Case 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 and DAVID ROGERS,

Plaintiffs-Appellees-Cross-Appellants,

v.

STATE OF TEXAS, ET AL.,

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

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

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REPLY BRIEF AND BRIEF IN OPPOSITION OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES HOPWOOD AND CARVELL

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SUMMARY OF ARGUMENT

Plaintiffs Hopwood and Carvell continue to seek a complete remedy for the injuries inflicted on them by defendants' intentional race discrimination. Plaintiffs' opening brief demonstrated the district court's antagonism toward plaintiffs and their case, its strong disagreement with this Court's rulings on appeal, and its numerous errors on causation, damages, and attorneys' fees. Defendants fail to rebut plaintiffs' analysis of the district court's failings.

Instead, the bulk of defendants' brief is dedicated to an inappropriate, misleading, unsupported and often incorrect treatment of the constitutional issues that were addressed and conclusively resolved in this case in 1996. As discussed below, none of those issues is properly presented by this appeal, and defendants' attempt to use the district court's injunction as a springboard to re-open fully-resolved issues is an abuse of the judicial process. Plaintiffs demonstrated in their opening brief that the district court's decision is severely flawed, and the district court's *sua sponte* issuance of an injunction lacking factual or legal findings simply typifies the district court's misguided approach to this case.

The few pages reserved by the defendants to address the issues properly presented by this appeal are also misleading and error-filled. On issue after issue, defendants fail to meet plaintiffs' arguments, ignore controlling case law and their own admissions, misstate or ignore record facts, advance arguments that would chill enforcement of the Nation's civil rights laws, and simply repeat and adopt the district court's manifestly erroneous assertions. Arguments that merely re-state a trial court's ipse dixits are seldom useful to an appellate court, and such arguments are particularly useless here, because the district court was obviously displeased with this Court's rulings on appeal and determined to avoid their import.

Among many significant concessions and omissions, defendants *fail to address* that portion of plaintiffs' claim for damages based on defendants' violation of their constitutional rights in the discriminatory admissions process itself. Under *Carey v. Piphus*, 435 U.S. 247 (1978), and its progeny, damages for that distinct injury are

independent of the separate damages flowing from the ultimate unlawful denial of admission. Pls. Br. at 28-30. The district court failed even to consider that claim or to award any damages for that injury, and defendants do not argue otherwise.

By concentrating on issues that were resolved against them long ago, and by ignoring the evidence and issues that are central to this appeal, defendants betray their inability to defend the district court's unjust decision on its merits.

ARGUMENT

I.

The District Court Erroneously Concluded That Defendants Carried Their Burden On Causation.

Plaintiffs have already demonstrated that defendants failed to carry their causation burden on remand (Pls. Br. at 13-17) and that defendants' repeated concession that plaintiffs were "close cases" underscored that failure (*id.* at 17-19). Plaintiffs also established at some length that the analysis of defendants' admissions "expert," Professor Wellborn, was hopelessly flawed, rushed and inadequate (*id.* at 19-25). Nothing in defendants' brief overcomes those showings.

Defendants wait until page 54 of their brief to discuss the issues properly presented by this appeal -- and then begin with a mistake. Defendants suggest, incorrectly and without explanation, that the district court's conclusions regarding the causation issue are "fact findings" subject to review for clear error. Defs. Br. at 54-55. As explained in plaintiffs' opening brief, the district court's failure to follow this Court's instructions on remand, and its failure properly to apply the burden of proof, are legal errors subject to *de novo* review. Pls. Br. at 12-13, 14, 17. The district court's acceptance of Wellborn's conclusions presents both questions of law and mixed questions of law and fact, which are also reviewed *de novo* by this Court. *Id.* at 19.

A. Defendants Never Explain How They Carried Their "Impossible" Burden.

Defendants had the burden on remand to prove that Hopwood and Carvell would not have been admitted to the Law School *if* a constitutional admissions process had been in place in 1992. *Hopwood v. Texas*, 78 F.3d 932, 956-57 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Plaintiffs' opening brief established that defendants failed to provide the

evidence necessary to carry that virtually impossible burden. Pls. Br. at 14-17.

Defendants join the district court's attack on this Court's decision regarding the burden of proof. *Compare Hopwood v. Texas*, 999 F. Supp. 872, 882, 883 (W.D. Tex. 1998) (district court characterized this Court's ruling on burden of proof as analytically "incomplete" and wrong as a matter of "common sense and rudimentary mathematics," without "basis in fact or logic," and not applicable "to this case"), *with* Defs. Br. at 54 n.21 ("*For reasons well explained by the district court*, the burden of proof on this issue *should not have been placed on the defendants*.") (emphases added). As defendants ultimately concede, however, they can only prevail by carrying the burden of proving "what would have happened" if they had not discriminated in 1992. *Id.*

The district court originally found that proving "what would have happened" under a constitutional admissions system is "virtually impossible." *Hopwood v. Texas*, 861 F. Supp. 551, 582 n.86 (W.D. Tex. 1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). That conclusion is amply supported by defendants' own evidence. *See* Pls. Br. at 14-15 (collecting testimony). Indeed, Dean Yudof went further, stating flatly that "it is *impossible* to say how each individual file would be read in the absence of an affirmative action program." *See id.* at 14 (quoting P-219) (emphasis added). The virtually impossible burden that defendants in these circumstances precludes a conclusion that defendants' half-hearted and thoroughly flawed effort was sufficient to carry their burden. *Id.* at 14-17.

Indeed, defendants acknowledge that they did not even attempt to perform the analysis necessary to prevail on this issue. They admitted that in order to determine "what would have happened" under a race-neutral admission system, the whole admissions process would have to be reconsidered. *E.g.*, Tr. Vol. I (Wellborn) at 42. They further admitted that "[a] constitutional admissions procedure requires comparison of each individual applicant with the entire pool of applicants." Record at 3814 (Defendants' Amended And Annotated Proposed Conclusions of Law at ¶ 2). Yet it is undisputed that defendants did *not* reconsider the entire process, and instead incorporated results from the unconstitutional 1992 process, in which each individual applicant was *not* compared to "the entire pool of applicants." *See* 861 F. Supp. at 579; Tr. Vol. I (Wellborn) at 42, 51; Tr. Vol. II (Johanson) at 68; P-219 (Yudof's sworn Response to Request for Admission No. 13); Pls. Br. at 15-17.

Defendants ignore their concession that they did not attempt to re-create a lawful admissions process. Instead, they seek refuge in the district court's summary pronouncement that plaintiffs' arguments were "unpersuasive." Defs. Br. at 59. But defendants were required to carry the "virtually impossible" burden of proving what

would have happened *under a constitutional admission process*. They simply did not do so.

B. *Odom v. Frank* Does Not Carry Defendants' Burden.

Defendants argue that their failure to offer the causation evidence required by this Court is excused by *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993). Defs. Br. at 55-56. They rely on *Odom* to argue that Professor Wellborn's post-hoc, litigation-driven conclusions are insulated from judicial review because he has been a member of the Law School's admissions committee. *Id.* Far from supporting defendants' position, however, *Odom* demonstrates that Wellborn's views are entitled to no deference whatever.

