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

CHERYL J. HOPWOOD, *et al.,*	§	
Plaintiffs,	§	
	§	
v.	§	No. A 92-CA-563-SS
	§	
THE STATE OF TEXAS, *et al.*,	§	
Defendants.	§	

RESPONSE TO PLAINTIFFS' MOTION FOR AWARD OF SUPPLEMENTAL ATTORNEYS' FEES AND EXPENSES AND MOTION TO VACATE PRIOR FEES JUDGMENT

In accordance with the Court's July 31, 2001 order, Defendants respond to Plaintiffs' motion for supplemental fees. Defendants request the Court both to deny Plaintiffs Hopwood and Carvell's current request for supplemental fees and to vacate its prior judgment awarding fees to all the Plaintiffs. This result is required by the United States Supreme Court's most recent announcement on attorneys' fees as a result of Plaintiffs' overall lack of success in obtaining any judicial remedy in the form of an order or judgment, and particularly by Plaintiffs' utter lack of success after June 1996.

INTRODUCTION

This lawsuit may have been a catalyst in the law school's voluntary decision to cease its affirmative action efforts, but the Supreme Court has now made crystal clear that a lawsuit's catalytic effects cannot support a fee award. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Servs.*, 121 S.Ct. 1835, 1838 (2001). *Buckhannon* precludes any award of fees to the Plaintiffs. It confirms that Plaintiffs cannot be entitled to attorneys' fees without an enforceable order or judgment. They have none. The Fifth Circuit has already held that *Buckhannon*

applies to pending cases, even if the work was done and the fees were awarded before *Buckhannon* was decided. *Johnson v. Rodriguez*, 2001 WL 845180 (5th Cir. Aug. 10, 2001).

Plaintiffs have spent the past nine years litigating three primary claims for relief: (1) admission to law school; (2) damages; and (3) injunctive or declaratory relief. Plaintiffs lost the first two claims on the merits when this Court decided in 1998 that these Plaintiffs would not have been admitted under a race-neutral admissions policy. That ruling was affirmed on appeal to the Fifth Circuit, and Plaintiffs cannot rationally argue that they are prevailing parties on either their quest to be admitted to the law school or their damage claims. Now, after nine years of litigation on Plaintiffs' claims for injunctive and declaratory relief, they have simply waived those claims and expressly declared that they no longer seek that relief. Plaintiffs' Joint Status Report at 3.

Under the law as it now stands, Plaintiffs are not entitled to any attorneys' fees for their efforts in this case. They have never obtained an order or judgment that materially changed their legal relationship with the law school. The law school is not subject to any judicial order restraining its behavior. Like any other college or university, the law school must examine the adverse precedent in the Fifth Circuit, the strongly favorable precedent in the Ninth Circuit, and the surrounding body of precedents in the Supreme Court and elsewhere, and decide for itself what would be a prudent course of action. It cannot look to any judgment. That the law school is guided by precedent does not distinguish it from any other citizen or institution anywhere in the Fifth Circuit.

Consequently, Plaintiffs are not entitled to attorneys' fees, and *Buckhannon* requires the Court to deny the supplemental application for fees. Moreover, because this case was still pending when *Buckhannon* was decided, *Buckhannon* applies to the fees already awarded and requires that

that award be vacated. Finally, even if there were some basis for awarding supplemental fees, the amounts requested are grossly excessive.

ARGUMENT

Plaintiffs seek attorneys' fees under 42 U.S.C. §1988, which permits a court in a civil rights action to award the prevailing party reasonable attorneys' fees. The courts have typically treated the §1988 analysis as having two main prongs: (1) whether the party claiming fees is a prevailing party, and (2) if so, what is a reasonable fee under the circumstances. A plaintiff may be considered a prevailing party if the plaintiff is "able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 1493 (1989). This standard now requires an enforceable judgment or consent decree, *Buckhannon*, 121 S.Ct. at 1843, and this relief "must directly benefit [the plaintiff] at the time of the judgment or settlement." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566, 573 (1992).

I. THE SUPREME COURT REJECTED THE CATALYST THEORY IN *BUCKHANNON* AND THUS REJECTED THE ONLY BASIS FOR FEES IN THIS CASE.

Before May of this year, it was well accepted in most circuits that a plaintiff could become a prevailing party by acting as a catalyst in prompting informal or voluntary change by a defendant. The leading case in the Fifth Circuit was *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981) (stating that "plaintiffs may recover attorneys' fees if their lawsuit is a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior"). On May 29, the Supreme Court unambiguously held that "the 'catalyst theory' is *not* a permissible basis for the award of attorney's fees." *Buckhannon*, 121 S.Ct. at 1843 (emphasis added). The Supreme Court held that only "enforceable judgments on the merits and court-ordered consent decrees create

the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 121 S.Ct. at 1840 (citation omitted).

> [T]he "catalyst theory" . . . allows an award where there is no judicially sanctioned change in the legal relationship of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.

Id. (citations omitted). *Buckhannon* insists "that a plaintiff must obtain formal judicial relief, and not merely 'success,'" in order to receive attorneys' fees. *Crabill v. Trans Union, L.L.C.*, 2001 WL 856573 (7th Cir. July 30, 2001). "[A] judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Farrar*, 506 U.S. at 112, 113 S.Ct. at 573.

The supplemental fee petition, and the prior fee determinations by this Court and the Fifth Circuit, are unquestionably predicated on Plaintiffs' role as catalysts. After the 1994 trial, this Court denied plaintiffs' request for fees, because plaintiffs had "only attained de minimis relief." *See Hopwood v. Texas*, 999 F.Supp. 872, 911 (W.D. Tex. 1998) (*Hopwood B*) (reviewing the Court's earlier rulings). That characterization of the 1994 relief was plainly correct, and no subsequent development has cast any doubt on the Court's holding that that relief cannot support a fee award.

Since that 1994 decision to deny fees, Plaintiffs have obtained no judicial relief whatsoever—no order of admission, no damages, no declaratory judgment, and a short-lived injunction that was reversed on appeal. Plaintiffs were wholly unsuccessful on their "outrageous requests" for more than $5 million in compensatory damages. *Hopwood B*, 999 F.Supp. at 923. In 1996, the Fifth Circuit refused to direct the entry of an injunction against the law school, even though Plaintiffs asked the Court to do so. *Hopwood v. Texas*, 78 F.3d 932, 957-59 (5th Cir. 1996) (*Hopwood II*) ("[W]e leave intact [the district] court's refusal to enter an injunction."). And

although this Court entered an injunction in 1998, the Fifth Circuit reversed that injunction last year. *Hopwood v. Texas*, 236 F.3d 256, 276 (5th Cir. 2000) (*Hopwood III*). On remand, Plaintiffs have chosen to waive their requests for declaratory and injunctive relief, thus ensuring that they will never obtain any enforceable judgment barring affirmative action at the law school. They obtained favorable statements in an appellate opinion, but such statements will not support a fee award. *Farrar*, 506 U.S. at 112, 113 S.Ct. at 573; *Hewitt v. Helms*, 482 U.S. 755, 760-63, 107 S.Ct. 2672, 2676-77 (1982). Those appellate statements had the catalytic effect of causing the law school to abandon affirmative action, but after *Buckhannon*, these catalytic effects cannot support a fee award either.

