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

PETITION FOR EN BANC CONSIDERATION

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STATEMENT

This case presents the following question of exceptional importance: Whether The University of Texas School of Law was properly enjoined from any consideration of race in its admissions decisions—no matter the form or procedure, the degree of racial preference, or the mix of other factors considered. The injunction issued in this case conflicts with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), and *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

This case requires review by the full Court to secure and maintain uniformity of the Court's decisions. A panel decision in this appeal would necessarily be controlled by the panel opinion on a prior appeal, *Hopwood v. Texas*, 78 F.2d 932 (5th Cir. 1996) (*Hopwood II*). Only the Court en banc may reconsider the wisdom of the pronouncements made in *Hopwood II*.

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STATE OF TEXAS, *ET AL.*,
Defendants-Appellees-Cross-Appellants-Cross Appellees.

PETITION FOR EN BANC CONSIDERATION

Appellees-Cross-Appellants the State of Texas, *et al.*, move the Court for en banc consideration of this case in the first instance. *See* FED. R. APP. P. 35(b)(1).

Three years ago, a panel of this court declared that *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), is not good law and held that The University of Texas School of Law could not consider race in its admissions decisions. The effects of that decision were devastating. The law school suffered an immediate and drastic reduction in the number of minority students it could admit. In 1992, the law school enrolled 41 black and 55 Mexican American students. In 1997, the first year after *Hopwood II*, the law school enrolled only 4 black and 26 Mexican American students. Almost overnight, the student body at the law school became more

racially identifiable than it had been in decades.

In addition, by refusing to acknowledge the continuing validity of the Supreme Court's *Bakke* judgment, the Court became the first and only circuit in the United States to reject any consideration of race in admissions decisions. Schools outside Texas were left free to continue to use race in their admissions decisions, creating an uneven playing field and putting the law school at a severe competitive disadvantage. Not only was the law school forbidden to admit black and Mexican American students who, though highly qualified for the study of law, could not quite meet the traditional objective criteria, it was also prevented from competing effectively with out-of-state schools for minority applicants who do meet those criteria. Many of Texas's brightest minority students are wooed to other states by strong minority admissions and financial aid programs, often never to return.

Ironically, the injunction subsequently entered by the district court in accordance with *Hopwood II* closely resembles the injunction struck down in *Bakke*. No matter what one may say about the opinions in *Bakke*, five Justices joined in Part V(C) to reverse an injunction that is strikingly similar to the one mandated by *Hopwood II*.

Because the injunction entered in this case directly conflicts with the judgment in *Bakke* and because a subsequent panel of the Court cannot reexamine the *Hopwood II* panel decision, this case should be heard by the Court en banc in the first instance.

STATEMENT OF THE ISSUE

Whether The University of Texas School of Law was properly enjoined from any consideration of race in its admissions decisions—no matter the form or procedure, the degree of racial preference, or the mix of other factors considered.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Plaintiffs, unsuccessful applicants for admission to The University of Texas School of Law, filed this action alleging that they were denied admission because of their race. After an eight-day trial, the district court held that the law school's consideration of race in admissions served compelling interests in maintaining a diverse student body and overcoming the effects of past discrimination. *Hopwood v. Texas*, 861 F.Supp. 551, 569-73 (W.D. Tex. 1994) (*Hopwood I*). This Court reversed, holding that the law school's racial classifications served no compelling state interest. *Hopwood v. Texas,* 78 F.3d 932, 955 (5th Cir. 1996) (*Hopwood II*).[1]

On remand, after a second trial of four days, the district court enjoined defendants "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."

1. The Supreme Court denied certiorari, 518 U.S. 1033, 116 S.Ct. 2581 (1996), with two Justices noting that the petition challenged only this Court's "rationale," and not its "judgment." *Id.* at 1034 (Ginsburg & Souter, JJ., concurring). In the view of those Justices, the judgment at that stage was confined to the administrative details of the 1992 admissions procedure.

