No. 98-50506

In The
United States Court Of Appeals
For The Fifth Circuit

CHERYL J. HOPWOOD,
Plaintiff-Appellant-Cross-Appellee,
v.
STATE OF TEXAS, *ET AL.*,
Defendants-Appellees-Cross-Appellants-Cross-Appellees,

DOUGLAS CARVELL,
Plaintiff-Appellant-Cross-Appellee,
and
KENNETH ELLIOTT; DAVID ROGERS,
Plaintiffs-Appellees-Cross-Appellants,
v.
STATE OF TEXAS, *ET AL.*,
Defendants-Appellees-Cross-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

MOTION FOR STAY OF MANDATE PENDING CERTIORARI REVIEW

Pursuant to FED. R. APP. P. 41 and FIFTH CIR. R. 41, Appellees (collectively, the law school) request the Court to stay its mandate pending the filing and disposition of a petition for writ of certiorari.

The Court's decisions in this case have created uncertainty and procedural incongruity. By refusing to reconsider the *Hopwood II* panel decision, the Court has reaffirmed its fundamental rejection of the Supreme Court's *Bakke* judgment and has solidified the conflict of authority between this Court and other circuit courts' rejection of the Court's *Hopwood* jurisprudence. Moreover, the Court has affirmed the district court's determination that the four plaintiffs would not have been admitted under a race-neutral system and, therefore, are not entitled to damages. The Court has also, paradoxically at the plaintiffs' own request, reversed the injunction entered by the district court, thus depriving the plaintiffs of any of the compensatory and prospective relief that they sought in their pleadings. Yet, at the same time, the Court has affirmed a substantial award of attorneys' fees based solely on language in the *Hopwood II* opinion that it apparently treated as an appellate declaratory judgment.

The law school is entitled to a stay of the mandate pending disposition of a petition for writ of certiorari because the Court's *Hopwood* decisions are inconsistent with the *Bakke* judgment and with the other courts of appeals that have addressed the issue of affirmative action in higher education and because the Court's attorneys' fees award is inconsistent with *Hewitt v. Helms* and its progeny. There is a reasonable probability that the United States Supreme Court will grant a petition for writ of certiorari in this case and, if it does, there is a significant possibility of reversal. Failure to grant this application will irreparably harm the law school.

INTRODUCTION

This case involves the admissions procedure at The University of Texas Law School. The plaintiffs are four white applicants who were not accepted for admission in 1992. After the first trial, the district court invalidated the law school's 1992 admissions policy insofar as it employed a separate committee for evaluating minority applicants, finding that this aspect of the policy was not narrowly tailored to the State's compelling interests in seeking the educational benefits that flow from having a diverse student body and in redressing the present effects of past discriminatory practices in Texas' public education system. *Hopwood v. Texas*, 861 F.Supp. 551, 578-79 (W.D. Tex. 1994). The court awarded the plaintiffs only nominal damages, because the State had shown that "in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." *Id*. at 581. The district court declined to impose prospective injunctive relief because the law school had adopted a new policy that appeared to "remedy the defects the Court . . . found in the 1992 procedure," *id*. at 585, while continuing to consider race in a limited fashion, as one factor among many.

In 1996, this Court reversed the district court's judgment, holding broadly that "the law school may not use race as a factor in law school admissions." *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996). With respect to the benefits of a diverse student body, the Court held that "the use of ethnic diversity simply to achieve racial

heterogeneity, even as part of the consideration of a number of factors, is unconstitutional . . . . [T]he use of race *per se* is proscribed." *Id*. at 945-46. With respect to remedying the present effects of past discrimination in Texas public education—effects that the district court found were extensive—this Court held, in direct conflict with the Sixth Circuit decision in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), that "the law school"—and *only* the law school—was "the relevant past discriminator." *Id*. at 952. "As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions." *Id*. at 954.

On the remedial issues, this Court ruled that the district court erred in requiring the plaintiffs to prove that they had been injured by the law school admissions procedure in place in 1992. Instead, this Court held that, "once discrimination is proved, the defendant bears the burden of proving no damage." 78 F.3d at 956 n.53. Accordingly, this Court remanded the matter of determining a remedy and calculating damages to the district court.