Yet in affirming the 1998 fee award, the Fifth Circuit relied squarely on the catalyst theory and on the leading Fifth Circuit case announcing that theory:

> Attorneys' fees are particularly appropriate here, given the Law School's change of its admissions process as a direct result of the instant litigation. *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981) (noting that fee awards are reasonable when a plaintiff's lawsuit is "a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior.").

Hopwood III, 236 F.3d at 278 & n.84. The Fifth Circuit also said that "[t]he plaintiffs accomplished the principal goal of the lawsuit—to dismantle all forms of racial preferences in public higher education in Texas.") (quoting *Hopwood B*, 999 F.Supp. at 916.). This accomplishment was the catalytic effect of plaintiffs' lawsuit—and nothing more, as the Court's reliance on *Robinson* confirms. Certainly there was no *order* "to dismantle all forms of racial preferences in public higher education in Texas"; there was not even an attempt to litigate such preferences at any school other than the law school. Similarly, when this Court awarded fees, it did not rely on any judgment or order awarded in favor of Plaintiffs and against Defendants, but only on Plaintiffs' "extraordinary success in the appellate courts." *Hopwood B*, 999 F.Supp. at 916. Reliance on success "in the

appellate courts" is the catalyst theory again; what Plaintiffs received in the appellate courts was not an injunction, nor a mandate to enter an injunction on remand, but merely an opinion with catalytic effects. Under *Buckhannon*, that is not enough.

The supplemental fee petition relies exclusively on the foregoing quotations from the earlier opinions of this Court and of the Fifth Circuit. Memorandum of Law in Support of Plaintiffs Hopwood and Carvell's Motion for Awards of Supplemental Attorneys' Fees and Expenses at 5-6 (Pl. Mem.). Those quoted statements are of course from pre-*Buckhannon* opinions finding a right to fees based on the catalyst theory. The supplemental fee petition asserts no basis for fees that could survive the application of *Buckhannon* to this case.

The admissions policy changes noted by the Court and the Fifth Circuit in awarding attorneys' fees in 1998 and 2000, respectively, were made voluntarily by the law school. The law school would not be in violation of any existing court order or judgment if it now attempted to re-institute a *Bakke*-compliant affirmative action program. Like the plaintiff in *Hewitt v. Helms*, plaintiffs abandoned pursuit of a formal order, and consequently received no relief that will support a fee award. In *Hewitt*, the Court said that even if plaintiff Helms retained live claims that could have supported a judgment and thus a fee award, "the fact is that Helms' counsel never took the steps necessary to have a declaratory judgment or expungement order properly entered. Consequently, Helms received no judicial relief." 482 U.S. at 760, 107 S.Ct. at 2676.

Another case quite similar to this one is *Friends of the Earth, Inc. v. Laidlaw Services, Inc.*, 149 F.3d 303 (4th Cir. 1998), *rev'd on other grounds*, 528 U.S. 167, 120 S.Ct. 693 (2000). Friends of the Earth (FOE) sued Laidlaw and obtained detailed findings of recurrent violations of the environmental laws. But Laidlaw came into compliance shortly after receiving notice of FOE's intent to file suit. Thus, as in this case, plaintiff obtained an opinion strongly adverse to the

defendant, and defendant complied with the interpretation of the law urged by plaintiff and announced in the opinion.

The District Court declined to issue either an injunction or declaratory judgment, because plaintiff was already in compliance—reasoning quite similar to the Fifth Circuit's in declining to mandate entry of an injunction in this case. And the plaintiff did not appeal the denial of an injunction or declaratory judgment, effectively abandoning pursuit of that relief as Plaintiffs have expressly abandoned it here. With the case in this posture, the Fourth Circuit held that "Plaintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees." 149 F.3d at 307 n.5. The Fourth Circuit had rejected the catalyst theory even prior to *Buckhannon*, and without the catalyst theory, plaintiffs were not entitled to attorneys' fees.

In the Supreme Court, plaintiffs argued for fees based on the catalyst theory, but the Court found it unnecessary to reach the issue. 528 U.S. at 194-95, 170 S.Ct. at 711-12. The District Court had not yet passed on any fee petition, and more importantly, the Supreme Court had held that plaintiffs had standing to seek large civil penalties. (The District Court had already awarded $405,000 in civil penalties, but the Fourth Circuit had reversed that part of the judgment.) If plaintiffs eventually obtained a judgment for $405,000, their claim to fees would be based on that judgment and would no longer depend on the catalyst theory.

Here, as in *Buckhannon* and *Hewitt*, Plaintiffs do not have and never will have an enforceable judgment prohibiting the use of race in admissions at the law school. They have statements in an appellate opinion with catalytic effect. The catalytic nature of those effects is further highlighted by the lack of any individual benefit to plaintiffs. Even under pre-*Buckhannon* law, Plaintiffs would have been entitled to fees only if the "relief the plaintiff secures . . . directly benefit[s] him at the time of the judgment or settlement." *Farrar*, 506 U.S. at 111, 113 S.Ct. at 573. Even the catalytic effect

that Plaintiffs claim—the voluntary cessation of affirmative action after *Hopwood II*—conferred absolutely no benefit on any Plaintiff, because only Plaintiff Rogers sought admission to the law school after *Hopwood II*. Ex. A, Affidavit of Shelli D. Soto, ¶5 (Rogers was denied admission). Plaintiffs are like the inmates in *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988), who forced changes at the prison, but were ineligible for fees because one of the inmates had been released and the other had died. *Id.* at 4, 109 S.Ct. at 203. As in *Rhodes*, Plaintiffs are not entitled to fees because they have not obtained any personal benefit from this lawsuit.

In the radically different context of reviewability on certiorari, defendants said the Fifth Circuit's opinions were operating as a de facto injunction. That description was accurate under the law relevant to that context. Jurisdiction to review on certiorari does not even require a judgment, *see* 28 U.S.C. §1254, and an opinion's catalytic effects may help show its general public importance, which is an important factor in selecting which cases to review. Even so, that argument was not successful. Plaintiffs Hopwood and Carvell said that any review of the statements in the Fifth Circuit's opinion would be merely an "advisory opinion," Op. Cert. 1, and the Supreme Court declined review.

However the matter should have been treated for purposes of certiorari, the law of attorneys' fees is very different. The Supreme Court interprets the fee statute to require a judgment or consent decree that changes the legal relationship between the parties, and it holds that catalytic effects, however powerful, are simply irrelevant to that determination. Arguments in favor of Supreme Court review are in no sense arguments for an award of attorneys' fees. The Fifth Circuit's opinion and its catalytic effects are ethereal, disconnected from all the parties—conferring no benefit on any Plaintiff and not embodied in any judgment against any Defendant. For purposes of the law of attorneys' fees, Plaintiffs' characterization of the case as an "advisory opinion" is entirely accurate.

It advises institutions in the Fifth Circuit about what may happen if they engage in affirmative action and the Supreme Court denies review. And that is all.

II. *BUCKHANNON* APPLIES TO THIS CASE.

A. The Petition for Supplemental Fees.

Johnson v. Rodriguez, 2001 WL 845180 (5th Cir. Aug. 10, 2001), is dispositive of the supplemental fee petition. In *Johnson*, the fees had already been awarded before *Buckhannon* was decided. The Fifth Circuit applied *Buckhannon* and summarily reversed the fee award. *Accord*, *Morrow v. Dillard*, 580 F.2d 1284, 1297 (5th Cir. 1978).

