Case No. 98-50506

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHERYL J. HOPWOOD, *et al.*,

Plaintiffs

CHERYL J. HOPWOOD,

Plaintiff-Appellant-Cross-Appellee,

v.

STATE OF TEXAS, BOARD OF REGENTS
OF THE TEXAS STATE UNIVERSITY SYSTEM;
ROBERT M. BERDAHL, President of the University
of Texas at Austin, in his official capacity;
UNIVERSITY OF TEXAS SCHOOL OF LAW;
MARK G. YUDOF Dean of the University of Texas
School of Law, in his official capacity;
STANLEY M. JOHANSON, Assistant Dean, in his official capacity,

Defendants-Appellees-Cross-Appellants-Cross-Appellees.

[caption continues on next page]

Appeal From The United States District Court For The Western District of Texas

BRIEF FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES HOPWOOD AND CARVELL

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Case No. 38-50506
[caption continued]

DOUGLAS CARVELL, *et al.*,

Plaintiffs

DOUGLAS CARVELL,

Plaintiff-Appepellant-Cross-Appellee,
and

KENNETH ELLIOTT and DAVID ROGERS,

Plaintiffs-Appellees-Cross-Appellants,

v.

STATE OF TEXAS, BOARD OF REGENTS
OF THE TEXAS STATE UNIVERSITY SYSTEM;
BERNARD RAPOPORT; ELLEN TEMPLE;
LOWELL LEBERMANN; ROBERT CRUIKSHANK;
ZAN HOLMES; TOM LOEFFLER; MARTHA SMlLEY;
THOMAS O. HICKS; MARIO E. RAMIREZ,
as members of the board,

Defendants-Appellees-Cross-Appellants-Cross-Appellees.

CERTIFICATE OF INTERESTED PERSONS

Case No. 98-50506

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellants-Cross-Appellees,

v.

STATE OF TEXAS, *et al.,*
Defendants-Appellees-Cross-Appellants-Cross-Appellees.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Douglas W. Carve11	Appellant
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Kenneth R. Elliott David A. Rogers	Appellants
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Hopwood and Carve11

STATEMENT REGARDING ORAL ARGUMENT

This case involves complex and controversial issues surrounding plaintiffs' seven-year struggle to achieve redress from the adjudicated unconstitutional admissions policies of the flagship law school of the State of Texas. Plaintiffs have faced not only determined and unyielding resistance from the defendants and their numerous counsel, but the palpable hostility of a district court that plainly disagrees with and resents the orders and instructions issued by this Court Oral argument is necessary to allow the plaintiffs the opportunity to explain in full the district court's errors, and the manner in which their rights have been denied,

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STATEMENT OF JURISDICTION

This case was decided on remand by the United States District Court for the Western District of Texas, Sparks, J That court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The district court entered final judgment on March 20, 1998; plaintiffs Hopwood and Carve11 timely filed a notice of appeal on April 13, 1998. Defendants filed a notice of cross-appeal on April 17, 1998; plaintiffs Rogers and Elliott filed a notice of appeal on April 20, 1998. The Court of Appeals has jurisdiction over this case pursuant to 28 U.S.C. § 1291 .[1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court misapply the instructions of this Court, or otherwise: commit reversible error, in holding that the defendants succeeded in proving that plaintiffs Hopwood and Carvell would not have been granted admission to the Law School if a constitutional admissions procedure had been utilized in 1992?

2. Are the district court's "alternative" findings regarding damages suffered by plaintiffs Hopwood and Carve11 erroneous?

3. Did the district court commit errors in its evaluation of plaintiffs' claim for attorneys' fees?

STATEMENT OF THE CASE

For nearly seven years, plaintiffs have labored to attain relief from the violations of their federal constitutional rights by the State of Texas through its racially discriminatory law school admissions program. While they have

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[1] This brief is submitted on behalf of plaintiffs Hopwood and Carvell. Plaintiffs Elliott and Rogers have been separately represented since 1994.

succeeded in establishing that defendants did, indeed, violate their rights, their respective efforts to achieve a meaningful, individual remedy have been frustrated by the hostility of the district court and its vehement disagreement with the rulings of this court.

The district court initially held that it would be "difficult and, perhaps, almost impossible," for the plaintiffs to prove that they would have been admitted to the law school under a constitutional admissions standard. But when instructed by this Court that the burden was on the defendants to prove that plaintiffs would not have been admitted under a constitutional system, the district court first announced that this Court's ruling was analytically "incomplete" and wrong as a matter of "common sense and rudimentary mathematics." The court then reversed its earlier conclusion and held, based on the most insubstantial and flawed evidence, that the defendants had carried their "almost impossible" burden, The court also rejected powerful, and essentially unrefuted, evidence of plaintiffs' injuries, and reduced plaintiffs' claims for attorneys' fees to a fraction of the amount actually incurred in conducting this proIonged and highly important challenge to the defendants' unlawful practices.

The district court's lesson for plaintiffs who would risk challenging fashionable, but unlawful, racial discrimination is that the cost, delay and obloquy incident to such a struggle cannot possibly be worth it -- a message that this Court must surely want to correct.

Prior Proceedings

In 1996, this Court reversed the district court and remanded in part, to enable the district court to correct its prior errors on remedial issues. This appeal is from the district court's judgment in the remand trial.

For years, defendants administered a racially discriminatory admissions system at the University of Texas School of Law at Austin (the "Law School") in

violation of the Fourteenth Amendment to the Constitution, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and 42 U.S.C. § 1981, Plaintiffs, who were denied admission to the Law School, brought this action seeking an injunction ordering their admission, damages for defendants' unlawful race discrimination, and an injunction prohibiting the Law School from considering race in admissions.

The case was assigned to District Judge Sam Sparks, and was tried without a jury in May, 1994. On August 19, 1994, the district court issued an opinion holding that certain aspects of defendants' admissions practices violated plaintiffs' rights under the Fourteenth Amendment. Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex, 1994), *rev'd on other grounds,* 78 F.3d 932 *(5th Cir.* 1996). The court declined, however, to correct other discriminatory aspects of defendants' admissions practices, or to enjoin the defendants from administering a racially discriminatory admissions program in the future,

The district court allocated to plaintiffs the burden of proving that they would have been admitted to the Law School under a constitutional admissions system, *id.* at 579-82, while explicitly acknowledging that this burden was a "difficult and, perhaps, almost impossible obstacle to overcome in a case of this nature." *Id.* at 582. The court held that "*it is virtually impossible to establish the outcome of a comparison of the pluintiffs' applications against the other applicants,* whether minority or nonminority," *id.* at 582 n.86 (emphasis added), and thus concluded that the court "simply cannot find from a preponderance of the evidence that the plaintiffs would have been offered admission under a constitutional system." *Id.* at 582.

Accordingly, the district court declined to order the admission of plaintiffs to the Law School and also refused to award any compensatory damages, holding that "none of [the plaintiffs] established monetary damages as required under the law and rules of this circuit." *Id.* at 583. The district court refused to award Title VI

damages because it did not believe defendants intended to discriminate. *Id.* The *only* relief awarded by the district court was a declaration that the 1992 admissions process violated the Fourteenth Amendment, $1 in nominal damages to each plaintiff, and an order that the plaintiffs be permitted to reapply for admission without paying the $50 application fee. *Id.* at *582-83.*

Plaintiffs appealed, and on March 18, 1996, this Court issued an opinion reversing the district court and remanding in part. *Hopwood v. Texas, 78* F.3d 932 (Sth Cir. 1996). This Court held that defendants' race-driven admissions system was not justified under the Constitution. *id* at 955, The Court also concluded that the district court had erred on questions of plaintiffs' relief. The Court held that the district court had misapplied the burden-shifting analysis required by Mt. *Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274* (1977), and thereby misallocated to plaintiffs rather than defendants the burden of proof on causation. ***Id.*** at 957. The Court also held that "the district court erred in holding that plaintiffs did not prove that defendants had committed intentional discrimination under title VI." *Id.* at *957.* The Court found that "*there is no question that a constitutional violation has occurred . and that the plaintiffs were harmed thereby," Id.* (emphasis added). Accordingly, the Court "instruct[ed] the [district] court to reconsider the issue of damages in accordance with the legal standards" that it articulated. *Id.* at 935.

On April 4, 1996, this Court denied Rehearing En Banc. *Hopwood v. Texas, 84* F.3d 720 (5th Cir, 1996). Defendants petitioned the United States Supreme Court for *certiorari,* claiming that the decision of this Court was one of "national significance" involving important questions of equal protection, state sovereignty and federal judicial power, and "the first of its kind by any federal court." Petition for Certiorari at 1. Plaintiffs Hopwood and Carve11 opposed that petition. On July *1, 1996,* the Supreme Court denied *certiorari. Hopwood v. Texas, 518* U.S. *1033* (1996).

The remanded portion of this case was tried before Judge Sparks between March 31 and April 4,1997. Nearly a year later, on March 20, 1998, the district court issued an opinion holding, once again, that plaintiffs were not entitled to any damages other than the $1 nominal damages previously granted. The court entered an order enjoining the defendants from using racial preferences in admissions, even though the district court failed to make factual findings to support the injunction.

Although the district court had initially concluded that it was essentially "impossible" for the plaintiffs to prove they would have been admitted to the Law School under a constitutional admissions system, the district court had no difficulty on remand in finding that defendants had proven that plaintiffs would *not have* been admitted under a constitutional system. ***Hopwood v. Texas, 999 F***, Supp. 872, 879 (W.D. Tex. 1998). The court also made several "alternative" factual findings and legal conclusions ensuring that, "[i]n the event any of the plaintiffs successfully appeals th[e] decision" regarding plaintiffs' admission, plaintiffs would nonetheless achieve little or no meaningful individual relief. *Id* Thus, in the "alternative," the court held that Hopwood "sustained mental anguish damages in the amount of $6,000 as a result of the Law School's rejection of her application for admission," ***id.*** at 908, and that Carve11 suffered no compensable emotional injuries from "the denial of admission." ***Id.*** at 910. The court did not award *any* damages to either Hopwood or Carve11 for the mental anguish flowing from the defendants' unlawful discrimination and violation of the plaintiffs' constitutional rights, which had, according to this Court, unquestionably harmed the plaintiffs.