This Court issued a list of "judicial instruction[s]" to the law school, commanding it not to consider race as a factor in the admissions process "for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other

than the law school." *Id*. at 958. This Court expressed its "confiden[ce] that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion," and threatened punitive damages if they did not. *Id*. The Court did not enter a formal injunction, but the Court's "instructions" and "directives" (*id*.) were issued on the understanding that they would be obeyed. As the concurring judge understood, this Court's order "constitute[d] a de facto injunction" or an "un-injunction." 78 F.3d at 966-67 (Wiener, J., specially concurring).

On remand, the district court embodied this Court's directives in an injunction, prohibiting the law school "from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law." *Hopwood v. Texas*, 999 F.Supp. 872, 923 (W.D. Tex. 1998). The district court also found that none of the four plaintiffs would have been admitted to the law school under a constitutional, race-neutral system of admissions. *Id*. at 900. In addition to the $1 in nominal damages awarded at the first trial, the district court also awarded plaintiffs approximately $775,000 in costs and attorneys' fees. *Id*. at 922-24.

On appeal from the second trial, this Court affirmed the district court's rulings that the plaintiffs would not have been admitted to the law school, and upheld the award of attorneys' fees, basing that award on the plaintiffs' success in dismantling affirmative action in Texas. This Court also reversed the district court's injunction

against the use of race in admissions decisions by the law school and ordered a remand to give the district court the opportunity to make appropriate findings and conclusions before deciding again whether to enter an injunction. This Court nevertheless left in place the "instructions" and "directives" from its 1996 opinion. Thus, defendants are again left with a de facto injunction or declaratory judgment, just as in 1996—a de facto injunction or declaratory judgment sufficient to support over three-quarters of a million dollars in attorneys fees.

STANDARD OF REVIEW

To demonstrate its entitlement to a stay of the mandate pending disposition of a petition for writ of certiorari, the law school must demonstrate three prerequisites:

(1) a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious for the grant of certiorari;

(2) a significant possibility of reversal of the decision; and

(3) a likelihood that irreparable harm will result if that decision is not stayed.

Baldwin v. Maggio, 715 F.2d 152, 153 (5th Cir. 1983).

ARGUMENT

The law school is entitled to a full opportunity for Supreme Court review of the core issues at stake in this important case. The 1996 panel's attempt to bind the university's behavior without issuing an injunction or declaratory judgment deprived

the law school of a square opportunity for Supreme Court review in 1996, and left the case in an unprecedented and difficult procedural posture that continues even today. Issuance of the mandate would further complicate the procedural posture and the law school's long-sought opportunity for Supreme Court review.

Because the Court is fully aware of the issues and the parties' positions in this case, it is unnecessary to reargue the merits of the case to the Court in this application. The central issues in this case are obviously ones on which reasonable judges can and do disagree. But the conflict among the circuits on these issues has created an intolerable situation for the law school (and other public institutions of higher education in Texas) because the legal disparities among the circuits has made it impossible for schools to compete on a level playing field for the brightest minority students, and this Court's decisions have placed Texas schools at a severe disadvantage in that respect. *See Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986); *Wessman v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998); *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000); *Gratz v. Bollinger*, 122 F.Supp.2d 811 (E.D. Mich. 2000).

Despite the long path this case has traveled, this is the law school's first opportunity for Supreme Court review. The 1996 panel's failure to mandate an injunction, 78 F.3d at 958-59, apparently had the consequence of precluding further appellate review at that time. *See Texas v. Hopwood*, 518 U.S. at 1033-34 (1996) (Ginsburg & Souter, JJ., concurring in denial of certiorari). If the issue of future use

of affirmative action had been squarely presented, the Supreme Court may or may not have granted certiorari, but the Court's failure to issue an injunction to enforce the sweeping scope of the opinion led some Justices to conclude that the question of future use of affirmative action was not yet squarely presented. Five years have now elapsed. The case is now nine years old, and the Court has solidified its position on the important constitutional issues presented by this case. It is time to permit the Supreme Court to review the important constitutional principles at issue.

