

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50506

CHERYL J. HOPWOOD, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

THE STATE OF TEXAS, et al.,

Defendants-Appellees, Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

**BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS,
THE AMERICAN COUNCIL ON EDUCATION, THE AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS, AND THE LAW
SCHOOL ADMISSION COUNCIL AS *AMICUS CURIAE* IN
SUPPORT OF THE STATE OF TEXAS *ET AL.* URGING
REVERSAL OF THE DISTRICT COURT'S INJUNCTION AND
IN SUPPORT OF *EN BANC* REVIEW**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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Plaintiffs-Appellants, Cross-Appellees,

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Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following additional persons and entities 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.

The American Council on Education	<i>Amicus</i>
The American Association of University Professors	<i>Amicus</i>
The Association of American Law Schools	<i>Amicus</i>
The Law School Admission Council	<i>Amicus</i>
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STATEMENT OF INTEREST

The Association of American Law Schools ("AALS"), the American Council on Education ("ACE"), the American Association of University Professors ("AAUP") and the Law School Admission Council ("LSAC") submit this *amicus curiae* brief in support of the defendant-appellees'/cross-appellants' brief urging reversal of the district court's injunction and requesting the Court to hear this appeal *en banc*. For reasons set forth below, each of

the *amici* vigorously opposes the broad injunction that was entered by the district court as part of its final judgment. The injunction permanently enjoins the University of Texas ("U.T.") School of Law from "taking into consideration racial preferences in the selection of those individuals to be admitted as students at the [law school]."

AALS is a non-profit educational organization whose members consist of 160 ABA-approved law schools. AALS' primary mission is "the improvement of the legal profession through legal education." To that end, AALS bylaws require, among other things, that AALS members seek to have a "faculty, staff, and student body which are diverse with respect to race, color and sex." AALS Bylaw 6-4.c. Similarly, AALS' Statement on Diversity, Equal Opportunity and Affirmative Action emphasizes AALS' commitment to "equality of opportunity and diversity" and seeks "to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary." AALS strongly believes that "broadening the boundaries of inclusiveness of American institutions is economically necessary, morally imperative, and constitutionally legitimate." Id. Consistent with that belief, most AALS member institutions have some form of a race-conscious admissions program. These admissions programs are threatened by the district court's injunction and the prior panel holding in this case.

ACE is a non-profit educational association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has sought to promote the highest standards in all aspects of higher education. As a leading participant in higher education affairs, ACE seeks to advance the interests of all members of the academic community, including students and the educational institutions themselves. ACE is dedicated to the principle that a strong higher educational system is the cornerstone of a democratic society. In furtherance of this principle, ACE supports diversity as a means of "enrich[ing] the educational experience," "promot[ing] personal growth," "strengthen[ing] communities and the workplace," and "enhanc[ing] America's economic competitiveness."

See "On The Importance of Diversity in Higher Education," The New York Times A27 (Apr. 24, 1997). ACE is committed to helping its members "to reach out and make a conscious effort to build healthy and diverse learning environments appropriate to their missions." Id. ACE's policies, and the admissions programs of many ACE members, will be adversely affected if the district court's injunction, and the prior panel's decision, are left standing.

AAUP is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines.

Founded in 1915, AAUP is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. AAUP develops policy standards for the protection of academic freedom, shared governance, and other elements central to higher education that are widely respected and followed as models of sound academic practice in American colleges and universities. See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 579 n.17 (1972); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971). For many years, AAUP has supported the right of academic institutions to adopt programs designed to promote diversity among students and faculty. See, e.g., Brief of AAUP as Amicus Curiae, Regents of the University of California v. Bakke, 438 U.S. 265 (1978). At the heart of this support is the recognition that diversity contributes directly and substantially to the educational process. See, e.g., Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination, 59 AAUP Bulletin 178-83 (1973); Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties, 68 ACADEME 15a-20a (1982); see also Resolutions on Affirmative Action, 82 ACADEME 50 (Jul./Aug. 1996) and 83 ACADEME 38 (Jul./Aug. 1997). If not overturned, the original panel's decision and the district court's injunction in this case will have a lasting adverse impact on these long-standing policies.

