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 REHEARING EN BANC

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STATEMENT

This case presents the following question of exceptional importance: whether The University of Texas School of Law should be prohibited 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 judgments of the two panels in this case conflict with *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986); *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Smith v. University of Washington*, 2000 WL 1770045 (9th Cir., Dec. 4, 2000); and *Gratz v. Bollinger*, 2000 WL 1827468 (E.D. Mich., Dec. 13, 2000). Consideration by the full court is necessary to secure and maintain uniformity of the Court's decisions.

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STATEMENT OF THE ISSUE

Whether The University of Texas School of Law should be prohibited 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*). A panel of this Court reversed, forbidding "*any* consideration of race," even "as *a* factor" in the admissions process. *Hopwood v. Texas*, 78 F.3d 932, 948 n.36, 962 (5th Cir. 1996) (*Hopwood II*) (emphasis added).[1]

1. *Hopwood II* forbids consideration of race for any of four stated reasons, 78 F.3d at 962, leaving open the theoretical possibility that the law school might consider race for some other reason. But the four forbidden reasons are the only reasons ever suggested why the law school (or any other law school) might now consider race and, therefore, *Hopwood II* is effectively an absolute prohibition on considering race for any purpose ever at issue in this case. For this reason, the district court on remand would have no alternative but to enter another injunction substantially the same as the one reversed by the panel, because *Hopwood II* allows no other outcome on the law.

The form of the first panel's judgment had the unintended consequence of precluding further appellate review at that time. Because the panel declined to mandate an injunction on remand, 78 F.3d at 958-59, the scope of its judgment was unclear. The Supreme Court denied certiorari, 518 U.S. 1033, 116 S.Ct. 2581 (1996), with two Justices stating that the judgment appeared to address only "the particular admissions procedure used" in 1992, and noting that that Court reviews "*judgments*, not *opinions*." *Id.* at 1034 (Ginsburg & Souter, JJ., concurring).

After a second trial on remand, the district court enjoined further consideration of race. *Hopwood v. Texas*, 999 F.Supp. 872, 923 (W.D. Tex. 1998) (*Hopwood III*). The district court awarded substantial 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 appealed.

The second panel decision in this Court affirmed the findings that plaintiffs would not have been admitted and affirmed the denial of damages. Slip Op. at 33 & n.50 (*see* Appendix). It criticized the first panel's "aggressive" ban on all consideration of race, but held that it was bound by what the first panel had done. *Id.* at 38. It reversed the injunction on procedural grounds, remanding for findings of fact and conclusions of law explaining why the injunction was necessary. *Id.* at 43-45. Even so, it held that the first panel's judgment was sufficient relief to support the fee award. *Id.* at 47.

The second panel, with its authority severely limited by the first panel's ruling, actually compounded the injury. It ordered a remand to the district court to again consider whether to enter an injunction formally implementing the first panel's prohibition on any consideration of race. In the meantime, the law school remains subject to judicial "directives" that are unambiguously binding but not embodied in any formal judgment that is unambiguously subject to further appellate review. This is too important a case and too important an issue to leave in legal limbo. The express "directives" of the two panel opinions are inconsistent with the judgment in *Bakke*, which still controls in other circuits. At the very least, the Court should enter a clear order that may properly be presented to the Supreme Court for resolution of the asserted conflict with that Court's precedent and of the mounting intercircuit split of authority.

B. Statement of Facts

Texas's educational system, including the law school, 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 eliminate current effects of past discrimination in Texas's public education system. *Id*. at 556-57.

Prior to *Hopwood II*, the law school employed an affirmative action plan to remedy those vestiges of past discrimination and to enhance the diversity of its student body. Details of the plan changed from year to year, but the law school 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. 861 F. Supp. at 557-63, 582 n.87. Over time, 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 first panel's *Hopwood II* opinion was swift and dramatic. In the first class admitted after *Hopwood II*, 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. Massive recruiting efforts since 1997 have raised these numbers somewhat, to 18 blacks and 34 Mexican-Americans in the 2000 entering class, but the law school remains more racially identifiable than it has been in many years.

Not only is the law school forbidden to admit highly qualified minority students who approach but do not exceed the ever-rising threshold for admission in each year's

competitive admissions process, it is also forbidden to compete effectively with out-of-state schools for minority applicants who do exceed that threshold. Many of Texas's brightest minority students are wooed to other states by strong minority admissions and financial aid programs, which remain lawful in every other circuit.

