No. 98-50506

In The

United States Court Of Appeals

For The Fifth Circuit

Cheryl J. Hopwood,

Plaintiff-Appellant-Cross-Appellee,

v.

State of Texas, *et al.*,

Defendants-Appellees-Cross-Appellants-Cross-Appellees,

Douglas Carvell,

Plaintiff-Appellant-Cross-Appellee,

and

Kenneth Elliott; David Rogers,

Plaintiffs-Appellees-Cross-Appellants,

v.

State of Texas, *et al.*,

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

On Appeal from the United States District Court

for the Western District of Texas

Brief of the State of Texas, *et al*.

JOHN CORNYN

Attorney General of Texas

P.O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 463-2191
[Fax] (512) 474-2697

Attorney for the State Of Texas, et. al.

Additional Counsel Listed on Reverse

Additional Counsel

Linda S. Eads
Gregory S. Coleman
Julie Caruthers Parsley
Meredith B. Parenti
Brent A. Benoit
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 463-2191
Facsimile: (512) 474-2697
Harry M. Reasoner
Allan Van Fleet
Betty R. Owens
Beverly G. Reeves
Vinson & Elkins L.L.P.
1001 Fannin Street
Houston, Texas 77001-6760
Telephone: (713) 758-2358
Facsimile: (713) 615-5173
Samuel Issacharoff
Douglas Laycock
727 E. Dean Keeton Street
Austin, Texas 78705
Telephone: (512) 471-5151
Facsimile: (512) 477-8149
Facsimile: (512) 471-6988
John L. Hill, Jr.
Locke Liddell & Sapp LLP
3400 Chase Tower, 600 Travis

Houston, Texas 77002-3095

Telephone: (713) 226-1230

Facsimile: (713) 223-3717

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Cheryl J. Hopwood

Douglas W. Carvell

Kenneth R. Elliott

David A. Rogers

Counsel for Plaintiffs-Appellants Hopwood and Carvell

Michael P. McDonald

Michael E. Rosman

Center for Individual Rights

1300 19th Street, N.W. #260

Washington, D.C. 20036

Theodore B. Olson

Douglas R. Cox

Daniel Nelson

Gibson, Dunn & Crutcher

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

Walter J. Skip Scott, Jr.

Gibson, Dunn & Crutcher

1717 Main Street, Suite 3400

Dallas, Texas 75201

Counsel for Plaintiffs-Appellants Elliott and Rogers

Steven W. Smith

3608 Grooms Street

Austin, Texas 78705

Counsel for Plaintiffs-Appellants

Terral R. Smith

100 Congress Ave., #1100

Austin, Texas 78768-2023

R. Kenneth Wheeler

Paul J. Harris

1100 Boulders Parkway, Suite 100

Richmond, Virginia 23225

Joseph A. Wallace

P.O. Box 1669

Elkins, West Virginia 26241

Defendants-Appellees/Cross-Appellants

The State of Texas

The University of Texas Board of Regents

Bernard Rapoport, in his official capacity as a former member of the University of Texas Board of Regents

Ellen C. Temple, in her official capacity as a former member of the University of Texas Board of Regents

Lowell H. Lebermann, Jr., in his official capacity as a former member of the University of Texas Board of Regents

Robert J. Cruikshank, in his official capacity as a former member of the University of Texas Board of Regents

Thomas O. Hicks, in his official capacity as a former member of the University of Texas Board of Regents

Zan W. Holmes, in his official capacity as a former member of the University of Texas Board of Regents

Tom Loeffler, in his official capacity as a member of the University of Texas Board of Regents

Mario E. Ramirez, in his official capacity as a former member of the University of Texas Board of Regents

Martha E. Smiley, in her official capacity as a former member of the University of Texas Board of Regents

Rita Crocker Clements, in her official capacity as a member of the University of Texas Board of Regents

Donald L. Evans, in his official capacity as a member of the University of Texas Board of Regents

Patrick C. Oxford, in his official capacity as a member of the University of Texas Board of Regents

A. W. Riter, Jr., in his official capacity as a member of the University of Texas Board of Regents

A. R. Sanchez, in his official capacity as a member of the University of Texas Board of Regents

Woody L. Hunt, in his official capacity as a member of the University of Texas Board of Regents

Charles Miller, in his official capacity as a member of the University of Texas Board of Regents

Raul R. Romero, in his official capacity as a member of the University of Texas Board of Regents

The University of Texas at Austin

Robert M. Berdahl, in his official capacity as former President of the University of Texas at Austin

Larry R. Faulkner, in his official capacity as President of the University of Texas at Austin

The University of Texas School of Law

Mark G. Yudof, in his official capacity as former Dean of the University of Texas School of Law

M. Michael Sharlot, in his official capacity as Dean of the University of Texas School of Law

Stanley M. Johanson, in his official capacity as Professor of Law of the University of Texas School of Law

Counsel for Defendants-Appellees/Cross-Appellants

John Cornyn
Attorney General of Texas
Linda S. Eads
Gregory S. Coleman
Julie Caruthers Parsley
Meredith B. Parenti
Brent A. Benoit
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Samuel Issacharoff
Douglas Laycock
University of Texas School of Law
727 E. Dean Keeton Street
Austin, Texas 78705
Harry M. Reasoner
Allan Van Fleet
Betty R. Owens
Kathleen B. Spangler
Vinson & Elkins
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002
Harley R. Clark, Jr.
Beverly G. Reeves
Vinson & Elkins
600 Congress Avenue
2700 One American Center
Austin, Texas 78701-3200
John L. Hill, Jr.
Locke Liddell & Sapp LLP
3400 Chase Tower
600 Travis
Houston, Texas 77002-3095

Statement Regarding Oral Argument

This case requires the Court to resolve extraordinarily important questions about the proper use of affirmative action in higher education admissions. These issues are both complex and controversial. We believe that oral argument will assist the Court in resolving the issues presented in this case and, therefore, request that the Court grant oral argument in this case.

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other

No. 98-50506

In The

United States Court Of Appeals

For The Fifth Circuit

Cheryl J. Hopwood, *et al.*,

Plaintiffs-Appellants-Cross-Appellees,

v.

State of Texas, *et al.*,

Defendants-Appellees-Cross-Appellants-Cross-Appellees,

Brief of the State of Texas, *et al*.

Three years ago, a panel of this Court declared that *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), is not good law, and held that The University of Texas School of Law could not consider race in its admissions decisions. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (*Hopwood II*). The effects of that decision were devastating. The law school suffered an immediate and drastic reduction in the number of minority students who enrolled. Almost overnight, the student body at the law school became more racially identifiable than it had been in decades.

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

Ironically, the injunction subsequently entered by the district court in accordance with *Hopwood II* closely resembles the injunction struck down in *Bakke*. No matter what one may say about the opinions in *Bakke*, five justices joined the Court's central holding in Part V(C) to reverse an injunction that was strikingly similar to the one sanctioned by *Hopwood II*.

Appellees-Cross-Appellants the State of Texas, *et al.*, believe that *Hopwood II* was wrongly decided and that the injunction entered pursuant to it was improper. The Court should reverse that injunction, affirm the finding of nominal damages only, and reverse the award of attorneys' fees.

Statement of Jurisdiction

The Court has jurisdiction over the district court's injunction and final judgment pursuant to 28 U.S.C. §1291.

Issues Presented

1. Whether the district court erred in enjoining The University of Texas School of Law from any consideration of race in admissions. (Cross Appeal).

2. Whether the district court clearly erred in finding that none of the plaintiffs would have been admitted to the law school in 1992 under a constitutional admissions process. (Response).

3. Whether a state may be held liable for damages under Title VI for conduct urged or requested by the administrative agency responsible for enforcement of the statute and completed before any clear notice that the conduct violated the statute and would result in damages. (Response).

4. Whether the district court's findings and alternative findings on damages are clearly erroneous. (Response).

5. Whether plaintiffs are entitled to recover any attorneys' fees when they recovered only nominal damages and received no personal benefit from the injunction. (Cross Appeal).

6. Whether, if any plaintiffs are entitled to recover attorneys' fees, the amount of fees awarded by the district court was an abuse of discretion or based on fact findings that are clearly erroneous. (Response).

7. Whether the district court abused its discretion in denying Elliott's request for discovery sanctions. (Response).

Statement of the Case

A. Course of Proceedings and Disposition in the Court Below

Plaintiffs, unsuccessful applicants for admission to The University of Texas School of Law, filed this action alleging that they were denied admission because of their race. After an eight-day trial, the district court held that the law school's consideration of race in admissions served the law school's compelling interests in maintaining a diverse student body and overcoming the effects of past discrimination. *Hopwood v. Texas*, 861 F.Supp. 551, 569-73 (W.D. Tex. 1994) (*Hopwood I*). This Court reversed, holding that the law school's racial classifications did not serve a compelling state interest. *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996) (*Hopwood II*).

On remand, the district court enjoined defendants "from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law." *Hopwood v. Texas*, 999 F.Supp. 872, 923 (W.D. Tex. 1998) (*Hopwood III*). That injunction forbids any consideration of race of any kind or to any degree in any future admissions program at the law school. Because the injunction is inconsistent with controlling Supreme Court precedent, defendants cross-appeal from the injunction order and, in a separate petition filed with this brief, ask that this appeal be heard initially by the Court en banc.

In addition to the injunction, plaintiffs on remand sought more than $5.4 million in damages and $1.5 million in attorneys' fees. *Hopwood III*, 999 F.Supp at 902, 903, 909, 910. After a four-day second trial, the district court awarded only nominal damages, finding that none of the plaintiffs would have been admitted to the law school under a race-neutral system of admissions. *Id.* at 900. In the alternative, assuming that plaintiffs would have been admitted, the district court found that plaintiffs had proved $46,000 in damages. *Id.* at 901-11. The district court also awarded approximately $775,000 in costs and attorneys' fees. *Id*. at 922-24. Both sides have appealed.

B. Statement of Facts

1. Brief History of Educational Discrimination in Texas.

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993); *see id.* at 915 (King, J., dissenting). The district court found that discrimination in Texas was nowhere more pervasive than in Texas's public education system. *Hopwood I*, 861 F.Supp. at 554-57. "The history of official discrimination in primary and secondary education in Texas is well documented in history books, case law, and the record of this trial." *Id*. at 554.

Texas's history of discrimination in primary and secondary education continues to have present-day effects. Even during the 1980s, many Texas students lived in school districts that courts and the United States Department of Justice had determined were still

unconstitutionally segregated. *Id.* at 554; D434. Over 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans. R.43.43; D378B. School districts were found to have practiced official discrimination against Mexican American as well as black students. *Hopwood I*, 861 F.Supp. at 554, 572-73.

In 1983, when the plaintiffs were attending high school or college and when the youngest applicants for the law school class of 2002 were entering grade school, this Court found that schools in Ector County still suffered from unconstitutional segregation. *United States v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983). Dallas public schools were still segregated and had "opposed any student desegregation, no matter how feasible or how minimal." *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983). Fort Worth still was not unitary. *Flax v. Potts*, 567 F.Supp. 859, 861 (N.D. Tex. 1983). Although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students." *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983). At the time of trial, when the law school class of 2011 was entering grade school, desegregation lawsuits were still pending against at least 40 Texas school districts. *Hopwood I*, 861 F.Supp. at 554; D457.