LSAC is a nonprofit corporation whose members are 196 law schools in the United States and Canada. Founded in 1947, LSAC's mission is to coordinate, facilitate and enhance the law school admissions process. Through LSAC, law schools receive a variety of centralized services, such as the Law School Admission Test ("LSAT") and the Law School Data Assembly Service ("LSDAS"), which assist individual law schools in their admissions processes. LSAC conducts and funds extensive research on the LSAT, law school admissions, and other aspects of legal education, and has a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC also participated as *amicus curiae* before the United States Supreme Court in Bakke, 438 U.S. 265 (1978).

In terms of both institutions and faculty members, AALS, ACE, AAUP and LSAC collectively represent most of the undergraduate and legal academic communities. Based upon many years of first-hand experience, we are convinced that student diversity is absolutely essential to the continued legitimacy and vibrancy of higher education. We respectfully present our views in the hope that they will assist the Court in resolving an issue of significant moment not only for higher education, but for society as a whole.

The Court has previously stated that "any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body" is unconstitutional. Hopwood v. Texas, 78 F.3d

932, 944, 946 (5th Cir.), reh'g denied, 84 F.3d 720 (5th Cir.), cert. denied, 518 U.S. 1033 (1996). For this reason and because of the exceptional importance of the issue presented, AALS, ACE, AAUP and LSAC join the Texas defendants in urging the Court to reverse the district court's injunction and to grant *en banc* review.

STATEMENT OF THE ISSUE

Whether the Fourteenth Amendment categorically prohibits state educational institutions from considering an applicant's race and ethnicity in order to obtain a diverse student body.

SUMMARY OF THE ARGUMENT

This brief does not address the legitimacy of U.T.'s specific law school admissions program, nor any other factual issues presented on appeal. Instead, AALS, ACE, AAUP and LSAC are gravely concerned about the broader constitutional issue raised by the prior Hopwood decision and the district court's subsequent injunction. The freedom of educators to consider race in their admissions processes in order to create a rich and diverse learning environment is of paramount importance to our educational system and to the next generation of Americans. Only through diversity in student population can educational institutions assure a broadly educated student body that is prepared to take on the challenges of an increasingly multi-cultural society.

Contrary to the original panel ruling in this case, Supreme Court precedent establishes that undergraduate and professional schools are constitutionally permitted to consider race in their admissions processes in order to foster legitimate educational goals. Given the complexities of modern American society, educational institutions concerned with leadership and good citizenship are obligated by their own missions to create a racially and ethnically diverse and varied learning environment both within, and outside of, the classroom. Educational institutions must have flexibility and independence to admit those students whom they believe, both as individuals and as a group, will not only meet the academic standards set by the institutions, but also vitally contribute to the educational process and later be in a position to use what they have learned for the greater good of society.

Placing value on racial and ethnic diversity neither compromises academic standards nor disadvantages students. To the contrary, studies confirm that diversity benefits **all** students. A racially heterogeneous student population is generally more satisfied with the educational experience and learns to think more deeply, to resolve conflict more productively, and to be more tolerant.

The curtailment of race-conscious admissions resulting from the prior panel's decision has already had dramatic effects on minority enrollment at U.T.'s School of Law. Allowing the

district court's injunction to stand would increase the very real risk of a return to substantially all-white educational institutions and a loss of the educational benefit of diversity for **all** students, a benefit so painstakingly gained in the last thirty years.

Students are suffering the loss of the important learning tool of a student body consisting of a wide range of backgrounds, life experiences, talents and perspectives, while undergraduate and graduate institutions are suffering the loss of their academic freedom to maximize the benefits of their educational environments. The constitutional issue presented is of great legal and social importance. It deserves *en banc* review.

ARGUMENT

IV. THE PROCEDURAL HISTORY OF THIS CASE AND THE EXCEPTIONAL IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED JUSTIFY *EN BANC* CONSIDERATION

Federal Rule of Appellate Procedure 35 allows an appeal to be heard *en banc*, either before or after a panel has ruled on the appeal, when "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." The current appeal easily fits both criteria. The prior panel's decision conflicts with Supreme Court precedent and inhibits any subsequent panel hearing this appeal from fully considering the propriety of the district court's broad injunction. Moreover,

whether diversity in education is a sufficiently compelling state interest to justify the consideration of race in the application process implicates critical, national interests. Consequently, this case is ripe for immediate *en banc* review.