The district court also stated in its "alternative" findings that Hopwood had failed to establish *any* economic damages as a result of being denied admission to the Law School in 1992 because the court assumed that she would have dropped out before receiving a law degree. ***Id.*** at 903-04,906. The court held that Carve11 was also not entitled to any economic damages for loss of future income, and

awarded him only $40,036 in damages, representing the difference in the cost of tuition between the Law School and Southern Methodist University Law School, which Carve11 attended after being rejected by the defendants, *Id.* at 908-10.

Following the 1994 trial, the district court had denied plaintiffs' requests for attorneys' fees and expenses as prevailing parties under 42 USC. § 1988. The court reasoned that although plaintiffs prevailed, they attained only *de minimis* relief. This Court granted plaintiffs' motion to vacate the district court's judgment on attorneys' fees and remanded the case with an instruction to reconsider the fees issue. *Hopwood v. Texas,* 95 F.3d 53 (5th Cir. 1996). On August 8. 1996, the district court issued an order requiring plaintiffs to supplement their application for attorneys' fees by October 1, 1996, months before the trial of this case on remand. Record at 2518 (order). Plaintiffs Hopwood and Carvell complied with that order. While a fraction of those fees were awarded, the district court rejected all claims for fees incurred in connection with the remand trial. 999 F. Supp. at 914.

STATEMENT OF FACTS

Both Cheryl J. Hopwood and Douglas W. Carve11 were Texas residents who applied for admission to the Law School's 1992 entering class. Each was denied admission.

The 1992 Admissions Process

The 1992 admissions process was held to be unconstitutional by this Court in 1996, and thus is no longer at issue. Certain aspects of the 1992 admissions process are, however, significant to the remedial issues presented by this appeal.

In 1992, the Law School sorted applicants into categories based on the Texas Index ("TI"), a number calculated by the Law School Data Assembly Service by combining an applicant's grade point average ("GPA") and score on the Law School Aptitude Test ("LSAT"). 78 F.3d at 935. Based on their TI score,

applicants were separated into either the presumptive admit, presumptive deny, or discretionary zone. *Id.*

"Blacks and Mexican Americans were treated differently from other candidates, however." *Id. at* 936. In order to achieve a goal of at least 10% Mexican Americans and 5% Blacks in each class, the Law School employed different presumptive admit and presumptive deny thresholds depending upon an applicant's race. *Id.* at 937. The presumptive ***denial*** score for whites and non-preferred minorities (192) was higher than the presumptive ***admit*** score for preferred minorities (189) and substantially higher than the presumptive denial score for preferred minorities (179). ***Id.*** at 936. Most applicants in the presumptive admit zone were admitted and most candidates in the presumptive deny zone were denied admission. ***Id.*** at 935-36.

The applications of preferred minorities received a thorough review by a three-person "minority subcommittee" of the admissions committee, which met to discuss every preferred minority candidate. ***Id.*** at 937. The applications of whites and non-preferred minorities in the discretionary zone, however, were placed in one large stack in the admissions office. Tr. Vol. II (Johanson) at 53-54; Tr. Vol. 1 (Wellborn) at 133. The applications were then dealt out, like playing cards, into groups of thirty, which were reviewed by a random three-member "subcommittee" of the fifteen-member admissions committee. Tr. Vol. I (Wellborn) at 133; 861 F. Supp. at 562,582 n-86; 999 F. Supp. at 880. These screening "subcommittees" were created on an ad hoc basis by the order in which individual members of the admissions committee happened to come into the admissions office to pick up a stack of thirty applications for review. Each of the three members of a "subcommittee" conducted an independent and secret screening of the stack of files, 999 F. Supp. at 880, and was instructed to vote for ten candidates. Tr. Vol. I (Wellborn) at 142-43.

The number of votes each applicant received within his or her group of thirty was tallied, and "[a]pplicants receiving two or three votes were offered admission, applicants receiving no votes were immediately denied admission, and applicants receiving one vote were offered a position on the waiting list." 999 F. Supp. at 881. Hopwood and Carvell each received one vote and were offered positions on the waiting list, but ultimately were denied admission to the Law School. *id.*

Cheryl J. Hopwood

Plaintiff Hopwood had a TI score of 199, which placed her in the resident presumptive admit range. 999 F. Supp. at 881. She earned an associate's degree in accounting from Montgomery County Community College in *1984* and a bachelor's degree in accounting from California State University-Sacramento in 1988. Id. She graduated with a GPA of 3.80 and had an LSAT score in the 83rd percentile. *Id*. At the time she applied for admission to the *Law* School, Hopwood was caring for her severely handicapped daughter and was a certified public accountant. 861 F. Supp. at 564, Her application also stated that she was a member of two honor societies and had won the Outstanding Senior Award at California State University-Sacramento (for which she had been in competition with 6,000 classmates). P- I45. Hopwood's file was downgraded from a presumptive admit to the discretionary zone because one member of the admissions committee believed that her GPA overstated her educational background. 999 F. Supp. at 881.

Hopwood testified that she suffered mental anguish as a result of defendants' conduct both in discriminating against her and in rejecting her from the Law School. Tr. Vol. II (Hopwood) at 168-71. Her testimony was corroborated by an expert forensic psychologist, and by the testimony of a long-time friend. Tr. Vol. III (Dr. Lees-Haley) at 152; P-470 (D. Davis Dep.) at 9, 11, 13.

Douglas W. Carve11

Plaintiff Carvell had a TI score of 197, which placed him near the top of the **discretionary zone.** *999* F. Supp, at 881. He graduated from Hendrix College with a B.A. in political science and a GPA of 3.28. Id.

Carve11 spent a substantial amount of time preparing his application to the Law School, Tr. Vol. IV (Carvell) at 92. His application included four letters of recommendation, far more than the average applicant, and included two extremely strong letters from former employers at a law firm. 999 F. Supp. at 898; Tr. Vol. IV (Carvell) at 95; P-15 1. Carvell's personal statement was well written, Tr. Vol. I (Wellborn) at 127, and his application also detailed numerous extracurricular activities useful in a legal career, including writing for the student newspaper and substantial involvement in student government. P- 151.

After being rejected by the Law School, Carve11 attended Southern Methodist University Law School and graduated with a joint law degree and master's of business administration in 1996. 999 F. Supp. at 908. The difference in cost of tuition between the Law School and SMU Law School was $40,036. *Id.* at 909. To account for the increased tuition at SMU Law School, Carve11 worked part-time during the school years. Tr. Vol. IV (Carvell) at 102-03. Carvell's part-time work diminished the amount of time that he could devote to his legal studies. Id. at 103. Moreover, Carve11 incurred substantial debt associated with his education at SMU Law School, a burden that continues to cause Carve11 anxiety. Tr. Vol. IV (Carvell) at 102; P-472 (T. Wilson Dep.) at 10.

Carvell testified that he suffered mental anguish as a result of both the Law School's discrimination and the Law School's rejection of his application, particularly because he had a long-standing goal of attending the Law School, Tr. Vol. IV (Carvell) at 92-93,98-1 01 Carvell's testimony was corroborated by an expert witness and two lay witnesses. Tr. Vol. III (Dr. Lees-Haley) at 152; Tr. Vol.

IN (J. Carvell) at 135-37, 138-43; P-472 (T. Wilson Dep,) at 2.

Defendants' Causation Evidence On Remand

In attempting to carry their causation burden on remand, defendants relied on only *one* witness, Professor Wellborn, an employee of the Law School who had no expertise in statistics or probabilities. Tr. Vol. I (Wellborn) at 116-17. Wellborn did not attempt to create a constitutional version of the 1992 admissions process, and he did not review every application. Tr. Vol. I (Wellborn) at 41-42,48-49. He submitted two analyses, in both of which he used Hopwood and Carve11 as a "floor" and conducted a search for applicants that, in retrospect, he felt would have been more likely to be offered admission than the plaintiffs. *Id*. at 163. He admitted that the 1992 admissions committee did not operate in that manner, i.e., the committee did not set out to deny admission to pre-selected individuals. *Id.* He concluded that 10 applicants who in 1992 had *been presumptively denied* admission and 54 discretionary zone applicants who received *zero* admission committee votes would have been admitted ahead of Hopwood and Carve11 -- each of whom had received one vote in the discretionary screening in 1992. Record at 3749-52 (Proposed Findings of Fact and Conclusions of Law of Plaintiffs Hopwood and Carve11 ("Proposed Findings'+) at fl 104-11)[2]

[2] Wellborn also concluded that applicants who applied late, who submitted incomplete or illegible applications, and at least one candidate that defendants ultimately conceded would not have been admitted under a race-neutral system, all would have been admitted before Hopwood and Carvell. Record at 3749-52 (Proposed Findings at 117 104-l 1); P-407 (Defendants' Second Supplemental Response To Plaintiff Hopwood's Interrogatories).

SUMMARY OF ARGUMENT

The numerous errors in the decision below are the product of the district court's palpable antipathy toward the plaintiffs, their challenges to the Law School's racially discriminatory admissions policies, and the decision by this Court reversing the district court's previous decision.

The district court made no effort to conceal its intense disapproval of this Court's decision placing the burden of proof on defendants. That binding instruction is characterized by the district court as -- among other things -- "incomplete," without "basis in fact or logic," and, as plainly as the district court could put it, not applicable "to this case." 999 F. Supp. at 883, **882.** While the district court went on to state that it would apply the rule of law it flatly rejected, *id.* at 885, it is obvious from the district court's blunt and hostile language that it could not apply that rule of law objectively, and would perform its duty, if at all, only in the narrowest and most grudging manner. The consequence was entirely predictable: this Court's instruction as to the burden of proof was overridden in spirit and in fact.