Hopwood v. Texas, 999 F.Supp. 872, 923 (W.D. Tex. 1998) (*Hopwood III*). That injunction forbids any consideration of race of any kind or to any degree in future admissions program at the law school. In addition to the injunction, plaintiffs on remand sought more than $5.4 million in damages and $1.5 million in attorneys' fees. *Id*. at 902, 903, 909, 910. The district court awarded attorneys' fees but only nominal damages, finding that none of the plaintiffs would have been admitted to the law school under a race-neutral system of admissions. *Id.* at 900. Both sides appeal.

B. Statement of Facts

Texas has a long history of educational discrimination against minority students at all levels. That history is set out in some detail in *Hopwood I*, 861 F.Supp. at 554-57. The State believes it has rid itself of overt discriminatory practices, but vestiges of its prior practices are evident in the racial identifiability of the pool of applicants who meet the objective admissions criteria used at its institutions of higher education. For over twenty years, the Department of Education's Office for Civil Rights (OCR) has demanded that the university and the law school take affirmative, race-conscious measures to ensure that the current effects of past discrimination in Texas's public education system are eliminated in the State's higher education institutions. *Id*. at 556-57.

Prior to the *Hopwood II* decision, the law school employed an affirmative action plan to remedy those vestiges of past discrimination and to enhance the diversity of its

student body. Some details of the plan changed from year to year, but it consistently sought to admit additional black and Mexican American students who were well qualified for the study of law at UT, but who would not otherwise be admitted to the law school. *Id*. at 557-63, 582 n.87. As time progressed, the pool of minority applicants became stronger, and the law school gradually reduced the magnitude of its racial preferences. *Id.* at 560 n.18, 575 & n.69.

The effect of the panel's *Hopwood II* opinion was swift and dramatic. Under the injunction, the law school is prohibited from considering race in its admissions decisions. In the 1997 entering class—the first post-*Hopwood II* class—the law school enrolled 4 blacks and 26 Mexican Americans—one-tenth the blacks and fewer than half the Mexican Americans who had enrolled in 1992. Without affirmative action, the law school's 1992 entering class would have included at most 9 blacks and 18 Mexican Americans. *Id*. at 573; D441.

ARGUMENT

For the first time in American history, a formerly segregated state institution has been enjoined from all ameliorative consideration of race in attempting to remedy past discrimination in the state's public education system evidenced by minority under-representation in that institution's student body. The injunction is a categorical command that the law school may not consider race, in any way or to any extent, in

selecting students for admission. Race may not be used as a tiebreaker, or even as one factor among many. The effect of the injunction and the panel opinion on which it is based has been an immediate and dramatic increase in the racial identifiability of the law school.

I. THE INJUNCTION CONFLICTS WITH THE SUPREME COURT'S JUDGMENT IN *BAKKE*.

The district court enjoined the law school and its officers "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." That blanket prohibition of any consideration of race in admissions conflicts with the only clear holding in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). Although *Bakke* was a fractured decision, a majority united in one clear holding in Part V(C) of the lead opinion:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Id. at 320, 98 S.Ct. at 2763 (opinion of Powell, J.).

That is the clear holding of *Bakke*, and it has never been overruled. *Bakke* reversed an injunction, substantially identical to the one entered by the district court in

this case, that prohibited any consideration of race in admissions. A faithful reading of *Bakke* mandates the same result in this case. Because *Bakke* remains the law, this Court remains bound by its controlling precedent. *See Agostini v. Felton*, 521 U.S. 203, 237-38, 117 S.Ct. 1997, 2017 (1997). Lower courts may not conclude that more recent Supreme Court cases have, by implication, overruled its earlier precedent. *Id.* Yet that is exactly what the *Hopwood II* panel did. Indeed, the First Circuit noted the irreconcilable conflict between *Hopwood II* and *Bakke*, and declined to follow this circuit's reasoning. *Wessman v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998).