Plaintiff Odom alleged that he was denied a promotion on the basis of age and race. *Odom*, 3 F.3d at 840, 845. Despite an absence of direct evidence of discrimination, the district court found that Odom had been discriminated against because it concluded that the promotion of another applicant over Odom was a pretext for discrimination. *Id.* at 845-46. To make that finding, the district court was required to conclude that Odom was "clearly better qualified" for the promotion than the individual who received it. *Id.* at 845-46 (emphasis omitted). This Court reversed the district court because, on the issue of whether Odom was "clearly better qualified," the district court's "findings of discrete facts were either not supported by sufficient evidence or simply wrong." *Id.* at 844.

Odom does not help defendants, for many reasons. First, in *Odom*, unlike this case, there was no direct evidence -- let alone a prior adjudication -- of unlawful discrimination.

Second, defendants make the obviously incorrect assertion that under *Odom* plaintiffs cannot prevail unless this Court concludes that they were "'clearly' better qualified than the 119 applicants identified by defendants." Defs. Br. at 56. But the "clearly better qualified" language in *Odom* governs the legal standard for making a pretext finding based upon the applicants' relative qualifications. *Odom*, 3 F.3d at 845-46. That standard has no relevance here, *where it is conceded that defendants unlawfully discriminated against plaintiffs*. Defendants' reliance on the "clearly better" language in *Odom* is nothing more than another improper attempt to shift their burden of proof on the causation question to plaintiffs.

Third, the *Odom* Court emphasized deference to the *actual* decisionmakers involved in the underlying decisions. Wellborn, however, was offered as an admissions "expert," not a fact witness. Tr. Vol. 1 (Wellborn) at 35-36. It is *Wellborn's* testimony that is at odds with the views of the actual decisionmakers: Hopwood and Carvell each received one vote for admission in 1992 from the actual decisionmakers, yet Wellborn argued

that 54 individuals who received *zero* votes in 1992 (and ten who were presumptively denied admission) would have been admitted to the Law School ahead of them under a race-neutral admissions system. Pls. Br. at 22. If this Court were to adopt defendants' argument and grant deference to Wellborn, then the decisions of those "individuals charged with the evaluation duty" in 1992 -- who voted for Hopwood and Carvell -- would be undermined, *contrary* to *Odom*. *See Odom*, 3 F.3d at 847.

Fourth, the *Odom* Court concluded that the district court "clearly erred in substituting its comparative evaluation of the two candidates" for the evaluation of the actual decisionmakers. *Id.* at 847. The Court should reach the same conclusion here, and reject the district court's error in "substituting [Wellborn's] comparative evaluation of the . . . candidates," and instead give full weight to the votes Hopwood and Carvell actually received in 1992.

Finally, defendants' attempt to discover in *Odom* a newly-minted "deference to experts" rule will have unacceptable consequences in all civil rights suits. Under defendants' argument, any witness offering an "expert" opinion on any contested decision or job action, whether in admissions, in hiring, training, promotion or firing, would be entitled to special deference for retrospective opinions about a plaintiff's "weaknesses" and the preferred candidate's "strengths," and any defendant could invoke that deference -- as defendants do here -- to try to cloak injurious discriminatory acts.

Odom cannot repair Professor Wellborn's failure to base his opinions on a constitutional admissions process. Pls. Br. at 14-17. To the extent that *Odom* has any relevance, it supports plaintiffs.

C. Defendants Cannot Carry Their Burden Because They Concede That Hopwood And Carvell Are "Close Cases."

Professor Wellborn testified that Hopwood and Carvell were "close cases." Tr. Vol. I (Wellborn) at 225; *see also* Pls. Br. at 17-18. Defendants repeat that concession in their brief. Defs. Br. at 56 ("as 'close cases' their damages are [not] automatic."). Defendants' recognition that Hopwood and Carvell presented "close cases" in the admissions process provides an additional and independent basis for concluding that defendants did not carry their burden on the causation issue.

This Court and the Supreme Court have emphasized that "close cases" on remedial issues in discrimination cases must be decided in favor of the victims of discrimination. *E.g.*, Pls. Br. at 18-19 (citing cases). Defendants ignored each of the relevant authorities on this important issue. In particular, defendants disregarded the teachings of *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977), in which

the Supreme Court emphasized that victims of proven discrimination are presumptively entitled to relief, and *Shipes v. Trinity Indus.*, 987 F.2d 311, 317 (5th Cir. 1993), in which this Court explained that any uncertainties in proof must be resolved against the discriminating defendants. Here, defendants' evidence was rife with uncertainties: as Wellborn testified, "you can't make a prediction about the outcome between two closely qualified candidates that would be born[e] out." Tr. Vol. III (Wellborn) at 225. These uncertainties require that plaintiffs, as "close cases," prevail on the causation issue.

Defendants resort to urging the creation of a new category of "close cases" by claiming that Hopwood and Carvell were "close cases," but not "*such* close cases as to require admission." Defs. Br. at 56 (emphasis added). Such metaphysical hairsplitting is surely unpersuasive standing alone. Moreover, such an excessively refined line-drawing exercise to disfavor the proven victims of discrimination would be inconsistent with settled law. *E.g., Shipes*, 987 F.2d at 317 ("uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer"); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 445 (5th Cir. 1974) ("It is apparent that whether any particular individual would have been advanced under a color-blind system cannot now be determined with 100% certainty. . . . Any substantial doubts created by this task must be resolved in favor of the discriminatee who . . . is the innocent party in these circumstances.").

Defendants also argue that "Hopwood and Carvell incorrectly and unfairly assert that the district court gave the law school the benefit of the close call." Defs. Br. at 56 n.23. But defendants fail to demonstrate that plaintiffs' assertion was either "incorrect" or "unfair." Plaintiffs simply pointed out that the district court's acknowledgment that this Court's instructions require that "close calls must always be decided in favor of the plaintiff," 999 F. Supp. at 884, cannot be reconciled with the fact that the district court gave the "close calls" to *defendants*, thereby demonstrating that the district court did not properly apply the burden as directed by this Court.

D. Defendants Have Been Unable To Paper Over The Multiple Flaws In Professor Wellborn's Analysis.

Plaintiffs catalogued many legal, logical and factual errors in Professor Wellborn's analysis that further demonstrate that defendants did not carry their burden on the causation issue. Pls. Br. at 19-25. Defendants do little more than assert that they believe that Wellborn's methodology is "sound," Defs. Br. at 57, and do not engage the substance of plaintiffs' arguments.

1. Defendants, Like The District Court, Refuse To Address The Dispositive Consequences Of The *Malooly* Case.

Neither the defendants nor the district court can explain away the compelling contradiction between the defendants' position in this case and defendants' contemporaneous sworn statement in another race discrimination case, *Malooly v. Texas*, Civ. No. A96CA229SS (W.D. Tex. 1994). Pls. Br. at 23-24.

Defendants do not dispute the significance of Professor Johanson's sworn statement in the *Malooly* case. Instead, they assert that the district court "obviously" weighed the "apparently conflicting evidence" of the statement in *Malooly* against Wellborn's "expert" conclusions. There is, of course, no indication that the district court did anything of the kind: in its lengthy opinion, the district court never mentioned *Malooly*. Defendants then leap from their supposition concerning the district court's unrevealed mental processes to assert that it was within the district court's discretion to reject the admissions in *Malooly* and rely instead on Wellborn. *Id.* Defendants are mistaken.