The district court's errors and hostility towards the plaintiffs radiate from nearly every page of the district court's lengthy opinion. The court describes the plaintiffs, their academic records, their motivations, their emotions and their ambitions in the most disparaging of terms. The admission votes they received are dismissed as meaningless or worse, and their evidence is repeatedly rejected or ignored. Virtually every aspect of plaintiffs' counsels' work is dismissed as unnecessary, redundant or overvalued. Plaintiffs' decision to seek experienced appellate counsel to handle a complex constitutional case is described as wasteful and somehow an affront to local counsel. A landmark outcome that even the district court describes as an "extraordinary success," 999 F. Supp. at 916, is

unaccountably brushed aside as involving legal issues that were "neither novel nor extraordinarily difficult." Id. at 921.

The district court plainly perceived the plaintiffs' claims as nothing short of "outrageous," destructive to the "integrity of the admissions process," and damaging to the "needs of higher education" in Texas. *Id.* at 923. That attitude led the district court into numerous errors, as the court did everything in its power to prevent the vindication of the valid claims and unquestionable injuries that this Court has already acknowledged. Nothing could be more chilling to future efforts to challenge unconstitutional. practices and seek redress of constitutional grievances.

ARGUMENT

I.

The District Court Erred In Holding That Defendants Carried Their Burden Of Proving That Plaintiffs Would Not Have Been Admitted To The Law School.

The district court failed to follow this Court's instructions on remand. It also ignored defendants' admission that Hopwood and Carvell were "close cases" and its own conclusion that "close cases" had to be resolved in plaintiffs' favor as a matter of law, and it accepted defendants' self-exculpatory analysis of the admissions process, even though that analysis did not meet this Court's requirements, contained overwhelming logical errors, was contradicted by record evidence including defendants' admissions, and was filled with factual errors.

A. Standard Of Review.

The standard of review for the district court's application of law, including its application of this Court's decision remanding this action, is *de novo. Odom v, **Frank,*** 3 F.3d 839,843 (5th Cir. 1993). The standard of review for mixed

conclusions of law and fact is also *de nuvo* *United States v. LULAC, 793* F.2d 636,642 (5th *Cir.* 1986); see also *Collins v. Baptist Mem'l Geriatric Ctr., 937* F.2d 190, 195 (5th Cir. 1991). Factual findings are reviewed under the "clearly erroneous" standard. *Odom,* 3 F.3d at 843.

B. The District Court Failed To Follow This Court's Instructions On The Burden Of Proof:

This Court instructed that on remand, the district court was to apply the *Mt. Healthy* burden-shifting analysis, and that "[i]n the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff *would not have been* admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate." 78 F.3d at 957 (emphasis added).

The district court strongly disagreed with that instruction. The district court declared flatly that *"Mt. Healthy* does not apply to this case," 999 F. Supp. at **884,** that this Court's "analysis in this regard was incomplete at best," *id.* at *883,* that application of Mt. *Healthy* to defendants "may be imprudent," *id.* at **884** n.23, and that this Court had reached conclusions inconsistent with "common sense and rudimentary mathematics." *Id.* at *883.* The court revealed its commitment to its previous, erroneous, approach by re-stating, as it did in its first decision, that *"[i]f the plaintiffs were denied admission because of their race, they should have to prove it." Id.* at 884 (emphasis added). The court criticized plaintiffs because they "did not proffer their own expert to testify as to what a constitutional admissions system would look like or whether any of the plaintiffs would have been admitted under such a system." *Id.* at **885** n. 24. Of course, under a correct application of *Mt. Healthy,* plaintiffs do not bear the burden of proving what would have happened under a constitutional admissions system; nor are plaintiffs the partics charged with conducting a lawful admissions process.

These and other angry statements by the district court speak for themselves, and demonstrate that the court could not objectively evaluate the evidence and apply a standard of proof that it felt was not only wrong, but affirmatively dangerous to the Texas educational system. As a consequence, the district court simply evaded this Court's directions.

C. Had the District Court Followed This Court's Instructions, It Would Have Held That Defendants Did Not Carry Their "Impossible" Burden.

In its first opinion in this case, the district court candidly acknowledged that it would be "difficult and, perhaps, almost impossible" to establish whether plaintiffs would or would not have been admitted under a constitutional system. 861 F. Supp. at 582. Moreover, as the court noted:

> the difficulty does not stem from the unconstitutional aspects of the procedure alone but from the random shuffle of files into stacks of thirty, with each stack reviewed by different subcommittees of three. *Under such a system, it is virtually impossible to establish the outcome of a comparison of the plaintiffs' applications against the other applicants, whether minority or nonminority.*

Id. at **582** n.86 (emphases added). On remand, that "comparison of the plaintiffs' applications against the other applicants" is precisely the "virtually impossible" task that this Court required defendants to perform.

The defendants repeatedly confirmed that it would be impossible to predict a given candidate's chance of admission under a constitutional process without re-evaluating the entire pool of applicants. For example, Law School Dean Mark Yudof stated under oath that "it is *impossible* to say how each individual file would be read in the absence of an affirmative action program," P-219 (Response to Request for Admission No. *13)* (emphasis added). Stanley Johanson, the chairman of the 1992 admissions committee, testified that one cannot say that a given

applicant "probably" would have been admitted in a race-neutral system "because we don't know the overall pool. Unless we reexamine every file and simulate the same construct." Tr. Vol. II (lohanson) at 68. See also Record at 3735-38 (Proposed Findings at ¶¶ 64-68). The district court simply ignored those dispositive concessions.

Professor Wellbom, defendants' only remand witness on the causation issue, testified -- consistent with the acknowledgments by Johanson and Yudof -- that "you would start the entire [admissions] process over to create a race-neutral system." Tr. Vol. I (Wellborn) at 42. Yet Wellborn admitted that he did not "attempt to recreate the entire admissions procedure for 1992." *Id.* at 41; *see also id.* at 227. Thus, by his own admission, Wallbom did not perform the analysis defendants had admitted was necessary for them to carry their burden of proof.

Instead of attempting to hypothesize or create a constitutional admissions system, Wellbom adopted significant aspects of the unconstitutional 1992 process. In using Hopwood and Carvell as a "floor" and attempting to find applicants "better" than they, he assumed that every non-preferred applicant admitted in 1992 would have been admitted under a race-neutral system, including candidates from the discretionary zone and candidates from the racially-segregated waiting list. But "[t]he admissions procedure employed in 1992 was fraught with constitutional error," and "the waiting list was generated by an unconstitutional system in which minority and nonminority applicants were reviewed separately. Therefore, the waiting list created in 1992 would not exist under a constitutional adrnissions system." 999 F. Supp. at 891. By *assuming* that each of the individuals admitted under the *unconstitutional 1992 process* would be admitted in his hypothetical process, Wellborn thus failed to address the question framed by this Court -- whether plaintiffs would have been admitted "under a constitutional admissions system." 78 F.3d at 957.

Wellbom attempted to justify his reliance on the fruits of the unconstitutional 1992 admissions process by claiming that an offer of admission was "strong evidence" that if the admissions process were constitutional the applicant would emerge as a "probable admit[]." Tr. Vol. 1 (Wellborn) at 42. While it may appear to be an appealing shortcut to assume that someone who succeeded even under a system that discriminated against him would also succeed under a constitutional system, such an assumption ignores the fact that, in the absence of racial preferences, the 1992 admissions process would have yielded materially different results for many discretionary zone candidates -- as defendants conceded. E.g., Record at 3738 (Proposed Findings at 167). Wellbom's shortcut cannot substitute for the required analysis of what would have happened "under a constitutional admissions process."

Wellbom also defended his failure to replicate the 1992 process, or to examine all of the applicant files, as "largely a concession to the limited time I had available." Tr, Vol. I (Wellborn) at 48-49. Wellbom looked at only 450 applicant files and "examined" only about 200 for "about two and a half days." *Id.* at 45. It is not clear why Wellborn claimed his time was limited: almost nine months elapsed between the Supreme Court's denial of *certiorari* and the trial on remand, and defendants were uniquely in a position to attempt to replicate the 1992 admissions system. The "limited time" Wellbom chose to allot to his task cannot justify his inadequate and constitutionally-tainted analysis. *Wessmann v. Gittens,* 160 F.3d 790,805 (1 st Cir. 1998) (in case involving remedy for racially discriminatory school admissions policy, Circuit Court rejected as "unacceptable" expert's attempt to excuse flawed analysis on ground that "a thorough study would have required more time than he had available").

Wellborn was obligated, at a minimum, to postulate a constitutional admissions process and to advance an analysis that was consistent with the

evidence. He did neither, The district court found that defendants' burden was "virtually impossible" to carry, and defendants admitted the impossibility of determining what would have happened to Hopwood and Carvell's applications under a constitutional admissions system, short of re-creating the entire admissions process -- which they did not attempt to do. Those findings and admissions required the district court to find that defendants had failed to carry their burden.

D. Defendants Conceded That Hopwood And Carve11 Were "Close Cases," And *Mt. Healthy* Requires That Close Cases Be Decided In Favor Of Plaintiffs.

Defendants failed to carry their burden as a matter of **law** for an additional, 'entirely independent reason, As the district court acknowledged, this Court's instructions require that "close calls must always be decided in favor of the plaintiff," 999 F. Supp. at 884. Defendants conceded that Hopwood and Carvell presented "close **cases."** Consequently, had the district court correctly applied its own understanding of this Court's decision, it would have been compelled to conclude that Hopwood and Carve11 were entitled to judgment on the causation issues.

