro se against the University of Missouri-Kansas City (UMKC) School of Law and against LSAC. See *Scherer* v. *UMKC Sch. of Law & Law Sch. Admission Council, Inc.*, No. 01-2085-JWL (D. Kan.). Mr. Scherer's complaint in that action challenges the decision of UMKC not to admit him to the law school and asserts that UMKC violated "Mr. Scherer's civil rights as guaranteed by the Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act and the state statutes of Missouri referred to as the Sunshine Laws" (UMKC Complaint at 5, attached to R. 24, Request to Intervene). Mr. Scherer's complaint in that action also claims that LSAC denied his request for a reasonable accommodation in taking the LSAT, denied his request for a waiver of fees, improperly transmitted his medical information to one or more law schools, denied his request for an extension of time within which to provide medical documentation, and generally violated "Mr. Scherer's rights to privacy, [and] his right to a reasonable accommodation as

[1] References to "R. _" are to the docket number of documents filed in the district court. References to "Br. _" are to pages in the Appellant's opening brief.

guaranteed by the Americans with Disabilities Act, the Civil Rights Act and the Rehabilitation Act" (UMKC Complaint at 6-7, attached to R. 24).

On July 16, 2001, Mr. Scherer filed a request to intervene in the district court in this case (R. 24). Along with his request, Mr. Scherer included a copy of the complaint that he filed against UMKC and LSAC in the district court in Kansas (R. 24). The district court construed this document as the "pleading setting forth the claim or defense for which intervention is sought" that the Rules require an applicant-in-intervention to file along with a motion to intervene. Fed. R. Civ. P. 24(c); see R. 29, Memorandum and Order Denying Request to Intervene, at 1-2. Mr. Scherer identified four grounds supporting his request to intervene:

> 1. Both cases involve the same defendant the LSAC.
> 2. The cause of action in both cases is regarding LSAC documentation prior to granting reasonable accommodation on the law school exam.
> 3. The United States of America Department of Justice as the plaintiff has the right to intervene.
> 4. The parties seeking relief are all disabled individuals who have requested reasonable accommodation.

(R. 24, Request to Intervene, at 1-2). Both the United States and LSAC opposed Mr. Scherer's request to intervene (R. 27, R. 26). Although Mr. Scherer did not specify whether he sought intervention as of right under Federal Rule of Civil Procedure 24(a) or permissive intervention under Rule 24(b), the parties and the district court addressed both types of intervention.

On August 7, 2001, the district court denied Mr. Scherer's request for intervention as of right, finding that the application was untimely because "the

claim filed in Kansas raises issues unrelated to the case at bar and would broaden the scope of litigation to the prejudice of the parties" (R. 29, Order, at 3). The district court also found that Mr. Scherer had "failed to demonstrate a sufficient interest in the litigation at bar, or the threat of impairment of such an interest by disposition here," and had "failed to overcome the presumption that a government entity charged by law with representing a national policy is presumed adequate for the task" (R. 29 at 4-5). In addition, the district court denied Mr. Scherer's request for permissive intervention on the ground that "[Mr.] Scherer's intervention would so unduly delay resolution of this matter as to make intervention unfair" (R. 29 at 5). Mr. Scherer filed a timely notice of appeal on August 10, 2001.

SUMMARY OF ARGUMENT

In order to intervene either as of right or permissively in an ongoing action, an individual must satisfy the requirements of Federal Rule of Civil Procedure 24. Mr. Scherer has not satisfied even one of the requirements of Rule 24, and therefore is not entitled to intervene in the action between the United States and LSAC. In addition to being untimely, Mr. Scherer's request to intervene failed to establish either that he has a significantly protectable interest in the underlying action or that any interest he might have would be adversely affected absent intervention. In addition, Mr. Scherer has failed to overcome the presumption that a governmental entity charged by law with representing a national policy will adequately represent the interests of individuals who might otherwise be entitled to intervene. Finally, the district court did not abuse its discretion in determining that

allowing Mr. Scherer to intervene at this late stage of the litigation would unduly delay the resolution of this action, thereby causing prejudice to the existing parties.