Because of the large number of applicants for admission and the distribution of qualifications among those applicants, quite limited consideration of race can substantially increase minority enrollment with negligible impact on the academic qualifications of the class as a whole or on any nonminority applicant's chances for admissions. If the prospective portions of the two panel judgments are vacated on the merits, the law school will again consider race in admissions to the minimum extent necessary to remedy the present effect of past discrimination in the Texas educational system and to achieve reasonable diversity to avoid operating a racially identifiable law school.

ARGUMENT

I. THE JUDGMENTS OF THE PANELS CONFLICT WITH THE SUPREME COURT S JUDGMENT IN *BAKKE*.

This Court's 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 the Court).

That is the holding of *Bakke,* and it has never been overruled. *Bakke* reversed an injunction, substantially identical to the prohibition announced by the panels in this case, that prohibited any consideration of race in admissions. Because the *Bakke* majority disagreed on the rationale of the judgment, the panels in this case refused to follow *either* rationale, and thus refused to follow the judgment. No judge on either panel suggested that this case is distinguishable from *Bakke*. No judge suggested that the need for diversity, or the effects of past discrimination, are any less in professional education in Texas than in California.

This Court is bound by *Bakke*, whatever the ambiguity in *Bakke*'s rationale and whatever might be inferred from later decisions less squarely in point. *See Agostini v. Felton*, 521 U.S. 203, 237-38, 117 S.Ct. 1997, 2017 (1997). The First and Ninth Circuits, and a district court in the Sixth Circuit, have all noted the 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); *Smith v. University of Washington*, 2000

WL 1770045 (9th Cir., Dec. 4, 2000); *Gratz v. Bollinger*, 2000 WL 1827468 (E.D. Mich., Dec. 13, 2000).

The second panel noted that "*Hopwood II* went beyond established Supreme Court precedent in several respects." Slip Op. at 38. Yet the second panel would not say that *Hopwood II* was "dead wrong," because it did not clearly contradict a single rationale supported by five justices in *Bakke*. Like the first panel, the second ignored the judgment in *Bakke*, clearly stated by five justices in Part V(C), and ignored the fact that *Hopwood II* clearly contradicts the collective rationales adopted by at least five justices in *Bakke*. Texas has been denied Supreme Court review because that Court reviews judgments, not opinions; and Texas has been denied the benefit of Supreme Court precedent because this Court has followed *opinions*, not *judgments*.

In this circuit, a panel cannot reconsider even another panel decision absent en banc review. Members of this Court have meticulously obeyed that rule, even when they believed that a prior case was wrongly decided. *See, e.g.*, Slip Op. at 38 ("This or other subsequent panels of our court may well disagree with the aggressive legal reasoning employed by the *Hopwood II* panel, but it cannot be said that, as a matter of law, the panel's decision is 'dead wrong.'"); *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352, 355-56 (5th Cir. 1993) (following unpublished per curiam that second panel believed was wrong), *rev d en banc*, 44 F.3d 334 (5th Cir. 1995). Surely even a fractured Supreme Court decision is entitled to as much deference as a prior panel.

Bakke is the Supreme Court's only case on affirmative action in higher education and it directly controls in this case. The Court should consider this case en banc and bring the circuit into conformity with *Bakke* and the other circuits.

II. THE PANEL JUDGMENTS PRESENT QUESTIONS OF EXCEPTIONAL IMPORTANCE REQUIRING DETERMINATION BY THE COURT EN BANC.

A. The Panel Judgments Prevent the Law School from Satisfying Its Compelling Interest in Eliminating the Present Effects of Past Discrimination.

For the first time in American history, a formerly segregated state institution has been prohibited from any ameliorative consideration of race in attempting to remedy past discrimination in the state's public education 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. The law school had a strong evidentiary basis for believing that vestiges of that past discrimination 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; it refused to examine any evidence of discrimination suffered by prospective students before they arrived on the law school's doorstep. It also excluded from consideration the only continuing consequences of

past discrimination by the law school itself—the continuing effect on minority attitudes towards the law school. By improperly 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 eventually enter 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 apply for higher education. Limited consideration of race in admissions responds directly, and in a narrowly tailored way, to these vestiges of past discrimination. Struggling to indulge the presumption that the first panel's decision was not "dead wrong," the second panel was forced to reason that although the law school could have used affirmative action if it had been a *passive* participant in *private* discrimination, it could not use affirmative action because it had instead been an *active* participant in *governmental* discrimination. Slip Op. at 37-38 & n.61. This distinction is backwards on both variables and is facially irrational.