Many minority residents who applied for admission to the law school in 1992 would have spent all or most of their precollege education in school systems that had been unconstitutionally segregated and had never been declared unitary. *Hopwood I*, 861 F.Supp. at 572-73. The evidence at trial of expert educators and social scientists, as well as the testimony of minority students, established that Texas's history of segregation in public education continues to be manifest in tangible harm suffered by minority students. *Hopwood I*, 861 F.Supp. at 554-55, 573; D422; R.46.49; R.47.37-42. Accordingly, the district court found that official discrimination had "handicapped the educational achievement of many minorities." *Hopwood I*, 861 F.Supp. at 573.

Regrettably, the law school also contributed to Texas's history of official discrimination. *See Sweatt v. Painter*, 339 U.S. 629, 632, 70 S.Ct. 848, 849-50 (1950). The district court found that overt discrimination at the law school continued "during the 1950s, and into the 1960s." *Hopwood I*, 861 F.Supp. at 555.

The law school has since the early 1970s attempted to remedy that history of discrimination. Although the law school had already stopped any overt discrimination, it recognized that "affirmative" action was necessary to remedy past discrimination both in the law school and, more generally, in Texas's public education system. In 1971, with no affirmative action plan in place, the law school admitted no black students. *Id.* at 558. In 1974, only 10 of the law school's 1600 students were black. *Id.* at 573 n.66. The law school responded by beginning to consider race in its admissions process. *Id.* at 558.

For over twenty years the executive branch of the federal government has forcefully insisted that Texas and the law school take affirmative, race-conscious measures to ensure that the current effects of past discrimination are eliminated in Texas's higher education institutions. In 1977, the district court for the District of Columbia ordered the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (now the Department of Education or DOE) to investigate discrimination in Texas's system of higher education. *Hopwood I*, 861 F.Supp. at 555; D296. *See Adams v. Richardson*, 356 F.Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). Following a two-year investigation, OCR found in 1980 that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. OCR also found significant under-representation of Hispanics in state institutions of higher education and insisted on a desegregation plan that included enrollment goals for Hispanics as well as blacks. *Hopwood I*, 861 F.Supp. at 556.

Because of OCR's findings, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan), which included a general commitment to equal educational opportunity for both black and Hispanic students and student body desegregation. *Id.* at 556; D237. In 1982, DOE informed Governor Clements that the Texas Plan was deficient because the numeric goals for black and Hispanic enrollment in graduate and professional programs were insufficient to enroll minorities in proportion to their representation among graduates of Texas's undergraduate institutions. *Hopwood I*, 861 F.Supp. at 556; D284. Texas submitted a revised plan that OCR again rejected, in part because it did not set targets for increasing minority enrollment at *each* institution instead of on a statewide basis. *Hopwood I*, 861 F.Supp. at 556; D219.

In March 1983, the *Adams* court found that "Texas has still not committed itself to the elements of a desegregation plan which in [DOE's] judgment complies with Title VI" and ordered enforcement proceedings to begin unless Texas submitted a fully conforming plan within 45 days. *Hopwood I*, 861 F.Supp. at 556; D446. In response, OCR recommended that each Texas professional school reevaluate its admissions criteria and "admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." *Hopwood I*, 861 F.Supp. at 556; D220 at 5. In June 1983, OCR accepted the revised Texas Plan. *Hopwood I*, 861 F.Supp. at 556. As OCR required, the Plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such schools." D238 at 7.

In November 1987, DOE contacted Governor Clements regarding the Plan's expiration in 1988. DOE instructed Texas officials to continue to operate under the Plan while OCR evaluated whether further action would be necessary to bring Texas into compliance with Title VI. *Hopwood I*, 861 F.Supp. at 556; D323. The district court found that Texas officials concluded that Texas had not met

OCR's goals and that they therefore adopted a successor plan to avoid a federal mandate to negotiate another plan. *Hopwood I*, 861 F.Supp. at 557. In January 1994, DOE notified Governor Richards that OCR continued to oversee Texas's desegregation efforts and would review the Texas system in light of *United States v. Fordice*, 505 U.S. 717, 733-36, 112 S.Ct. 2727, 2738-39 (1992). *Hopwood I*, 861 F.Supp. at 557.

OCR has been absolutely insistent that Texas continue its affirmative action efforts, even in the wake of *Hopwood II*. Indeed, in 1997, OCR threatened to cut off Texas's federal funding if the State followed the panel's holding. *See* Peter Applebome, *Texas Is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N. Y. Times Mar. 26, 1997, at B4. Although OCR backed down on that particular threat, it has not backed down on its demand that Texas maintain its affirmative action efforts. In February 1997, DOE wrote Governor Bush to renew OCR's dialogue with Texas "to augment our information in the areas of the [desegregation] plan where OCR has concerns, and to address information indicating possible problems with higher education opportunities for blacks and Hispanics in Texas." D652. To this day, DOE has yet to determine that Texas's higher education system complies with Title VI and the Fourteenth Amendment.

Pursuant to the 1983 Texas Plan, the law school's Admissions Committee sought to enroll blacks and Mexican Americans in proportion to their graduation rates from Texas undergraduate institutions. *Hopwood I*, 861 F.Supp. at 560. The administrative details of the program evolved in light of experience, *id.* at 557-60, 582 n.87, and the number of black and Mexican American students fluctuated substantially, *id.* at 574 n.67. The district court, reviewing the statistics and evaluating the credibility of Admissions Committee members, found that the law school's targets were not rigid quotas, but "aspirations only, subject to the quality of the pool of applicants." *Id.* at 563. From 1983 through 1996, the combined enrollment of black and Mexican American students in the law school's entering classes ranged from a high of 20.5% in 1984 to a low of 13.4% in 1987. *Id.* at 574; D71. Over time, the pool of minority applicants became stronger, and the law school was able to reduce the magnitude of racial preferences, slowly but persistently progressing toward a race-neutral system of admission. *Hopwood I*, 861 F.Supp. at 560 n.18, 575 & n.69.

With affirmative action, the law school's 1992 entering class of 514 students included 41 blacks (8.0%) and 55 Mexican Americans (10.7%). *Id.* at 574 & n.67. Without affirmative action, it was undisputed that the class would have included at most only 9 blacks (1.8%) and 18 Mexican Americans (3.6%), *id.* at 573; D441, assuming that minorities offered admission would continue to attend the law school at the same rates, despite their assured isolation and the message that abandoning affirmative action sent to Texas's black and Mexican American communities. Graduates from Texas's undergraduate institutions in 1992 were 6.2% black and 12.8% Mexican American. D430. The general population of Texas in 1994 was 11.9% black and 25.3% Mexican American. In 1999, Texas's population is estimated to be 11.6% black and 29.6% Mexican American. *See* Texas Comptroller of Public Accounts, Population Forecasts for Texas Counties by Race/Ethnicity 1990-2030, <http://www.cpa.state.tx.us/cgi-bin/poppgm> (1999) ("Comptroller's Population Forecast").

Enrollment figures after the Court's *Hopwood II* decision were even worse than predicted for blacks, but somewhat better for Mexican Americans. Despite intense recruiting efforts, the law school enrolled only 4 blacks and 26 Mexican Americans in the class that entered in 1997, and only 8 blacks and 30 Mexican Americans in the class that entered in 1998. In 1993, 62% of all black law students attending one of Texas's public law schools attended Texas Southern University (TSU), a historically black law school. If an absolute ban on affirmative action remains in place, almost 90% of all black law students in Texas will attend TSU, where the student body will be over 85% blacks and Mexican Americans. D453; D454; R.36.44-48; *see Hopwood I*, 861 F.Supp. at 573 n.66.

Under the injunction, the university is virtually powerless to effectively remedy the current effects of past discrimination in Texas's public education system. In addition, the district court found that "it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority students." *Hopwood I*, 861 F.Supp. at 573. The abandonment of any consideration of race has not only severely frustrated the law school's attempts to remedy the vestiges of past discrimination and achieve a diverse student body, it has also crippled the law school's ability to compete with schools outside the State in recruiting the brightest minority law school applicants. *Hopwood I*, 861 F.Supp. at 573-74.

2. Assessment of Plaintiffs' Applications

At the trial on remand, Olin Guy Wellborn testified for the defendants. Professor Wellborn has served on the law school's Admissions Committee for over fifteen years, including 1992. In accordance with this Court's prior decision, Wellborn analyzed whether the plaintiffs would have been admitted to the law school under a race-neutral admissions system and concluded that none of the plaintiffs would have been admitted. R.55.37-38; D519; D520; *see Hopwood III*, 999 F.Supp. at 885-93. The plaintiffs offered no witnesses, expert or otherwise, to controvert this evidence, nor did they provide any testimony about the form of a race-neutral admissions system or whether any of the plaintiffs would have been admitted under such a system.

Wellborn's inquiry into whether the plaintiffs would have been admitted under a race-neutral procedure in 1992 included: lowering the presumptive admission line from 199 to 198; lowering the presumptive denial line from 192 to 190; concluding that all nonminority residents who had been admitted in 1992 in spite of racial preferences would more likely than not be admitted; and providing approximately the same number of offers that would be needed to fill the seats made available by eliminating the racial preferences. *Hopwood III*, 999 F.Supp. at 886. Wellborn then reviewed the 96 resident minority applicants who were offered admission in 1992

and the approximately 450 denied residents (minority and nonminority) who had TI scores above 190. *See* D520; R.55.45. Wellborn considered the caliber of the applicant's school as shown by the LSAT college mean; the applicant's major, rank in class, and college transcript; the applicant's personal statement and letters of recommendation; and other factors such as the applicant's age and background.

Wellborn attempted to predict which applicants would most likely be offered admission. He made an overall estimate of who was likely to be admitted or denied, based upon his experience on the committee and his judgment about which criteria are generally most influential and most important to the committee as a whole. R.55.231-33,249-51. He testified that all denied nonminorities within the discretionary zone would clearly not have an equal chance of admission and that the process is not random or "unpredictable." R.55.250.

In an initial report, he determined that the additional offers would go to applicants better qualified than the plaintiffs. D519. Wellborn then reviewed all the admitted minority and denied discretionary zone applicants to identify all applicants most likely to be admitted in a race-neutral process. Having previously determined that Hopwood and Carvell were stronger than Elliott and Rogers, but were still unlikely to be admitted, he used their files as a benchmark in initially reviewing the 450 applicants. He identified approximately 200 applications that were more promising than the rest of the applications under review. *Hopwood III*, 999 F.Supp. at 887-88; D520; R.55.45,163.

Wellborn then examined those 200 applicants in greater detail. He identified 97 applicants who he predicted would be most likely to receive offers of admission in a race-neutral process and then identified an additional 22 applicants who were less qualified than the 97, but still more likely to receive offers of admission than the remaining applicants. None of the plaintiffs was among the applicants selected by Wellborn as probable admittees.

Standard of Review

The trial court's findings of fact must be accepted unless clearly erroneous or grounded on an incorrect view of the law. *Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994); Fed. R. Civ. P. 52(a). None of the facts found in the first trial were set aside as clearly erroneous in the first appeal. Questions of law are reviewed de novo. *Branch-Hines v. Hebert*, 939 F.2d 1311, 1317 (5th Cir. 1991).

Attorneys' fee awards are reviewed under an abuse of discretion standard, while the supporting factual findings are reviewed for clear error. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S.Ct. 1933, 1941 (1983)*; Riley v. City of Jackson*, 99 F.3d 757, 759 (5th Cir. 1996). "[T]he district court has broad discretion in setting the appropriate award of attorneys' fees." *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) (citing *Hensley*, 461 U.S. at 436-37, 103 S.Ct. at 1941).