II. UNDER SUPREME COURT PRECEDENT, DIVERSITY IN EDUCATION IS A CONSTITUTIONALLY PERMISSIBLE, COMPELLING STATE INTEREST

In two decisions concerning minority set-asides for government contractors, the Supreme Court has held that the Fifth and Fourteenth Amendments require "strict scrutiny" of all race-based action taken by any level of government. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236-37 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989). Before a state can consider race, it must show that such action is both "necessary to further a compelling [state] interest" and "narrowly tailored" to satisfy that interest. Adarand, 515 U.S. at 237; Police Ass'n of New Orleans v. City of New Orleans, 100 F.3d 1159, 1167 (5th Cir. 1996). However, in writing for the divided Court in Adarand, Justice O'Connor was careful to note that strict scrutiny is not an insurmountable barrier that prohibits all forms of race-based action regardless of the goals served or the narrowness of its scope. 515 U.S. at 237 ("we wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact'"). Thus, a state may still make race-conscious decisions in certain situations - - including higher education.

In Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978), Justice Powell wrote for the Supreme Court that "the interest of diversity is **compelling** in the context of a university's admissions program," because it contributes to "the robust exchange of ideas" on campus. Id. at 313-14 (emphasis added). This concept of diversity may include, among other factors, the consideration of race and national origin. Id.

Since Bakke, and in the wake of Croson and Adarand, several courts, in addition to this Court, have confronted thorny issues concerning a state's consideration of race in student applications. See, e.g., Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995); Smith v. University of Washington Law School, slip op., No. C97-3352 (W.D. Wash., Feb. 12, 1999); Wooden v. Board of Regents of Univ. Sys. of Georgia, 32 F. Supp. 2d 1370 (S.D. Ga. 1999); Eisenberg v. Montgomery County, 19 F. Supp. 2d 449 (D. Md. 1998); Hunter by Brandt v. Regents of the Univ. of California, 971 F. Supp. 1316 (C.D. Cal. 1997). Some of these courts have recognized that Bakke requires the conclusion that diversity in education is a compelling state interest. See Smith, slip op. at 6 (court "will follow Justice Powell's opinion in Bakke that educational diversity 'is a constitutionally permissible goal for an institution of higher education'"); Eisenberg, 19 F. Supp. 2d at 452-55 (court believes that, pursuant to Bakke, "the diversity interest remains a

compelling state interest in the [education] context"). Others have assumed the continued vitality of Bakke but have found the admissions program at issue to be insufficiently tailored to achieve the legitimate goals of diversity. See Wessmann, 160 F.3d at 796 (assuming "diversity" is constitutionally permissible goal, middle/high school admissions program was not "narrowly tailored" to meet this goal); Wooden, 32 F. Supp. 3d at 1380-81 (same with respect to University of Georgia's freshman admissions program). Still other courts did not address the "diversity" issue. See Podberesky, 38 F.3d at 151 (University of Maryland's all-black scholarship program was not justified as remedy for past discrimination); Hunter, 971 F. Supp. at 1327 (experimental lab school had unique compelling interest in having controlled admissions program). While these courts have all struggled with the place of race-conscious state action in education, none has gone as far as the original panel decision in Hopwood in asserting that Bakke is no longer good law and that a diverse student body can **never** be a compelling state interest. Hopwood stands alone in this regard.

Bakke has not been overruled by the Supreme Court. Indeed, Justice O'Connor indicated in a concurring opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986), that the Bakke Court had previously found that racial diversity constituted a compelling interest, at least in the higher education context.

In addition, in Adarand, 515 U.S. at 258, Justice Stevens noted in his dissent that the Court was not overruling that aspect of Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), which recognized that diversity "may provide a sufficient interest to justify [racial classifications]." Bakke therefore remains good law and should have been applied in the prior appeal. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also Buchwald v. University of New Mexico, 159 F.3d 487, 499 (10th Cir. 1998) (Bakke remains leading jurisprudential authority in area of admissions); Smith, slip op. at 6 (court will "leave to the Supreme Court the prerogative of overturning its own decisions"); University & Community College Sys. of Nevada v. Farmer, 930 P.2d 730, 735 (Nev.) (Bakke permits state to try to attain racially diverse student body and faculty), cert. denied, 118 S. Ct. 1186 (1998); A. Amar & N. Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745, 1754 (1996) (concluding that Bakke has not been overruled by subsequent Supreme Court cases); Recent Cases, "Fifth Circuit Holds That Educational Diversity Is No Longer A Compelling State Interest -- Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S.Ct. 2581 (1996)," 110 Harv. L. Rev.