Here the fees have not been awarded; they had not even been applied for when *Buckhannon* was decided. Under *Johnson*, *Buckhannon* applies to the supplemental fee petition, which must be denied in its entirety.

B. The 1998 Award of Fees.

Buckhannon also applies to the 1998 award of fees, which must be vacated. This affects not only Plaintiffs and the lawyers who filed the supplemental fee petition, but also Plaintiffs and the lawyers who were awarded fees in 1998.

It is black letter law that courts must apply new appellate decisions to cases that have not become final. In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510 (1993), the Supreme Court held that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and to all events, *regardless of whether such events predate or postdate our announcement of the rule.*" *Id.* at 97, 113 S.Ct. at 2517 (emphasis added). When the Supreme Court applies a new rule to the parties before it, that Court "and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to *all pending cases*, whether or not

those cases involve predecision events." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 115 S.Ct. 1745, 1748 (1995). This rule applies to the rejection of the catalyst theory in *Buckhannon*, because *Buckhannon* applied its new rule to the parties before the Court. *See* 121 S.Ct. at 1838-39 (motion for fees denied in District Court and Court of Appeals), *id.* at 1843 (judgment affirmed).

The Fifth Circuit has recognized and adopted as its own the Supreme Court's decisions on application of new law to pending cases.[1] That has been the rule in the Fifth Circuit since long before the recent decisions strengthening the rule in the Supreme Court. *See Morrow v. Dillard*, 580 F.3d 1284, 1297 (5th Cir. 1978) (a fee award case further discussed below).

This case is not final. This Court entered a final judgment in 1994; in 1996, that judgment was "reversed and remanded for further proceedings." *Hopwood II,* 78 F.3d at 962. This Court entered another final judgment in 1998; in 2000, parts of that judgment were reversed and "remand[ed] for further proceedings on the injunction." *Hopwood III*, 236 F.3d at 282. And even Plaintiffs agree that the fees issues remained open for their supplemental petitions. The case was in that posture, with no final judgment in place and pending further proceedings on fees and the injunction pursuant to the Fifth Circuit's mandate, when *Buckhannon* was decided on May 29, 2001. Because this case was still pending, it is settled that *Buckhannon* applies to it.[2]

It is irrelevant that the effects of the new legal development are broader than the scope of the remand that kept the case open. The Fifth Circuit has held that new decisions must be applied even

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1. *Johnson v. Rodriguez*, 2001 WL 845180 (5th Cir. Aug. 10, 2001); *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329-31 (5th Cir. 1999); *Crawford v . Falcon Drilling Co., Inc*., 131 F.3d 1120, 1123-24 (5th Cir. 1997).

2. *"See also McGinty v. New York,* 251 F.3d 84, 90 (2d Cir. 2001). *McGinty* applied *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000), to dismiss a claim that was still pending on remand, even though the Court of Appeals had fully decided the merits and "[p]rior to the Supreme Court's decision in *Kimel*, plaintiffs had prevailed in this action."

though they address issues outside the scope of a remand. *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992) (irrelevant whether "the district court's findings went beyond the mandate"). As the Ninth Circuit has explained, the principle of retroactivity does not "cease to apply when the case is almost final or close to being final. . . . [I]t ceases to apply when the case *is* final." *Oregon Short Line R.R. v. Department of Revenue*, 139 F.3d 1259, 1265 (9th Cir. 1998). In *Oregon Short Line*, the court had entered judgment on the affected claim in 1992. *Id.* at 1262. A completely separate second claim was bifurcated and was still pending in 1996, *id.*, when a new Supreme Court decision appeared to eliminate the claim that had been decided in 1992. *Id.* at 1263. Because the case as a whole was still pending, the intervening decision applied to re-open the decided claim. *Id.* at 1265.

Another strong example is *Miles v. Kohli & Kaliher Assocs., Ltd.*, 917 F.2d 235 (6th Cir. 1990). Plaintiffs filed six separate claims, including products liability, negligence, and breach of warranty, against multiple defendants. *Id.* at 238, 240. The District Court granted summary judgment in favor of United States Steel and American Culvert on all claims, and certified that judgment for appeal under Rule 54(b). *Id.* at 240. The Sixth Circuit "upheld the grant of summary judgment as to all products liability claims." *Id.* at 240 n.6. The Court emphasized that it had "disposed of '*all* pending products liability claims,'" and that it had "foreclosed further consideration of claims grounded in strict products liability regardless of the type of defect alleged." *Id.* at 242. Only the "negligence and warranty claims were remanded for further consideration." *Id.* at 240 n.6. On remand, the District Court granted summary judgment for defendants on all claims. *Id.* at 240. Plaintiffs again appealed.

While this second appeal was pending, the Supreme Court of Ohio "overruled the line of cases upon which the lower court had relied in holding that a claim of inadequate warning was not

cognizable in strict liability." *Id.* at 242. The Sixth Circuit unhesitatingly remanded the strict liability claim for reconsideration under the new decision. The new law applied even though the strict liability claim had been affirmed on appeal, and considered in isolation seemed to be completely final. But it did not stand in isolation; it was part of a larger case that was still pending, kept alive by the remand of the negligence claims. Similarly here, the first fee award is part of a case that is still pending, vacated in part and remanded by *Hopwood III*.

Any finality argument plaintiffs may make is simply a law-of-the-case argument or a mandate-rule argument, and thus cannot override the Court's duty to follow a controlling decision of the Supreme Court. The Fifth Circuit has squarely held, in a fee award case, that the duty to follow new appellate decisions overrides law of the case and related concepts, including the mandate rule. *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978).[3] *Morrow* is remarkably similar to this case. The district court awarded attorneys' fees in approximately half the amount requested by plaintiffs. *Id.* at 1296. Plaintiffs appealed the amount of fees. *Id.* at 1297. The court of appeals, en banc, mandated the award of additional fees: "The District Court *shall* reconsider the award of the amount of attorney's fees, and *shall award such fees* as may be appropriate for this appeal and further proceedings." *Morrow v. Crisler,* 491 F.2d 1053, 1057 (5th Cir. 1974) (emphasis added). This mandate was based on the judge-made private-attorney-general theory that prevailed in the courts of appeals in 1974.

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3. Among the many cases to the same effect, *see, e.g.*, *Carnival Leisure Indus. v. Aubin*, 53 F.3d 716, 718 (5th Cir. 1995) (law of the case is subject to "an intervening change in the law"); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992) ("the 'mandate rule' is 'a specific application of the "law of the case" doctrine,'" and is subject to "an intervening change in the controlling law") (citation omitted); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967) (law of the case applies unless "controlling authority has since made a contrary decision of the law applicable to such issues").

Before the district court could comply with the mandate, the Supreme Court rejected the private-attorney-general theory in *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975). Holding that *Alyeska* superseded the mandate, the district court withdrew its earlier award of fees. *Morrow v. Dillard,* 412 F.Supp. 494, 507 (S.D. Miss. 1976). The Fifth Circuit agreed: "The District Court, even if bound by the doctrine of 'law of the case' as discussed above, properly reconsidered its prior award of attorney's fees because of the intervening decision of the United States Supreme Court in *Alyeska*." 580 F.2d at 1297.[4]

Morrow's original award of fees for work prior to the first appeal, remanded only to consider plaintiffs' argument that the amount should be increased, corresponds to the original fees awarded in this case. Fees already awarded were vacated in response to *Alyeska*, which rejected the basis on which the fees had been awarded. Similarly here, the original fees must be vacated in response to *Buckhannon*, which rejected the basis on which the fees have been and would be awarded.[5] *See also U.S. v. Becerra,* 155 F.3d 740, 753 (5th Cir. 1998) (holding that exceptions to the "law of the case" also apply to the court of appeals's mandate.)

