

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

Greg Gegenheimer,

Plaintiff,

v.

Frank Stevenson, Tom Vick, Allan K. Dubois, Jose “Joe” Escobedo Jr., David E. Chamberlain, Rehan Alimohammad, Christy Amuny, Barbara R. Bass, Micah Belden, Amy Bryan, H. Alan Carmichael, E. Leon Carter, Jeff Chandler, Estrella Escobar, Sylvia Borunda Firth, Laura Gibson, Ricky G. Gonzalez, Ann Greenberg, August W. Harris III, Angelica Hernandez, Joe “Rice” Horkey Jr., Sam Houston, Joseph Indelicato Jr., John V. Jansonius, Sarah Clower Keathley, Mary Abbott Martin, Rudolph K. Metayer, Brian Miller, Gary L. Nickelson, Christopher Oddo, Curtis Pritchard, Baili Rhodes, Lisa S. Richardson, Ruben S. Robles, Fidel Rodriguez Jr., Scott Rothenberg, Gregory W. Sampson, Lance D. Sharp, Scott Sherwood, Rebecca Simmons, Scott P. Stolley, C. Barrett Thomas, Andrew Tolchin, Travis Torrence, Bradley C. Weber, Michael J. Wynne, in their official capacities as Members of the Board of Directors of the State Bar of Texas,

Defendants

Civil Action No. 16-1270

COMPLAINT

Plaintiff Greg Gegenheimer brings this action against Defendants Frank Stevenson, Tom Vick, Allan K. Dubois, Jose “Joe” Escobedo Jr., David E. Chamberlain, Rehan Alimohammad, Christy Amuny, Barbara R. Bass, Micah Belden, Amy Bryan, H. Alan Carmichael, E.

Leon Carter, Jeff Chandler, Estrella Escobar, Sylvia Borunda Firth, Laura Gibson, Ricky G. Gonzalez, Ann Greenberg, August W. Harris III, Angelica Hernandez, Joe “Rice” Horkey Jr., Sam Houston, Joseph Indelicato Jr., John V. Janosonius, Sarah Clower Keathley, Mary Abbott Martin, Rudolph K. Metayer, Brian Miller, Gary L. Nickelson, Christopher Oddo, Curtis Pritchard, Baili Rhodes, Lisa S. Richardson, Ruben S. Robles, Fidel Rodriguez Jr., Scott Rothenberg, Gregory W. Sampson, Lance D. Sharp, Scott Sherwood, Rebecca Simmons, Scott P. Stolley, C. Barrett Thomas, Andrew Tolchin, Travis Torrence, Bradley C. Weber, and Michael J. Wynne, in their official capacities as Members of the State Bar of Texas Board of Directors.

Mr. Gegenheimer alleges that the State Bar of Texas is violating the Equal Protection Clause by maintaining a race- and sex-based quota scheme on its Board of Directors, and he seeks declaratory and injunctive relief against this unconstitutional discrimination.

JURISDICTION AND VENUE

1. The Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343.
2. Venue is proper in this district because at least one of the defendants resides in this district and all defendants reside in the State of Texas. *See* 28 U.S.C. § 1391(b)(1).

PARTIES

3. Plaintiff Greg Gegenheimer is a lawyer in good standing with the State Bar of Texas (“State Bar”). Mr. Gegenheimer has never served as a minority director or elected director of the Board of Directors of the State Bar.

4. Mr. Gegenheimer is a white male.

5. Defendant Frank Stevenson is the President of the State Bar and a member of the State Bar Board of Directors.

6. Defendant Tom Vick is the President-elect of the State Bar and a member of the State Bar Board of Directors.

7. Defendant Allan K. Dubois is the Immediate Past President of the State Bar and a member of the State Bar Board of Directors.

8. Defendant Jose “Joe” Escobedo Jr. is the Chair of the Board and a member of the State Bar Board of Directors.

9. Defendant David E. Chamberlain is the Immediate Past Chair of the Board and a member of the State Bar Board of Directors.

10. Defendants Christy Amuny, Micah Belden, Amy Bryan, H. Alan Carmichael, E. Leon Carter, Jeff Chandler, Laura Gibson, Ann Greenberg, Joseph Indelicato Jr., John V. Janosonius, Sarah Clower Keathley, Mary Abbott Martin, Brian Miller, Gary L. Nickelson, Christopher Oddo, Curtis Pritchard, Lisa S. Richardson, Ruben S. Robles, Fidel Rodriguez Jr., Scott Rothenberg, Gregory W. Sampson, Lance D. Sharp, Scott Sherwood, Rebecca Simmons, Scott P. Stolley, Andrew Tolchin, Travis Torrence, Bradley C. Weber, and Michael J. Wynne are elected directors of the State Bar Board of Directors.

11. Defendants Rehan Alimohammad, Sylvia Borunda Firth, Angelica Hernandez, and Rudolph K. Metayer are minority directors and members of the State Bar Board of Directors.

12. Defendants Barbara R. Bass, Estrella Escobar, Ricky G. Gonzalez, August W. Harris III, and Joe “Rice” Horkey Jr. are public members of the State Bar Board of Directors.