Defendants' claim that Johanson's statement and Wellborn's testimony are only "apparently conflicting" is a gross mischaracterization. Those two sworn positions are in direct, irreconcilable conflict: Johanson swore that, in attempting to determine "what would have happened," any applicant who received one vote in the discretionary screening process would have been admitted before *any* applicant who received zero votes; Wellborn testified to precisely the opposite conclusion, that *fifty-four* candidates from the discretionary zone who received *zero* admission votes "would have been" admitted in preference to Hopwood and Carvell, even though each received one vote.

Moreover, Johanson's sworn statements are not simply "evidence." The Johanson affidavit in *Malooly* is an *admission*. Wellborn's conclusions were offered as "expert" testimony, which must have underlying factual support. The Supreme Court has emphasized that "*when indisputable record facts contradict or otherwise render [an expert] opinion unreasonable*," the opinion cannot support a judgment. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (emphasis added); *see also Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 72-73 (5th Cir. 1987) (holding that district court's reliance on expert's testimony where "[t]he undisputed facts and the expert's assum[ptions] . . . cannot be reconciled" was clear error). Wellborn's factually contradicted opinion cannot support the judgment here.

The case cited by defendants, *Floyd v. Segars*, 572 F.2d 1018 (5th Cir. 1978), Defs. Br. at 59 n.26, is not to the contrary. *Floyd* involved weighing potentially conflicting testimony from the same fact witness, not an admission on the one hand and an "expert" opinion on the other. The *Floyd* Court also emphasized that an "inconsistent statement under oath is a very serious matter *which deserved and received careful weighing by the district court*." 572 F.2d at 1022 (emphasis added). There is no sign that *this* district

court gave *any* consideration to defendants' conflicting statements.

Professor Wellborn's refusal to acknowledge the significance of plaintiffs' votes has no independent corroborative support. The historical evidence, common sense, and Professor Johanson's admissions in *Malooly*, on the other hand, all compel the conclusion that Wellborn's rationalization for the rejection of plaintiffs was no more than a litigation invention that should not have been credited by the district court.

2. The Wellborn Methodology Was Not "Sound."

Defendants claim that Professor Wellborn "replicated a race-neutral admissions system." Defs. Br. at 57. Even he acknowledged that he did not do so.

Wellborn admitted that "you would start the entire [admissions] process over to create a race-neutral system," Tr. Vol. I (Wellborn) at 42, and that "the hypothesis I have to address is one in which there would be a constitutional colorblind process *in which all candidates would be blended together*." *Id.* at 51 (emphasis added). However, Wellborn did not "start over" or reconsider a process in which all candidates were "blended together." Instead he laid the foundation for his analysis by incorporating certain results from the racially-tainted 1992 process as a short-cut and "a concession to the limited time I had available." *See, e.g., id.* at 48-49, 158, 247, 251-52; *see also* Pls. Br. at 15-16.

Defendants appear not to realize that Wellborn's concessions are fatal to their assertion that he "replicated a race-neutral system." Indeed, defendants offer two additional damaging concessions regarding Wellborn's analysis. Wellborn assumed that the 42 individuals offered admission in 1992 from the waiting list would have been admitted under a constitutional process, but defendants acknowledge that "the waiting lists created in 1992 could not exist under a constitutional admissions system." Defs. Br. at 59. Moreover, Wellborn assumed that each individual admitted from the 1992 discretionary zone "groups of 30" process would have been admitted in 1992, but defendants concede that under a constitutional admissions process, "the segregated piles of 30 in which plaintiffs were evaluated in 1992 could not have existed [and] [i]t is *impossible* to know what piles would have existed." *Id.* at 58 (emphasis added).

Defendants attempt to salvage Wellborn’s short-cut by claiming that any decision to admit non-minority students from the discretionary zone ahead of Hopwood and Carvell "was not affected by race." Defs. Br. at 56. But defendants acknowledge that the groups of 30 would have been *different* under a race-neutral admission process, Defs. Br. at 58; 999 F. Supp. at 889, and thus *every* discretionary zone decision was "affected by race" under defendants' unconstitutional system. *See also* 999 F. Supp. at 889 n.38 (quoting Johanson) ("I can't say, if [Hopwood] was in another stack, whether she would have

gotten two votes to admit or no votes to admit."); Pls. Br. at 22-23. Defendants also swore that "it is impossible to say how each individual file would be read in the absence of an affirmative action program." P-219 (Yudof's sworn Response to Request for Admission No. 13). For this very reason, Johanson testified that it would be "improper" and "sheer speculation" to say how the 1992 admissions decisions would have come out in the absence of racial preferences. 999 F. Supp. at 889 n.38.

Thus, Wellborn's time-saving "short cut" of relying on "inference," Defs. Br. at 60, and selectively assuming away the effects of the particular groups of 30 for applicants admitted in 1992, was not a "sound" methodology at all, but an attempt to create a virtual highway over untraversable terrain.

3. Defendants' Litigation-Inspired Admissions "Criteria" Are Legally Meaningless.

Defendants mistakenly rely on Professor Wellborn's "four criteria" to compensate for the district court's errors on the causation issue. But his "four criteria" were not, as defendants' suggest, the "admissions criteria of a race-neutral system." Defs. Br. at 60. They were created solely for this case; nothing more than post-hoc rationalizations for an unconstitutional result; an invented set of standards that Wellborn exchanged for the actual criteria used in 1992.

Wellborn made the shocking admission that he used Hopwood's and Carvell's applications as a "floor" from which to find candidates that he could argue would have been admitted ahead of them, and that he created the "four criteria" *only after* he selected his candidates. Tr. Vol. I (Wellborn) at 164, 166-67, 248. Wellborn also admitted -- even more shockingly -- that the *very purpose* of his "four criteria" was to provide a (purportedly objective) mechanism to explain his conclusion that Hopwood and Carvell would not be admitted. *Id.* at 166-67 (Wellborn created his "four criteria" because "I had already distinguished the plaintiffs by my selection, and I had to explain those, explain how I did that").

Conclusively demonstrating the utter irrelevance of his "four criteria," Wellborn testified that a "substantial number" of the individuals actually admitted in 1992 -- individuals whose admission he assumed as part of his analysis -- did not meet his "four criteria." *Id.* at 168-69. Indeed, all individuals who applied for admission in 1992 were not evaluated under Wellborn's "four criteria" but under a broader, different set of criteria. *See* P-40 at 3 (contemporaneous list of the many criteria applied in 1992 admissions); P-215 (Defendants' First Supplemental Response To Interrogatory No. 1); Tr. Vol. I (Wellborn) at 118-21. The "four criteria" are nothing more than a fiction created to persuade the judiciary to deny plaintiffs a remedy for the damages caused

them by a blatantly unconstitutional admissions program.

Both plaintiffs possessed many of the factors that the Law School *actually* considered desirable in 1992, in addition to their high Texas Index scores. For example, Hopwood was an accountant who worked her way through school, yet maintained a very high GPA, factors that made her admission more likely under the 1992 criteria. P-40 (criteria list) at ¶ 10. Carvell's grades in college steadily rose throughout his four years. *Id.* at ¶ 1.