Summary of Argument

For the first time in American history, a formerly segregated state institution has been enjoined from all ameliorative consideration of race in attempting to remedy past discrimination in a state's public education system and under-representation of minorities in that institution's student body. The injunction is a categorical command that the law school may not consider race, in any way or to any extent, in selecting students for admission. Race may not be used as a tiebreaker, or even as one factor among many.

The district court's sweeping injunction against all consideration of race in admissions to the law school stands in conspicuous contrast to two decades of Supreme Court cases governing the use of racial preferences. Most obviously, it directly rejects the holding of *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978), that race may be considered in admission to higher education. The injunction goes beyond *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721 (1989), which condemned not every racial consideration in municipal contracting, but only those that were "grossly overinclusive" in seeking some measure of amelioration of past racial exclusion. It also rejects the Supreme Court's nuanced approach in the redistricting cases, which did not prohibit any consideration of race, but only consideration that "predominates," *Miller v. Johnson*, 515 U.S. 900, 915-16, 115 S.Ct. 2475, 2488 (1995), or violates "traditional districting principles." *Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816, 2824 (1993). Finally, the injunction treats the Supreme Court's extension of strict scrutiny in *Adarand Constructors v. Peña*, 515 U.S. 200, 221, 115 S.Ct. 2097, 2109 (1995), to be precisely the "strict in theory, but fatal in fact" standard of review that the Supreme Court expressly cautioned against.

The breadth of the injunction means that this appeal is primarily about compelling interests, not narrow tailoring, because any finding of a potential compelling interest would have categorically barred the absolute injunction entered by the district court. Unlike the holding of this Court in *Dallas Firefighters Ass'n v. Dallas*, 150 F. 3d 438 (5th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3470 (Mar. 29, 1999), or that of the First Circuit in *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998), the panel opinion in *Hopwood II* did not find the law school's affirmative action program insufficiently narrowly tailored. Instead, because the Court found that there was no compelling interest that would justify any consideration of race, it never reached the narrow tailoring analysis.

The unprecedented constitutional breadth of the injunctive order is all the more striking given that the University of Texas is operating in a clear remedial context. As the district court found, Texas had operated a dual school system at all levels of education. The desegregation of higher education was still under the direct supervision of the DOE pursuant to a 1983 consent decree. A large number

of school districts had not yet been declared to be unitary and were operating under federal court desegregation oversight. In those circumstances, an absolute prohibition on any consideration of race was both improper and entirely without support. *See United States v. Fordice*, 505 U.S. 717, 733-36, 112 S.Ct. 2727, 2738-39 (1992); *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064 (1987); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342, 97 S.Ct. 1843, 1858 (1977); *cf. Johnson v. Transportation Agency*, 480 U.S. 616, 640, 107 S.Ct. 1442, 1443 (1987). There is no setting in the remedial desegregation case law in which an institution has been prohibited from taking race into account in order to achieve integration. Not schools; not employment; not contracting; not voting.

Carefully limited affirmative action is the only successful mechanism that has enabled flagship professional schools to maintain high admissions standards and high standards of excellence while addressing the vestiges of past discrimination, achieving racial diversity, and avoiding racial identifiability. Affirmative action sufficient to meet these goals can be constrained by judicially administrable limits derived from the Supreme Court's cases. This Court should reverse the injunction prohibiting any consideration of race in the admission process.

Even were this Court to allow the panel opinion and the ensuing injunction to stand, there is no basis for the award of more than nominal damages. Plaintiffs would not have been admitted under a race-neutral admissions program, nor have they suffered any legally compensable damages. Even if plaintiffs had proven damages, the State cannot be held liable for damages under a Spending Clause statute for conduct consistent with the interpretation of the statute by the agency charged with its enforcement. A state is entitled to choose between complying with the statute or rejecting federal funds, and it is entitled to clear notice of federal requirements before damage liability can accrue.

Similarly, even if the injunction were to stand, this Court should reverse the award of attorneys' fees because plaintiffs obtained no personal relief apart from $1 in nominal damages. Alternatively, even were this Court to allow attorneys' fees, the district court's findings of fact on the appropriate lodestar calculation should be affirmed. In addition, the trial court properly decided that no sanctions were available against defendants, and the plaintiffs' attacks on the district court should be roundly rejected.

Argument

I. The Injunction Should Be Reversed Because It Conflicts with the Supreme Court's Judgment in *Bakke*.

The district court enjoined the law school and its officers "from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law." That blanket prohibition conflicts with the only clear holding in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). Although *Bakke* was a fractured decision, with six different opinions and Justice Powell announcing the judgment of the Court, one clear holding emerged in Part V(C), the core of the opinion of the Court in which five Justices (Powell, Brennan, White, Marshall, and Blackmun) joined:

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

Id. at 320, 98 S.Ct. at 2763. That is the clear holding of *Bakke*. Justices Brennan, White, Marshall, and Blackmun expressly agreed with Justice Powell that some uses of race in university admissions are permissible. *Id.* at 325-26, 98 S.Ct. at 2766 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). Thus, *Bakke* reversed an injunction, substantially identical to the one entered by the district court in this case, that prohibited any consideration of race in admissions. A faithful reading of *Bakke* mandates the same result in this case.

The Supreme Court has not overruled *Bakke*, and this Court remains bound by its controlling precedent. *See Agostini v. Felton*, 521 U.S. 203, 237-38, 117 S.Ct. 1997, 2017 (1997) (only the Supreme Court has the prerogative of overruling its own decisions); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989) (same). Lower courts may not conclude that more recent Supreme Court cases have, by implication, overruled an earlier precedent. *Agostini*, 521 U.S. at 237-38, 117 S.Ct. at 2017. Yet that is exactly what the panel in this case did. Relying on dicta in Supreme Court cases involving contracting and layoffs of public employees, none of which overruled *Bakke* or dealt with higher education, the panel essentially pronounced that opinion dead. *Hopwood II*, 78 F.3d at 944 (stating that "the *Bakke* Court did not express a majority view and is questionable as binding precedent") (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221, 115 S.Ct. 2097, 2109 (1995)). A panel of the Fifth Circuit cannot even reconsider another *panel's* decision absent en banc review. Supreme Court decisions should be entitled to at least as much deference.

In the past, this Court has repeatedly recognized and followed the fundamental principle that Supreme Court decisions should be followed until they are clearly overruled. *See Haynsworth v. The Corporation*, 121 F.3d 956, 969 n.26 (5th Cir. 1996) (holding that the panel is bound to follow prior Supreme Court precedent "regardless of whether we believe (or, as the case may be, do not believe) that later decisions have undermined its rationale"); *Wilkinson v. Whitley*, 28 F.3d 498, 504 n.8, 505 n.10 (5th Cir. 1994) (declining to ignore a case not yet overruled by the Supreme Court); *Williams v. Whitley*, 994 F.2d 226, 235 (5th Cir. 1993) (holding that the panel

should not refuse to follow Supreme Court precedent "simply because its reasoning and result appear inconsistent with later cases").

Despite the panel's disregard for *Bakke*, the Supreme Court authorized some consideration of race in admissions based on either Justice Powell's diversity rationale or on Justice Brennan's view that it may be used as a remedy for past discrimination. *Bakke*, 438 U.S. at 311-15, 98 S.Ct. at 2759-61 (opinion of Powell, J.), *id.* at 325-26 & n.1, 98 S.Ct. at 2766 & n.1 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993 (1977); *see City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 765 n.9, 108 S.Ct. 2138, 2148 n.9 (1988). Although judges may disagree about which rationale is narrower, the Supreme Court was clear in *Bakke* that *some* consideration of race in admissions is permissible.

Regardless of which rationale is used to justify the consideration of race in admissions, five Justices in *Bakke* endorsed an affirmative action plan that allowed some consideration of race along with many other factors. The district court's injunction would prohibit even a Harvard-style affirmative action plan that considers race among many other factors. Accordingly, the injunction and the panel's opinion conflict with the Supreme Court's holding in *Bakke*. While courts may disagree about the rationales or circumstances that may allow the use of race in admissions, they cannot ignore the Supreme Court's precedent.

II. The Injunction Should Be Reversed Because Compelling Interests Justify the Use of Carefully Limited Affirmative Action.

A. Defendants Have a Compelling Interest in Remedying the Present Effects of Past Discrimination.

The *Hopwood II* panel improperly treated both the past discrimination against minorities in Texas's public education system, and the enforcement efforts of the Office for Civil Rights pursuant to the *Adams* consent decree, as irrelevant to the propriety of the law school's affirmative action program. Instead, it held that the law school could consider race only as a remedy for its own recent discrimination. *Hopwood II*, 78 F.3d at 948-52. The district court's injunction perpetuated that error.

As an initial matter, it is clear that a public educational institution has an affirmative duty to achieve desegregation and eliminate all vestiges of the former segregated system. "The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise*, 480 U.S. at 167, 107 S.Ct. at 1064. In determining whether remedial action is justified, the trial court need only "make a factual determination that the [defendant] had a strong basis in the evidence for its conclusion that remedial action was necessary." *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1849 (1986)). In *Hopwood I*, the district court made that factual determination based on the continuing racial identifiability of Texas's public law schools and the continuing effects of past discrimination by Texas in the education of blacks and Mexican Americans at all levels, including the University of Texas and the law school. *Hopwood I*, 861 F.Supp. at 571-73. The *Hopwood II* panel disregarded this finding because it believed that only discrimination at the law school could justify remedial action at the law school. *Hopwood II*, 78 F.3d at 948-52.

1. The Court Erred in Looking Only at the Law School in Isolation and Not Considering Discrimination in Other Texas Schools from Which Law School Applicants Come.

The panel's reasoning is internally inconsistent because only looking at the history of discrimination at the law school–only one component of Texas's education system–will not redress the harm to students who were the victims of past discrimination by Texas's education system. For example, a minority student who attended a segregated primary school in the 1970s or 1980s receives no benefit from remedial measures implemented at that primary school after the student leaves. Yet, under the panel's reasoning, the only appropriate remedy is belated remedial action at the primary school that does not benefit the actual victims of discrimination.

The correct approach is to recognize that students who were victims of past discrimination in Texas's public education system are now in Texas's higher education system. The unique self-contained nature of a State's education system makes it possible to afford some relief to a class of individuals that will include the actual victims of discrimination. Accordingly, one way to narrowly tailor remedial action to remedy the effects of past discrimination in Texas's public education system is to provide remedial measures at Texas's higher education institutions, including the law school. Such an approach would be consistent with the Sixth Circuit's decision in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986). In *Geier*, the Sixth Circuit stated:

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

Id. at 809-10.

Moreover, remedial action that focuses on the public education system rather than myopically focusing on an individual institution also comports with the prior rulings of the United States Supreme Court. In *United States v. Fordice*, the Court made it clear that a State's duty to end and remedy past discrimination is assessed by focusing on the State's "institutional system":

> *[T]he State of Mississippi* had the constitutional duty to dismantle the dual school system that its laws once mandated. Nor is there any dispute that *this obligation applies to its higher education system.* . . . Thus we have consistently asked whether existing racial identifiability is attributable *to the State* . . . and examined a wide range of factors to determine *whether the State* has perpetuated its formerly de jure segregation *in any facet of its institutional system.*

Fordice, 505 U.S. at 727-28, 112 S.Ct. at 2735-36 (citations omitted) (emphasis added).