13. Defendant Sam Houston is the President of the Texas Young Lawyers Association and a member of the State Bar Board of Directors.

14. Defendant Baili Rhodes is the President-elect of the Texas Young Lawyers Association and a member of the State Bar Board of Directors.

15. Defendant C. Barrett Thomas is the Immediate Past President of the Texas Young Lawyers Association and a member of the State Bar Board of Directors.

STATEMENT OF FACTS

A. The Minority-Member Law

16. The governing body of the State Bar is the Board of Directors. Tex. Gov't Code Ann. § 81.020(a).

17. Under Texas law, the Board of Directors must include, among others, “four minority member directors appointed by the President of the State Bar.” *Id.* § 81.020(b) (“minority-member law”).

18. A minority-member director must (1) be a “minority member” of the bar; (2) who is not serving as an elected director at the time of appointment; and (3) who is not serving as a minority-member director at the time of appointment. *Id.* § 81.020(d).

19. A “minority member” is defined as “a member of the state bar who is female, African-American, Hispanic-American, Native American, or Asian-American.” *Id.* § 81.002(7).

20. The President of the State Bar appoints the minority-member directors, subject to confirmation by the Board of Directors. *Id.* § 81.020(d).

21. Minority-member directors serve three-year terms. *Id.*

B. The Minority-Director Vacancy

22. The defendants are currently accepting nominations for a minority-member director, whose term will begin in the summer of 2017. *See* Exhibit A, *State Bar of Texas Minority Director Sought*.

23. As required by the minority-member law, the defendants are accepting nominations only from individuals who are “female, African-American, Hispanic-American, Native American, or Asian-American.” *Id.*

24. The defendants are prohibiting white men from being nominated or considered for the open minority-member-director position. *Id.*

25. To be nominated for the minority-member position, an interested person must submit a nomination letter from a third party, a résumé, and three to five letters of recommendation. The documents must be sent to Defendant Ruben Robles, who chairs the Ad Hoc Committee to Select Minority Directors.

26. The deadline for nominations is December 15, 2016.

27. After receiving the nominations, the nominating committee will submit two nominees to the President of the Board (Defendant Frank Stevenson). The President will appoint one of these two individuals to be the minority director.

28. As required by the minority-member law, the President will not appoint any individual who is not a “female, African-American, Hispanic-American, Native American, or Asian-American.”

29. After appointment by the President, the individual must be confirmed by the full Board of Directors.

30. If confirmed, the individual will become the minority director on June 22, 2017, and will serve a three-year term.

C. Mr. Gegenheimer’s Exclusion from Consideration for the State Bar Board of Directors Because of His Race and Sex

31. Plaintiff Greg Gegenheimer is a lawyer in good standing with the State Bar and wants to be considered for the open appointment to the State Bar Board of Directors.

32. Mr. Gegenheimer is not serving (and has never served) as a minority director or elected director of the Board of Directors of the State Bar. *See* Tex. Gov’t Code Ann. § 81.020(d).

33. Mr. Gegenheimer is ready to submit a nomination letter from a third party, a résumé, and three to five letters of recommendation. *See* Exhibit A, *State Bar of Texas Minority Director Sought*.

34. Despite these qualifications, Mr. Gegenheimer is ineligible to serve as a minority member of the State Bar Board of Directors because he is not “female, African-American,

Hispanic-American, Native American, or Asian-American.” Tex. Gov’t Code Ann. § 81.002(7); Exhibit A, *State Bar of Texas Minority Director Sought*.

COUNT I
42 U.S.C. §§ 1983, 1988
Racial Discrimination in Violation of
the Equal Protection Clause of the Fourteenth Amendment

35. Mr. Gegenheimer re-alleges paragraphs 1 through 34 as if fully stated herein.

36. Under section 1983, “[e]very person who under color of any statute [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983.

37. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

38. When a State statute employs a racial classification, as Texas law does here, it “is always subject to strict scrutiny.” *United States v. Santos-Rivera*, 183 F.3d 367, 373 (5th Cir. 1999) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

39. Racial classifications imposed by a state actor violate the Equal Protection Clause of the Fourteenth Amendment, accordingly, unless they are “narrowly tailored measures that further compelling governmental interests.” *Adarand*, 515 U.S. at 227.

40. “[A] quota system ‘cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing,’ and ‘[r]acial balance is not to be achieved for its own sake.’” *Cavalier ex rel. Cavalier v. Caddo Parish School Bd.*, 403 F.3d 246, 260 (5th Cir. 2005) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989), and *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)). In accordance with the Equal Protection Clause, therefore, a State “cannot use a quota system—it cannot ‘insulat[e] each category of applicants with certain desired qualifications from competition with all other applications.’” *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003)).

41. The minority-member law violates the Equal Protection Clause because there is no compelling interest in imposing a racial quota for consideration to the State Bar Board of Directors. Nor is this quota system narrowly tailored to achieve any compelling interest.

42. The defendants are liable under section 1983 because they acted under color of state law when they unconstitutionally prohibited white men, including Mr. Gegenheimer, from being considered for appointment to the State Bar Board of Directors.