Hopwood and Carve11 were near the top of the discretionary zone, and Wellborn testified that "screeners will disagree about candidates who were within the discretionary zone." Tr. Vol. I (Wellborn) at 224-25. Wellborn conceded that there were many examples where professors in 1992 voted for discretionary zone candidates who were weaker than or comparable to Hopwood and Carvell. Indeed, the professors preferred those 'comparable or worse' candidates to others that Wellborn hypothesized would have been admitted before Hopwood and Carvell. *Id.* at 224; *see generally id.* at **2 12-23. For** Wellborn, all these differences in opinion were "the definition of files being fairly close together." *Id.* at 57; *see also id.* at **224-25** (there are "lots and lots of close cases involving candidates that are

comparable to Hopwood and Carvell."). Wellborn further admitted that "you can't make a prediction about the outcome between two closely qualified candidates that would be born[e] out." *Id.* at 225.3 Wellborn's admissions regarding Hopwood and Carvell's "close" qualifications are fatal to defendants' position. Given those admissions, defendants could not prove by a preponderance of the evidence that other "close cases" -- some of the individuals actually admitted in 1992 and many of Wellborn's additional candidates -- would have been admitted under a hypothetical constitutional admissions system over Hopwood and Carvell.

The district court concluded that *defendants* should receive the benefit of "close calls" because "at most ... 7% of resident nonminority applicants were affected by the law school's use of racial preferences," and a policy that affects 7% of a population would not "cause one to infer that an individual decision was infected by the discriminatory policy." 999 F. Supp. at 883 & n.22. That conclusion ignores this Court's directions regarding the application of *Mt. Healthy* and is also contradicted by *International Bhd. of Teamsters v. United States, 43 1* U.S. 324, 362 (1977), where the Supreme Court stated that "[t]he proof of the pattern or practice [of discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." Under *Teamsters,* victims of discrimination are presumptively entitled to relief, subject to a showing by the

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3 Then-Professor Sharlot similarly testified in 1993 that "[a]11 of those in the discretionary zone were substantially similar." Record at 3735-36 (Proposed Findings at ¶ 66).

defendant that a particular decision was not made based on its discriminatory policy. *Id.*

This Court has repeatedly emphasized that on the issue of relief, close cases must be decided against the discriminating party, not against the victims of unlawful discrimination. E.g., *Hopwood, 78* F.3d at 957; *Shipes v. Trinity Indus., 987* F.2d 3 11,3 17 (5th Cix. 1993) ("uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer"); Baxter v. *Savannah Sugar Refining Corp., 495* F.2d *437,445 (5th Cir*. 1974) ("It is apparent that whether any particular individual would have been advanced under a color-blind system cannot now be determined with 100% certainty, ... Any substantial doubts created by this task must be resolved in favor of the discriminated who ... is the innocent party in these circumstances."); *cf: Mt. Healthy, 429* U.S. at 286 ("A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct.")_ Hopwood and Carvell, the innocent parties here, should not have a concededly "close" case resolved against them.

E. Defendants' Evidence Was Flawed In Numerous Respects.

Even if the Court were to set aside the insurmountable problems described above, the Court would nonetheless conclude that Wellbom's analysis was not remotely adequate to carry defendants' burden. The district court's acceptance of Wellborn's conclusions presents both questions of law and mixed questions of law and fact and thus is reviewed *de nova* by this Court. *LULAC, 793* F.2d at 642.

1. Wellborn's Analysis Contained Logical Contradictions And Ignored Signifcant Record Evidence.

As noted above, Wellborn *began* his supplemental analysis with the indefensible hypothesis that Hopwood and Carvellwould not have been admitted,

and used their applications as a "floor" in seeking other candidates for admission. Tr. Vol. I (Wellborn) at 163.[4] As Wellborn himself admitted, the actual admissions process was not tailored to find candidates who were "better" than Hopwood and Carvell. *Id.*

Wellbom also adopted an inconsistent approach to the results produced by the 1992 race-based admissions process, embracing those results when they favored defendants' position in this litigation, and rejecting those results when the historical facts favored plaintiffs. Such an obviously selective manipulation of the evidence undermines the credibility and logical coherence of Wellborn's analysis.

For example, while Wellborn assumed. that every candidate admitted in 1992 who did not benefit from a race preference would have been admitted in a race-neutral system -- even though those offers of admission were generated by a racially-biased system -- he simultaneously rejected the historical fact that both Hopwood and Carve11 received one vote for admission **in** 1992. E.g., Tr. Vol. T (Wellborn) at 163.[5] Wellborn's ostensible reason for this inconsistency was that

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4 Wellborn's first analysis was rejected by the district court because it "relie[d] too heavily on unreliable percentages of admission." 999 F. Supp. at 886 n.26.

5 The district court devalued the admissions committee vote for Hopwood because it "was essentially a 'sympathy vote' from Hamilton." 999 F. Supp. at 891. Putting aside the facts that a vote is a vote and that the district court did not inquire into the motives of any other votes, the district court improperly relied upon unreliable and impeached testimony from Hamilton to support its finding. *See id.* at 891 n.42. Notably -- when Hamilton's testimony was favorable to plaintiff Elliott -- the district court disparaged Hamilton's testimony on the g-round of "several discrepancies in Hamilton's trial testimony and affidavit." *Id.* at 899-900. Moreover, the district court interrupted plaintiffs'

[footnote continued on next page]

the system in 1992 was unconstitutional and that there would have been new groups of 30 under a constitutional system. *Id* at 5 I-52. But it is equally true that each of the individuals actually admitted in 1992 from the discretionary zone would also have been in a new group of 30 under a constitutional system, so Wellborn's rationale undermines his basic assumption.6

[footnote continued from previous page]

impeachment of Hamilton's story about the "sympathy vote," stating: "If this is simply an attack on 'Ms. Hamilton's credibility, so what? The Court did not find much credibility in the first trial with Ms. Hamilton, if you will recall." Tr. Vol. II (Judge Sparks) at 62. The district court also ignored documentary evidence that conclusively undermined Hamilton's testimony that she was the third and final reviewer of Hopwood's application, and thus demonstrated that she could not have cast a "sympathy vote" because she could not have known how both of the two previous reviewers had voted. See Record at 3754-56 (Proposed Findings at m 120-122); Tr. Vol. II (Johanson) at 60-61,73-75.

The district court's "discounting" **of the** vote received by Carvell, because it was cast by a student member of the admissions committee (999 F. Supp. at 891), is similarly contradicted by the record. Johanson testified that student votes were "very effective" and "pretty much the same" as faculty votes. Tr. Vol. II (Johanson) at 5 l-52. The district court did not consider whether other candidates received votes from student members of the Committee.

6 Similarly, Wellborn assumed that every single individual offered admission in 1992 would have been admitted under a constitutionally permissible system -- with the sole exception of plaintiff Elliott. Defendants had previously argued that Elliott had been admitted in 1992. *Hopwood,* 78 F.3d at 957 n.57 (noting "contradictory results" that defendants claimed that Elliott had been admitted but that district court nonetheless held that he would not have been admitted under a constitutionally permissible system). That Wellborn created a "special exception" to his otherwise universal assumptions, to Elliott's disadvantage, simply exemplifies Wellborn's unacceptable methodology,

Moreover, if Wellbom accepted two votes as evidence of a candidate's superiority to those with only one vote, then as a matter of logic, he should have accepted one vote as evidence of a candidate's superiority to those with zero votes. Hopwood and Carve11 each received one vote, yet Wellborn somehow concluded that *fifty-four* applicants who received *zero* votes would somehow be admitted before them. Record at 3741-44 (Proposed Findings at 17 76-84); ***id.*** at 3593-94 (Plaintiffs Hopwood's and Carvell's Post-Trial Brief Addressing Defendants' Burden of Proof on Causation).

Wellbom claimed his methodology was not dependent on whether the admissions procedure used groups of 30 or whether one reviewer or a group of reviewers evaluated applicant files, even though he adopted the results of the 1992 admissions process. 999 F. Supp. at 889 n.38. But that assertioon is contrary to the sworn statements of Johanson, chairman of the 1992 admissions committee, and Yudof, Dean of the Law School at that time, both of whom recognized that the 1992 results were peculiarly the result of the methods used in 1992. Johanson, for example, testified that attempting to determine how applicants in the discretionary zone would have been processed in the absence of racial preferences was "sheer speculation" and would be "improper." Id. The groups of 30 would have been entirely different if preferred minority files had been included in the regular admissions process, and the make-up of the groups of 30 was often decisive in determining who was admitted. *Id.,* quoting Johnson ("I can't say, if [Hopwood] was in another stack, whether she would have gotten two votes to admit or no votes to admit."). Yudof swore that "there are hundreds and hundreds of applicants who are admitted from the discretionary zone in which the individual assessments of reviewers from the admissions committee are decisive." P-21 8, P-220 (Responses to Requests for Admission No. 20). Dean Sharlot, a member of the 1992 admissions committee, similarly testified in 1993 that "Well, who knows on a

particular day that I'm reading these files how I would come out. ... How it would weigh relative to this other file on a particular day, there is no way for me to say with any conviction." Tr. Vol. I (Sharlot Dep.) at 261-62; P-601, Record Excerpts at Tab 6. Wellborn himself conceded that "[t]here are clearly weaker candidates [that] are admitted and stronger candidates [that] are denied in the real world process because of the voting." Tr. Vol. I (Wellborn) at 226.

Defendants cannot have it both ways: as a matter of logic Wellbom was required either to start over, or to accept all of the events from 1992 -- even assuming that incorporating the fruits of the unconstitutional admissions system could ever be deemed permissible under this Court's directions.

The district court rested its decision entirely on Wellborn's analysis, despite its illogical and self-serving use of the unconstitutional 1992 admissions process, The district court thus failed to consider, as this Court required, what would have happened under a constitutional admissions process.