To be sure, the posture of the case has also changed in important ways. But five years of experience have demonstrated the power of the 1996 opinion to control the law school's behavior, and on the strength of that experience, this Court has held that the 1996 opinion is enough of an order or judgment to support a substantial award of attorneys' fees—in a case in which the plaintiffs were awarded no other significant relief. Slip Op. at 47. It is settled that mere statements of law in an appellate opinion will not support a fee award. *Hewitt v. Helms*, 482 U.S. 755, 759-63, 107 S.Ct. 2672, 2675-77 (1987). The second panel has treated the first panel's judgment as, or converted the first panel's judgment into, the equivalent of an injunction or declaratory judgment. As such, it is now amenable to Supreme Court review.

Although the law school could ask the district court to formally enter appropriate findings of fact and conclusions of law, and again embody this Court's opinions in a more clearly appealable declaratory judgment or injunction, there is no

reason to require that at this stage of the case. The Court announced its interpretation of *Bakke* and the accompanying constitutional issues in 1996 and has now reaffirmed those holdings on law-of-the-case grounds as the sole basis for the attorneys' fees award. No matter what else is said about the posture of the case, it cannot be denied that the Court's holdings on the core constitutional issues in this case are now embodied in an appealable order or judgment that is ripe for Supreme Court review.

Issuance of the mandate at this point would further complicate a procedural situation that is already deeply confused, and threaten once again to deprive the law school of any opportunity for review in the Supreme Court. Plaintiffs would presumably renew their law-of-the-case argument and extend it to the fee award. Plaintiffs would likely insist that neither the merits nor the fees would be reviewable on a further appeal, but that the law school is still bound by the first panel's opinion. Plaintiffs have pushed just such inconsistent positions in this appeal. They relied on *Hopwood II* to justify their fees request, but sought to prevent further appellate review by repudiating their longstanding request for an injunction. Hopwood Reply/Cross-Appellee Br. at 41-43. If Plaintiffs no longer seek injunctive relief, then *Texas v. Lesage*, 528 U.S. 18, 21-22, 120 S.Ct. 467, 468-69 (1999), requires that the fee award be vacated or reconsidered and judgment be entered for the law school.

The Supreme Court has recently emphasized the strong interest in full appellate review of judgments striking down state laws and state programs. Thus, in *City of*

Erie v. Pap s A.M., 529 U.S. 277, 120 S.Ct. 1382 (2000), the Court reached out to review a judgment invalidating a municipal ordinance, even though the business challenging the ordinance had closed and its owner had retired to Florida. "If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot." *Id*. at 288. The business's attempt to preserve its judgment by mooting the case triggered the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Id*. The Court reiterated these concerns in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 (U.S., Jan. 17, 2001), holding a case moot on similar facts where the city had prevailed below. Dismissing the writ of certiorari did not "keep Waukesha under the weight of an adverse judgment," or "reward an arguable manipulation of our jurisdiction," because it was the losing party who had mooted the case. *Id*. at *4.

Here the problem is the procedural ambiguity of this Court's de facto injunction rather than mootness, but the same principles apply. An important state policy has been terminated by a judgment of this Court, and the successful plaintiffs seek to exploit procedural and jurisdictional ambiguities to prevent Supreme Court review of that judgment. This Court should not aid them in that attempt by issuing its mandate before the Supreme Court decides whether to hear the case.

After nine years, this is the law school's first real opportunity for Supreme Court review. The law school has never had an opportunity to seek a national resolution of these vitally important issues. The procedural posture of the case is unprecedented in a case of this significance, and issuance of the mandate would complicate it further. Given that the Court has finally announced its position on *Bakke* and the related issues of affirmative action in higher education and embodied them in a final judgment, this case is at last ripe for certiorari review and the law school will be irreparably harmed by issuance of the mandate at this point.

For these reasons, the law school requests the Court to stay issuance of its mandate pending the filing and resolution of a petition for writ of certiorari with the United States Supreme Court. Pursuant to FIFTH CIR. R. 27.1, counsel for the law school attempted to contact counsel for Plaintiffs to determine whether they oppose this motion but did not reach them. Counsel believes that Plaintiffs oppose this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion for Stay of Mandate was served on all counsel of record, by First Class United States Mail, hand delivery, or third-party commercial carrier, on January 23, 2001, as listed below:

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