Defendants also excused some of Wellborn's weak "likely admits" on the basis of qualities not captured in his "four criteria," such as having significant work experience (like Hopwood and Carvell), having children (like Hopwood) and having significant extracurricular activities (again, like Hopwood and Carvell). *See* Record at 3649-74 (Defendants' Post-Trial Brief Addressing Professor Wellborn's Selections For Admission); *id.* at 3687-94 (Plaintiffs Hopwood's and Carvell's Reply Brief Concerning Wellborn Candidates). And even some of Wellborn's own "likely admits" did not satisfy his "criteria." Defs. Br. at 60. Defendants' use of litigation "criteria" that differ from admission standards actually in effect in 1992 in order to deny relief to the plaintiffs should be condemned by this Court.

Defendants are similarly mistaken in claiming that Hopwood's and Carvell's applications contained "striking weaknesses." Defs. Br. at 56. To the contrary, Wellborn admitted that there were candidates with qualifications similar to Hopwood and Carvell *who were actually admitted in 1992*. Tr. Vol. I (Wellborn) at 172. He admitted that there were many examples where professors in 1992 voted to admit certain discretionary zone candidates who were weaker than or comparable to Hopwood and Carvell. *Id.* at 224. He also recognized that "clearly weaker candidates are admitted and stronger candidates are denied in the real world process because of the voting." Tr. Vol. I (Wellborn) at 226. Indeed, *ten* of the candidates that Wellborn concluded were "likely admit" candidates presented such "striking weaknesses" in actual fact that they were *presumptively denied* admission in 1992. P-415; Tr. Vol. I (Wellborn) at 195-97.

Defendants' specific attacks on plaintiffs' applications are unsubstantiated and unjust. For example, defendants criticize Hopwood because her application did not contain letters of recommendation, Defs. Br. at 60, but defendants themselves told her, both orally and in writing, that such letters were not necessary in her case. Similarly, Wellborn used Carvell's two LSAT scores to reduce Carvell's Texas Index score from a 197 to a 191, Defs. Br. at 61, thereby moving him from the top of the discretionary zone all the way into the "presumptive denial" category established for non-minority candidates in 1992, even though it is undisputed that in 1992 defendants evaluated Carvell at a score of 197.

Defendants' efforts to paint Hopwood and Carvell as "weak" are also undercut by defendants' varying and obviously expedient characterization of other applicant files. For example, one of the 119 candidates that Wellborn concluded was more likely to be admitted than Hopwood and Carvell was an individual (Candidate 2306) who was a former plaintiff in this case. At that time defendants also tried to characterize that individual as a weak candidate. *See* Record at 3752 (Proposed Findings of Fact Of Plaintiffs Hopwood And Carvell at ¶ 111); P-423 (Motion For Additional Interrogatories And Requests For Admission And Modification Of Discovery And Briefing Schedule). This turn-about struck even the district court as implausible. Tr. Vol. I (Judge Sparks) at 210 ("This is a former plaintiff, and this was the position of the university at this time, and now she's on his [Wellborn's] list [of admittees]."). Wellborn even selected as a "likely admit" at least one applicant who defendants *concede* would *not* have been admitted under a race-neutral system. *E.g.*, Pls. Br. at 10 n.2.

Finally, defendants attempt to discount the admission votes received by Hopwood and Carvell as "forced" votes. *See* Defs. Br. at 59 n.25. Their "expert" testified, however, that a purported "forced" vote occurred only "in some instances," *id.*, and thus it is impossible to say that Hopwood's and Carvell's votes were "forced." *See also* Pls. Br. at 20 n.5. Defendants are also factually mistaken in their assertion that Wellborn considered only the last vote to be "forced," Defs. Br. at 59 n.25, because he testified that in his view the 7th, 8th, and 9th votes were sometimes "forced." Tr. Vol. I (Wellborn) at 53. Wellborn's view that many votes were "forced" must have meant in practice that some individuals who were admitted in 1992 received two "forced" votes -- yet he assumed those individuals would be admitted in a constitutional system. Whatever confused point defendants wish to make about "forced votes," it remains the case that Hopwood and Carvell each received a vote -- and *fifty-four* of Wellborn's "likely admits" did not receive a vote, "forced" or otherwise, and *ten* others were presumptively denied admission *before the voting began*.

In short, Professor Wellborn's analysis is riddled with error, contradiction, logical fallacies, invented rationalizations, and implausible conclusions. His testimony simply cannot begin to carry the defendants' burden in this case. And that is all that defendants have.

E. This Court Should Order Hopwood's Prompt Admission.

Significantly, defendants do not contest that if the district court is reversed on the causation issue, this Court should directly order Hopwood's admission to the Law School. *See* Pls. Br. at 25-26.

II.

The District Court's Damages Analysis Is Erroneous.

This Court has already held that "there is no question that a constitutional violation has occurred . . . and that the plaintiffs were harmed thereby." 78 F.3d at 957. Defendants nonetheless insist that "plaintiffs are entitled to no or nominal damages." Defs. Br. at 67. The uncontested evidence presented during the remand trial makes it impossible to sustain that position.

A. The District Court's "Alternative" Factual Findings Are Impermissibly Tainted By Its Legal Errors On The Causation Issue.

Defendants argue that this Court should uphold the district court's "alternative" findings limiting plaintiffs' damages, even if this Court reverses the district court's holding on the causation issue. Defs. Br. at 67. Plaintiffs demonstrated in their opening brief that the district court's "alternative" damage findings were tainted by its errors on the causation issue, just as this Court had found to be the case in the 1996 appeal, 78 F.3d at 956 n.51, and by the district court's irritation that it was being forced to listen to plaintiffs' evidence when it believed plaintiffs had "utterly failed to present competent evidence on damages at the first trial." 999 F. Supp. at 901. The district court was all too anxious "to ensure that there is no third trial." *Id.* But it is not this Court's role to accept legally erroneous analyses simply to spare the district court and the defendants any additional inconvenience. Plaintiffs are entitled to a legitimate and complete remedy for defendants' violation of their constitutional rights. The "alternative" damages findings should be vacated, and the entire damages issue remanded for determination by an unbiased judge on the record already compiled, without any need for a "third trial." Pls. Br. at 26.

B. Plaintiffs Are Entitled To Mental Anguish Damages Flowing From Defendants' Unlawful Discrimination.

Plaintiffs' constitutional rights were violated when defendants discriminated against them on the basis of race. That injury, as a matter of law, is distinct and separately compensable from the further injury they received through denial of admission. *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978); *Price v. City of Charlotte*, 93 F.3d 1241, 1245-48 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); Pls. Br. at 28-31. The district court simply ignored the substantial, uncontested and corroborated evidence of plaintiffs' emotional injuries resulting from the Law School's unlawful discrimination. Defendants confine their arguments to the effects of the Law School's denial of admission and ignore the district court’s failure to address mental anguish damages for the separate violation of Hopwood and Carvell's constitutional rights. Defendants do not discuss, let

alone distinguish, *Carey v. Piphus* and its progeny, authority that explicitly recognizes plaintiffs' separate category of damages. That is tantamount to a concession that the district court's analysis of damages was fundamentally flawed. Accordingly, the Court should vacate and remand for a determination of those damages.