2. Wellborn's Analysis Cannot Be Reconciled With Defendants' Statements In The *Malooly* Case.

The district court ignored statements made by defendants in a similar discrimination lawsuit, *Malooly v. Texas*, Civ, No. A96CA229SS (W.D. Tex. 1994). Plaintiff Malooly sued the Law School for race discrimination in the admissions procedure used in 1994, a procedure that was nearly identical to the 1992 procedure. Defendants moved for summary judgment in *Malooly* based solely on the fact that Malooly received zero votes in the discretionary zone screening in 1994. Based exclusively on that fact, defendants argued that "the preponderance of the evidence shows that Mark Malooly would not have been admitted to the Fall 1994 entering class at UT Law School under a race neutral system." Record at 3739-40 (Proposed Findings at ¶ 70). In support of defendants' motion for summary judgment in *Malooly* Johanson submitted an affidavit in

which he swore that ***anyone who*** received a vote in the 1994 discretionary screening "would have been considered superior to Mr. Malooly," because Malooly did not receive a vote. P-61 7 (Johanson Affidavit) at ¶ 10, Record Excepts at Tab 7, pp. 4-5.

Hopwood and Carvell, of course, received one vote in the discretionary screening process. Defendants' statements in the *Malooly* case demonstrate that they "would have been considered superior" to *anyone* who received zero votes in the discretionary screening, such as 54 of the candidates Wellbom claimed would. have been admitted ahead of Hopwood and Carvell. Defendants' statements in *Malooly are* uncontested, sworn admissions that contradict Wellborn's conclusions. The district court, without explanation, chose to ignore entirely defendants' admissions in ***Malooly.***

3. Wellborn's Analysis Contains Numerous Factual Errors, Further Rendering His Conclnsions Unreliable.

Wellbom conceded that he "made a number of errors" in his analysis. Tr. *Vol. 1* (Wellborn) at 227. Many of Wellbom's errors were significant. These numerous factual errors call into question both Wellbom's qualifications as an admissions "expert" and the accuracy of **his** conclusions. For example:

Although his initial report was predicated on an analysis of the presumptive admit and presumptive deny lines set in 1992 for non-preferred applicants, Wellbom used the wrong presumptive deny line from 1992 -- even though he could have learned. the correct line from reviewing this Court's decision. Tr. Vol. I (Wellborn) at 141; 78 F.3d at 936.

Second, Wellbom erroneously asserted that each screener was instructed to cast "exactly nine votes" for each group of 30 resident discretionary zone candidates, and he reasoned that "the much finer adjustment of allowing ten rather

than nine votes per pile would yield too many [admittees]." D-5 19 (Wellborn Report) at 1-2; Tr. Vol, I (Wellborn) at 53,58. In fact, each screener was instructed to vote for ten candidates. P-414 (discretionary screening zone instructions); Tr. Vol. I (Wellborn) at 142-43. The district court's tiding that there were nine votes per group is incorrect, 999 F. Supp. at 880, and, in the face of the evidence presented on cross-examination, inexplicable.

Third, in 1992 some applicants had two-digit TI scores and others had. three-digit TI scores, and those with two-digit TI scores were considered separately from those with three-digit TI scores. *Id,* at 890 n.39. Thus, all of the individuals actually admitted (and incorporated into Wellborn's analysis) were considered only with individuals who also had either a two-digit or a three-digit TI score. Tr, Vol. I (Wellborn) at 159. Wellborn was not even aware of this fact, and did not separately consider applicants who had a two-digit versus a three-digit TI score. *Id.*

These errors are illustrative of many others, and are in addition to the legal shortcomings, conflicts with defendants' previous sworn statements, and logical errors in Wellborn's report described above. Wellborn's report simply misses the mark and falls far short of proving that plaintiffs would not have been admitted to the Law School *under a constitutional system.* Plaintiffs, therefore, are entitled to all relief flowing from a finding that they would have been admitted to the Law School had defendants not unlawfully discriminated against them on the basis of their race.

F. This Court Should Order Hopwood's Prompt Admission To The Law School.

Hopwood originally sought to enter the Law School in 1992. For economic and related reasons, her career effectively has been delayed for nearly seven years as this case proceeded. Accordingly, if the Court concludes that the district court

erred on causation, it should directly order her admission -- as even the district court recognized would be appropriate. 999 F. **Supp.** at 901-02.

II.

The District Court's "Alternative" Factual Findings Are Tainted By The Court's Legal Errors On The Causation Issue And Are Otherwise Erroneous.

The district court awarded plaintiffs no substantial individual relief, despite the fact that this Court has already found that "there is no question that a constitutional violation has occurred. .. and that the plaintiffs were harmed thereby." 78 F.3d at 957.

The district court claims that it made "alternative" findings on the issue of damages "[i]n the event any of the plaintiffs successfully appeals [the causation.] decision," in order "to ensure there is no third trial and for the benefit of the circuit court." 999 F. Supp. at 879,90 1. It appears, however, that the district court actually was attempting to insulate its errors from effective review and to ensure that plaintiffs do not receive substantial individual relief. The "alternative" findings should be vacated, and this case should be remanded for a determination of damages on the record already established.

A. Standard Of Review.

"In reviewing a trial court's determination of damages, [this Court] examines all issues of law de nova." ***Boehms v. Crowell, 139*** F.3d 452,459 (5th Cir. 1998) (citation omitted), *cert.* ***denied,*** 119 S. Ct. 866 (1999)**.** Although the clearly erroneous standard of review generally applies to the award of compensatory damages, this is not true where there has been an error of law. ***Id.*** This Court "must ensure that the factfinding of the district court is performed with the proper legal standards in mind. Only then can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact. The

district court's analysis, of course, is subject to plenary review by this court, to ensure that the district court's understanding of the law is proper." *Brock v. Mr. W Fireworks, Inc., 814* F.2d 1042, 1044-45 (5th Cir. 1987) (citation omitted).

B. The District Court's Errors On Causation Have Again Improperly Influenced Its Analysis Of Damages.

This Court previously noted that the district court had allowed its erroneous analysis of causation to influence its analysis of relief. 78 F.3d at 956 n.51 (the district court's mistaken views on causation "also affected the court's analysis in denying prospective relief and compensatory damages"). As set forth above, the district court has again conducted a legally improper causation analysis; once again, the district court's errors on the causation issue have pre-ordained the results of its analysis of damages.

The district court began its damages analysis by further disparaging this *Court's* decision, announcing that "[i]t is beyond the intellectual skills of this Court to comprehend why the plaintiffs have been given a second trial to present evidence regarding damages when they utterly failed to present competent evidence on damages at the first trial." 999 F. Supp. at 901; see also, e.g., *id.* at 901 n.62 and 902 n. 67 (district court noting additional disagreements with this Court). The assertion that plaintiffs "utterly failed" to present damages evidence at the first trial is simply wrong, and in making that statement the district court not only ignored the record, but also this Court's reference on appeal to some of that damages evidence. E.g., 78 F.3d at 957 n. 57 (highlighting Carvell's damages evidence introduced at the first trial). More importantly, the district court's view that plaintiffs should be denied an opportunity to present damages evidence on remand was explicitly rejected by this Court. *Id.* at 957 ("[T)he law school's inability to establish the plaintiffs non-admission ... opens a panoply of potential

relief, depending in part upon what course that plaintiffs career has taken since trial in mid-l 994.“).

C. The District Court’s "Alternative” Damages Findings Are Permeated With Errors.

The district court complains at the outset of its “alternative” findings that the damages figures advanced by plaintiffs at the remanded proceeding are “exponentially higher” than the figures advanced in 1994, and it suggests that all post- 1994 damages claims must be damages resulting from the lawsuit itself. 999 F. Supp. at 902 & n. 65. That reasoning is absurd. Obviously, plaintiffs’ damages were higher in 1997 than in 1994 because plaintiffs suffered the unremedied effects of defendants’ intentional discrimination for an additional three years. Hopwood is still seeking an injunction permitting her to attend the Law School; and thus her legal career has been delayed by at least an additional three years. Moreover, this Court’s decision expressly contemplated that additional damages would have accrued since 1994. E.g., 78 F.3d at 957.

1. The District Court Misapplied The Law In Denying Hopwood And Carve11 Mental Anguish Damages.

Hopwood and Carve11 are entitled to damages stemming from the emotional consequences of defendants’ denial of their constitutional rights -- an entitlement that is independent of any finding on causation -- and the district court’s contrary holding must be reversed. Both presented substantial evidence of their injuries, much of it uncontested, through their own testimony, the testimony of other percipient witnesses, and the testimony of an expert. The district court rejected all of that evidence, and both misunderstood and misapplied governing legal principles.

The district court mistakenly viewed the availability of mental anguish damages in this case as undecided and “muddled.” 999 F. Supp. at 906-07. To the

contrary, "the federal courts have recognized that personal humiliation, embarrassment, and mental distress imposed as a result of the deprivation of constitutional rights are injuries whose redress in damages is considered compensatory." *Baskin v. Parker,* 602 F,2d 1205, 1209 (Sth Cir. 1979). Damages for mental anguish suffered as a consequence of a procedural civil rights violation are recoverable even if the same outcome would have occurred without the violation. *Carey v. Piphus, 435 U.S. 247,263-64* (1978) (plaintiffs permitted to "produc[e] evidence that mental and emotional distress actually was caused by the denial of procedural due process itself" as opposed to adverse action by defendants); *Laje v. Thomason Gen. Hosp.,* 665 F.2d 724 (5th Cir. 1982) (emotional distress damages awarded for due process violation, even though plaintiffs discharge was substantively justified). Most of the civil rights laws -- including those involved in this ease -- are designed to compensate fully individuals whose rights have been violated. See *Franklin v. Gwinnett County Pub. Schs,, 503* U.S. 60 (1992); *Memphis Community Sch. Dist. v. Stachura, 477* US. 299,307 *(1986)* ("compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation ... personal humiliation, and mental anguish and suffering") (citation and quotation omitted); *Guardians Ass'n v. Civil Serv. Comm'n of City of New York,* 463 U.S. *582* (1983).