There is no injustice or technicality in the retroactive application of *Buckhannon*. Rather, *Buckhannon* clarifies that plaintiffs were never entitled to fees in the first place. *Buckhannon* holds

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4. The court of appeals went on to reverse the judgment, because it applied a still—later legal development to the still-live case, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. That result might be doubtful today; in sharp contrast to the rule requiring retroactive application of new court decisions, there is a presumption against retroactive application of new statutes. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483 (1994). In any event, the Fifth Circuit's application of the new statute to an earlier fee award only reinforces its unambiguous holding that the district court properly applied *Alyeska* to an earlier fee award.

5. *Morrow* cannot be distinguished on the ground that *plaintiffs* there obtained a remand on the amount of fees. That would be to say that Plaintiffs here would have been worse off if they had succeeded in persuading the Fifth Circuit that they were entitled to even more fees than this Court awarded, and that they are now better off because the Fifth Circuit rejected their arguments.

that the statute on which plaintiffs rely does not now, and never did, authorize fee awards based on a catalyst theory. 121 S.Ct. at 1843. Decisions applying the catalyst theory were erroneous when rendered. Courts cannot reopen old cases and recover fees paid erroneously during the many years that lower courts misinterpreted the statute, but, in this case, the fees have not been paid, the judgment has not become final, and the case is still open. Plaintiffs' fee award simply has no basis in law as the statute has now been authoritatively interpreted by the Supreme Court of the United States. Plaintiffs have no right to a windfall unsupported by any law, and the law school "is just as entitled to the preservation of its rights under this rule as litigants whose conduct occurred after [a new case] was decided." *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992).

III. PLAINTIFFS HAVE NOT OBTAINED ANY JUDICIAL RELIEF SUBSEQUENT TO THE 1996 REMAND AND, THEREFORE, ARE NOT ENTITLED TO ANY SUPPLEMENTAL FEES.

What we have said in Parts I and II is dispositive. It remains to review the claims in the supplemental fee petition. Plaintiffs did not disclose the existence of *Buckhannon*, offer any reason why the new interpretation of the statute on which they rely should not apply in this case, or offer any basis for fees other than the pre-*Buckhannon* catalyst-theory acknowledgments of this Court and the Fifth Circuit that this litigation had led to a change in admissions policy. Instead, without dealing with anything actually at issue, Plaintiffs blandly assert that prior determinations in this case remain binding on the Court.[6] *Id.* at 6 n.4. That is not true, as explained fully above.

The supplemental fee petition fails to identify any merits relief that Plaintiffs have obtained. Instead, Plaintiffs point solely to various motions or "issues" on which they claim to have prevailed.

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6. They offer no argument for this proposition, and only one citation: an irrelevant footnote in *Reimer v. Smith*, 663 F.2d 1316, 1327 n.13 (5th Cir. 1981). That footnote summarizes a Texas rule about inconsistent final judgments entered by the same court in the same case, without the formality of vacating the first judgment, and without reference to any intervening change in law. This obscure rule was not even at issue in *Reimer*, and it is certainly not at issue here.

But prevailing on an *issue* does not support a fee award; plaintiffs must have prevailed on a *claim to relief* by getting an enforceable judgment or consent decree. Plaintiffs assert that they are entitled to recover attorneys' fees for a series of interim steps taken in the litigation that resulted in no merits relief. Specifically, they claim fees for the following (using Plaintiffs' organization and headings):

Work Related to Plaintiffs' 1996 Fee Application (Pl. Mem. at 10): If plaintiffs were to ultimately prevail in their earlier request for fees, despite the applicability of *Buckhannon*, then Defendants concede that they would also be entitled to reasonable fees for successful work in preparing the fee petition. But even in that eventuality, they were only about 50% successful. Plaintiffs asked in all for more than $1.5 million, but were awarded only $704,000, *Hopwood B*, 999 F.Supp. at 911, 923. Of this total, Gibson Dunn sought $292,000 and was awarded $141,000. *Id.* at 912, 921. CIR was only about 33% successful, seeking $543,000 and being awarded $184,000. *Id.* at 911-12, 920-21. At a minimum, Plaintiffs' fees for seeking fees should be reduced proportionately. *See, e.g., Commissioner v. Jean*, 496 U.S. 154, 163 n.10, 110 S.Ct. 2316, 2321 n.10 (1990) ("[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation."). And if the earlier fee award is vacated, as it must be under *Buckhannon*, then obviously plaintiffs will have been totally unsuccessful on this claim for relief.

Work Related to Defendants' Motion to Dismiss on Eleventh Amendment Immunity Grounds (Pl. Mem. at 10): Even before *Buckhannon*, this was precisely the kind of motion that could not support fees in the absence of merits relief. *Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675-76 ("The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made."). Moreover, the Eleventh Amendment motion went only to damages, as the Court expressly recognized. ("[T]his Court ordered the parties to submit briefs addressing whether the Eleventh

Amendment protects Defendants from an award of compensatory damages." Order, Nov. 12, 1996.) Plaintiffs' claim that the Eleventh Amendment motion jeopardized their claims to injunctive relief or fees is simply false.[7] And of course, their claims for money damages utterly failed on the merits. So although they prevailed on the Eleventh Amendment *issue*, they lost on the only *claims to relief* to which the Eleventh Amendment issue was relevant.

Plaintiffs falsely claim that their defense of the Eleventh Amendment motion "successfully protected their prior 1994 award of injunctive relief." Pl. Mem. at 11. As noted, the Eleventh Amendment motion had nothing to do with injunctive relief of any kind. Moreover, the "injunctive relief" to which they refer was a declaration that permitted them to reapply for admission to the law school for the 1995-96 school year without further expense or fees. *See Hopwood v. Texas*, 861 F.Supp. 551, 583, 585 (W.D. Tex. 1994) (*Hopwood A*).[8] Any such applications were to be considered under the one-committee affirmative action policy adopted in 1994 and permitted by the Court's 1994 judgment. *Id.* at 578-79. Because anyone can reapply in any year, the only significance of this relief was to waive the $50 application fee. Ex. A, Soto Aff. ¶2. The Court properly characterized that relief as de minimis. *Hopwood B*, 999 F.Supp. at 911. And that relief expired by its own terms in 1995 (the deadline for applying for 1995-96, Ex. A, Soto aff.¶2), long

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7. It is long settled that state officials are subject to injunctive relief even when they are immune from damages. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). Immune defendants are also subject to fee awards if injunctive relief is awarded against them. *Hutto v. Finney*, 437 U.S. 678, 689-700, 98 S.Ct. 2565, 2572-78 (1978). Moreover, the key question in the motion was the constitutional basis for the statute authorizing damage awards under Title VI, a Spending Clause statute at least originally; that argument implied nothing about the constitutional basis of the Civil Rights Attorney's Fees Awards Act, which was always and unambiguously an act to enforce the Fourteenth Amendment.