In this circuit, a panel cannot reconsider even another panel decision absent en banc review.[2] Members of the Court have meticulously obeyed that rule, even when they believe that a prior case was wrongly decided. *See, e.g.*, *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352, 355-56 (5th Cir. 1993) (following unpublished per curiam opinion to hold that state tort claim was preempted by the Airline Deregulation Act despite panel's belief that the prior opinion was wrong), *rev'd en banc*, 44 F.3d 334 (5th Cir. 1995). That being so, and given the Supreme Court's repeated admonitions against lower court rejection of its precedents, surely even a fractured Supreme Court decision is entitled to at least as much deference as a prior panel opinion. *See Haynsworth v. The Corporation*, 121 F.3d 956, 969 n.26 (5th Cir. 1996)

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2. *Missouri Pac. R.R. v. Railroad Comm'n*, 948 F.2d 179, 186 (5th Cir. 1991); *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 112-13 (5th Cir. 1962).

(holding that the panel is bound to follow prior Supreme Court precedent "regardless of whether we believe (or, as the case may be, do not believe) that later decisions have undermined its rationale"). *Bakke* is the Supreme Court's only case on affirmative action in higher education and it directly controls the outcome in this case. The Court should consider this case en banc and bring the circuit into conformity with *Bakke* and into harmony with the other circuits in recognizing that *Bakke* remains the law and is binding on this Court.

II. THE INJUNCTION AGAINST *ANY* CONSIDERATION OF RACE IN ADMISSIONS PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE REQUIRING DETERMINATION BY THE COURT EN BANC.

A. The Injunction Prevents the Law School from Satisfying Its Compelling Interest in Eliminating the Present Effects of Past Discrimination.

A public educational institution has an affirmative duty to achieve desegregation and eliminate all vestiges of the former segregated system. "The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064 (1987). Texas's educational system and the law school both have a past history of de jure segregation and plentiful experience with the continuing vestiges of that past discrimination. The law school had a strong evidentiary basis for believing that vestiges of past discrimination—both in the law school and in the public education system—manifest themselves in the significant under-representation of black and

Mexican American applicants in the highest credentialed strata of the applicant pool.

Hopwood II wrongly held that the Court could look only at vestiges caused by discrimination at the law school itself and refused to examine any evidence relating to discrimination suffered by prospective students before they arrived on the law school's doorstep. By improperly redefining (and narrowing) the scope of the evidence it would examine, the *Hopwood II* panel simply refused to consider most of the State's evidence of the present effects of past discrimination.

The largely self-contained nature of a State's education system makes it possible to afford some relief to a class of individuals that will include actual victims of discrimination. Students who suffered past discrimination in Texas's public education system are now in the higher education system. If the State has been unable to redress the vestiges of discrimination while these students are still in the public education system, the State's only recourse is to redress those wrongs as the students enter the higher education system. An approach that permits consideration of past discrimination in other parts of the educational system is consistent with the Sixth Circuit's decision concerning an affirmative action program at the University of Tennessee Law School. *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986). In *Geier*, the Sixth Circuit stated:

> Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years. . . . The consent decree in this case does not seek to remedy some amorphous "societal" wrong. It is directed solely at the continuing effects of past practices that adversely affected black[s] as

> they moved through the public school systems and the higher education systems of the State.

Id. at 809-10. *Hopwood II* conflicts directly with *Geier* on this point, and the en banc Court should address this issue of great public importance.

Limited consideration of race in admissions responds directly, and in a narrowly tailored way, to these vestiges of past discrimination. There are substantial numbers of minority applicants with academic credentials at or near the threshold for admission. If the law school can consider race in the selection of these applicants, it can maintain minority enrollment with negligible effect on the overall standard of admissions.

B. The Injunction Prevents the Law School from Satisfying Its Compelling Interest in Achieving a Diverse Student Body.

Diversity serves compelling purposes that are unique to higher education. Students must be exposed to others with differing ideas, backgrounds, and life experiences. "The law school, the proving ground for legal learning and practice, *cannot be effective in isolation* from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 850 (1950) (emphasis added).