43. Mr. Gegenheimer is entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

COUNT II
42 U.S.C. §§ 1983, 1988
Sex Discrimination in Violation of
the Equal Protection Clause of the Fourteenth Amendment

44. Mr. Gegenheimer re-alleges paragraphs 1 through 43 as if fully stated herein.

45. Under section 1983, “[e]very person who under color of any statute [or] regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” 42 U.S.C. § 1983.

46. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

47. Under the Fourteenth Amendment, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *United States v. Virginia*, 518 U.S. 515, 531 (1996).

48. To withstand equal-protection review, the State must show that “the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 533. “The burden of justification is demanding and it rests entirely on the State.” *Id.*

49. A quota system “set[ting] aside . . . positions for women” and “automatically exclud[ing] [white men] from consideration” cannot withstand heightened scrutiny. *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 638 (1987).

50. The minority-member law violates the Equal Protection Clause because Texas lacks a sufficient constitutional interest for imposing a sex-based quota for consideration to be appointed to the State Bar Board of Directors. Nor is this quota system sufficiently tailored to achieve any such interest.

51. The defendants are liable under section 1983 because they acted under color of state law when they unconstitutionally prohibited white men, including Mr. Gegenheimer, from being considered for appointment to the State Bar Board of Directors.

52. Mr. Gegenheimer is entitled to attorneys’ fees and costs pursuant to 42 U.S.C. § 1988.

COUNT III
28 U.S.C. § 2201
Declaratory Judgment Act

53. Mr. Gegenheimer re-alleges paragraphs 1 through 52 as if fully stated herein.

54. Mr. Gegenheimer is entitled to a declaratory judgment that the discriminatory minority-member law violates the Equal Protection Clause.

55. Mr. Gegenheimer is entitled to attorneys’ fees and costs pursuant to 42 U.S.C. § 1988.

DEMAND FOR RELIEF

Mr. Gegenheimer respectfully requests that the Court:

- (1) Enter judgment in his favor and against the defendants;
- (2) Enter a declaratory judgment that the minority-member law and State Bar regulations enforcing that law are unconstitutional;
- (3) Issue a preliminary and permanent injunction preventing the defendants from enforcing the minority-member law and State Bar regulations enforcing that law;

- (4) Enter any appropriate declaratory or equitable relief required to prevent the continued violation of Mr. Gegenheimer's constitutional and statutory rights, including, but not limited to, forbidding the defendants to discriminate against white men by conferring any form of preferential treatment on women or racial minorities;
- (5) Award Mr. Gegenheimer the reasonable costs and fees associated with bringing this action to enforce his constitutional and statutory rights; and
- (6) Make any other award that the Court deems just and proper.

Respectfully submitted.

By: Jonathan F. Mitchell

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**pro hac vice* application forthcoming

Dated: December 5, 2016

Counsel for Plaintiffs

Exhibit A

STATE BAR *of* TEXAS

MINORITY DIRECTOR SOUGHT

Nominations are now being accepted for minority director for the State Bar of Texas Board of Directors. Four appointed positions were created on the board to increase minority participation as well as to provide representation from varying professional, geographic, and social environments. One position will become vacant in 2017. Minority directors serve three-year terms, and the vacant position term begins June 22, 2017.

Nominees will be selected by the Ad Hoc Committee to Select Minority Directors, composed of members of the State Bar Board, the Women in the Profession Committee, and the Diversity in the Profession Committee. Nominees will be responsible for their own expenses related to the interview process.

Criteria for selection:

Any minority lawyer in good standing with the State Bar is eligible to be nominated, provided such lawyer has never served, or is not currently serving, as a minority director or as an elected director. To the fullest extent possible, the Ad Hoc Committee shall nominate only persons who demonstrate the sensitivity and knowledge, gained from experiences in the profession and the community, necessary to represent the interests of minority lawyers.

A minority member of the State Bar is any lawyer who is female, African-American, Hispanic-American, Native American, or Asian-American.

The Ad Hoc Committee shall be guided, but not limited, by the following criteria in selecting its nominees for minority director:

- **The minority population of the area in which the candidate resides and practices.**
- **The degree of minority representation already on the State Bar Board of Directors from a particular geographic area.**
- **Demonstration of leadership ability.**
- **Involvement in civic or political activities within the minority community.**
- **Participation in minority bar associations.**
- **Participation in local bar, State Bar, and American Bar Association committees and activities.**
- **Years of licensure.**
- **Number and content of recommendation letters.**
- **Ethnicity and gender.**

The deadline for nominations is December 15, 2016. Persons interested in being nominated for the position should submit the following: a nomination letter from a third party (*self-nominations will not be accepted*); resume, and three to five letters of recommendation.

Submit the information to:
Ruben Robles, Chair
Ad Hoc Committee to Select Minority Directors
c/o State Bar of Texas
1414 Colorado Street, Ste. 300
Austin, TX 78701-1627

Please note that a nomination for minority director does not preclude an applicant from running for a geographic area board position. Petitions for the elected board member positions must be received at the State Bar headquarters by March 1, 2017, to be considered.