8. Only Plaintiff Elliott applied for admission in 1995 without paying the $50 application fee. Ex. A, ¶3. He was denied admission. Hopwood and Carvell never reapplied at anytime, and Rogers only reapplied in 1996, after this provision had expired by its own terms.

before the Eleventh Amendment motion was filed in October 1996. Such temporary relief cannot be the basis for a fee award. *Foreman v. Dallas County*, 193 F.3d 314, 322-23 (5th Cir. 1999). For multiple reasons, defense of the Eleventh Amendment motion has no relationship to any relief actually awarded.

Defending Against Defendants' Cross-Appeal to the Fifth Circuit (Pl. Mem. at 12): Plaintiffs misrepresent both the litigation and the outcome of the most recent set of appeals. Plaintiffs appealed for orders of admission, damages, and additional attorneys' fees; Defendants' cross-appealed the injunction and attorneys' fees.

First, Plaintiffs allocate 50% of their time on the second set of appeals to Defendants' cross-appeal, apparently on the simplistic theory that there were two appeals and they claim to have won one of them. But Plaintiffs devoted only 12% of the pages in their brief, and almost none of their oral argument, to the cross-appeal.[9] Nearly 90% of their effort was invested in their own appeal, which was wholly unsuccessful.

Second, and more fundamentally, Plaintiffs erroneously suggest that they completely prevailed on Defendants' cross-appeal. Pl. Mem. at 12. In fact, the Fifth Circuit *reversed* the injunction prohibiting the law school from considering race in its admissions decisions. *Hopwood III*, 236 F.3d at 282. That was the central claim to relief in the cross-appeal and, on that claim to relief, Defendants clearly prevailed. Plaintiffs' suggestion that they prevailed against Defendants' appeal "of the constitutional issues," Pl. Mem. at 7, once again confuses issues with claims to relief.

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9. The body of the Brief of Plaintiffs-Appellants-Cross-Appellees Hopwood and Carvell is 47 pages, exclusively devoted to Plaintiffs' appeal. The body of the Reply Brief and Brief in Opposition of Plaintiffs-Appellants-Cross-Appellees Hopwood and Carvell is 45 pages, divided as follows: Pages 1-2 are a Summary of Argument, of which one paragraph is devoted to Defendants' cross-appeal. Pages 2-29, 32-35, and 43-45 are devoted to Plaintiffs' appeal. Pages 29-31 are devoted to Defendants' cross-appeal on attorneys' fees, and pages 35-43 are devoted to Defendants' cross-appeal on the injunction. This is approximately 11 pages on the cross-appeal and 81 pages on the appeal.

Defendants attempted to reopen the constitutional issues as an argument directed at reversing the injunction and, while the Fifth Circuit declined to reconsider those issues, it did reverse the injunction. The fact that the Fifth Circuit relied on other arguments to reverse the injunction does not in the least suggest that Plaintiffs "prevailed" on the cross-appeal. To the contrary, the *only* significant relief Plaintiffs ever obtained was taken away.

Defendants' cross-appeal also challenged the 1998 fee award in its entirety, and it is true that the Fifth Circuit did not reverse that fee award. That issue consumed 2.5 pages of Plaintiffs' Brief in Opposition, or less than 3% of their total briefing pages. Whether they ultimately prevail on that claim to relief is still dependent on the pending motion to vacate that award under *Buckhannon*.

Responding to Defendants' Amici (Pl. Mem. 13): Various amici filed briefs arguing that the injunction should be reversed. The injunction was reversed; Plaintiffs did not prevail on the claim to relief that the amici supported. Moreover, the Court has already held that Plaintiffs would not be entitled to fees against Defendants for their efforts opposing proposed *intervenors*, even assuming they prevailed. *Hopwood B*, 999 F.Supp. at 913-14. Amici have less status and influence and fewer rights in the case than intervenors; if Plaintiffs could not recover fees for opposing Intervenors, *a fortiori* they should not recover fees for opposing amici.

Finally, Plaintiffs did not respond on the merits to any of the amici. Their merits-based opposition to the amici is wholly embedded in the eight pages of their Brief in Opposition devoted to the injunction, which refused to brief the issues supported by the amici, arguing instead that those issues were not presented. Nothing in these eight pages would have been any different if there had been no amici in the case.

Plaintiffs' entire response to amici was a series of memoranda, individually objecting to every motion for leave to file an amicus brief.[10] Plaintiffs objected even to the brief of the United States. The time spent preparing these memoranda was not reasonably expended on the litigation. Amicus briefs are to be expected in high-profile litigation with broad public policy implications, as even Plaintiffs' witness recognizes. Declaration of Michael A. Carvin, ¶5 (Tab A-10 in Appendix to Plaintiffs Hopwood and Carvell's Motion for Award of Supplemental Attorneys' Fees and Expenses (Pl. App.)). It is standard practice for parties in such cases to consent to the filing of amicus briefs. It is not reasonable to spend thousands of dollars litigating whether the United States and other interested organizations can file an amicus brief.

Opposing Defendants' Motion to Stay the Fifth Circuit's Mandate (Pl. Mem. 14): A stay of mandate is a procedural motion with a very brief temporal effect. In itself, it will not sustain an award of attorneys' fees. *Foreman*, 193 F.3d at 322-23. If Plaintiffs had ultimately obtained an enforceable judgment, then the time spent opposing the stay of mandate could be included in a fee

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10. " *See* Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the United States for Leave To File Brief as Amicus Curiae in Support of Petition for Hearing En Banc (Apr. 30, 1999) (5 pages); "Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the Association of American Law Schools, et al., To File a Joint Brief as Amicus Curiae in Support of the State of Texas, et al., URGING REVERSAL OF THE DISTRICT COURT AND IN SUPPORT OF EN BANC REVIEW (Apr. 30, 1999) (8 pages); Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of Texas Appleseed, et al., for Permission To File an Amicus Curiae Brief in Support of the State of Texas (May 6 1999) (8 pages); Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of Certain Texas Law Schools for Leave To Proceed as Amici Curiae and in Support of Appellees' Request to Proceed En Banc and for Stay (May 6, 1999) (4 pages); Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the Association of American Medical Colleges, et al., for Permission To File a Motion and a Joint Brief as Amici Curiae Out of Time; and Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the Association of American Medical Colleges, et al., for Permission To File an Amici Curiae Brief in Support of the State of Texas (May 12, 1999) (5 pages); Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the Mexican American Bar Association of Texas, et al., for Extension of Time; and Opposition of Plaintiffs-Appellants Hopwood and Carvell to Motion of the Mexican American Bar Association of Texas, et al., for Permission To File a Joint Brief as Amicus Curiae in Support of the State of Texas (May 13, 1999) (6 pages).

petition based on that judgment. Without such a judgment, resisting the stay of mandate is of no significance.

Opposing Defendants' 2001 Petition for Certiorari (Pl. Mem. 15): Plaintiffs' discussion of their resistance to the petition for certiorari repeatedly emphasizes the "issues" on which they prevailed; it makes no mention of any claim for relief on which they prevailed. Denial of a petition for certiorari adds nothing to the relief granted below. If Plaintiffs had obtained an enforceable judgment, time spent resisting a petition for certiorari could be included in a fee award based on that judgment. Without such a judgment, resistance to the petition is just one more procedural step that never led to any enforceable relief on the merits.

The Instant Proceedings Before This Court (Pl. Mem. 16): The status conference on February 15, 2001 has not led to any enforceable judgment, and without that, cannot support a fee award. Plaintiffs' principal merits filing since the second remand is their disclaimer of any desire for further relief on the merits (Plaintiffs' Joint Status Report at 3), disqualifying them from any fee award. Time reasonably spent on their fee petition would be compensable if and to the extent that they obtain fees, but their supplemental fee petition is plainly barred by *Buckhannon*. If they do not prevail on the supplemental fee petition, they obviously cannot recover fees for preparing it.