Hopwood II's refusal to consider past discrimination in other parts of the educational system is squarely inconsistent with the Sixth Circuit's approval of 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.

B. The Panel Judgments Prevent 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). 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. It remains true that "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 sources of diversity. But race and ethnicity are undeniably important sources of diversity, and they are the only sources that are largely eliminated by the workings of the ordinary admissions process. Nor does the law school contend that all members of a given race think alike. But students have no chance to learn about the broad range of views within each racial or ethnic group unless each group is represented in reasonable numbers.

The combined black and Mexican-American population in Texas today is about 42% 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 (2000). Even with affirmative action, the law school enrolled less than half that percentage of black and Mexican-American students—not nearly enough to achieve racial balance, but enough to avoid resegregation, provide some remedy for past discrimination, and achieve at least some diversity. The Court should take this case en banc to reconsider the rejection of diversity as a compelling interest.

III. THIS IS THE FIRST OPPORTUNITY FOR THESE ISSUES TO BE REVIEWED BY A COURT MORE AUTHORITATIVE THAN THE FIRST PANEL.

The second panel, consistent with this Court's strong policy, held itself bound by the first panel's decision. But of course the en banc court is not bound by either

prior decision. *Commercial Nat l Bank v. Connolly*, 176 F.2d 1004, 1006 (5th Cir. 1949) (en banc overruling of decision on prior appeal in the same case).[2]

The first panel's judgment was designed to control the law school's behavior quite as effectively as any injunction, and it succeeded. Finding that "the law school will continue to take race into account in admission unless it receives further judicial instruction," the panel gave those instructions, expressed confidence that the law school "will heed the directives contained in this opinion," and threatened "actual and punitive damages" if it did not. 78 F.3d at 958-59. But the panel's refusal to enter an injunction, 78 F.3d at 958-59, had the consequence of precluding further appellate review at that time. *See* 518 U.S. at 1033-34 (Ginsburg & Souter, J.J., concurring).

The second panel treated the first panel's judgment as sufficient 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. The relief relied on as a basis for substantial fees was that "the plaintiffs accomplished the principal goal of the law suit—to

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2. For additional cases recognizing en banc power to reconsider panel decision from an earlier appeal of same case, *see Lincoln Nat l Life Ins. Co. v. Roosth,* 306 F.2d 110, 112-13 (5th Cir. 1962); *Irving v. United States*, 162 F.3d 154, 161-62 (1st Cir. 1998), *cert. denied*, 528 U.S. 812, 120 S.Ct. 47 (1999); *Watkins v. United States Army,* 875 F.2d 699, 704 n.8 (9th Cir. 1989); *Shimman v. International Union of Operating Engineers, Local 18,* 744 F.2d 1226, 1229 n.3 (6th Cir. 1984); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978), *aff d*, 444 U.S. 913, 100 S.Ct. 225 (1979); *In re Central R.R.*, 485 F.2d 208, 210 (3d Cir. 1973).

dismantle all forms of racial preferences in public higher education in Texas." *Id.* In other words, the second panel found that *Hopwood II* had the effect of an injunction or declaratory judgment that could support attorneys' fees, even though it had not supported appellate review.

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. But if it has become an injunction or declaratory judgment for purposes of controlling the law school's behavior and supporting a fee award, then it cannot be a mere opinion for purposes of appealability. The State of Texas cannot remain forever under the constraints of a decree that is binding for all purposes except appellate review.

Plaintiffs, too, have pushed these inconsistent positions. They rely on *Hopwood II* to justify their fees request, but they now seek to prevent further appellate review by repudiating their longstanding request for an injunction. Hopwood Reply/Cross-Appellee Br. at 41-43. If *Hopwood II* is functionally an injunction or declaratory judgment that will justify fees, then the State is entitled to full appellate review. If it is not, and 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 *Hopwood II* be vacated and judgment entered for the State. And, of course, if *Hopwood II* is vacated or modified,

either on the merits or because Plaintiffs no longer seek an injunction, then the fee award must also be vacated or reconsidered.

Although the second panel held itself bound by the substance of the first panel's decision and entered a similar judgment of its own, the Court en banc is not so bound. Because the two panel judgments in this case directly conflict with the judgment in *Bakke* and with the opinion of every other circuit to consider the same questions, and because the disputed issues are of extraordinary public importance, this case should be reheard by the Court en banc.

CONCLUSION

For these reasons, the panel judgments prohibiting any consideration of race in admissions should be determined by the Court en banc.

Dated: January 3, 2001

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