At least in the primary and secondary school context, the Court has expressly recognized that white and black students "benefit from exposure to 'ethnic and racial diversity in the classroom.'" *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 472, 102 S.Ct. 3187, 3195 (1982) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486,

99 S.Ct. 2941, 2991 (1979) (Powell, J., dissenting)). In *Washington v. Seattle School District*, the Court endorsed the need for ethnically diverse schools to further the goals of a pluralistic society. Because the environment in which we live

> is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in–and are fully accepted by–the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage."

458 U.S. at 472-73, 102 S.Ct. at 3196 (quoting *Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437, 451, 100 S.Ct. 716, 723 (1980) (Powell, J., dissenting); *Penick*, 443 U.S. at 485 n.5, 99 S.Ct. at 2946 n.5 (Powell, J., dissenting)).

This compelling interest in diversity has a role in higher education as well. In *Bakke*, Justice Powell articulated a vision of diversity in higher education that "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315, 98 S.Ct. at 2761. "In the education context, *Hopwood* is the only appellate court to have rejected diversity as a compelling interest." *Wessman v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998).

No one contends that race and ethnicity are the only important sources of diversity, or that all members of a given race think alike. But race and ethnicity are *one* important source of diversity, and they are the only sources that are largely eliminated

by the workings of the ordinary admissions process. Distinctive life experiences are likely to result in distinctive perceptions of the world. It is equally important for students to learn that disagreements between the races are only statistical tendencies—that on any given issue, and even when there are sharp racial disparities in the opinion polls, many minority individuals will not hold the presumed or stereotypical minority position, and many white individuals will not hold the presumed or stereotypical white position.

The combined black and Mexican American population in Texas today is about 41% of the total population. *See* TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, POPULATION FORECASTS FOR TEXAS COUNTIES BY RACE/ETHNICITY 1990-2030, <http://www.cpa.state.tx.us/cgi-bin/poppgm> (1999). The law school used affirmative action in pursuit of less than half that percentage of black and Mexican American students—not nearly enough to achieve racial balance, but enough to satisfy OCR, enough to further the State's compelling interest in avoiding racial identifiability and remedying past discrimination, and enough to further the State's compelling interest in encouraging diversity in its educational institutions.

That goal was narrowly tailored to satisfy compelling state interests and should not have been prohibited by the district court's injunction. The Court should take this case en banc to reconsider the *Hopwood II* panel's rejection of diversity as a compelling interest.

III. THESE ISSUES CAN BE PROPERLY CONSIDERED ONLY BY THE COURT EN BANC, NOT BY ANOTHER PANEL OF THE COURT.

The State strongly believes that the *Hopwood II* panel improperly rejected *Bakke* and held that the State lacks a compelling interest that could justify the ameliorative use of race in admissions. That decision may not, however, be reconsidered by another panel of the Court, because a new panel would be bound by the *Hopwood II* panel opinion. *See Missouri Pac. R.R. v. Railroad Comm'n*, 948 F.2d 179, 186 (5th Cir. 1991). Only the Court en banc may reconsider the legal pronouncements made by the *Hopwood II* panel. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc overruling of prior panel opinion that en banc court decided was not a correct statement of law); *Commercial Nat'l Bank v. Connolly*, 176 F.2d 1004, 1006 (5th Cir. 1949) (en banc overruling of panel determination on prior appeal in the same case).[3] Because the disputed issues in this case are of extraordinary public importance, en banc review is necessary.

Other issues in the case are entangled with the en banc issue, or may disappear depending on how the en banc issue is decided. After resolving the en banc issue, the Court en banc may resolve the entire case, or it may assign any remaining issues to a

3. *See Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 112-13 (5th Cir. 1962) (recognizing en banc power to reconsider decision of panel in an earlier appeal); *Watkins v. United States Army*, 875 F.2d 699, 704 n.8 (9th Cir. 1989) ("the law of the case doctrine . . . does not impair the power of an en banc court to overrule any panel decision"); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (same).

panel, in its discretion.

CONCLUSION

For these reasons, the propriety of the injunction against any consideration of race in admissions should be determined by the Court en banc, prior to any consideration by a panel.

Dated: April 19, 1999

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