In finding that only past discrimination at the law school itself will justify remedial action at the law school, the panel relied on two cases: *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842 (1986), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989). Neither, however, support the panel's conclusion. In *Wygant*, the Court rejected "societal discrimination" as a valid basis for remedial race-based action. *Wygant*, 476 U.S. at 274-75, 106 S.Ct. at 1847. The Court found that there should be "some showing of prior discrimination by the governmental unit involved." *Id.* at 274, 106 S.Ct. at 1847. Contrary to the panel's reasoning, however, the Court in *Wygant* never defined "governmental unit." *Id.* In *Croson*, the Court addressed a minority set-aside program for construction contracts in the City of Richmond. The Court rejected the notion that past discrimination in the entire construction industry could support such a plan. *Croson,* 488 U.S. at 470, 109 S.Ct. at 709. In doing so, the Court noted that "'[r]elief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] in Richmond mirrored the percentage of minorities in the population as a whole." *Id.* at 498, 109 S.Ct. at 724. Accordingly, the *Croson* Court felt that the relevant inquiry was past discrimination in the Richmond construction industry–not the national construction industry and not other industries or institutions in Richmond. *Id.* at 505, 109 S.Ct. at 728.

Wygant and *Croson* do not control this case. First, neither case concerned a State's public education system. Second, while both cases appear to be concerned with the breadth of discrimination that can justify race-based remedial measures, neither case commands the narrow approach taken by the panel. In *Wygant*, the Court cited its prior opinion in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977), as standing for the proposition that an evaluation of discrimination in the employment context should focus on "the relevant labor market." *Wygant,* 476 U.S. at 275, 106 S.Ct. at 1847 (quoting *Hazelwood*, 433 U.S. at 308, 97 S.Ct. at 2742). The plurality in *Croson* made a geographic distinction by rejecting a focus on discrimination in the entire construction industry in favor of a focus on discrimination in the construction industry in Richmond. *Croson*, 488 U.S. at 505, 109 S.Ct. at 727. The point of both cases is that there has to be a "logical stopping point" that a focus on nation-wide or industry-wide discrimination cannot supply. *Wygant*, 476 U.S. at 275-76, 106 S.Ct. at 1847-48; *Croson*, 488 U.S. at 498, 109 S.Ct. at 724.

Properly focusing on Texas's public education system provides "a logical stopping point" for this Court's analysis of past discrimination. In *Wygant,* the correct focus was the relevant labor market. Here, the law school's focus is on the relevant applicant market (80% of the law school's student body consists of residents).

A focus on Texas's public education system properly identifies the relevant governmental actor. Looking at the past discrimination in Texas's educational system as a whole is not tantamount to relying on "societal discrimination" nor is it an attempt to focus on discrimination in primary and secondary schools nationwide. Instead, it is an attempt to fashion a narrowly tailored and effective remedy for discrimination that occurred specifically in Texas's public education system. Discrimination at one level of a public education system directly affects later levels as students who are victimized by past discrimination proceed through the system. *Geier*, 801 F.2d at 809-10; *see also Podberesky v. Kirwan,* 838 F.Supp 1075, 1098 n.79 (D.Md. 1993), *rev'd on other grounds,* 38 F.3d 147 (4th Cir. 1994).

Croson contradicts the panel's holding that only discrimination at the law school can be considered. The Court noted that "[t]here was no direct evidence of race discrimination on the part of the city." *Croson,* 488 U.S. at 480, 109 S.Ct. at 715. That did not end the Court's inquiry because the Court expressly rejected the "stark" notion that a governmental entity "must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." *Id.* at 486, 109 S.Ct. at 718. The panel's opinion depends on precisely the stark notion that the Court rejected.

By suing the State of Texas, even plaintiffs have recognized that the State is the relevant governmental actor. It is the State whose affirmative action and discrimination in public education is under scrutiny. A single provision of the Texas Constitution formerly mandated separate schools at all levels. Tex. Const. art. VII, §7 (1876, repealed 1969). It was the fundamental law of the State, not the law school's admissions requirements, that barred Heman Sweatt. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App.—Austin 1948, writ ref'd), *rev'd*, 339 U.S. 629, 70 S.Ct. 848 (1950). It was the State that was found to have engaged in official discrimination against blacks and Mexican Americans throughout its public school system. It was the State that ultimately negotiated with OCR the desegregation goals that the law school's affirmative action program sought to implement. Even the panel recognized that the law school is not autonomous, but is controlled, at least in part, by the Texas Legislature. *Hopwood II,* 78 F.3d at 951 n.44. Allowing remedial action to be taken only for discrimination at the law school ignores those facts, completely frustrates Texas's efforts to remedy the continuing effects of past discrimination, and absolutely prevents any remedial action that is narrowly tailored to remedy past discrimination. The injunction should be reversed.

2. The State Has a Compelling Interest in Remedying Past Educational Discrimination Against Applicants to the Law School.

Without a narrowly tailored admissions policy that may consider race as one of many factors, the law school will be unable to remedy the continuing present effects of past discrimination by primary, secondary, and postsecondary schools throughout Texas, including the law school itself. Since *Hopwood II*, enormous efforts devoted to interviewing, recruiting, and privately funded scholarships have largely failed. Black enrollment only grew from four students in the class that entered in 1997 to eight in the class that entered in 1998. Despite vigorous efforts to live with *Hopwood II*, a substantial portion of the law school's classes face "the inexorable zero" that is clear evidence of the continuing effects of past discrimination. *See Johnson v. Transportation Agency*, 480 U.S. 616, 656-57, 107 S.Ct. 1442, 1464-65 (1987) (O'Connor, J., concurring); *International Brotherhood of Teamsters v. United States*, 431 U.S. at 342 n.23, 97 S.Ct. at 1858 n. 23.

Limited consideration of race in admissions responds directly, and in a narrowly tailored way, to this vestige of past discrimination. Modest racial preferences can have dramatic effects. There are substantial numbers of minority applicants with academic credentials at or near the threshold for admission. If the law school can consider race in the selection of these applicants, it can maintain minority enrollment with negligible effect on its overall standard of admissions. By 1992, the difference between the median entering credentials for nonminority and black students had been reduced to .26 in undergraduate grade point average (6.5% of a 4.00 scale), and to 6 points on the Law School Admission Test (10% of a 60 point scale). *Hopwood I*, 861 F.Supp. at 563 n.32. But this preference made a difference of 1000% in the number of black students in the first-year class, and more than 100% in the number of Mexican Americans.

Merely implementing a race-neutral admissions policy is insufficient to overcome the continuing effects of past discrimination. *United States v. Fordice*, 505 U.S. 717, 729, 112 S.Ct. 2727, 2736 (1992). The panel assumed that because the law school has not discriminated against minorities in recent years, it can discharge its constitutional duties by adopting race-neutral policies. But the Supreme Court in *Fordice* explicitly rejected this Court's view that racial neutrality is enough:

> We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.

Id.

The *Hopwood II* panel misconstrued the essence of the *Adams* litigation and the successive Texas Plans. The panel said that "the law school's admissions program was self-initiated" and that the *Adams* litigation of the 1980s predated the law school's affirmative action program, which the panel said "was formulated primarily in the 1990s." *Hopwood II*, 78 F.3d at 954. The panel ignored the fact that OCR and DOE ordered Texas (and, consequently, the law school) to take remedial action designed to remedy past discrimination. The law school initiated its affirmative action plan in the 1970s, recognizing its affirmative obligation to desegregate after admitting a class with *zero* black students in 1971. *Hopwood I*, 861 F.Supp. at 558. Only the administrative details of the plan changed in the 1990s; the purposes did not change and the degree of racial preference actually declined. *Id.* at 560 n.18, 575 & n.69. Contrary to the panel's assumption that the Texas Plan imposed no obligation on the law school, *Hopwood II*, 78 F.3d at 954, the Plan acceded to OCR's demand for goals for each school, D238 at 7, and for racially differential admission standards for graduate and professional programs. *Hopwood I*, 861 F.Supp. at 556; D220. The panel's failure to recognize the OCR's demands on Texas and its universities illustrates the Catch-22 created by *Hopwood II*.

The law school has a compelling interest in remedying the present effects of past discrimination, and the district court erred in enjoining the law school from any consideration of race in admissions.

B. The Law School Has a Compelling Interest in Promoting a Diverse Student Body.

The law school also has a compelling interest in promoting racial and ethnic diversity among its students. Diversity serves purposes that are unique to education. Students should be exposed to others with conflicting ideas, backgrounds, and life experiences. Law students in particular benefit from interaction with others of diverse backgrounds. "The law school, the proving ground for legal learning and practice, *cannot be effective in isolation* from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 850 (1950) (emphasis added). Like the medical students in *Bakke*, law students with diverse backgrounds, "whether ethnic, geographic, culturally advantaged or disadvantaged," bring to the school "their experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314, 98 S.Ct. at 2760 (opinion of Powell, J.).

In holding that diversity may never be a compelling interest justifying the consideration of race or ethnicity in admissions, the *Hopwood II* panel attempted to create a new rule of constitutional law despite the Supreme Court's continued hesitation to do so. *See Hopwood II*, 78 F.3d at 944. Contrary to the panel's implication, the Supreme Court has recognized the need for diversity in the classroom ever since it decided *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954) (recognizing that education is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment"); see also *Milliken v. Bradley*, 433 U.S. 267, 297, 97 S.Ct. 2749, 2761 (1977) (observing that

students who are "educationally and culturally set apart" will be less well prepared to "function and compete" in the larger community).. At least in the primary and secondary school context, the Court has recognized that white and black students "benefit from exposure to 'ethnic and racial diversity in the classroom.'" *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 472, 102 S.Ct. 3187, 3195 (1982) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486, 99 S.Ct. 2941, 2991 (1979) (Powell, J., dissenting)); *see also Milliken v. Bradley*, 433 U.S. 267, 297, 97 S.Ct. 2749, 2761 (1977) (observing that students who are "educationally and culturally set apart" will be less well prepared to "function and compete" in the larger community).. In *Washington v. Seattle School District*, the Court endorsed the need for ethnically diverse schools to further the goals of a pluralistic society. Because the environment in which we live

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

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

This compelling interest in diversity has a role in higher education as well. In *Bakke*, Justice Powell articulated a vision of diversity in higher education that "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315, 98 S.Ct. at 2761. Noting the substantial contribution of diversity at the graduate level, Justice Powell observed that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313, 98 S.Ct. at 2760 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683 (1967)). Five Justices joined in *Bakke*'s judgment, and at least the narrower rationale must be recognized as the holding of the case. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993 (1977); *see City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 765 n.9, 108 S.Ct. 2138, 2148 n.9 (1988). Justice Powell's diversity rationale, which is confined to education, is arguably narrower than Justice Brennan's societal discrimination rationale.

Hopwood stands alone in its complete rejection of diversity as a compelling state interest in education. *See Wessman v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) ("In the education context, *Hopwood* is the only appellate court to have rejected diversity as a compelling interest."). Recognizing that the Supreme Court might eventually repudiate the diversity rationale in *Bakke*, the First Circuit nevertheless concluded: "It has not done so yet." *Id.* at 796. Although it has not squarely addressed the diversity rationale in higher education since *Bakke*, the Supreme Court cited Justice Powell's opinion with approval in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568, 110 S.Ct. 2997, 3010 (1990) ("[A] 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race conscious university admissions program may be predicated.") (quoting *Bakke*, 438 U.S. at 311-13, 98 S.Ct. at 2759-60 (opinion of Powell, J.)). Although the Court later overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Peña* "to the extent that" it failed to apply a strict scrutiny standard, *Adarand* said nothing about whether educational diversity is a compelling interest. *Adarand*, 515 U.S. 200, 227, 115 S.Ct. 2097, 2113 (1995); *see also id.* at 257, 115 S.Ct. at 2127 (Stevens, J., dissenting) (noting that "[t]he proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today–indeed, the question is not remotely presented in this case–and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*").