C. Plaintiffs Also Are Entitled To Mental Anguish Damages Flowing From Defendants' Unlawful Denial Of Admission.

Defendants also err in their analysis of plaintiffs' mental anguish damages arising from the Law School's denial of their applications. For example, defendants assert that Hopwood's emotional distress "at most was *temporarily* aggravated by the law school's denial of admission." Defs. Br. at 70 (emphasis added). But Dr. Lees-Haley testified that the Law School's discrimination against Hopwood and its rejection of her application caused her *chronic* emotional injuries, Tr. Vol. III (Dr. Lees-Haley) at 155-56; *see also* Pls. Br. at 30-31, and neither the district court cite nor the record cite provided by defendants support their contrary assertion. Defendants are also wrong to assert that Carvell's mental anguish is nothing more than "self-reported emotional complaints," Defs. Br. at 71, because Carvell's testimony regarding his mental anguish damages was corroborated by other percipient fact witnesses, in addition to Dr. Lees-Haley. *See, e.g.*, P-472 at 4-11 (T. Wilson depo. excerpts); Tr. Vol. IV (J. Carvell) at 140-41; Tr. Vol. III (Dr. Lees-Haley at 159).

For these reasons, defendants' reliance on *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997), is misplaced. Defs. Br. at 70, 72. In *Patterson*, this Court reversed the trial court's findings on mental anguish damages because the findings were based exclusively upon uncorroborated testimony from the plaintiffs. *Id.* at 939-41. The Court expressly recognized that "[i]n many instances, corroborating testimony and evidence of medical or psychological treatment have been relied upon to support an award of emotional harm or mental anguish." *Id.* at 938. That "corroborating testimony and evidence" is abundantly present in this record.

Moreover, the *Patterson* Court noted that the standard of review for mental anguish damages is "deferential to the fact finder," but it reversed the district court's factual findings on mental anguish because they were unsupported by the evidence. 90 F.3d at 937-38, 941. This Court should similarly reverse the district court's unsupported and erroneous "alternative" findings and remand for a fresh determination of damages by an impartial judge, without the pervasive taint of the district court's bias and numerous errors.

D. Defendants Are Unable To Defend The District Court's Decisions Regarding Economic Damages.

Plaintiffs offered substantial evidence of their economic damages, including their own testimony and testimony and analyses from two highly qualified experts, Bradford Hildebrandt and Dr. Wayne Ruhter. Plaintiffs demonstrated in their opening brief the district court's errors relating to this evidence. Pls. Br. at 31-33. Defendants' response is both tepid and incomplete. For example, defendants do not make a *single reference* to the expert testimony from Hildebrandt regarding Hopwood's and Carvell's economic damages. Instead, they apparently fall back on the theory that the district court's summary dismissal of plaintiffs' experts is "entitled to deference" because it allegedly turned on assessments of witness credibility. Defs. Br. at 69 (citing Rule 52 and a credibility assessment case). That is a strange and baseless argument, however, because the district court never found that Ruhter and Hildebrandt were not credible witnesses, and defendants do not and cannot cite to any such "finding."

Defendants' more specific attacks on plaintiffs' economic damages are equally baseless. For example, defendants claim that under the authority of a district court decision from Indiana, plaintiffs' economic damages are "impermissibly speculative." Defs. Br. at 68, citing *Williams v. Pharmacia Opthalmics, Inc.*, 926 F. Supp. 791 (N.D. Ind. 1996), *aff'd*, 137 F.3d 944 (7th Cir. 1998). But defendants' expansive reading of *Williams* would unjustifiably undercut the rule in this Circuit that uncertainties in determining what a victim of discrimination would have earned but for the discrimination are resolved in favor of the plaintiffs, not the discriminator. *See Shipes*, 987 F.2d at 317; Pls. Br. at 33. In any event, the plaintiff in *Williams* received an award of $250,000 in damages for lost earnings in addition to a substantial "front pay" remedy, and that lost earnings award was affirmed by the Seventh Circuit. 137 F.3d 944 (7th Cir. 1998).

Defendants also cite to *FDIC v. Wheat*, 970 F.2d 124, 132 (5th Cir. 1992), to suggest that Hopwood did not mitigate her damages, arguing that she "could have attended law school elsewhere and still has the opportunity to do so." Defs. Br. at 68. Defendants are barred from making that mitigation argument. Mitigation is an affirmative defense that defendants failed to plead and thereby waived. Fed. R. Civ. P. 8(c); *Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir. 1987); Record at 7-12 (Defendants' Original Answer). Even if they had not waived the defense, defendants did not carry their burden of proving that Hopwood failed to mitigate her damages, or even that going to a different law school would have mitigated her damages. *See, e.g., Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 29 (5th Cir. 1992); Record at 3616-21 (Hopwood's and Carvell's Post-Trial Brief Addressing Defendants' Mitigation Defense).

E. Defendants Are Liable For Damages Under Title VI.

This Court has already decided that plaintiffs may recover damages from defendants for

their intentionally discriminatory acts. 78 F.3d at 957 (specifically stating that potential relief for plaintiffs includes money damages). Defendants cite *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), to argue that money damages are unavailable for "an unintentional violation" of Title VI. Defs. Br. at 65. But this Court, specifically citing *Gwinnett*, has already held that "there is no question that [defendants] intended to treat the plaintiffs differently on account of their race," 78 F.3d at 957, and under *Gwinnett* injuries from such intentional discrimination are compensable in money damages. 503 U.S. at 74-75. During the remand trial, even the district recognized that the time for defendants' damages argument "has already . . . passed" and that "at least impliedly that defense has been overruled by the Fifth Circuit." Tr. Vol. IV (Judge Sparks) at 153-54.

Defendants also make the peculiar argument that they cannot be liable in damages under Title VI because they lacked *notice* that their 1992 admissions procedure -- with its overt racial classifications, different admissions standards for different racial groups, segregated waiting lists, racially color-coded applicant files and separate admissions committees according to race -- violated the non-discrimination command of Title VI. Defs. Br. at 64. That argument would eviscerate enforcement of Title VI by private civil rights plaintiffs, and has in any event been foreclosed by *Gwinnett*. 503 U.S. at 74-75 ("This notice problem does not arise in a case such as this, in which intentional discrimination is alleged."). It simply is not the law in this country that "There Can Be No Damages Under Title VI for Conduct Undertaken Without *Notice* that the Conduct Was Wrongful." Defs. Br. at 64 (emphasis added). Indeed, it is ironic that the State of Texas and its "flagship" law school take the position that government discriminators are entitled to the equivalent of a "one bite" rule, and that they can therefore practice intentional racial discrimination with impunity, at least until the first adverse court decision.

Finally, defendants claim that they were coerced to construct their unlawful 1992 admissions system, to satisfy a "mandate" from the federal Office of Civil Rights ("OCR") and in order to "comply with federal directives." Defs. Br. at 64, 66. Defendants must know that claim is factually false, because it was rejected as a factual matter by the district court *as long ago as 1994.* The district court concluded that "OCR has provided Texas with a number of suggested tools . . . it has not, however, required the State to adopt any specific procedures." 861 F. Supp. at 568-69. The district court similarly found that there was no "congressional mandate" for defendants' race preferences and that the defendants had "voluntarily" adopted their race-driven system. *Id.* at 568 & n.53. Defendants did not appeal from the district court's 1994 decision. *See also* 78 F.3d at 954 (rejecting defendants' OCR argument and concluding that "the law school's admissions program was self-initiated"). Defendants' tactic of attempting to

re-litigate their long-discredited OCR claim is yet another improper and unconscionable abuse of the judicial process and an additional example of how defendants have made it exceedingly difficult and expensive for plaintiffs to obtain individual remedies for defendants' unconstitutional acts.

III.