775 (1997) (same). Indeed, in dissenting from the denial of rehearing *en banc* on the prior appeal, seven Judges on this Court recognized that Bakke remains the law of the land. See Hopwood, 84 F.3d at 724 n.11 ("Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules Bakke, student body diversity is a compelling governmental interest for the purposes of strict scrutiny."). By prohibiting any form of race-conscious admissions to obtain diversity, regardless of how narrowly the race-conscious lines are drawn, the original panel decision, and the district court's subsequent broadly-worded injunction, ignore established constitutional standards. *En banc* consideration is necessary to correct the prior panel's departure from the principle of *stare decisis* in holding that Justice Powell's opinion in Bakke "is not binding precedent." Hopwood, 78 F.3d at 944.

Diversity in student populations is a constitutionally permissible, compelling government interest that should survive strict scrutiny when plans to achieve diversity through race-based action are carefully and narrowly devised. To hold otherwise is contrary to Supreme Court precedent and would have devastating, long-term consequences on higher education.

III. STUDENT DIVERSITY SIGNIFICANTLY IMPROVES THE QUALITY OF AN INDIVIDUAL'S EDUCATION

A. The Judgment of the Educational Community Is Entitled to Deference

American higher education has gained world prominence in part due to its autonomy and freedom from governmental interference. W. Bowen & D. Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions, at 287 (1998) ("The Shape of the River").^{1/} Because such matters as course requirements, tenure decisions or graduation and admissions standards do not lend themselves to judicial appraisal or legalistic decision-making, courts have given educational institutions broad leeway in these areas. See, e.g., Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (courts show great deference to judgment of educators and normally will not overturn such decisions unless they are such "a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not exercise professional judgment"). The belief that racial and ethnic diversity serves an imperative educational purpose has wide support in the academic community. See supra pp. 1 to 5. These views should be seriously considered.

Allowing educators academic freedom in such matters as student admissions also comports with the First Amendment. The Supreme Court has long recognized that academic freedom is

^{1/} Counsel for *amici* would be happy to make any study, article, or case cited in this brief available to the Court.

essential to safeguard "[t]eachers and students [who] must always remain free to inquire, to study and to evaluate." Keyishian v. Board of Regents of the Univ. of New York, 385 U.S. 589, 603 (1967) (quotations and citation omitted). Justice Frankfurter, for example, acknowledged the historic independence of educational institutions and set out the "four essential freedoms of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and **who may be admitted to study.**" Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Consistent with that reasoning, Justice Powell recognized in Bakke that "a countervailing constitutional interest, that of the First Amendment," is implicated in connection with the right of universities "to select those students who will contribute the most to the 'robust exchange of ideas'...." 438 U.S. at 313.

Here, the original panel's decision and the district court's injunction threaten academic freedom and clearly implicate the First Amendment. The Court should not erode academia's freedom to make autonomous decisions concerning who will best contribute to the educational process and mission of a particular institution. See, e.g., L. Ware, Turning Back the Clock: The Assault on Affirmative Action, 54 Wash. U.J.U. & C.L. 3, 24 (1998). The First Amendment, in combination with the deference historically given to educational decisions, counsel against any

broad and sweeping judicial decision to prohibit undergraduate and professional schools from implementing race-and-ethnicity-conscious programs designed to promote and obtain diversity.

B. A Diverse Student Body Is An Imperative Educational Goal

Diversity in education has been valued and vital for more than a century. N. Rudenstine, The Uses of Diversity, 98 *The Harvard Magazine* 48, 49 (1998). Here, the value of a diverse student body was recognized as a necessary component of the education of citizens in a heterogeneous democracy as early as the mid-nineteenth century. Id. at 50. By the end of the nineteenth and the beginning of the twentieth centuries, diversity in education became a more explicit goal. Id. at 50-51. One Harvard president during that time, Charles William Eliot, believed that a student body consisting of individuals from all over the country and from all walks of life would "promote[] thought on great themes, convert[] passion into resolution, cultivate[] forbearance and mutual respect and teach[] . . . candor, moral courage, and independence of thought...." Id. As the nation matured in complexity, this vision of diversity grew to include students of different races, religions and skin colors. Id. at 55.