Efforts to Settle Litigation with Defendants (Pl. Mem. 16): Plaintiffs' alleged settlement efforts consisted primarily of unreasonable demands for millions of dollars well after the Court's 1998 decision, and for immediate payment of all outstanding attorneys' fees after the denial of certiorari in June 2001. Efforts to settle the litigation focused exclusively on Plaintiffs' individual claims for relief—on admission, damages, and most recently, on attorneys' fees. *See* Ex. B, Affidavit of Betty R. Owens, ¶3. By their own admission, Plaintiffs did not prevail on their claims for admission or damages, so they cannot recover fees for trying to settle those unsuccessful claims.

There were never any discussions about settling the law school's authority to engage in affirmative action, and even if there had been, Plaintiffs have not obtained an enforceable judgment eliminating that authority. Settlement discussions in a case that does not end in an enforceable judgment cannot support a fee award. If Plaintiffs ultimately prevail on their supplemental fee petition, despite *Buckhannon*, then time reasonably spent attempting to settle that petition would be compensable.

IV. ALTERNATIVELY, THE RATES AND TIME RECORDS SUBMITTED BY PLAINTIFFS ARE BOTH INFLATED AND INADEQUATE AND SHOULD BE SUBSTANTIALLY REDUCED.

In the event the Court determines that an award of attorneys' fees is warranted, any such award must be guided by the familiar principles set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983). In particular, the Court must determine the "lodestar" which is the product of the number of hours *reasonably* expended on the litigation and the *reasonable* hourly rate. *Id.* The factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974) further inform this analysis, as appropriate. Plaintiffs, once again, seek compensation at hourly rates far in excess of what is reasonable and for hours expended far in excess what was appropriate. They have also grossly misallocated time between the issues on which they (erroneously) claim to have prevailed and the issues on which even they admit they lost.

The total amount of fees requested in Plaintiffs' separate supplemental and supplemental-to-the-supplemental submissions is as follows:

Sept. 1, 1996 to June 30, 2001		
	Gibson, Dunn & Crutcher	$530,925
	Center for Individual Rights	
	Fees	$ 52,565
	Expenses	$ 11,222.14
July 2001		
	Gibson, Dunn & Crutcher	$ 64,200
	Center for Individual Rights	
	Fees	$ 15,173
	Expenses	$ 762.39
Total		$674,847.53

A. The Hourly Rates Proposed by Plaintiffs Are Excessive.

The reasonable hourly rate is based on "prevailing market rates in the relevant community." *League of United Latin American Citizens v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1234 (5th Cir. 1997) (quoting *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547 (1984)). Plaintiffs' supplemental fee petition is based on attorney rates ranging from $500 per hour for Theodore Olsen to $160 per hour for second-year law students. Every single attorney identified on the Gibson, Dunn & Crutcher fee petition, including one who graduated from law school in 1999, is charged at a rate in excess of what this Court and the Fifth Circuit considered "reasonable" less than three years ago for Theodore Olson and Terral Smith, lawyers admitted to the bar in 1965 and 1973 respectively. *Compare* Tab A-6 in Pl. App. (setting out requested rates), *with Hopwood B*, 999 F.Supp. at 920 (setting out rates awarded in 1998).

The sole evidence of the purported reasonableness of these rates in the Austin market is the declaration of Terral Smith, formerly an attorney of record for Plaintiffs in this litigation, to the effect that his current rate of $425 is reasonable. Declaration of Terral Smith ¶5 (Tab A-9 in Pl. App.).[11] Smith offers little explanation for the meteoric increase in his rate since 1998 other than

11. Defendants object to Plaintiff's Motion for Award of Supplemental Attorney's Fees and Expenses insofar as it fails to meet the requirements of Local Rule CV-7, (I) (1), which requires that all

general references to the Austin legal market. Nor does he state that this rate is based on his litigation skills as distinguished from his extensive political experience and his personal relationships with state and federal leaders, including the President of the United States, whom he served for five years first as Legislative Director and then as Chief of Staff. *Id.* Moreover, even were the Court to accept the reasonableness of Smith's rate, his affidavit is hardly competent evidence of the appropriate billing rate for attorneys at other levels within the Austin market. Indeed, Smith is notably vague in his declaration with respect to the rates charged by associates in the region. *See id.* ¶5 ("Associate rates in the Austin market have undergone similar, significant increases."). Such "evidence" is insufficient. *See Blum,* 465 U.S. at 896 n.11, 104 S.Ct. at 1547 n.11 ("the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community"); *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999) (requiring fee applicant to provide "specific and detailed evidence" of the prevailing rate).

The prevailing rates in the Austin market are considerably lower than those suggested by Plaintiffs. John J. ("Mike") McKetta, a shareholder in the Austin firm of Graves, Dougherty, Hearon & Moody, P.C. attests that the range of rates for "excellent trial lawyers in the Austin area," serving as "lead counsel in litigation involving important controversies," is $225 to $400 per hour, and that most such lawyers charge in the range of $275 to $375. Ex. C, Affidavit of John J. McKetta, ¶3. T.B. Wright, the senior attorney at the Austin Firm of Wright & Greenhill, attests that "competent,

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claims for attorney's fees be accompanied by an affidavit certifying that the time billed was actually spent working on the case and the charges are reasonable. Plaintiffs have submitted a "declaration" and two "statements," all of which are signed but unsworn and one of which is notarized. *See* Declaration of Douglas R. Cox (Pl. App. Tab A), Statement of Michael E. Rosman (Pl. App. Tab B), Statement of Paul Terrill (Pl. App. Tab C).

skilled and experienced litigation attorneys can be employed in Austin, Texas, for $200.00 to $250.00 per hour with the exception of some highly specialized areas such as Antitrust and Intellectual Property litigation." Ex. D, Affidavit of T. B. Wright, ¶3. *See also* Ex. E, Affidavit of Judy Bolling, ¶4. Similarly, *Plaintiffs'* witness Paul Terrill attests to much lower rates than those sought by Gibson Dunn. Affidavit of Paul Terrill (Tab C in Pl. App.). Mr. Terrill states that $310 per hour is a reasonable rate in the Austin market for an attorney with "16 years of litigation practice" and "significant expertise in civil rights litigation," who has argued "a landmark case in front of the United States Supreme Court," "as well as significant cases before the federal courts of appeals." Ex. C, ¶3. The range of rates identified by Mr. McKetta applies only to lead counsel, but Plaintiffs seek significantly higher rates for three lawyers: $500 for Theodore Olson, $425 for Douglas Cox, and $400 for Thomas Hungar. Tab A-6 in Pl. App. These rates exceed the reasonable range in the Austin market.