The District Court's Analysis Of Attorneys' Fees Contained Numerous Blatant Errors.

Defendants have declared that *one* of their several sets of lawyers has incurred more than $2,000,000 in fees in their losing effort to preserve defendants' racial preferences. Defendants nonetheless cross-appeal to *oppose* plaintiffs' statutorily-mandated fees on the ground that plaintiffs are not "prevailing parties." Defendants, once again, are wrong on both the facts and the law.

With respect to fees incurred through the denial of certiorari, the record is complete and this Court may make its own determination of the fee award. Pls. Br. at 35-37. Plaintiffs demonstrated in their opening brief, however, that a remand is necessary in order to compile a complete record of fees incurred on remand, and in order to have that portion of the fee award determined by an impartial judge. *Id.* at 37-45.

A. Plaintiffs Are Prevailing Parties Entitled To An Award Of Attorneys' Fees.

Even the district court, which certainly cannot be said to be biased *toward* plaintiffs' case or their counsel, found that "plaintiffs attained extraordinary success in the appellate courts [and] *accomplished the principal goal of the lawsuit* -- to dismantle all forms of racial preferences in public higher education in Texas." 999 F. Supp. at 916 (emphasis added). In the face of that finding, it is nothing short of astonishing that defendants' chief argument on fees is that plaintiffs are not entitled to any fees whatever because plaintiffs were not "prevailing parties." Defs. Br. at 74-75. Defendants' position is so extreme that even the district court rejected it.

Moreover, defendants have already litigated and lost this very issue. As the district court correctly understood, this Court determined that plaintiffs were prevailing parties entitled to fees, and remanded the fee issue to permit the district court to calculate the fee award in the first instance. 999 F. Supp. at 911. This Court's rejection of defendants' "prevailing party" arguments, under the law of the case doctrine, cannot be revisited on this appeal. *E.g., Burroughs v. FFP Operating Partners, L.P.*, 70 F.3d 31, 33 (5th Cir. 1995).

Defendants' contentions are in any event wrong as matters of law and fact. Defendants assert that plaintiffs are not prevailing parties entitled to fees because their relief was limited to an award of nominal monetary damages. Defs. Br. at 74. But in the very case defendants cite, the Supreme Court held just the opposite: "*a plaintiff who wins nominal damages is a prevailing party under § 1988*." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (emphasis added); *see also* Record at 2355 (District Court's 1994 Fee Order at 3-4) ("no dispute" that plaintiffs are prevailing parties because they obtained "an enforceable judgment" for nominal damages, citing *Hobby*). Plaintiffs have also received far more relief than nominal damages: in addition to accomplishing "the principal goal of the lawsuit -- to dismantle all forms of racial preferences in public higher education in Texas," 999 F. Supp. at 916, plaintiffs have already obtained the equitable relief that they be permitted to reapply without having to pay an application fee and without being subject to defendants' racially discriminatory procedures. *See also United States v. Jones*, C/A No. 2:93-048802, slip op. at 11 (D.S.C. Mar. 30, 1999) (plaintiffs whose suit required defendant educational institution to end its discriminatory admissions practices obtained a "far from de minimis" result and were entitled to more than $4.5 million in fees and costs) (for the Court’s convenience, a copy of *Jones* is included as an addendum to the brief). And, as set forth above, plaintiffs are in any event entitled to additional, substantial damages once the district court's errors are corrected.

Section 1988 was enacted "to ensure effective access to the judicial process" and "encourage private enforcement of the nation's civil rights statutes." *Cobb v. Miller*, 818 F.2d 1227, 1233 (5th Cir. 1987) (citations omitted). The unjustified and standardless rule advocated by defendants would ensure that many civil rights plaintiffs could not find counsel, and thus would undermine the private enforcement of the civil rights laws. This Court will surely wish to reject defendants’ self-serving proposal.

B. The District Court Erroneously Reduced Plaintiffs' Attorneys' Fees.

Significantly, defendants do *not* address many of plaintiffs' arguments on fees. For example, while defendants generally endorse the district court's lodestar calculation, they do not rebut plaintiffs' argument that the district court erred in reducing the hourly rates charged by plaintiffs' counsel -- reductions that ranged up to 50%. 999 F. Supp. at 918-19; Pls. Br. at 43-46. Defendants also do not defend the district court's order requiring plaintiffs to submit manifestly incomplete fee applications months *before* the remand trial, and the court's refusal to permit plaintiffs to seek compensation for the preparation of fee applications. *See* Pls. Br. at 35-36 and 39 n.7.

Similarly, defendants concede that the district court did not consider several factors set

forth by this Court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), but claim that failure "is of no consequence" because the district court need not "meticulously" detail its *Johnson* analysis. Defs. Br. at 77. In order to avoid setting forth its *Johnson* analysis, however, the court was obliged to show that it did not proceed in "a summary fashion," and that it "arrived at an amount that can be said to be just compensation." *Cobb*, 818 F.2d at 1232. Here, the district court's slashing attack on plaintiffs' fee application and its refusal even to consider certain fee evidence shows that the district court did not perform the requisite analysis. Indeed, when the total fee award to all counsel for all four plaintiffs is *less than one-half of the fees* incurred by *just one* of defendants' multiple sets of lawyers, not to mention defendants' unlimited use of taxpayer funded lawyers, it is plain that the district court did *not* award "an amount that can be said to be just compensation."

Indeed, defendants do not explain the district court's selective disregard of several *Johnson* factors. Among others, defendants do not comment on the "[t]he novelty and difficulty of the questions" presented by this case, "[t]he skill requisite to perform the legal service properly," "[t]he experience, reputation and ability of the attorneys," and "[t]he 'undesirability' of the case." *Johnson*, 488 F.2d at 717-19; Pls. Br. at 40-41. Presumably, defendants do not address these factors for the same reason the district court evaded or minimized them: each weighs heavily in plaintiffs' favor. Defendants' mushrooming platoons of lawyers, including prominent attorneys and professors, demonstrate that defendants themselves believe that this case presents novel, difficult and important questions and requires a high degree of skill. The district court should have taken those factors into account in evaluating the reasonableness of plaintiffs' far leaner legal staffing and more modest fees.

Even though defendants do not dispute many of the district court's errors on fees, defendants urge this Court somehow to presume that the district court "no doubt" engaged in a "scrupulous," "painstaking," "appropriate," and "fair" review before making its "adjustments." Defs. Br. at 76-77. Those fulsome characterizations cannot be reconciled with the dramatic "adjustments" actually imposed by the district court -- "adjustments" that even the district court recognized "may seem excessive," 999 F. Supp. at 921 -- and with the court's scornful description of the plaintiffs' counsel and plaintiffs' need for lawyers with specialized skills. *E.g.*, *id.* at 917, 921. Thus, the district court's error-riddled fee analysis must be vacated.

C. Defendants' Limited Attempt To Support The District Court's Flawed Attorneys' Fees Analysis Is Unavailing.

Defendants briefly attempt to justify the district court's unsupported, drastic percentage

reductions in compensable hours for purportedly vague time entries and an alleged lack of billing judgment. Defendants claim that the district court did perform a line-by-line analysis as required by this Court and, seemingly in the alternative, that no line-by-line analysis was performed because there was no evidence of the application of billing judgment. Defs. Br. at 78 n.27. Both assertions are wrong as matters of record fact. Indeed, the district court itself acknowledged that it performed no detailed review of time entries. 999 F. Supp. at 916. Moreover, the plaintiffs did present substantial evidence that careful billing judgment was exercised, Pls. Br. at 38, which the district court and defendants cannot rebut and instead simply ignore. Given the district court's confessed failures and plain omissions, it was not justified in imposing an across-the-board reduction in fees as a substitute for the required analysis, *id.* at 37-38, and defendants do not offer a valid argument to the contrary.