In *Price v. City of Charlotte, 93* F.3d 1241, 1244 (4th Cir. 1996), seven white police officers sued the City *over its* race-based promotion practices even though "[a] substantial number of white officers who were not promoted had rankings superior to those of any of the [plaintiffs]" and the plaintiffs "would not have been selected for promotion" even in the absence of the racially-tainted process. The City argued that the plaintiffs lacked standing to sue for compensatory damages; the Fourth Circuit rejected that argument and held that

plaintiffs would still be entitled to compensation for any emotional distress caused by the discriminatory process itself. *Zd.* at 1248 ("*Carey* and its progeny demonstrate that the injury [plaintiffs] suffered is the ignominy and illegality of the City's erecting a racial bar to promotions, and more importantly, that this injury can be compensable by damages, not merely declaratory or injunctive relief.").

Discrimination based upon an immutable characteristic like race is particularly likely to cause serious mental anguish because it threatens one's dignity and sense of self-worth. E.g., *Heckler v. Mathews,* 465 U.S. 728,739-40 (1984) ("discrimination itself. . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group"); *Curtis v. Loether,* 4**15** U.S. 189, 195 n. 10 (1974) ("An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress.").

The district court ignored completely the mental anguish caused by the Law School's *unlawful discrimination* against Hopwood and Carvell, and limited its analysis to the injuries caused by the Law School's separate offense, *the denial of admission,* and used that error as a mechanism to minimize their damages, 999 F. Supp. at 908,910. Although injuries from denial of admission are compensable, they are *in addition* to injuries caused by the denial of equal protection. Hopwood and Carvell offered substantial evidence of mental anguish attributable to the Law School's discrimination against them, See, e.g., Tr. Vol. III (Dr. Lees-Haley) at 152, 159; Tr. Vol. II (Hopwood) at 168-70; P-470 (D. Davis Dep.) at 9, 11, 13; Tr. Vol. IV (Carvell) at 100-01; Tr. Vol. IV (J. Carvell) at 140-41; P-472 (T. Wilson Dep.) at 4-5,7. This evidence was more than sufficient to prove plaintiffs' injuries.

The district court's "contingent" $6,000 award in mental anguish damages for Hopwood and its finding of no mental anguish damages for Carvell from the denial of admission are also erroneous. First, of course, their mental anguish injuries

from defendants' ***discrimination*** are not "contingent" and do not turn on the question of admission. Moreover, the district court unjustifiably characterized as "frivolous" and unworthy of discussion much of Hopwood's evidence. 999 F. Supp. at 907. The court also evidently rejected Hopwood's testimony, corroborated by another witness, that the Law School's discrimination against her placed great strains on her marriage. ***Id.; see*** Tr. Vol. II (Hopwood) at 170-71; P-470 (D. Davis Dep.) at 18, Such evidence, however, supports mental anguish damages. E.g., ***Forsyth v. City of Dallas, 91*** F.3d 769,774 (5th Cir. 1996). Indeed, the $6,000 figure for Hopwood trivializes the emotional distress and anguish she has suffered as a result of defendants' long-standing and continuing, highly injurious conduct. E.g., Forsyth, 91 F.3d at 774 (affirming awards of $100,000 and $75,000 for emotional distress damages after plaintiffs were assigned to less desirable duties in retaliation for exercise of First Amendment rights); *Flanagan v. Aaron E. Henry Community* ***Health Servs. Ctr., 876*** F.2d 123 1, 1236-37 (5th Cir. 1989); see ***also*** Record at 3611-14 (Plaintiffs' Post-Trial Brief on Noneconomic Damages at 3-6). These same errors underlie the district court's astounding characterization of Carvell's evidence of mental anguish resulting from defendants' proven race discrimination as "simply a part of everyday life." 999 F. Supp. at 9 10.

Hopwood and Carve11 proved their mental anguish damages, and should be compensated for their injuries at defendants hands.

2. The District Court's Analysis Of Economic Damages is Also Erroneous.

In order to justify its view that plaintiffs suffered no lost earnings, the district court was required to reject plaintiffs' evidence -- including testimony from two highly qualified experts -- in its entirety. A brief overview will demonstrate that **the** district court did not engage in a good faith review of the evidence.

Plaintiffs presented expert testimony from two respected witnesses: Dr. Wayne Ruhter of Sartain & Co., and 'Bradford Hildebrandt, a nationally-recognized law firm consultant. Both presented income projections for Hopwood and Carve11 as a standard measure of their damages.

The district court's attack on these experts reveals its bias. For example, the district court criticized Dr. Ruhter for using accountant salary information from Philadelphia to predict Hopwood's loss in earnings, stating that he should have "reasonably predict[ed] earnings from her current employment in Columbia, Maryland." 999 F. Supp. at 905. That criticism is pointless -- if anything, Dr. Ruhter's use of verified data for salaries in Philadelphia rather than Hopwood's salary in nearby Columbia *underprojects* her damages, because accountant salaries in Philadelphia are higher. The district court also questioned Dr. Ruhter's use of a standard salary survey, 999 F. Supp. at 905, even though defendants' rebuttal witness conceded that she relied on the same survey. Tr. Vol. IV (Jones) at 84-85.

The district court actually found "[e]ven more troubling" Dr. Ruhter's failure to take into account the "benefits of *not* being a lawyer." 999 F. Supp. at 905 n.71, The district court's invocation of such a bizarre concept is highly surprising because the court repeatedly criticizes plaintiffs for offering objective evidence of far more tangible damages, such as the benefits of a law degree from. a top school. *Id.* at 906-10. Moreover, *every* plaintiff in *every* case would be subject to the same criticism: a projection of economic damages in an employment case, for example, could be attacked for failing to take into account the quality of life "benefits of *not* being employed," or of not working in certain stress-filled and dangerous jobs such as police officer or firefighter. The district court was obviously straining to find something in Dr. Ruhter's testimony to criticize: that it had to go to such lengths is a sign of the strength of that testimony.

The district court rejected entirely the testimony of plaintiffs' expert Bradford Hildebrandt, even though at trial the district court stated that it was "very familiar with Mr. Hildebrandt and his business . . . You don't need to build him up for me." Tr. Vol. III. (Hildebrandt) at 104, The district court erred in stating that Hildebrandt's opinion was "wholly dependent" on Dr. Ruhter's analysis. 999 F. Supp. at 906. Hildebrandt relied on his own data sources and concluded that **the** data used by Dr. Ruhter ***underestimated*** the economic loss incurred by Hopwood and Carve11 as a result of not attending the Law School. Tr. Vol. III (Hildebrandt) at 107-08.

The district court also rejected Hildebrandt's testimony because "[i]t is sheer speculation whether Hopwood would have completed law school, much less whether she would have had an academic record sufficient to result in her recruitment by a private law firm, whether she would have remained at that law firm for eight years, and whether she would have been selected as a partner in that law firm." 999 F. Supp. at 906. Such uncertaintics, however, are present in any projection of an injured plaintiff's income stream, and are plainly not fatal to recovery. If they were fatal, every person denied a position because of his or her race would have no meaningful remedy. In any event, "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against" the discriminator. *Shipes*, 987 F.2d at 3 17.

These examples demonstrate that the district court unjustifiably rejected, minimized or misconstrued the substantial economic damages evidence offered by plaintiffs, These errors must be reversed by this Court.

III.

The District Court's Findings On Attorneys' Fees And Costs Are Erroneous.

There is no dispute that plaintiffs Hopwood and Carve11 are "prevailing parties" under the civil rights laws. Even the district court recognized that "without question," the plaintiffs "attained extraordinary success" and "accomplished the principal goal of the lawsuit." 999 P. Supp. at 916. Nonetheless, the district court reduced the amount sought in plaintiffs' fee applications by about 50% -- and de *facto* reduced plaintiffs' fees for the remand trial by lOO%, by awarding no fees at all for that work. As the district court conceded, "at first blush, the reductions may seem excessive." *Id.* at 921. The reductions are, indeed, excessive -- they are also based on incorrect legal standards, an incomplete record, obvious factual errors, and manifest hostility toward the plaintiffs and their challenge to Texas affirmative action programs, and toward plaintiffs' counsel.

The district court refused even to consider the bulk of fees incurred in connection with the remand trial, and limited its analysis to the fee applications submitted prior to trial. It began its analysis of those applications by deducting all hours spent opposing intervention, tracking and responding to defendants' public utterances concerning this case, and on certain other categories of work. After these deductions, the district court reduced the hours submitted by counsel by either 25% or 35%. Next, the court reduced all trial hours -- from the first trial, which led to this Court's *reversal* of the district court -- by a further 15% to reflect a purported "lack of success." After slashing the amount of hours worked by plaintiffs' attorneys, the court then proceeded to reduce most of their *rates. These* reductions were also severe and ranged as high as 50%. The final award of attorneys' fees was a product of the erroneously reduced hours, multiplied by erroneously reduced rates, compounded by the district court's failure to consider

the fees incurred for work on remand. The lesson for lawyers asked to handle these types of cases is unmistakable; and the concomitant chilling effect on the ability of plaintiffs to obtain skilled and experienced counsel for these cases is quite substantial

A. Standard Of Review.

This Court reviews the district court's award of attorneys' fees for abuse of discretion. *Riley v. City of Jackson, 99* F.3d 757,759 (5th **Cir.** 1996). The underlying factual findings are reviewed for clear error, and the underlying legal conclusions are reviewed *de novo. Id.* Where, as here, the district court's findings are based upon the use of incorrect criteria, "the deferential review ordinarily inherent in [the abuse of discretion] standard is modified by a closer review". *Rum Creek Coal Sales, Inc. v. Caperton,* 31 F,3d 169, 174 (4th Cir. 1994). Moreover, when a significant amount of the legal work has been done on appeal, less deference is due to the district court because it lacks "superior understanding of the [appellate] litigation," *Leroy v. City of Houston, 906* F.2d 1068, 1078 n. 14 (5th Cir, 1990).