For work by associates, Plaintiffs seek $335 per hour for Daniel Nelson (who graduated in 1993), $305 for Jill Dennis (who graduated in 1995), $300 for Walter Scott (who graduated in 1987), $295 for David Salmons (who graduated in 1996), $260 for Jason Schwartz (who appears to have graduated in 1998), and $230 for Jeffrey Wadsworth (who graduated in 1999). *See* Tab A-6 and the resumes at Tab A-2 in Pl. App. There is no Austin-specific evidence to support any of these rates. Mr. McKetta attests that rates in excess of $200 for the work of associates "are not reflective of the rates customarily charged in the Austin area for appellate litigation." Ex. C, ¶8. *See also* Ex. E, ¶3. Plaintiffs' witness Mr. Terrill states that $200 is a reasonable rate in the Austin market for a lawyer who graduated in 1992—*i.e.,* for a lawyer senior to all but one of the Gibson Dunn associates. Terrill Aff. ¶4. Plaintiffs' witness further states that $150 per hour is a reasonable rate in the Austin for a lawyer who graduated in 1994. *Compare id.* ¶5 (stating that other rates requested by CIR are

reasonable), *with* Affidavit of Michael Rosman ¶16 (Tab B in Pl. App.) (requesting $150 for Hans Bader, a 1994 graduate).

Mr. McKetta attests that first-year associates in the Austin market are billed at rates ranging from $110 to $155 per hour, and that law students are billed at rates in the $40 to $100 per hour range, when their time is billed at all. Ex. C, ¶6. Gibson Dunn claims $230 and up for junior associates, and $160 for law students. Tab A-6 in Pl. App. McKetta is aware of only one law firm that charges its clients $100 per hour for law students' time and states that a reasonable rate would not exceed $50 per hour for student hours constructively spent on important matters. Ex. C, ¶6. He also attests that much time of law students and junior associates is not productively spent, and that his firm finds that it can bill only 31.6% of law student time. *Id.,* ¶9. Plaintiffs seek grossly excessive rates for the Gibson Dunn law clerks and junior associates, and it is entirely unclear whether Plaintiffs applied reasonable standards in identifying unproductive time expended by law students and junior associates. The Center for Individual Rights requests $70 for its law clerks, Rosman Aff. at 8 (¶17), less than half the Gibson Dunn rate but still 40% in excess of the Austin market.

Finally, Plaintiffs seek rates of $100 to $185 for paralegals and librarians. These rates are excessive. Mr. McKetta states that his firm charges $85 to $100 for paralegal hours, and that paralegal rates in excess of $100 "are not reflective of the rates customarily charged in the Austin area for appellate litigation." Ex. C, ¶8.

Regardless of the rate set by the Court for any other attorney, there is no evidentiary or legal support for the notion that the law school should pay Theodore Olson's proposed rate of $500 per hour. Olson's claimed rate runs counter to the Fifth Circuit's earlier admonition that "hourly rates

are to be computed according to the prevailing market rates in the relevant legal market, not the rates that 'lions at the bar may command.'" *Hopwood III*, 236 F.3d at 281 (citation omitted).

Another indicator of the unreasonableness of these rates is that they far exceed the rates determined by the Court for most of these same lawyers just three years ago. Total inflation since 1998 has been 9.2%.[12] Applying that inflation rate to the rates determined in 1998 suggests the following rates for 2001:

Attorney	Reasonable Rate in 1998[13]	Inflation-Adjusted Rate in 2001[14]
Rosman	$200	$220
Troy	$175	$190
Bader	$150	$165
CIR Clerks	$ 75	$ 80
Olson	$225	$245
Cox	$225	$245
Hungar	$175	$190
Scott	$175	$190
Nelson	$150	$165
GDC Clerks	$ 80	$ 85

The hourly rates sought by Plaintiffs are plainly excessive and should be adjusted to conform with the legal requirement that rates fall within the range of the relevant community, with the Austin-specific evidence of that range, and with the Court's prior findings concerning reasonable rates for these very lawyers.

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12. Bureau of Labor Statistics, Inflation Calculator (available at <*www.bls.gov*>(visited 08/13/01)).

13. *Hopwood B*, 999 F.Supp. at 920.

14. Rounded to the nearest $5.

B. Plaintiffs' Fees Include Charges for Numerous Redundant, Unnecessary, and Excessive Hours.

Defendants submitted Plaintiffs' largest supplemental fee petition, the $530,925.00 originally sought by Gibson Dunn & Crutcher, for analysis by Allegient Systems, an independent auditor that specializes in the analysis of attorneys' bills and fee petitions. The auditor did not comment on hourly rates, and did not have sufficient information to allocate hours between Plaintiffs' appeal and Plaintiffs' allegedly successful defense of the cross-appeal. Accepting Gibson Dunn's proposed rates and allocation, and examining only the hours billed, the independent auditor concluded that fully 20% of the requested fee, or $108,729.13, was unjustified. Ex. F, Audit of Plaintiffs' Attorneys' Fees and Billing Analysis Report, 1 *et seq.*

The auditor concluded that more than $12,000 of the petition is attributable to time spent by attorneys performing clerical and secretarial tasks. This type of work is routinely disallowed. *E.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989) ("purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them"). *A fortiori*, they should not be billed at a lawyer's rate. Another $5,400 was attributable to "non-substantive, administrative" tasks that should not be billed. *Id.* Nearly $6,800 was attributable to entries that did not reasonably describe the work performed, and thus cannot be billed. *See Barnes*, 168 F.3d at 427 ("The general subject matter of the time expenditures ought to be set out with *sufficient particularity* so that the district court can assess the time claimed for each activity") (emphasis added). More than $8,400 was billed for conferences with persons not identified on topics not identified with enough specificity to determine what was being done. *See id.*

More than $19,000 was attributable to lawyers simply talking to each other about what they planned to do. In the auditor's experience, high billing rates are based on a presumption that the

lawyers involved have the expertise to carry out assigned tasks on their own. However, because the complexity of this case required multiple lawyers and coordination of the efforts, the auditor stated that "it is customary and reasonable in such cases to pay only the time billed by the senior attorney participating in the conference." Ex. F, at 2. The proposed deduction of $19,000 thus deducts only the lower paid lawyers who were being supervised or instructed.

Nearly $2,800 was billed for redundant work already billed by another lawyer. This time too, should be disallowed. *See Barnes*, 168 F.3d at 432 ("[r]edundant hours must be excluded from the reasonable hours claimed by the fee applicant"). More than $19,000 was billed for work that appears to have been unnecessary to the litigation, including multiple and redundant reviews of filings and memoranda by summer clerks that appear to have never been used by the senior attorneys responsible for the case. *See id*. More than $1,000 was billed for work that should have been done, and apparently was duplicatively done, by paralegals. And more than $1,000 was billed for time that appears to be beyond what is reasonable and necessary for the work accomplished. All of these deductions, totaling $77,112.25, are further explained and specifically identified in Ex. F.

In addition to all the redundant time at Gibson Dunn, the Center for Individual Rights claims to have spent another $40,776 on the appeal and cross-appeal, "reviewing the work of various attorneys at GD&C and researching (or supervising research on) specific topics in which I or CIR had some comparative advantage." Rosman Stmnt. ¶¶ 4, 8.

Plaintiffs claim 50% of their fees on the appeal, a grossly inflated percentage discussed below. But the auditor discovered that Plaintiffs had miscalculated the 50% even on Plaintiffs' own assumptions. Gibson Dunn claims $282,027.50 for the cross-appeal, which is half of $564,055. But the auditor could identify only $500,821.65 expended on the merits of the appeal and cross-appeal, including appellants' brief, their reply brief, their response to the motion for rehearing en banc, and

attending and preparing for oral argument. Half of that number would be $250,410.82. So even on Plaintiffs' erroneous assumption of 50% success, and apart from any other deductions, Gibson Dunn's claim for the cross-appeal would have to be reduced by $31,616.88.