Defendants argue that the district court properly reduced the lodestar for "lack of success," and even that it awarded too much to the plaintiffs in light of the money damages awarded by the district court. The Supreme Court, however, has "explicitly rejected the view . . . [that] attorney's fees had to be proportional to the amount of damages recovered by a plaintiff." *Cobb*, 818 F.2d at 1234 (citations and quotations omitted) (reversing district court's erroneous reduction of lodestar).

Finally, defendants incredibly continue to oppose fees for plaintiffs' work in opposing intervention by defendants' allies, asserting that "[t]he intervention battle was not between plaintiffs and defendants, but between plaintiffs and the would-be intervenors." Defs. Br. at 78. Defendants rely on *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), but the court in *Reeves* emphasized that the defendants in that case had not taken any on-the-record position as to the intervenors. *Id.* at 1483-84. By contrast, the defendants here made on-the-record statements supporting the intervenors. That key difference alone renders plaintiffs' entitlement to fees on this issue crystal clear. Pls. Br. at 41-42.

IV.

Defendants Improperly Seek To Raise Issues Not Presented In The Remand Trial.

The Court's remand was limited to remedial issues, as *all* parties -- defendants included -- and the district court below clearly understood. *See, e.g.*,
78 F.3d at 962; 999 F. Supp. at 878-79 ("On remand, the Fifth Circuit directed the Court to reconsider two issues. First, the panel directed the Court to apply the proper burden and to reevaluate whether any of the four plaintiffs would have been admitted to the law school in the absence of admissions procedures which took into account an applicant's race or ethnicity. Second, the Fifth Circuit instructed the Court to 'revisit' the issue of

damages in the event the law school fails to meet its burden[.]"). The district court's lengthy opinion discusses *only* the remedial issues remanded by this Court. It is *those* issues that are properly the subject of plaintiffs' appeal and defendants' cross-appeal. *See also* Record at 3822 (Defendants' Amended And Annotated Proposed Conclusions of Law at ¶ 65) (noting "[t]he limited scope of the remand").

Nonetheless, the great bulk of defendants' brief in support of their cross-appeal is dedicated to an inaccurate and misleading treatment of constitutional issues already decided by this Court. In making those arguments, defendants rely on numerous assertions found nowhere in the record (*e.g.*, Defs. Br. at 46-53) and hysterical and unverified (and unverifiable) predictions of doom (*e.g.*, since 1996 some students have left Texas, "often never to return," *id.* at 2).

Defendants acknowledge that their arguments on these issues are precluded by the law of the case doctrine, but evidently believe they can avoid that jurisprudential rule by a motion for en banc consideration. They nonetheless present at length their precluded arguments at a time when no such review has been granted. *E.g.*, Defs. Br. at 6-15, 18-53. Plaintiffs recognize that Federal Rule of Appellate Procedure 35(e) provides that "[n]o response may be filed" to such a motion except at the Court's direction. Accordingly, plaintiffs have no right to articulate the overwhelming and numerous reasons requiring the denial of defendants' motion.

Independent of that motion, however, defendants' cross-appeal seeks to misuse the district court's *sua sponte* injunction as an illegitimate means to revisit the fully resolved constitutional issues.

A. Defendants' Constitutional Arguments Are Barred By The Law Of The Case Doctrine.

Defendants rely heavily on their cross-appeal from the district court's injunction as a contrivance to enable them to re-litigate the constitutional issues they litigated and lost in 1996. Defendants go so far as to argue that "[i]f the injunction is reversed, the law school will again implement an affirmative action plan . . . as it did from 1994 to 1996," Defs. Br. at 54 -- which is effectively an assertion that if the district court erred in entering the injunction, that error itself somehow provides a means to circumvent this Court's 1996 decision. The Court's 1996 decision, however, precludes racial preferences inconsistent with its statement of the law, and the district court cannot, by its unilateral acts and errors, change the effect of the 1996 decision or revive issues decided by this Court and precluded from reconsideration by the law of the case doctrine.

Defendants recognize that "[a] panel of the Fifth Circuit cannot even reconsider another

panel's decision absent en banc review." Defs. Br. at 24 (emphasis in original). That statement is correct in matters of Circuit precedent. But defendants' arguments are also barred here by the law of the case doctrine. Under both doctrines, defendants may not convert this appeal into a belated motion for reconsideration of this Court's 1996 decision in this case. Consequently, most of the first 53 pages of defendants' brief are irrelevant to any issue before the Court. *E.g., Burroughs*, 70 F.3d at 33 ("On a second appeal following remand, the only issue for consideration is whether the court below [complied with the appellate court's] previous opinion and mandate. . . . [T]his Court will not reconsider issues decided by the prior panel.") (citation omitted)). The irrelevant pages should be stricken.

In all but the most egregious circumstances, the law of the case doctrine precludes reconsideration of issues decided on a prior appeal even when the subsequent appeal is heard by the Court en banc. *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 113-14 (5th Cir. 1962) (en banc) (an en banc Court will not exercise the power to reconsider previous appellate decision on second appeal unless "substantially different" evidence is introduced at the remand trial, or the prior decision is "clearly erroneous" and would produce "manifest injustice"). Any other rule would undermine "stability in the law" and "put[] a premium on multiple appeals." *Id.*

Defendants did nothing on remand to place themselves within the rule of *Lincoln National Life* -- a failure that is not surprising given the parties' and the courts' shared understanding that purely *remedial* issues were to be tried on remand. Defendants did not attempt any showing of manifest injustice, nor did they offer any evidence -- let alone "substantially different" evidence -- regarding their abandoned race-based admissions program, or any evidence at all regarding a conjectural admissions program they might adopt at some point in the future. *See, e.g., Hopwood v. Texas*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting denial of petition) (noting *defendants' concession* as to the inadequacy of the record and concluding that defendants' abandonment of their concededly unconstitutional admissions system leaves no "program genuinely in controversy"). Thus, *defendants themselves* failed to make the showing required under *Lincoln National Life.*

It is not in dispute that defendants chose to discriminate against plaintiffs *seven years ago*. Yet defendants have sought through ensuing years of litigation to avoid responsibility for their race discrimination, marshaling the resources of the State, of the Law School, and of the nationwide "pro bono" bar. Requiring plaintiffs to vindicate their constitutional claims once again, and postponing further plaintiffs' individual remedies, would be a manifest injustice, and defendants' litigation tactics impose unreasonable burdens on plaintiffs that magnify the injustice. Defendants' message for

civil rights plaintiffs is unmistakable: Texas will engage in massive resistance, even to orders of the Fifth Circuit, and prolong litigation on any pretext to wear down anyone who has the temerity to challenge defendants' unconstitutional practices. Defendants' ill-considered assault on the law of the case doctrine should be rejected.

B. The District Court's Injunction Does Not Permit Defendants To Raise Issues That Were Not Litigated During The Remand Trial.