Justice O'Connor has also recognized the continuing validity of *Bakke*'s diversity rationale in higher education as distinguished from other contexts. *Compare Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S.Ct. 1842, 1853 (1986) (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest") and *id*. at 288 n.*, at 1854 n.* (noting the difference between providing role models and "the very different goal of promoting diversity among the faculty") *with Metro Broadcasting*, 497 U.S. at 614, 110 S.Ct. at 3035 (O'Connor, J., dissenting) (disagreeing with extending the interest in diversity to broadcasting). *Constructors, Inc. v. Pena*200, 22097,(1995)The panel failed to distinguish the Supreme Court's prior cases recognizing the benefits of diversity in higher education and primary and secondary education.

The First Circuit in *Wessman* assumed that *Bakke*'s diversity rationale is still good law. It found affirmative action unnecessary to achieve diversity, however, because color-blind admissions would have yielded black and Hispanic enrollment of about 20%. *Wessman*, 160 F.3d at 798. It concluded that the Boston Latin School was pursuing racial balance instead of diversity.

That is not the law school's situation. The combined black and Mexican American population in Texas today is about 41% of the total. *See* Comptroller's Population Forecast. The law school used affirmative action in pursuit of less than half that percentage of black and Mexican American students—not nearly enough to achieve racial balance, but enough to satisfy OCR, enough to avoid racial identifiability and further Texas's compelling interest in remedying past discrimination, and enough to further its compelling interest in encouraging diversity in its educational institutions.

Relying on the plurality opinion in *Croson*, which suggested that racial classifications should be "strictly reserved for remedial

settings," the panel reached the sweeping conclusion that "the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." *Hopwood II*, 78 F.3d at 944 (citing *Croson*, 488 U.S. at 493, 109 S.Ct. at 722 (plurality)). Only three Justices joined that portion of *Croson*, and the panel could not rely on it to reject diversity as a compelling interest.

In *Wittmer v. Peters*, 87 F.3d 916, 919-20 (7th Cir. 1996), the Seventh Circuit found a sufficiently compelling nonremedial interest in giving a preference to black applicants for a lieutenant's job at a boot camp. Rejecting the *Croson* and *Hopwood II* statements as dicta, the court stated that "[a] judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." *Id.* at 919. *Wittmer* offers "a more cautious, case-by-case approach" than the *Hopwood II* panel's decision—an approach that is more in line with the Supreme Court's continued hesitation to make broad pronouncements in the area of racial classifications. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 396-97 (1998).

The panel's treatment of the diversity rationale deals with a series of straw men. *Hopwood II*, 78 F.3d at 944-48. No one contends that race and ethnicity are the only important sources of diversity, or that all members of a given race think alike. But race and ethnicity are *one* important source of diversity, and they are the only sources that are largely eliminated by the workings of the ordinary admissions process. Distinctive life experiences often give members of different races distinctive perceptions of the world. It is equally important for students to learn that disagreements between the races are only statistical tendencies—that on any given issue, and even when there are sharp racial disparities in the opinion polls, many minority individuals will not hold the presumed or stereotypical minority position, and many white individuals will not hold the presumed or stereotypical white position. *See id*. at 946 ("To believe that a person's race controls his point of view is to stereotype him.").

The differences within each racial group are as important as the differences between racial groups. Students cannot experience either set of differences without racial diversity in the student body. They cannot learn of diverse views within a minority group unless there are significant numbers of that minority group in the class. If there are only one or two black students in a class, those one or two are inevitably thought to speak for the whole race. Stereotypes are reinforced, not dispelled. Two or three students in a section does little to achieve diversity, and none, of course, does nothing.

The *Hopwood II* panel failed to recognize that diversity enriches the learning environment for all students and that a state may properly assert it as a compelling interest in higher education. That diversity is more enriching and compelling in an educational system that continues to experience the lingering effects of past discrimination. Because diversity is a compelling interest, the district court erred in enjoining the law school from considering race in admissions.

C. Carefully Limited Affirmative Action Will Allow the Law School to Satisfy its Compelling Interests While Maintaining its Academic Standards.

Absent the ability to engage in focused, narrowly tailored affirmative action, the law school's pursuit of its compelling state interests would hamper its ability to maintain high academic standards. The University of Texas at Austin is an elite public institution in a populist state. The academic goals of excellence in teaching and research require the flagship public universities to be highly selective in their admission of students. At the same time, they are public institutions that must serve—and be seen to serve—all the people of the state. This political reality reinforces the constitutional obligation to affirmatively dismantle all vestiges of past discrimination in the system of state education.

Public universities have historically provided a principal path by which talented citizens of modest means join the elites of American society. Public education is part of the process by which individuals obtain the skills and credentials that will allow them to excel in their chosen career. Broad access is especially important in law schools, which train a disproportionate share of the future political leadership of the state and nation. *See Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 850 (1950).

There is no escaping the tension between exclusivity to preserve high academic standards and inclusivity to serve the interests of remedying past discrimination and promoting diversity. Limited affirmative action has been the one successful mechanism that allowed flagship public institutions to pursue both commitments. That is, limited affirmative action permits a school to ensure that the very best nonminority students and also the very best black and Mexican American students are admitted without lowering its academic standards.

Abandoning limited affirmative action does the greatest damage in the flagship professional schools, which admit large numbers of students from even larger pools of applicants. These schools are more selective than undergraduate programs, and they are generally larger than other graduate programs. Because of their selectivity, small differences have large consequences. Because of their size, objective credentials necessarily play a large role in the admissions process. As a result, minority applicants with impressive credentials may be denied admission simply because the number of nonminority applicants with impressive credentials is disproportionately high.

These competing goals require affirmative action, but they do not require unlimited affirmative action. In these circumstances, a

modest preference in admissions can produce large gains in a flagship professional school's ability to serve its compelling interests, without significant cost to its pursuit of academic excellence. If the law school can consider race within a narrow band near the threshold for admission, it can maintain minority enrollment with negligible effect on the overall standard of admissions. As explained above, a median preference amounting to only 6% to 10% of the range of the principal predictive criteria produced a 1000% increase in the number of black students in the first-year class.

No other method achieves both missions. Specifically, an incremental lowering of admissions standards will not solve the problem. Large numbers of applicants are bunched together in a narrow range around the threshold for admission. Many minority applicants fall in this range, but they are overwhelmed in number by nonminority applicants. As a result, incrementally lowering the floor of the discretionary zone, and then choosing on a race-neutral basis, would not admit significantly more minority applicants.

There are qualified minority students who can succeed at the law school and whose admission has no measurable effect on academic standards. These are the students, in or just below the discretionary zone, who would be admitted pursuant to a well-designed affirmative action plan. Unfortunately, the law school cannot target those students without taking race into account in a limited manner. For a lottery or similar admission standard to significantly change the number of minorities admitted, the threshold for entry into the lottery must be set low enough that the under-representation of minorities at the very highest levels of credentials no longer skews the racial makeup of the pool as a whole. That course would simply result in an erosion of academic excellence at the law school that will hurt minorities and nonminorities alike, depriving all Texans of the opportunity to obtain an affordable degree from a nationally ranked professional school.

If the district court's injunction is allowed to stand, the law school's history of academic excellence will be in jeopardy. Inevitable legal, political, and economic forces may pressure the law school to lower admission standards as far as necessary to achieve adequate minority representation in its student body. Appropriately limited affirmative action is a narrowly tailored way to avoid that choice and preserve the law school's commitment to excellence.

D. Narrowly Tailored Affirmative Action Sufficient to Satisfy Texas's Compelling Interests Can Be Constrained by Judicially Administrable Limits.

To be consistent with the Fourteenth Amendment, affirmative action must be subject to judicially administrable limits. Appropriate limits are largely implicit in the Supreme Court's cases and a narrowly tailored admissions program that considers race as a factor is consistent with those limitations.

The most important limit is the magnitude of the preference. It is a fundamental error to assume that either the law school must be color blind or that it can indulge any racial preference whatsoever. At least since *United Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2730 (1979), the Supreme Court has emphasized that in order to be lawful, racial preferences must be modest in scope. Justice Powell made a similar point in *Bakke*. *See Bakke*, 438 U.S. at 316-19, 98 S.Ct. at 2761-63.

An appropriate affirmative action plan would permit only limited preferences that are modest in proportion to the whole distribution of qualifications, which is also consistent with a prospect of reasonable success for the beneficiaries of affirmative action. Universities could define a "modest" preference in ways that are readily administrable and judicially reviewable. For example, the preference could be limited to a certain range on the primary admissions predictor—to a percentage of the predictive range, to a certain number of points, to one standard deviation, or even to a fraction of a standard deviation. The point is simply that the magnitude of the preference should be a central issue. Institutions could adopt limited preferences as part of an affirmative action plan and defend them in terms of their institutional circumstances. The law school has gradually reduced the magnitude of its preferences and, if the injunction below is reversed, the law school would continue to minimize its racial preferences in pursuit of the very best minority students consistent with the goals of remedying the current effects of past discrimination and achieving diversity.

Another essential limit is the relationship of the preference program to the other criteria for selection. Except in the most circumscribed remedial settings, *see, e.g., United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053 (1987), the Supreme Court's review of affirmative action has always presumed that preference programs would operate on the margin of established selection criteria. Thus, in *Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442 (1987), the candidates were evaluated under established selection criteria, the preference given to the first female applicant for a road-maintenance supervisory position was administered after the candidates had been evaluated on these criteria, and the preference was a small fraction of a total derived from the established criteria. Modest programs are less intrusive not simply because they are less visible, but because they allow the vast majority of applicants to rest secure in believing that the customary returns to achievement, perseverance, and merit will be honored.

Affirmative action should not be a permanent source of special treatment and cannot be used merely to achieve racial balance for its own sake. *Bakke*, 438 U.S. at 307, 98 S.Ct. at 2757 (opinion of Powell, J.). Affirmative action cannot continue in institutions where minorities have achieved reasonable representation without it. *See Wessman v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998). But where under-representation of minorities resulting from past discrimination hampers an educational institution's ability to perform its competing missions, affirmative action is sometimes the only solution.

Affirmative action must have an endpoint, but that endpoint cannot always be specified in advance. The law school's affirmative

action plan will naturally terminate when applicants to the law school are no longer victims of the lingering effects of past discrimination and when the law school is able to achieve reasonable diversity in its student body without considering race at all. The State cannot know when that time will come, but the record is clear that the magnitude of racial preferences has gradually declined and will continue to decline as that time approaches. *Hopwood I*, 861 F.Supp. at 575.

Finally, an essential limit on affirmative action is that it not disrupt settled expectations. The Supreme Court has long distinguished race-based layoffs and discharges from hiring and admissions, and with good reason. *See Johnson*, 480 U.S. at 638, 107 S.Ct. at 1455; *Wygant*, 476 U.S. at 282-84, 106 S.Ct. at 1851-52 (plurality opinion); *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730. Incumbent employees have invested years of their lives in a particular career path; tenured or civil service employees often have a property right in their jobs, protected by the Due Process Clause. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972); *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694 (1972). Individual employees bear the cost of any racial preference. By contrast, applicants for admission to public universities have no portion of their life invested in any particular school, no property right in admission, and no right to a hearing on their application. They can, and most of them do, apply to numerous schools.