B. The District Court Erroneously Failed To Award Any Fees For Services Rendered Following The Supreme Court's Denial Of *Certiorari On July* 1, 1996.

On August 8, 1996, the district court issued an order requiring plaintiffs to supplement their application for attorneys' fees by October 1, I996 -- months before the trial on remand. Unless the district court had already determined that it would not award plaintiffs any significant individual relief -- a shockingly improper determination for the fact-finder to reach before trial -- it is unclear why the district court insisted on supplemental fee applications before the remand trial.

Nonetheless, plaintiffs complied with the district court's instruction and supplemented their request for attorneys' fees, simultaneously stating the obvious: that their supplemental fee applications would themselves need to be supplemented, given that the case bad yet to be tried. E.g., Record at 4427 (Affidavit of Theodore B. Olson ¶ 1 (Sept. 30, 1996)). The district court, however, denied all fees incurred after the Supreme Court's denial of *certiorari* -- *even* though plaintiffs were never given an opportunity to present a fee application for most of that work. 999 F. Supp. at 914.

The district court's failure even to receive plaintiffs' evidence on fees incurred on remand is not saved by the district court's decision on the merits, because that decision is permeated by error, and because even in the district court's eyes the plaintiffs were largely successful in achieving their litigation objectives. Accordingly, this Court should vacate that portion of the district court's order that denied attorneys' fees and expenses incurred after the Supreme Court denied *certiorari,* and plaintiffs should be permitted on remand to file a fee application covering the entire post-certiorari period.

C. The District Court Improperly Reduced Plaintiffs' Claim For Attorneys' Fees And Expenses Incurred Through The Supreme Court's Denial Of *Certiorari On* July 1, 1996.

The district court improperly reduced plaintiffs' documented attorneys' fees and expenses through the Supreme Court's denial of *certiorari* on July 1, 1996. Because the record on fees through July 1, 1996 is complete, and further proceedings would waste judicial resources, this Court should enter an appropriate award of attorneys' fees incurred through that date. Rum Creek, 31 F.3d at 180-81 (appellate court awarded attorneys' fees itself in order to avoid further litigation and

remanded fee calculation to district court only for period for which it had insufficient information to compute an award).

1. The District Court Misapplied Certain *Johnson* Factors And Ignored Others.

In *Johnson v. Georgia Highway Express, Inc., 488* F.2d 714 (5th Cir. 1974) and ***Walker v. U.S. Dep't of Hous. and Urban Dev., 99*** F.3d 761 (5th Cir. 1996), this Court set out the factors to be considered in awarding attorneys' fees. The district court misapplied many of those factors and improperly ignored others.

a. The District Court's Cursory Review Was Insufficient To Support Its Summary Reduction Of Attorney Hours.

The district court reduced the plaintiffs' claim for attorney time by an across-the-board amount of either 25% or 35% without applying the proper legal standards and -- concededly -- without conducting the thorough analysis required by this Court. E.g., 999 F. Supp. at 916 (court performed no detailed review of time entries). The district court's blanket and arbitrary method of reducing hours is impermissible.

First, the district court based its reduction on a purported failure to provide adequate time entries. The court may reduce compensable time, however, only for hours for which the supporting documentation is too vague to permit meaningful review. In *LULAC* v. ***Roscoe Indep. Sch. Dist.*** 119 F.3d 1228 (5th Cir. 1997), this Court concluded that:

> mere recitation that there is insufficient documentation cannot insulate the district court's award from appellate review. The hourly records submitted by LULAC attorneys in this case were not so vague or unilluminating that they precluded meaningful review of whether particular hours were reasonably expended on this litigation or whether the hours spent were excessive or duplicative. Each attorney submitted records containing the date, the number of hours spent

> (calculated to a tenth of an hour), and a short but thorough description of the services rendered .... On remand, the ***district court should analyze whether particular hours were reasonably expended rather than making an across-the-board reduction based on inadequate documentation.***

Id. at ***1233*** (emphasis added), Here, too, plaintiffs' counsel submitted records "containing the date, the number of hours spent (calculated to a [quarter] of an hour), and a short but thorough description of the services rendered." ***Id. The*** district court admits it did not analyze whether "particular hours" were reasonably expended: consequently, its across-the-board reduction --specifically condemned in LULAC -- should be rejected.

Second, the district court also based its across-the-board reductions on the theory that there was "no evidence" of billing judgment. 999 F. Supp. at 9 16. However, there was substantial evidence that plaintiffs' attorneys exercised billing judgment. Reimbursement for the time of several attorneys who had only a limited involvement in the case was not sought ***at all,*** and reductions were made to time that was determined to be insufficiently productive. *E.g.*, Record at 443 1-32 (Olson Aff. ¶ 15). The district court simply chose to ignore that evidence.

b. The District Court's Reduction Of The Lodestar For "Lack Of Success"' Was Erroneous.

The district court also erred by imposing a reduction of 15% to the lodestar for trial hours in connection with the first trial, and (because the court awarded no fees at all for plaintiffs' work on remand) a *de facto* 100% reduction to the lodestar for all hours incurred in connection with the remand trial. "The lodestar, however, is presumptively reasonable and should be modified only in exceptional cases." *Watkins v. Fordice,* ***7*** F.3d 453,457 (5th Cir. 1993) (citation omitted). In this case, the 15% and 100% reductions are not justified by any exceptional circumstances.

The district court imposed the 15% reduction because "[t]he failure of the plaintiffs to obtain specific injunctive and monetary relief is not, in the Court's opinion, a trivial or insignificant matter." 999 F. Supp. at 916. However, the district court itself acknowledged that the plaintiffs "accomplished the principal goal of the lawsuit -- to dismantle all forms of racial preferences **in** public higher education in Texas." *Id.* Moreover, the 15% reduction for "failure" was applied to fees incurred in the *first* trial, even though that work was obviously the foundation for plaintiffs' appellate successes, and the ultimate attainment of the "principal goal" of the suit. All of those efforts eventually were successful because the litigation "correct[ed] a discriminatory or other unconstitutional circumstance which affects a large class of citizens" and "advanced an important public policy." Riley v. City of Jackson, 2 F. Supp. 2d 864, 873-74 (S.D. Miss. 1997) (on remand; increasing attorney fee award) (citations omitted); *cf: Blanchard v. Bergeron, 489* U.S. *87,95-96* (1989) (Congress has determined that attorneys' fees should be awarded in meritorious civil rights cases "because of the benefits of such litigation for the named plaintiff and for society at large," irrespective of damages).

The district court's 100% reduction for work on the remand trial is also contradicted by its own order, enjoining defendants from taking race into account in admissions. 999 F. Supp. at 923. Thus, plaintiffs *did* obtain additional injunctive relief as a result of the remand trial -- but did not receive any fees therefor.[7]

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7 The district court also denied plaintiffs any opportunity to seek fees for preparing the 1996 fee applications, work that is generally compensable. Leroy, 906 F.2d at 1086; *Riley, 99* F.3d at 760.

Thus, the district court's reliance on plaintiffs' purported "failure" is contradicted by the actual results achieved in this case, and cannot be reconciled with this Court's precedents.

c. The District Court Erred In Ignoring Other *Johnson* Factors Favorable To Plaintiffs.

The district court also failed to consider properly -- or at all -- several of the Johnson factors that supported plaintiffs' claim, including (1) "[t]he novelty and difficulty of the questions"; **(2)** "[t]he skill requisite to perform the legal service properly"; **(3)** "[t]he experience, reputation, and ability of the attorneys"; **(4)** "[t]he amount involved and the results obtained" and **(5)** "[t]he 'undesirability' of the case." *Johnson, 488* F.2d at 717-19. The district court's failure properly to examine these factors was an abuse of discretion. *Henson v. Columbus Bank & Trust Co.,* **65 1** F.2d 320,330 (5th Cir. 198 1). These factors, which under *Walker are* often treated as part of the lodestar analysis, further reveal the district court's errors, and its antipathy toward plaintiffs.

The district court's statement that "[t]he legal issues, however, were neither novel nor extraordinarily difficult," 999 F. Supp. at 921, is obviously in error, as the proceedings in this Court and before the Supreme Court amply demonstrated. The complicated constitutional issues raised by this ease required a high degree of skill. The experienced and able attorneys retained by the plaintiffs include a former Assistant Attorney General of the United States who has argued numerous cases before the Supreme Court, and a former member of the Texas Legislature. Record at 4428-3 1,443 8-43 (Olson Aff. at 7-12; apps, 1-3); Record at 1558 (Affidavit of T. Smith at ¶ 9 (Aug. 29, 1994)). See also *Rum Creeek,* 3 1 F.3d. at **179.**

As discussed above, the district court also failed appropriately to credit the "extraordinary success" of the plaintiffs. *Johnson* explained that "[a]lthough the court should consider the amount **of** damages . . awarded, that consideration

should not obviate court scrutiny of the decision's effect on the law. If the decision corrects across-the-board discrimination affecting a large class of an employer's employees [or, in this case, a university system's applicants], *the* ***attorney's fee award should reflect the relief granted."*** ***488*** F.2d **at** 718 **(emphasis added).**

Finally, the district court failed to take into account the controversial nature of this case. ***Johnson, 488*** F.2d at 719; ***Rum Creek, 31*** F.3d at 179. Plaintiffs submitted evidence that local counsel were unwilling to represent them in their politically sensitive struggle against a revered state institution, E.g., Record at 1671 (McDonald Statement at ¶¶ 25-26 (August 27, 1994) (discussing difficulty of finding-local counsel), Plaintiffs' difficulty in locating local counsel was greatly increased by their inability to pay for what would undoubtedly be (and has proven to be) a major engagement of time and resources, and the large number of attorneys working for or hoping to work for defendants and the large number of University of Texas alumni among the Texas Bar.