The district court's one-sentence injunction is so obviously flawed that it cannot transform this appeal from a focused consideration of remedial issues into a wide-ranging seminar on defendants' policy preferences for which there is no record support. Indeed, the legal significance of the injunction is limited to demonstrating further the district court's manifold errors and its inability to discharge its responsibilities with objectivity.

In its initial decision in 1994, the district court denied plaintiffs' request for prospective injunctive relief because the law school had changed its admissions system just prior to trial to eliminate the only features that the district court found constitutionally objectionable. 861 F. Supp. at 582 & n.87. This Court concluded that many more of defendants' practices violated the Constitution, but agreed that

prospective injunctive relief was unnecessary:

> It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.

78 F.3d at 958-59. Guided by that decision, plaintiffs never sought an injunction on remand and made no effort to introduce evidence to suggest that defendants were not complying with this Court's decision. Indeed, neither plaintiffs nor defendants raised any issue on remand with respect to prospective injunctive relief.

The defendants seize on the district court's flawed injunction as a pretext to re-open the already-determined constitutional issues. The district court entered the injunction *sua sponte,* but, as plaintiffs pointed out in their opening brief, made no findings of fact or conclusions of law to support the injunction, despite the requirements of Federal Rule of Civil Procedure 52(a). Pls. Br. at 5. Indeed, the injunction is not even mentioned in the body of the district court's lengthy opinion. The injunction is thus legally indefensible --

as the district court surely knew. *E.g., United States v. Rohm & Haas Co.*, 500 F.2d 167, 176 (5th Cir. 1974) (holding that injunction "must be vacated in view of the District Court's failure to comply with Rule 52(a)" where district court entered injunction with no findings of fact and "without any comment as to the reason or legal basis"). Nevertheless, defendants are so eager to use the injunction as a springboard to re-appeal this Court's earlier decision that they never point out that the injunction must be vacated under Rule 52(a). This tactic shows that defendants' real target is not the invalid injunction, but rather this Court's 1996 decision. Defendants apparently are willing to overlook their obvious arguments in an effort to use the injunction to obtain a new, improper appeal of the 1996 decision.

Even if the issue had been raised, evidence presented, and findings made, the injunction is overbroad and inconsistent with this Court's carefully crafted 1996 decision. 78 F.3d at 958. This Court did not preclude defendants from ever considering race in admissions. Rather, it held only that the Law School could not consider race "for the purposes of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school." *Id.* The district court's injunction thus impermissibly departs from the mandate of this Court. "*On remand, the district court must comply with the mandate of the court of appeals*, and may not *revisit* any issues that the court of appeals expressly or impliedly disposed of in its decision." *Gegenheimer v. Galan*, 920 F.2d 307, 309 (5th Cir. 1991) (emphases added). Similarly, a district court may not on remand address issues *outside* the mandate of this Court. *E.g., Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 387 (5th Cir. 1989) (reversing district court where legal theory supporting remand decision "reaches beyond" original mandate).

If the district court had actually believed that the injunction was warranted and appropriate, it would have buttressed the injunction with the requisite findings, and it would also have acknowledged that obtaining the injunction against the defendants supported a fee award to plaintiffs for their efforts on the remand trial. Yet the district court refused even to permit plaintiffs to submit any evidence with respect to those efforts, and awarded zero fees for that work. Pls. Br. at 38-39.

In short, the injunction is insupportable, and the circumstances surrounding the injunction do not reflect well on the motivations for its issuance. This Court has already set forth the constitutional limits on defendants' conduct, 78 F.3d at 958, and accordingly the Court should vacate the injunction as it corrects the district court's other errors.

V.

Remand To A Different Judge Is Necessary.

In their opening brief, plaintiffs extensively document the district court's errors and the sentiments that kept it from rendering an impartial decision. The district court itself signaled that it never wanted to see this case again, both in its disdain for this Court's ruling on appeal and in making its "alternative" findings to "ensure" no further trial. *See also* Record at 3831-32 (district court responded to counsel's request for a status conference by complaining that the request compelled the court to take medication). The cumulative weight of these factors have led plaintiffs, reluctantly, to ask that this case be remanded to a different judge. Pls. Br. at 46.

Defendants oppose that request, first arguing that no remand at all is necessary. Defs. Br. at 81. That argument must be rejected for all the reasons discussed above. Therefore, the question of remand to one judge or another cannot be avoided.

Defendants' remaining arguments are equally meritless. Defendants claim that plaintiffs based their request merely on the district court's disagreement with their damage evidence, and to punish the district court "for noting the weaknesses of their case in his written opinion." Defs. Br. at 82. Neither assertion is remotely correct as plaintiffs' opening brief abundantly demonstrates. Defendants are also wrong to argue that the plaintiffs took some of the district court's excessive language "out of context." Defs. Br. at 81 n.28. The tone of the district court's opinion is self-evident and overwhelming; and it is noteworthy that not even defendants maintain that the court's language is appropriately temperate and judicial.

Defendants also assert that remand to a different judge is not proper because it "would entail a huge duplication of effort and waste scarce judicial resources." Defs. Br. at 83. Given that defendants have needlessly burdened the Court with an inaccurate, misleading and factually unsupported 53-page exegesis on issues already conclusively determined by the Court, and given that the defendants have seen fit to burden every individual member of the Court with a disfavored motion under Rule 35, defendants can scarcely be heard to accuse the plaintiffs of imposing burdens or wasting judicial resources. In any event, a remand to a different judge, limited to the proper calculation of damages on the record already compiled and to calculation of attorneys' fees for the period following denial of certiorari in 1996, should impose only a slight burden; but whether that burden is slight or great, it is a burden that is necessary in order that justice may be done, and may be known to be done, to plaintiffs in this case.

CONCLUSION

Plaintiffs have had to wait far too long, and have had to battle far too many obstacles thrown up by the defendants, in order to achieve substantial, individual remedies for defendants' unconstitutional racial discrimination. It is time for that wait and those battles to be over.

Plaintiffs Hopwood and Carvell respectfully request that this Court reverse the district court and enter an injunction ordering Hopwood's admission to the Law School, reject the defendants' illegitimate effort to re-open the issues decided by this Court in 1996, enter an appropriate award of attorneys' fees through the Supreme Court's denial of *certiorari* on July 1, 1996, and remand this matter to a different judge for an award of damages and an award of attorneys' fees incurred after July 1, 1996.

Dated: May 17, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing Reply Brief and Brief in Opposition of Plaintiffs-Appellants-Cross Appellees Hopwood and Carvell plus 6 additional paper copies and one electronic copy were filed with the Court on the 17th day of May, 1999, by United States mail, first class, postage prepaid. I also certify that I caused to be served a paper and an electronic copy of the foregoing Reply Brief and Brief in Opposition of Plaintiffs-Appellants-Cross Appellees Hopwood and Carvell on the 17th

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 37(a)(7)(B) and 5th Cir. R. 32.2.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN Fed. R. App. P. R. 37(a)(7)(B)(iii) and 5th Cir. R. 32.2, THE BRIEF CONTAINS: 12,790 words.

2. THE BRIEF HAS BEEN PREPARED in proportionally spaced typeface using Microsoft Word 6.0 in Times New Roman font, with 14 pitch font for text and 14 pitch font for footnotes.

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.2, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE

PERSON SIGNING THE BRIEF.

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Theodore B. Olson