At the law school, the costs of affirmative action are spread over a wide pool of applicants and—for any individual applicant—affirmative action has only a minuscule effect on the odds of admission. The strongest applicants will be admitted with or without affirmative action; the marginal applicants would have far less than an even chance of admission without affirmative action, and only a slightly lesser chance with affirmative action.

If the injunction is reversed, the law school will again implement an affirmative action plan consistent with these limitations, as it did from 1994 to 1996. Because of its strong commitment to academic excellence, the law school will implement the smallest possible racial preference consistent with reasonable diversity and the elimination of racial identifiability. If future plaintiffs challenge either the magnitude or the details of the law school's affirmative action program, those challenges can be adjudicated when they arise. The district court's sweeping injunction should be reversed, so that the law school may use a narrowly tailored affirmative action plan to fulfill its mission as the flagship law school of Texas.

III. The District Court's Award of Only Nominal Damages Should Be Affirmed.

A. The District Court's Findings Are Not Clearly Erroneous and Must Be Affirmed.

The district court properly applied the burden-shifting required by this Court and found that the law school proved by a preponderance of the evidence that none of the plaintiffs would have been admitted under a race-neutral admissions system. The district court meticulously detailed the evidence supporting this conclusion. These fact findings are not clearly erroneous and should be affirmed by this Court. *See* Fed. R. Civ. P. 52(a); *Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994).

The evaluation of applicants for a position involves both objective and subjective elements that are better left to the evaluator's experience and expertise.

> [T]he evaluation of applicants (and applications) for high level positions in any discipline . . . involves both objective and subjective elements. . . . [A]s a general rule judges are not as well suited by training or experience to evaluate qualifications . . . as are those persons who have trained and worked for years in the field of endeavor for which the applicants under consideration are being evaluated.
>
> Therefore, unless disparities in [applications] are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.

Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993).

Because plaintiffs are not "clearly" better qualified than the 119 applicants identified by the defendants, the Court should not substitute its judgment for that of Professor Wellborn, a member of the law school's Admissions Committee for over fifteen years. *See id.*

Nor can plaintiffs prevail by arguing that as "close cases" their damages are automatic. Although plaintiffs' applications were within the discretionary zone, they were passed over in favor of numerous nonminority residents with lower TI scores: 189 in Hopwood's case and 111 in the cases of Carvell, Elliott, and Rogers. *See generally Hopwood III*, 999 F.Supp. at 885 n.25 (providing statistical admissions information). The law school's decision to admit those applicants instead of plaintiffs was not affected by race and could not have been affected by this litigation, which had not yet been filed. The striking weaknesses in plaintiffs' applications were not something Wellborn discovered for litigation purposes; the Admissions Committee had already decided five years earlier that these four applicants were weaker than many nonminority applicants with lower TI scores. Plaintiffs' applications simply did not present such close cases as to require admission, and the district court's findings must be affirmed.

B. The Law School Proved by a Preponderance of the Evidence that the Plaintiffs Would Not Have Been Admitted in a Race-Neutral Admissions System.

1. Wellborn's Methodology Was Sound.

Wellborn replicated a race-neutral admissions system by establishing a nonsegregated discretionary zone and personally reviewing each application in that zone, including those of plaintiffs. *See Hopwood III*, 999 F.Supp. at 886-87. Under this analysis, Wellborn identified 119 applicants who were better candidates for the study of law than the plaintiffs and who were therefore more likely to receive offers of admission under a race-neutral system. Wellborn made reasonable projections regarding the lowering of the presumptive admission and denial lines and the probable number of offers to be extended. He identified reasonable criteria to evaluate the application files and he applied the criteria in a fair, consistent, and nondiscriminatory way. Wellborn credibly supported the applicants he selected, and the faculty members who originally reviewed plaintiffs' files in 1992 universally supported Wellborn's judgment that plaintiffs were weak candidates for admission. *See* Johanson Declaration D332; Hamilton Declaration D333; Sharlot Declaration D334; Gergen Declaration D335; Goode Declaration D336; *see also Hopwood III*, 999 F.Supp. at 893.

Despite plaintiffs' arguments to the contrary, defendants were not required to replicate exactly the 1992 admissions procedure or to use the 1992 piles-of-30 approach. Even if the law school had attempted to create a race-neutral piles-of-30 system, minority and nonminority applicants would have been mixed in the same piles, so that the segregated piles of 30 in which plaintiffs were evaluated in 1992 could not have existed. It is impossible to know what piles would have existed; to construct new piles of 30 would arbitrarily assign controlling weight to just one of an astronomical number of possibilities. *See Hopwood III*, 999 F.Supp. at 890-91.

Similarly, none of plaintiffs' other criticisms of Wellborn's methodology has merit. Hopwood and Carvell argue that because each received one vote in 1992 placing them on the waiting list, they were more likely to receive offers of admission than someone securing no votes. Using the 1992 waiting lists to determine which nonminority applicants would have gained admission in 1992 in a race-blind procedure is problematic. First, there were two waiting lists in 1992, segregated by race. *See Hopwood I*, 861 F.Supp. at 574 n.68. Like the original piles of 30, they were generated by an unconstitutional system in which minority and nonminority applicants were reviewed separately. Therefore, the waiting lists created in 1992 could not exist under a constitutional admissions system. Second, in 1992 the Admissions Committee selected an unusually high number of candidates from the waiting list because of the change in the LSAT scoring system. R.55.52-53,144. Wellborn testified that the waiting list had been pretty well "picked over" and, consequently, the remaining applicants on the waiting list had, in effect, received a third "no" vote denying them admission. R.55.52-54. Third, using the waiting list to determine who would have gained admission would exclude Elliott and Rogers from consideration because they received no votes in screening.

Hopwood and Carvell also complain that Wellborn did not reconsider all offers of admission in hypothesizing a constitutional procedure. The district court found that this argument was not only unpersuasive, but also that it mischaracterized Wellborn's methodology. *Hopwood III*, 999 F.Supp. at 892. The fact that nonminority applicants received offers of admission in 1992 when racial preferences were in place strongly supports the inference that those applicants would receive offers under a race-neutral system. R.55.42. Furthermore, to the extent that other nonminorities were offered admission over plaintiffs, it certainly was not the result of any unlawful or invidious discrimination. *Hopwood III*, 999 F.Supp. at 892.

2. Plaintiffs' Applications Did Not Satisfy the Admissions Criteria of a Race-Neutral System.

Nearly all the applicants selected by Wellborn satisfied the following four criteria: (1) an LSAT score at the 80th percentile or higher; (2) a class rank of at least 60 percent; (3) undergraduate college mean LSAT score of at least 30; and (4) no more than one year in a community or junior college. None of the four plaintiffs satisfied all four criteria, while the vast majority of Wellborn's selections did. Those few who did not satisfy all four counterbalance the weakness with a specific strength in another area, while the plaintiffs did not. *Hopwood III*, 999 F.Supp. at 894.

Although Hopwood had a high GPA and an acceptable LSAT, she earned 70 of her undergraduate hours at community colleges over a six-year period. She earned her bachelor's degree at a college that is less competitive than those attended by the vast majority of admitted students, and she took mostly "how-to" courses rather than those providing rigorous analytical training. Her file was one of the least impressive in appearance of all those reviewed by the district court and contained no personal statement or letter of recommendation. *Hopwood III*, 999 F.Supp. at 897-98.

Carvell took the LSAT twice. His averaged score placed his "true" TI at the equivalent of 191 or 192, near the bottom of the adjusted discretionary zone. He graduated in the 59th percentile from a school that is not academically rigorous. One of his two academic letters of recommendation is "not very strong" and the other describes him as disappointing, mediocre, and uneven. *See* P151. He was denied admission to Vanderbilt Law School and the University of Texas Graduate School of Business, both considered less competitive than the law school. *Hopwood III*, 999 F.Supp. at 898-99.

Elliott had a strong LSAT score, but a "consistently weak academic record." R.55.82. His 2.98 GPA placed him at only the 40th percentile of his class in the University of Texas School of Business. He admitted in his application that his undergraduate GPA "is not of a caliber expected" by the law school. P153. He was denied admission to Baylor Law School, which is less competitive than the law school and had no affirmative action program in 1992. *Hopwood III*, 999 F.Supp. at 899. Following Elliott's rejection by the law school in April 1992, Elliott's father sent a letter to Dean Yudof complaining that the law school had rejected his son's application

because of the law school's "mandatory minority and women quotas." *See* P165. Elliott's application was reconsidered because of his father's letter. If a race-neutral admissions procedure had been in place, the letter would not have received the special treatment that it did in 1992, and Elliott's application would not have been reconsidered. R.55.80-81. Thus, even if, as Hamilton testified, the law school offered Elliott admission in August 1992, he would not have been offered admission under a constitutional process.

In three-and-one-half years as an undergraduate at the University of Texas, Rogers flunked out twice. He completed his undergraduate education at a school with an LSAT college mean significantly lower than that of virtually all students at the law school. In spite of a strong LSAT score, Rogers' "extremely weak" undergraduate record convinced the district court "beyond any doubt that Rogers would never be admitted to the law school under any circumstances." *Hopwood III,* 999 F.Supp. at 900.

The inherently subjective nature of the admissions process does not mean that distinctions cannot be made among applicants. Wellborn's opinion regarding the quality of certain universities is not subjective but is supported by an objective criterion, the LSAT college mean. Even without such quantifiable data supporting his assessments, Wellborn fairly evaluated the quality of colleges and universities around the nation given his 23 years as a law professor and 15 years on the Admissions Committee. One of Wellborn's constant themes was that the applicant be exposed to a "rigorous testing ground" to prepare him or her for the study of law at an elite law school. R.55.84. The evidence establishes that an applicant's undergraduate institution can be of paramount importance in determining admission.

Elliott and Rogers identify four applicants admitted in 1992 whom they claim Wellborn or Sharlot testified were equivalent to or less qualified than Elliott (but not Rogers). Elliott & Rogers Br. at 6. This mischaracterizes Wellborn's testimony, who considered the two applicants he was asked about to be slightly stronger than Elliott. R.55.238-44. Moreover, he placed one of the two not among those most likely to be offered admission, but among those more likely to be admitted than the applicants not chosen. The two candidates about whom Dean Sharlot was questioned both have letters of recommendation from influential alumni or benefactors of the law school, a factor specifically approved by this Court in *Hopwood II*, 78 F.3d at 946; *see also* P155; P156.

These applications do not require the rejection of either Wellborn's conclusions or those of the faculty members who originally reviewed plaintiffs' files in 1992. It simply does not follow that anyone on par with the least qualified admittee would have a reasonable chance of admission. Indeed, the district court drew the opposite inference—the fact that so few applicants arguably comparable to plaintiffs were actually admitted in 1992 is evidence that they probably would not have been admitted. *Hopwood III*, 999 F.Supp. at 897; D520; R.55.39-40.

C. There Can Be No Damages Under Title VI for Conduct Undertaken Without Notice that the Conduct Was Wrongful.

Defendants cannot be liable in damages even if plaintiffs should have been admitted, because defendants could not have known that the 1992 admissions procedure, which complied with the mandate of OCR, was in violation of Title VI. Title VI makes it unlawful for any federally funded program or activity to exclude an individual from participation of the basis of race, color, or national origin. 42 U.S.C. §2000d (1994). The only express means of enforcement is administrative action by the funding agency. 42 U.S.C. §2000d-1 (1994). Title VI does not expressly authorize a private right of action or a remedy in damages for intentional discrimination; these remedies are implied. *Bossier Parish Sch. Bd. v. Lemon,* 370 F.2d 847, 852 (5th Cir. 1967).