STANDARD OF REVIEW

This Court reviews a denial of both a motion for intervention as of right and permissive intervention for abuse of discretion, although this review is "more stringent" with respect to the denial of intervention as of right "than the abuse of discretion review [the Court] appl[ies] to a denial of a motion for permissive intervention." *Brody* v. *Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992) (quoting *Harris* v. *Pernsley*, 820 F.2d 592, 597 (3d Cir.), cert. denied, 484 U.S. 947 (1987)). "[A] denial of intervention as of right should be reversed if the district court 'applied an improper legal standard or reached a decision that [the Court is] confident is incorrect.'" *Ibid.* (quoting *Harris*, 820 F.2d at 597). The Court is "more reluctant to intrude into the highly discretionary decision of whether to grant permissive intervention." *Ibid.*

ARGUMENT

MR. SCHERER IS NOT ENTITLED TO INTERVENE IN THIS ACTION

Under Federal Rule of Civil Procedure 24, an individual may intervene as of right in ongoing litigation if he either has a statutory right to do so, Fed. R. Civ. P. 24(a)(1), or satisfies the requirements of Rule 24(a)(2). An individual is entitled to permissive intervention if he satisfies the requirements of Rule 24(b). Because Mr. Scherer has no statutory right to intervene and has not satisfied any of the other

requirements of Rule 24, this Court should affirm the district court's denial of his request to intervene.

A. *Mr. Scherer Does Not Have An Unconditional Statutory Right To Intervene*

Federal Rule of Civil Procedure 24(a)(1) provides that a timely application for intervention "shall" be granted "when a statute of the United States confers an unconditional right to intervene" on the applicant. Mr. Scherer has not identified, and cannot identify, any statute that grants him an unconditional right to intervene.[2] The enforcement provision of Title III of the ADA, 42 U.S.C. 12188, pursuant to which the underlying action was brought, does not confer on private individuals a right to intervene in enforcement actions. Rather, Section 12188(a) provides that the "remedies and procedures" set forth in the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a), are the remedies and procedures available to individuals seeking to enforce Title III. Although the United States has a statutory right to intervene in a private enforcement action if he certifies that the case is of general public importance, 42 U.S.C. 2000a-3(a), there is no like provision granting to individuals the right to intervene in enforcement actions brought by the Department of Justice.[3]

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[2] In addition, as discussed pp. 8-9, *infra*, Mr. Scherer's request to intervene was not timely filed.

[3] Where Congress has intended to provide such an individual right to intervene in government enforcement actions, Congress has expressly provided for such intervention. For example, the enforcement provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), expressly grant to aggrieved persons the right to intervene in a civil action brought by the EEOC or the Attorney General in a case involving a governmental entity.

Nor has Congress vested in individuals a statutory right to require the Department of Justice to intervene in private actions. Mr. Scherer may proceed with his own enforcement action for preventive relief under Title III, 42 U.S.C. 12188(a), but he has no statutory right to intervene in this government enforcement action.

B. *Mr. Scherer Is Not Entitled To Intervene As Of Right*

This Court has "interpreted Rule 24(a)(2) to require proof of four elements from the applicant seeking intervention as of right":

> first, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor's interest by existing parties to the litigation.

Kleissler v. *United States Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998). Each of these requirements must be met before a person is entitled to intervene as of right. *Mountain Top Condo. Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995). Because Mr. Scherer has failed to present proof of any of these elements, this Court should affirm the district court's denial of his motion to intervene.

The district court denied Mr. Scherer's request to intervene because the court found the request to be untimely (R. 29 at 3-4). In considering whether a motion to intervene has been timely filed, this Court has articulated three factors which must be considered: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Mountain Top Condo. Ass'n.* 73F.3d at 369. The action below was filed by the Department of Justice in

December 1999, over 19 months before Mr. Scherer filed his intervention request. During that interval, the parties had reached the final stages of discovery,[4] and had entered into mediation with District Judge Dalzell. Introducing an additional party and supplemental issues at this stage would significantly interfere with the progress of the ongoing case, thereby causing prejudice to the existing parties.[5] See *Donovan* v. *United Steelworkers of Am., AFL-CIO*, 721 F.2d 126, 127 (3d Cir. 1983) (finding motion to intervene untimely when filed thirteen months after the complaint had been filed, at which point all of the pre-trial work was complete), cert. denied, 466 U.S. 978 (1984).

Moreover, Mr. Scherer has failed to identify any legally protected interest that is in danger of being impaired by the litigation between the United States and LSAC. In determining whether an applicant in intervention has demonstrated that he has the required "significantly protectable" interest, *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), this Court has admonished that

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[4] At the present time, document production has been completed and depositions will begin shortly

[5] The complaint Mr. Scherer filed with his request to intervene presents a number of issues, including claims under the Rehabilitation Act and the "Civil Rights Act" as well as claims of violations of privacy, that are not present in the litigation between the United States and LSAC. Mr. Scherer's complaint also involves an additional defendant, UMKC. Certainly, the introduction of those additional issues and an additional defendant would significantly delay the resolution of the instant litigation, thereby causing prejudice to the United States and to LSAC. On appeal, Mr. Scherer seems to indicate (Br. 2-3) that, were he permitted to intervene, he would be willing to drop all of his claims except those under the ADA, and that he would be willing to drop UMKC as a defendant. As discussed pp. 10-11, *infra*, even were Mr. Scherer to so limit his claims, his introduction as a party in this suit would still inappropriately expand the scope of the litigation, thereby causing prejudice to the existing parties.

he has the required "significantly protectable" interest, *Donaldson* v. *United States,* 400 U.S. 517, 531 (1971), this Court has admonished that:

> [T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought. The interest may not be remote or attenuated.