The overreaching nature of Plaintiffs' fee petition is also revealed when the actual work product produced by Plaintiffs' attorneys is compared to the cost of that work product. Plaintiffs claim to have spent $564,055 at Gibson Dunn, plus $40,776 at CIR, or a total of $604,831 on the appeal and cross-appeal. This does not include an additional $43,043.75 at Gibson Dunn responding to amici (Declaration of Douglas Cox ¶47 (Tab A in Pl. App.), $23,342.50 at Gibson Dunn responding to the motion to stay the mandate (*id.,* ¶48, $68,368.75 at Gibson Dunn responding to the petition for certiorari (*id.,* ¶53, and $6,541 at CIR opposing the stay of mandate and the petition for certiorari. Thus, Plaintiffs claim to have spent more than $670,000 in the court of appeals, and $746,127 in the appellate process, including defending against an unsuccessful petition for certiorari.

Even in a high-stakes case, this is unreasonable. Mr. McKetta, who has experience with many complex appeals in important matters, states unequivocally that "I am not familiar with any occasion in which attorneys' fees approaching $600,000 were incurred in a Fifth Circuit appeal," and that in his experience, "the fees reasonably incurred for handling Fifth Circuit appeals in important matters, including the defense against any petitions for certiorari, have ranged from $50,000 to $200,000." Ex. C, ¶10. This range would apply to the appeals as a whole, before any allocation between successful and unsuccessful claims.

The amounts charged for smaller filings may be even more revealing. Gibson Dunn seeks $35,677.50 as fees attributable to their work on the issue of Eleventh Amendment immunity. Their memorandum was ten pages long! Notwithstanding the novel nature of the issue before the Court, a fee request that exceeds $3,500 per written page is excessive by any standard of reasonableness.

Plaintiffs' Response to Defendants' Motion to Stay the Mandate was only slightly less precious than their work on the Eleventh Amendment issue. In this simple procedural memorandum, Gibson Dunn allegedly ran up attorneys' fees of $23,342.50 (Cox Dec., ¶49, plus another $1,271 for CIR to review its work (Rosman time records 1/24/01-2/2/01, Tab B-1 to Pl. App.) This is well in excess of $2,000 per page—an amount reflective of unwarranted hours spent in review and revision of a very simple argument.

Perhaps the most astonishing number in Plaintiffs' supplemental fee petitions is their claim to have spent about $150,000 preparing fee petitions! This total emerges from widely separated entries as follows:

$ 24,602.50	"in fees related to GD&C's work in preparing plaintiffs Hopwood and Carvell's supplemental application for attorneys' fees and expenses filed with this Court on October 1, 1996." Cox Dec., ¶35.
$ 27,190.00	for Gibson Dunn's work on "the present proceedings in this Court," through June 30, 2001. Cox. Dec., ¶54. In this connection, Plaintiffs assert that "the only issue before this Court now is the issue of supplemental attorneys' fees." *Id.*
$ 25,636.00	"for CIR's work performed in the fall of 1996, most of which relates to plaintiff Hopwood and Carvell's previous fee application." Rosman Dec.,¶8.
$ 64,200.00	for Gibson Dunn's work in July 2001. "The great majority of the work conducted by GD&C for which plaintiffs Hopwood and Carvell now seek recovery in this supplemental fee application was in connection with preparing the attorneys' fee application submitted to this court on July 24, 2001." Supplemental Declaration of Douglas R. Cox ¶5.
$ 15,173.50	for CIR's work in July 2001. "As the Court can see, most of the time spent during the month of July was spent preparing the fee application." Rosman Supplemental Statement ¶2.
$ 762.39	for CIR's expenses in July 2001, mostly in connection with the supplemental fee petition. *Id.*
$157,564.39	Total of Plaintiffs' categories self-described as spent exclusively or predominantly on preparing fee petitions.

When more than 20% of the amount requested is the cost of making the request, this reflects both a lack of billing judgment and a disregard of the premise that a fee request should not become a

"second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941 (1983). Plaintiffs' grossly inflated demands and their refusal to acknowledge the effect of *Buckhannon* leave Defendants no choice but to vigorously resist.

C. Plaintiffs Have Grossly Misallocated Fees Between Successful and Unsuccessful Claims on the Appeal and Cross-Appeal.

Plaintiffs concede that their appeal was wholly unsuccessful, but they claim to have won Defendant's cross-appeal, and on that basis they claim 50% of their fees in the Court of Appeals. Cox Dec. ¶42. The independent auditor was unable to evaluate this allocation. Because of the short time available to prepare this response, the auditor did not have access to the briefs, and Gibson Dunn's billing practices made it impossible to identify which hours were spent on the appeal and which on the cross-appeal. Ex. F, at 1.

However, as noted in part III of this Response, the briefs reveal that only 11% of Plaintiffs' briefing was devoted to the cross-appeal. *See supra* at n.9 and accompanying text. Even assuming that Plaintiffs won the cross-appeal, this suggests a maximum award to Gibson Dunn for the cross-appeal of 11% of $500,821.65, or $55,090.38. This alone would be a deduction of $226,937.12 from the amount claimed, before any correction for excessive rates and hours.

In fact, as also shown above, Plaintiffs lost on the cross-appeal of the injunction, which was reversed. Even in the Court of Appeals, they prevailed only on the cross-appeal of the fee award, to which they devoted only 2.5 pages of briefing, or 2.7% of their 92 pages of briefs. This suggests a maximum award for the cross-appeal of 2.7% of $500,821.65, or $13,522.18. This is the appropriate allocation, and it would require a deduction of $268,505.32 from the amount claimed—again before any deduction for excessive rates or hours. And of course, Plaintiffs' claim to have prevailed on the cross-appeal on fees still depends on the pending motion under *Buckhannon*.

CIR claims $20,388 for the cross-appeal, or 50% of the $40,776 expended. An allocation of 11% for the pages actually spent on the cross-appeal would reduce this claim to $4,485.36. An allocation of 2.7% for the pages spent on the so-far successful defense of attorneys' fees would reduce this claim to $1,100.95. This too is before any reduction for redundancy and the like.

Quite apart from their excessive rates and excessive hours, and without regard to *Buckhannon*, the fact is that Plaintiffs' attorneys spent nearly all their time since 1996 on the unsuccessful pursuit of damages, orders of admission, and increases in their attorneys' fees. Only a very small portion of their time was devoted to the injunction against affirmative action or to Defendants' cross-appeal of their attorneys' fees. At most, they should recover only a very small portion of their claimed fees.

CONCLUSION

Plaintiffs have once again requested grossly excessive fees. But more fundamentally, they are not entitled to any fees at all.

Plaintiffs will no doubt rail against the unfairness of getting no fees for what they consider to be such a significant result. But their complaint is with the Supreme Court and its decision in *Buckhannon*. Whatever result Plaintiffs may have achieved, they achieved it in a way that simply does not merit a fee reward under the governing law. *Buckhannon* requires an enforceable judgment, and it fully applies to this case, which is still pending. All the supplemental fee petitions should be denied, and the earlier award of fees should be vacated in its entirety.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned has discussed Defendants' intention to move to vacate the prior award of fees and Plaintiffs' counsel has indicated that they oppose the motion.

_____
Gregory S. Coleman

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this response via certified mail, return receipt requested, on August 13, 2001, on:

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