It is fundamental to Spending Clause statutes such as Title VI that the states are entitled to clear notice of the conditions attached to the offer of federal funds. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540 (1981); *accord Suter v. Artist M.*, 503 U.S. 347, 356, 112 S.Ct. 1360, 1366 (1992) (refusing to recognize implied right because statute did not clearly notify states of plaintiff's interpretation of statute).

This requirement of clear notice carries over to the remedy stage. States are entitled to a choice between complying with federal law or forfeiting future federal funds. *Rosado v. Wyman*, 397 U.S. 297, 420-21, 90 S.Ct. 1207, 1222 (1970). Damages can be awarded only when the state had notice that its conduct was wrongful.

> In this and similar cases, it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations. . . . Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations.

Guardians Association v. Civil Service Commission, 463 U.S. 582, 598, 103 S.Ct. 3221, 3230 (1983) (opinion of White, J.); *see also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74, 112 S.Ct. 1028, 1037 (1992) ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award.") (citation omitted).

Most recently in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S.Ct. 1989, 1998 (1998), the Court stated that

its "central concern" is that the state have notice of any possible monetary liability. Emphasizing that the provisions for administrative enforcement require notice and an opportunity to comply, the Court stated:

> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.

Id. at 1999.

Prior to this Court's ruling in *Hopwood II*, the federal agency expressly charged with enforcement, the OCR, consistently demanded goals for minority enrollment and separate admission standards for minority applicants. *Hopwood I*, 861 F.Supp. at 556; D220. The agency's interpretation had support in such cases as *Bakke*, *Guardians*, and *Fordice*. The State was entirely without notice and wholly "unable to ascertain" that the plan demanded by the designated enforcement agency was in fact illegal. To hold the State liable for unlimited and unliquidated economic damages based on conduct undertaken in a good faith effort to comply with federal directives would be inconsistent with every Supreme Court holding regarding implied remedies under Spending Clause legislation. There is no basis to imagine that Congress intended such liability in 1964.

Thus, even if *Hopwood II* is to be the law, and even if plaintiffs would have been admitted under a color-blind system, there can be no award of damages for violations committed before *Hopwood II* was decided.

IV. Should this Court Overturn the District Court's Admission Decision, the Alternative Findings on Plaintiffs' Damages Are Correct.

Because the law school established that none of plaintiffs would have been admitted to the law school under a constitutional system, plaintiffs are entitled to no or nominal damages. However, in the event that the Court overturns the district court's determination regarding admission, plaintiffs should be limited to the amount of damages found in the alternative by the district court.

A. Cheryl Hopwood.

Hopwood failed to prove that she sustained economic damages as a result of being denied admission to the law school. Hopwood claimed $1,360,000 in economic damages, which she argued was the difference, over a 40-year period, between the projected earnings of an accountant and an attorney. *See Hopwood III*, 999 F.Supp. at 902. First, Hopwood's damages are impermissibly speculative given the extended time frame and the wide variance in legal career paths and attendant economic rewards. *See Williams v. Pharmacia Opthalmics, Inc.*, 926 F.Supp. 791, 796 (N.D. Ind. 1996), *aff'd*, 137 F.3d 944 (7th Cir. 1998) ("A remedy must be based on events more likely than not to occur, and the existence of future uncertainties have [sic] led courts to act cautiously when considering awards of front pay for lengthy periods.").

Second, the law school's denial of admission did not prevent Hopwood from obtaining a law degree. Hopwood could have attended law school elsewhere and still has the opportunity to do so. Thus, she is not entitled to damages based on her non-lawyer status for 40 years into the future. *FDIC v. Wheat*, 970 F.2d 124, 132 (5th Cir. 1992) ("[A]n injured party claiming damages resulting from the wrongful acts of another must take reasonable advantage of opportunities to reduce or minimize losses.").

Moreover, Hopwood's evidence cannot support any award of damages as she failed to prove a basic assumption of her damages model: that she would have completed her law school education in January 1996. As the district court concluded, Hopwood's unfortunate family situation presented significant obstacles to her graduation from law school in that timeframe. *Hopwood III*, 999 F.Supp. at 903-04. Even had she been able to establish a graduation date, the expert testimony concerning her two projected career paths is incompetent to establish economic damages. Hopwood's expert witness, Wayne Ruhter, testified that he did not even try to determine whether the projected career path he presented was one that Hopwood would have or could have taken if she had graduated from the law school. R.57.71. Without a realistic connection to Hopwood's future, Ruhter's testimony is irrelevant. Indeed, the assumption that Hopwood would have become a partner of a private law firm in a large Texas city or in the mid-Atlantic region within eight years of graduation is implausibly optimistic and represents an exceptional, rather than the expected, career path of a law school graduate. *Hopwood III*, 999 F.Supp. at 905; R.57.228-30. The district court found that Hopwood's experts repeatedly presented flawed analyses that were not credible, and that conclusion is entitled to deference. *See* Fed. R. Civ. P. 52; *Burma Navigation Corp. v. Reliant Seahorse MV*, 99 F.3d 652, 657 (5th Cir. 1996).

Additionally, Hopwood sought $1,500,000 in mental anguish damages. The district court failed to find that Hopwood would have completed her degree even if she had been admitted to the law school in 1992 and, therefore, the law school is not liable for mental anguish damages. *Hopwood III*, 999 F.Supp. at 907. If the Court finds that Hopwood would have completed her degree, her damages for mental anguish should be limited to the $6,000 the district court computed in its alternative damages findings. Hopwood failed to prove that the law school's denial of admission caused most of her emotional complaints. Other, far more significant stressors in her life, such as the deaths of her children and the breakup of her marriage, caused her to suffer from an emotional disorder that at most was temporarily aggravated by the law school's denial of admission. *Hopwood III*, 999 F.Supp. at 907-08; R.57.152. Any aggravation of her pre-existing condition is not compensable beyond the $6,000 award calculated by the district court. *Cf. Patterson v. P.H.P.*

Healthcare Corp., 90 F.3d 927, 937-38 (5th Cir. 1996) (noting that the standard of review for awards based on mental anguish is deference to the fact finder because harm is subjective and evaluation depends on assessing the witnesses' demeanor).

B. Douglas Carvell.

Douglas Carvell sought economic damages in the amount of $705,886, of which $40,036 is the difference in tuition between the law school and Southern Methodist University Law School. *Hopwood III*, 999 F.Supp. at 908. Carvell failed to prove that he sustained any economic damages beyond the $40,036 tuition differential. Carvell contends that his status as an SMU graduate rather than a graduate of the law school diminished his earnings by $665,850 over a projected career of 40 years. Carvell's "front pay" claim is as speculative and attenuated as Hopwood's and was properly denied.

The district court found that Carvell's claim that his status as an SMU graduate caused him monetary losses is counterfactual. Ruhter compared opportunities available at the placement office of SMU and the law school. P478. However, Carvell did not use the SMU placement office. *See Hopwood III*, 999 F.Supp. at 909. Additionally, Carvell failed to prove that these more lucrative positions would have been available to him at either school. He graduated in the third quarter of his class at SMU, R.58.114, and could not reasonably expect to achieve the class rank at the law school sufficient to secure a position at those more selective firms. Further, Carvell is not on the partnership track at his firm, Bickel & Brewer. R.58.106. One of the firm's named partners, John Bickel II, is a graduate of SMU Law School, so it is highly unlikely that the firm regards SMU graduates unfavorably. *Hopwood III*, 999 F.Supp. at 909 & n.77. Finally, Carvell's beginning salary was actually higher than the average starting salary for graduates of the law school in 1995. *Id*. at 909.

Carvell also sought $1,500,000 in mental anguish damages but failed to prove his entitlement to such damages. The evidence established that Carvell suffered no problems in functioning at his job and that he did not seek psychiatric or medical treatment as a result of the law school's denial. *Hopwood III*, 999 F.Supp. at 910; R.58.119-20. His self-reported emotional complaints simply do not rise to the level of compensable injury. *See Patterson*, 90 F.3d at 939 ("Hurt feelings, anger and frustration are part of life.").

C. Kenneth Elliott.

Kenneth Elliott is not entitled to the $56,021 in lost earnings he contends is the differential between his current salary as a CPA and the average starting salary of graduates from the law school. *See Hopwood III*, 999 F.Supp. at 910; R.57.271. Elliott was offered the opportunity to attend Texas Tech Law School in 1992 and he chose not to attend. Any injury was caused by his decision not to attend Texas Tech rather than by the law school's conduct and his damages are speculative and remote. Furthermore, by not attending another law school, Elliott failed to mitigate his damages. *See David H. v. Spring Branch I.S.D.*, 569 F.Supp. 1324, 1340 (S.D. Tex. 1983) ("[A] plaintiff cannot sit still and let damages pile up when reasonable steps would prevent further losses."). In addition, Elliott failed to present expert testimony of his future damages, as required by this Court. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d. 1129, 1137 (5th Cir. 1985).

D. David Rogers.

David Rogers claims compensatory damages of $332,967.94 consisting of lost wages, bad loans he made while running a business, and other expenses including the costs to attend a conference on affirmative action. *Hopwood III*, 999 F.Supp. at 910-11. However, like Elliott, Rogers turned down an opportunity to attend law school in 1992. R.56.100. He cannot, therefore, recover for lost earnings based on the fact that he is not a lawyer, both because any injury is remote and because he failed to mitigate his damages. The other elements of his damages were expressly found to be frivolous by the district court and were not caused by the law school's denial of his application for admission. *Hopwood III*, 999 F.Supp. at 911. Rogers also failed to offer expert testimony on any future damages. *See Gideon*, 761 F.2d at 1137.

V. The District Court's Award of Attorneys' Fees to Plaintiffs Should Be Reversed or, in the Alternative, Not Increased.

After the May 1994 trial, the district court denied plaintiffs' application for attorneys' fees on the ground that they had recovered only *de minimis* relief. That judgment, appealed separately, was vacated. On remand, plaintiffs asked the court to award them more than $1.5 million in fees and expenses for work on the original trial, the appeal, and the trial on remand. *Hopwood III*, 999 F.Supp. at 911-12. The district court assumed that plaintiffs were entitled to attorneys' fees and scrupulously calculated a "lodestar" value for the fees incurred in the original trial and appeal, declining to award any fees for plaintiffs' unsuccessful efforts on remand. *Id.* at 914. Ultimately, the district court awarded plaintiffs fees in the amount of $703,992.29, and awarded them an additional $71,768.02 in costs. *Id.* at 924.

A. Plaintiffs Are Not Entitled to Attorneys' Fees.

In calculating the lodestar, the district court erroneously assumed that plaintiffs were entitled to a fee award. Section 1988 permits an award of reasonable fees to "the prevailing party." 42 U.S.C. §1988. A plaintiff is entitled to attorneys' fees *only* if "actual relief on the merits . . . materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that *directly* benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 573 (1992) (emphasis added); *Texas State Teachers*

Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S.Ct. 1486, 1494 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties. . ."); *see also Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988) (per curiam) (declaratory judgment insufficient to support award of attorneys' fees because modification of prison policies could not benefit plaintiffs, one of whom was released and one of whom was dead); *Hewitt v. Helms*, 482 U.S. 755, 763, 107 S.Ct. 2672, 2677 (1987) (plaintiff was no longer a prisoner when judgment was entered and he was not entitled to fees even though his lawsuit brought about changes to prison system). Throughout this litigation, plaintiffs have sought significant direct relief—and won virtually none of it. Plaintiffs sought punitive damages, yet were awarded none. Plaintiffs sought more than $5 million in compensatory damages, yet recovered only $1 each. *Hopwood III*, 999 F.Supp. at 902-11. Plaintiffs sought an order that they be admitted into the law school, yet no order was rendered. The district court has twice found that plaintiffs would not have been admitted to the law school under a constitutional admissions system.