2. The District Court Erred In Denying All Fees Incurred In Opposing Attempted Intervention By Groups Aligned With The Defendants.

The district court incorrectly extended ***Independent Fed'n of Flight Attendants v. Zipes, 49*** **1 U.S. 754** (1989), to prevent recovery of intervention-related legal fees from defendants. The district court's view of ***Zipes*** "is not a necessary reading of ***Zipes,*** nor a compelling one," *Nash v. City of Tyler 736* F. Supp. ***733,734*** (E.D. Tex, 1989). As the ***Nash court*** stated:

> The opinion in *Zipes* holds only that the fee-shifting provisions ... do not operate as between a prevailing plaintiff and a losing intervenor. It does not in any way require that attorney's fees . . . are necessarily to be borne by a prevailing plaintiff rather than a losing defendant when a third party intervenes to vindicate its rights. Nor does such a result follow from the policy of the fee-shifting statutes, whose intent

> is to allow injured **plaintiffs to act as** private attorneys general, vindicating a policy that Congress considered of the highest priority.

***Id.* (citations** and quotations omitted).

In ***Jenkins v. Missouri, 967*** F.2d 1248, 125 1 (8th Cir. 1992), the Eighth Circuit **affirmed an award of intervention-related fees in a** school desegregation case against a losing defendant, on facts similar to those here. The court in ***Jenkins*** stated that "given the special nature of desegregation cases, withholding from the plaintiffs the means for paying for their attorneys could be devastating to the national policy of enforcing the civil rights laws through the use of private attorneys general." *Id. The* ***Jenkins*** court **also** noted that the defendant, "unlike the intervenor in *Zipes* is a constitutional violator, and not entitled to the solicitude *Zipes* showed the 'blameless' intervener." *Id.* Defendants here, of course, are adjudicated violators of the Constitution.

The district court found that defendants did not "participate" in the proposed third-party interventions, but they repeatedly took the position before this Court that intervention would be beneficial. 999 F, Supp. at 913 & n.87. And defendants also filed a brief with this Court on October 26, 1998 that endorsed the proposed interveners' "First Amended" Motion to Intervene in this appeal.

3. The **District Court Erred In Denying Any** Fees **For Efforts To Monitor And Respond To Defendants' Public Comments Concerning This Case.**

Although the district court acknowledged that this Court has not decided whether time spent monitoring the public comments of the defendant, or responding to them, is compensable, the court rejected all fees for such work. 999 F. Supp. at 913, *citing Watkins* 7 F.3d at 458. In fact, this Court in ***Watkins*** reserved judgment on the recoverability of case-related media work. Instead, this Court merely refused to find an abuse of discretion in the denial of fees where the

"[a]ppellants did not present any evidence regarding the efficacy" of the work. *Id.* Here, plaintiffs presented compelling evidence that the attorneys' fees incurred in monitoring developments in the media -- including statements made by defendants -- directly contributed to the results obtained. For example, plaintiffs based their successful opposition to *certiorari in* part on a public statement by the Texas Attorney General, and lodged that statement with the Supreme Court. *E.g.*, Record at 2740-42 (Hopwood and Carvell's Reply Brief In Support Of Motion For Attorneys' Fees at 3-5).

In *Davis v. City and County of Sun Francisco,* 976 F.2d 1536, I545 (1992), *vac'd in part on other grounds,* 984 F.2d 345 (9th Cir. 1993), the court reasoned "[w]here the giving of press conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients," and therefore "[p]revailing civil rights plaintiffs may do the same." *Id. Thus,* fees for the work in this case are justified because the work uniquely contributed to plaintiffs' success.

4, The District Court Erred In Reducing The Hourly Rates Sought By Plaintiffs.

The district court erred seriously in slashing the hourly rates for which plaintiffs sought reimbursement.

A reasonable hourly rate is determined "by compensating attorneys at the prevailing market rates in the relevant community. ... [M]arket rates may be proved by the rate which clients normally and willingly pay the petitioning attorneys." *Rum **Creek,*** 31 F.3d at 175 (citation and quotation omitted). Although the relevant market for determining the prevailing rate is ordinarily the community in which the court sits, "where it is reasonable to retain attorneys from other communities ... the rates in those communities may also be considered." *Id.*

(citation omitted); see also *Gates v.* ***Deukmejian,*** 387 F.2d 1392, 1405 (9th Cir. 1992) (awarding out-of-town rates due to complexity of issues); ***Maceira v. Pagan,*** ***698*** F.2d 38,40 (1st Cir. 1983) (upholding award of out-of-town rates due to complexity and lack of evidence that local attorneys could handle case); ***Chrapliwy v. Uniroyal, Inc.,*** 670 F.2d 760,768-69 (7th Cir. 1982).[8]

The standard for use of so-called "out-of-town" rates is one of rcasonablencss. "Rates charged by attorneys in other cities . . . may be considered when the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally, and the party choosing the attorney from elsewhere acted reasonably in making the choice." *Rum Creek,* 31 F.3d at 179 (citation and quotations omitted).

In this case, the parties litigated complex constitutional issues that, from the beginning, were destined for review by this Court (and, potentially, for Supreme Court consideration). Plaintiffs' chosen counsel possessed specialized expertise and ability in those issues that **was** unavailable locally. The plaintiffs presented extensive evidence about the specialized competence of their chosen counsel, the lack of available local counsel, and the reasonableness of counsel's rates. E.g., Record at 4428-3 1,4438-43 (Olson Aff. at ¶¶ 7- 12, 16; apps. l-3) (discussing counsel's experience and presenting evidence of reasonableness of billing rates, including cases in which rates were ***approved*** as reasonable by the Court of

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8 The court in ***Chrapliwy*** noted that "when the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists." 670 F.2d at 768 n. 18. In this case, defendants' three special appellate counsels were also from "out-of-town." See Petition for Certiorari.

Appeals for the District of Columbia Circuit); Record at 167 1 (McDonald Statement at ¶¶ 25-26 (August 27, 1994) (discussing difficulty of finding local counsel).

The district court summarily "reject[ed]" all of that evidence, and even announced that there had been no need for appellate counsel, asserting that "there has been a shortage of clients, not lawyers," 999 F. Supp. at 917, ignoring the fact that at every stage of this case defendants have had more lawyers than have plaintiffs.9 The district court also dismissed counsel's qualifications and disparaged the reasonableness of the widely accepted and competitively warranted rates, stating, for example, that it had "never seen a lawyer worth $450 per hour . . . only successful promoters." 999 F. Supp. at 917 n.96.[10]

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9 The district court's conclusion that plaintiffs did not need appellate counsel is also contradicted by its own observation that "local counsel got in over his head," 999 F, Supp. at 9 17, by its recognition of plaintiffs' "extraordinary success in the appellate courts," *id.* at 916, by the fact that *both* plaintiffs and defendants felt the need to retain experienced appellate counsel, and by defendants' characterization of this case before the Supreme Court as novel, unprecedented and extremely important. See Petition for Certiorari.

10 The district court is prohibited from substituting its own experiences about a reasonable fee for a proper analysis of the relevant community. *LULAC,* 119 F.3d at 1234. Remarkably, the court acknowledged this tie, while simultaneously invoking its own experience to discount illegitimately counsel's rates. 999 F. Supp. at 917. Defendants' own counsel are drawn from a firm where, as a matter of public record, some lawyers charge $450 an hour. E.g., *A Firm-By-Firm Sampling of Billing Rates Nationwide,* Nat'1 Law J., Dec. 21, *1998,* at B6. See *also Chrapliwy, 670* F.2d at 768 n. 18.

The district court's arbitrary reductions of the attorneys' ordinary rates were unsupported by evidence or law and, thus, must bc overturned. *Watkins, 7* F.3d at 459 ("listing [the Johnson] factors is no substitute for a discussion of the facts supporting the court's determination of a reasonable hourly rate at odds with the normal charge of the attorney"); *LULAC,* 119 F.3d at 1234 (hourly fee established by the district court "must be supported by the record").

IV. This Case Should Be Remanded To A Different Judge

Plaintiffs respectfully ask that, should the Court decide to remand this matter, it direct the remand to a different judge. Plaintiffs make that request reluctantly, and with due appreciation for its gravity, but believe that the facts here justify the request.

The district court here plainly found itself unable to function as an impartial judge in this case. The court has demonstrated that on any second remand it will be exceedingly difficult far the court to put aside its previously expressed, erroneous views, This Court has remanded to a different judge under far less compelling circumstances. E.g., *Johnson v. Sawyer, 120* F.3d 1307, 1333-34 (5th Cir. 1997) (remanding to a different judge "required because of the necessity to preserve the appearance of impartiality, fairness, and justice"); *Simon v. City of Clute,* 825 F.2d 940, 943-44 (5th Cir. 1987) (remanding to a different judge where trial judge expressed distaste for the plaintiffs after dismissing their claims); *see also United Nat'l Ins. Co. v. R&D Latex Corp.,* 141 F,3d 916,920 (9th Cir. 1998) (remanding to different district judge where first judge abused discretion twice).

CONCLUSION

For the foregoing reasons, Hopwood and Carvell respectfully request that this Court reverse the district court and enter an injunction ordering Hopwood's admission to the Law School, enter an appropriate award of attorneys' fees through the Supreme Court's denial of *certiorari* on July 1, 1996, and remand this matter to a different judge for an award of damages, and of attorneys' fees incurred after July 1, 1996.

Dated: March 22, 1399

Respectfully submitted,

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