Kleissler, 157 F.3d 964, 972 (3d Cir. 1998). This suit was filed by the government on behalf of four named individuals who have physical disabilities and "[a]ny other persons with physical disabilities who have been the victims of LSAC's discriminatory policies" (R. 3 at 11). Because Mr. Scherer alleges that he is a person with mental disabilities, he does not fall within the class of persons on whose behalf the United States filed this lawsuit. Although Mr. Scherer claims (Br. 9) that "there is no difference in physical v. mental disabilities," in fact the legal and factual issues raised by persons with mental impairments who are seeking test accommodations, including issues of documentation, are distinct from those raised by persons with physical disabilities. Because of the differences in the issues raised, the complaints Mr. Scherer has raised against LSAC are distinct from the complaints the United States has raised, and Mr. Scherer is therefore unable to demonstrate that he has an interest in this lawsuit that is specific to him and capable of definition.

For the same reason, Mr. Scherer has failed to demonstrate that a judgment with respect to any of the named plaintiffs or other similarly aggrieved individuals

would pose a "tangible threat to a legally cognizable interest," as he is required to do in order to intervene as of right. *Mountain Top Condo. Ass'n*, 72 F.3d at 366. In evaluating whether existing litigation poses such a tangible threat, this Court must "assess the practical consequences of the litigation," keeping in mind that "[i]ncidental effects on legal interests are insufficient" to satisfy Rule 24(a)(2). *Development Fin. Corp.* v. *Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 162 (3d Cir. 1995). Mr. Scherer has not shown how the law suit between the United States and LSAC could in any way affect his interests or his claims against LSAC. Although both the United States and Mr. Scherer raise issues about LSAC's documentation requirements, the United States has not raised any issues with respect to persons with mental disabilities. The United States' suit will not pose a tangible threat to Mr. Scherer's claims.

To the extent that Mr. Scherer has presented systemic complaints – unrelated to his claim of discrimination on the basis of mental impairment – about the manner in which LSAC handles requests for test accommodations that could overlap with some of the claims presented by the United States, he has failed to demonstrate that his interest in those issues would not be adequately represented by the Department of Justice. In general, "[a] government entity charged by law with representing a national policy is presumed adequate for the task." *Kleissler*, 157 F.3d at 972. The burden to rebut this presumption rests with the individual seeking intervention. *Brody* v. *Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992). This court has recognized three instances in which it will find representation to be inadequate:

> (1) [when,] although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) [when] there is collusion between the representative party and the opposing party; or (3) [when] the representative party is not diligently prosecuting the suit.

Ibid. With respect to his systemic complaints about LSAC's handling of requests for accommodations, Mr. Scherer has not even suggested that any of these three grounds is applicable. Mr. Scherer has therefore failed to carry his burden with respect to any of the requirements of Rule 24(a)(2) and is consequently not entitled to intervene as of right.

C. *Mr. Scherer Is Not Entitled To Permissive Intervention*

Mr. Scherer has similarly failed to demonstrate that he is entitled to permissive intervention in this action. In order to be eligible for permissive intervention, Mr. Scherer must demonstrate that he has a "claim or defense" that has a "question of law or fact in common" with the "main action." Fed. R. Civ. P. 24(b)(2).[6] In addition, "[i]n exercising its discretion[,] the [district] court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Ibid.* As discussed above, Mr. Scherer's claims are legally and factually distinct from the claims of the United States. To the extent that there is any overlap between Mr. Scherer's claims and those of the United

[6] Rule 24(b)(1) also provides that an applicant "may" be granted permissive intervention "when a statute of the United States confers a conditional right to intervene" on the applicant. As discussed pp. 7-8, *supra*, Mr. Scherer does not have a statutory right – either conditional or unconditional – to intervene.

States, the district court did not abuse its discretion in not allowing Mr. Scherer to intervene on the ground that, "even if a common question existed, Scherer's intervention would so unduly delay resolution of this matter as to make intervention unfair" (R. 29 at 5). Allowing Mr. Scherer to intervene at this point, when a good deal of discovery has been completed and the parties are engaged in court-assisted mediation, would indeed unduly delay the resolution of this action, thereby causing prejudice to the rights of the United States and LSAC. This Court should therefore affirm the district court's denial of Mr. Scherer's request for permissive intervention.

CONCLUSION

This Court should affirm the district court's denial of Mr. Scherer's request to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the United States as Appellee was sent by Federal Express to the following counsel of record on this 2nd day of November, 2001:

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