The only significant development since the original trial is a declaration by the Fifth Circuit, and a subsequent injunction by the district court, that defendants cannot factor race into admission decisions. Even if the injunction were proper, it did not "materially" alter the legal relationship between the parties in a way that "directly" benefits plaintiffs. Whatever change the injunction may bring about for future law school applicants, it does not directly and personally benefit plaintiffs at all. "[T]he moral satisfaction [that] results from any favorable statements of law" cannot be the basis of a fee award. *Hewitt*, 482 U.S. at 762, 107 S.Ct. at 2676; *see also Farrar*, 506 U.S. at 112, 113 S.Ct. at 573.

Even if plaintiffs' nominal damage awards and injunctive relief makes them prevailing parties, this case presents a circumstance in which the prevailing party should recover no attorneys' fees at all. *See Farrar*, 506 U.S. at 115, 113 S.Ct. at 575. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id*. (citations omitted). Plaintiffs' award of nominal damages is no basis for an award of more than $700,000 in attorneys' fees. That is especially true in this case where plaintiffs were unsuccessful in obtaining the direct relief they were seeking. *See Migis v. Pearle Vision Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998) (vacating award of attorneys' fees over 6.5 times of damages award because "the plaintiff's monetary success in a private civil rights suit must be the primary determinant of attorneys' fees" and ratios were too large to allow judgment to stand). Accordingly, defendants request the Court to vacate or reduce the district court's award of fees and expenses.

B. If Plaintiffs Are Entitled to Attorneys' Fees, the District Court Correctly Calculated the Lodestar.

If the Court determines that plaintiffs are entitled to some fee award, defendants do not contest the district court's calculation of the lodestar. The district court did *not* err in reducing the $1,500,000 in fees plaintiffs sought. Recognizing the district court's superior knowledge of the facts, the Court has repeatedly stressed that district courts enjoy "broad discretion" in setting appropriate awards of attorneys' fees and that it will vacate an award only when that discretion is abused. *Walker v. Dep't of Housing and Urban Develop.*, 99 F.3d 761, 768 (5th Cir. 1996); *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

Review of the district court's opinion leaves no doubt that the court scrupulously and painstakingly reviewed the evidence submitted by plaintiffs and made appropriate and fair adjustments, all within the proper legal and analytical framework. *Hopwood III*, 999 F.Supp. at 911-22. On appeal, plaintiffs complain about virtually every aspect of the fee award, but primarily argue that the district court erred in applying the factors stated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), pointing out that the district court did not individually address all of the *Johnson* factors in its opinion. Although true, it is of no consequence. A trial court need not "meticulously" detail its *Johnson* analysis, "so long as the record clearly indicates that the district court has utilized the *Johnson* framework as the basis of analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation." *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 331 (5th Cir. 1995); *Cobb v. Miller*, 818 F.2d 1227, 1232 (5th Cir. 1987). Here, the district court's analysis was exhaustive, and it was explicitly based on the *Johnson* factors.

Plaintiffs also argue that the district court misapplied the *Johnson* factors, particularly the most important one: the "degree of success." *See Migis*, 135 F.3d at 1047. Plaintiffs complain that the district court erred (1) in denying them any fees for work done on remand and (2) in reducing the final fee award for trial work by 15% because they failed to obtain any specific injunctive or monetary relief. These reductions relate directly to plaintiffs' lack of directly beneficial success throughout this litigation, other than $1 in nominal damages. In a case where plaintiffs' counsel have failed to obtain anything other than *de minimis* relief for their clients, there is simply no basis for an award greater than the $703,992.29 they have already obtained. In short, to the extent the district court misapplied this *Johnson* factor at all, it did so by awarding plaintiffs too much, not too little.

Plaintiffs also argue that the district court erred in denying them fees for opposing interventions and dealing with the media. The court acted well within its discretion. *Hopwood III*, 999 F.Supp. at 913. This Court has routinely denied requests for media-related fees because that work is not directly related to the litigation of the case. *See Watkins*, 7 F.3d at 458; *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 280 (5th Cir. 1990). The court also properly denied attorneys' fees for opposing the proposed interventions. The intervention battle was not between plaintiffs and defendants, but between plaintiffs and the would-be intervenors. *Hopwood III*, 999 F.Supp. at 914 & n.87. Plaintiffs were not prevailing parties *as against defendants* on that issue, and defendants should not be required to foot the bill. *See Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 177 (4th Cir. 1994);

Reeves v. Harrell, 791 F.2d 1481, 1483-84 (11th Cir. 1986).

If this Court determines that some fee award is appropriate, the district court did not err in its calculation of the lodestar, and this aspect of the judgment should be affirmed.

VI. The Trial Court Properly Denied Elliott's Request for Discovery Sanctions.

Elliott asks this Court to overturn the district court's refusal to sanction defendants by requiring payment of his attorneys' fees incurred in pursuing discovery of certain applicant files. Elliott's request is meritless.

This Court has repeatedly held that a district court's decision regarding discovery sanctions is reviewed for an abuse of discretion. *See, e.g., Scott v. Monsanto Co.*, 868 F.2d 786, 793 (5th Cir. 1989). Accordingly, in prior cases in which discovery sanctions issues have been presented, the Court has refused to substitute its judgment for that of the trial judge and has inquired only whether the district court *could* have entered the order it entered. *See United States v. $9,041,598.68*, 163 F.3d 238, 252 (5th Cir. 1998); *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 569 (5th Cir. 1996) (noting that reversal of a trial court's discovery rulings is warranted only in "unusual and exceptional cases").

The district court was clearly empowered to deny Elliott's request for attorneys' fees. Rule 37(a)(4)(A) states that the district court can refuse to award attorneys' fees where "the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4)(A).

The district court's comments during the December 20, 1996 hearing reflect that it properly determined that those circumstances existed. Defendants were motivated by a desire to protect the confidentiality of sensitive personal information contained in rejected applicants' files. The district court found this concern to be a "bona fide reason" for defendants' reluctance to produce unredacted application files. R.53.39. Further, the court expressed frustration over the necessity for its involvement in the disputes, noting that the discovery disputes could have been worked out "just with a little talking." *Id.* at 59. Thus, the district court properly denied the award of attorneys' fees under Rule 37(a)(4)(A).

Furthermore, the Court could not award Elliott his requested expenses and attorneys' fees for the motion to compel without evidence regarding the amount and reasonableness of those expenses and fees. *Carroll v. Jaques*, 926 F.Supp. 1282 (E.D. Tex. 1996), *aff'd*, 110 F.3d 290 (5th Cir. 1997). Elliott's brief cites no such evidence.

VII. Plaintiffs' Attacks on the District Judge Are Baseless.

Unfortunately, plaintiffs' disagreement with the district court's factual and legal conclusions motivated them to advance unwarranted attacks on Judge Sparks's impartiality. Indeed, Hopwood and Carvell go so far as to request that, if this cause is remanded, it be assigned to a different judge. Though Hopwood and Carvell profess "due appreciation for [the] gravity" of such relief, they seek reassignment in the face of a trial record and legal precedent that make their position completely untenable.

It must first be noted that remand is not necessary here. Judge Sparks employed a great deal of time, effort, and care to detail his findings so as to obviate the need for a remand. The Court has a sufficient record before it to decide all issues in this case, and a remand is not necessary.

Even if case were to be remanded, there is no basis for reassignment to another judge. The crux of Hopwood and Carvell's complaint is that Judge Sparks found their damages claims to be excessive and doubted the correctness of the burden of proof he applied. That is not sufficient reason for reassignment. *See Johnson v. Sawyer*, 120 F.3d 1307, 1333-34 (5th Cir. 1997) (reassignment was necessary because "there was immediate, continuing, and ever-increasing tension between the district judge and one of Appellants' counsel" as well as between Appellants and a key witness); *Simon v. City of Clute*, 825 F. 2d 940, 944 (5th Cir. 1987) (reassignment was necessary because trial judge referred to plaintiffs as "mutineers" and refused to rule until ordered to do so on mandamus). The facts of *Johnson* and *Simon* are not present here, and reassignment is not proper.

Moreover, plaintiffs cannot attack Judge Sparks for noting the weaknesses of their case in his written opinion. *See Garcia v. Women's Hosp. of Texas*, 143 F.3d 227, 229 (5th Cir. 1998) (recusal on remand not necessary where judge's comments concerning party's "ability to prove her case were perhaps unflattering, but reflected only the district judge's considered opinion upon having viewed the evidence and law in this case"). Opinions formed by the judge that are based on events occurring during the proceedings do not constitute a basis for recusal unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. *Conkling v. Turner*, 138 F.3d 577, 593 (5th Cir. 1998).

When there is no evidence of bias and the trial judge is able, experienced, and of unquestioned integrity, reassignment is not available. *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996). If remanded, this case should not be assigned to a different judge. Judge Sparks presided over two lengthy trials and painstakingly reviewed voluminous records in support of his decisions. Remand to a different judge would entail a huge duplication of effort and waste scarce judicial resources.

Conclusion

For these reasons, Defendants-Appellees-Cross-Appellants request the Court to (1) reverse the injunction entered by the district court; (2) affirm the district court's finding of nominal damages only; (3) reverse or reduce the district court's attorneys' fees award; and (4) to grant all other relief to which they are entitled in law or equity.

April 19, 1999

Respectfully submitted,

JOHN CORNYN

Attorney General of Texas

Linda S. Eads

Gregory S. Coleman

Julie Caruthers Parsley

Meredith B. Parenti

Brent A. Benoit

Office of the Attorney General, State of Texas

P.O. Box 12548

Austin, Texas 78711-2548

Telephone: (512) 463-2191

Facsimile: (512) 474-2697

Harry M. Reasoner

Allan Van Fleet

Betty R. Owens

Beverly G. Reeves

VINSON & ELKINS L.L.P.

1001 Fannin Street

Houston, Texas 77001-6760

Telephone: (713) 758-2358

Facsimile: (713) 615-5173

Samuel Issacharoff

Douglas Laycock

727 E. Dean Keeton Street

Austin, Texas 78705

Telephone: (512) 471-5151

Facsimile: (512) 477-8149

Facsimile: (512) 471-6988

John L. Hill, Jr.

Locke Liddell & Sapp LLP

3400 Chase Tower, 600 Travis

Houston, Texas 77002-3095

Telephone: (713) 226-1230

Facsimile: (713) 223-3717

Attorneys for Defendants-Appellees-

Cross-Appellants State of Texas, *et. al*.

Certificate of Service

I certify that I served a copy of this brief, in both paper and electronic forms, on all counsel of record, by First Class United States Mail, hand delivery, or third-party commercial delivery service on the 19th day of April, 1999, as listed below:

Theodore B. Olson

Douglas R. Cox

Daniel W. Nelson

Gibson, Dunn & Crutcher L.L.P.

1050 Connecticut Avenue, N.W., Suite 900

Washington, DC 20036

Stephen Smith

Texas Legal Foundation

1313-C West 6th Street

Austin, Texas 78768-2023

_____

Gregory S. Coleman

Certificate of Compliance

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 20,891 words.

2. The brief has been prepared in proportionally spaced typeface using WordPerfect 8, in Times New Roman 14 point.

3. If the court so requests, the undersigned will provide an electronic version of the brief and/or a 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 5th Cir. R. 32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.

_____

Gregory S. Coleman