Diversity in education serves unique and special purposes. Note, An Evidentiary Framework for Diversity as a Compelling

Interest in Higher Education, 109 Harv. L. Rev. 1357, 1358, 1366-73 (1996); cf. Bakke's Fate, 43 U.C.L.A. L. Rev. at 1774 (diversity in education serves wholly different purpose than in the commercial arena). "[M]uch of the point of education is to teach students how others think and to help them understand different points of view -- to teach students to be sovereign, responsible, and informed citizens in a heterogeneous democracy."

Id. It is for this reason that "integrated education democratically benefits students of all races, including white students, by providing a space for people of all races to grow together." Id. at 1775; see also J. Alger, The Educational Value of Diversity, 83 ACADEME 20 (Jan./Feb. 1997) (diversity serves "as a controlled microcosm previewing the larger society and working world into which the student will graduate").

The goals of diversity are more than mere sentiment or abstract ideals. Numerous studies concretely demonstrate that students who are exposed to racial diversity in education have better cognitive skills, greater satisfaction with their college experience, and greater tolerance and less prejudice both in the educational setting and beyond. See, e.g., Expert Report of Patricia Gurin at 100;^{1/} The Shape of the River at 218-55; S.

^{2/} All expert reports referred to in this brief were prepared for Gratz v. Bollinger, No. 97-75321 (E.D. Mich.) & Grutter v. Bollinger, No. 97-75928 (E.D. Mich.) (pending lawsuits challenging race-conscious admissions at University of Michigan and University of Michigan Law School respectively).

Hurtado, Linking Diversity and Educational Purpose: How the Diversity of the Faculty and Student Body May Impact the Classroom Environment and Student Development, at 8-9 (presented paper -- Civil Rights Project Conference on Non-Racial Standards and Minority Opportunity, Harvard Univ., Apr. 1997); O. Villalpando, Comparing the Effects of Multiculturalism and Diversity on Minority and White Students' Satisfaction with College, at 12 (presented paper -- Annual Meeting of the Association for the Study of Higher Education, Nov. 10-13 1994); M. Dawkins & J. Braddock II, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. of Negro Educ. 394, 403 (Summer 1994); A. Astin, Diversity and Multiculturalism on the Campus: How are Students Affected?, 25 Change 44, 45-46 (Mar./Apr. 1993). Students in a diverse learning environment are also better able to understand and consider multiple perspectives, deal with conflict, and appreciate common values expressed through consensus. See Expert Report of Patricia Gurin at 101. As one author summarized:

Overall, the literature suggests that diversity initiatives positively affect both majority and minority students on campus. Significantly, diversity initiatives have an impact not only on student attitudes and feelings towards intergroup relations on campus, but also on institutional satisfaction, involvement, and academic growth.

J. Alger, Unfinished Homework for Universities: Making the Case for Affirmative Action, 54 Wash. U. J. U. & C.L. 73, 77 (1998)

("Making the Case for Affirmative Action") (quoting D. Smith & Assocs., Diversity Works: The Emerging Picture of How Students Benefit (1997)). See also M. Hallinan, Affirmative Action in the Classroom: Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L. J. 733, 753 (1998) ("existing studies provide evidence that racial and ethnic diversity on college campuses promotes learning, increases understanding of racial groups and cultures, reduces racism and prejudice, and leads to cordial relationships between students of different racial and ethnic heritage"). Importantly, "[n]o comparable body of research is available that contradicts the major findings of these studies or demonstrates widespread negative effects of diversity on student learning or race relations." Id. See also Making the Case for Affirmative Action, 54 Wash. U. J. U. & C.L. at 74-75 & n.5 ("Opponents of affirmative action have certainly not disproven the benefits of diversity, nor have they demonstrated that race-conscious affirmative action programs are unnecessary to obtain racial diversity and its concomitant educational benefits in higher education.").

Of course, the benefits of diversity are not limited to undergraduate schools. As Justice Powell recognized in Bakke, "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial." Bakke, 438 U.S. at 313. Particularly in the law, effective teaching depends on diversity of thought. See Expert

Report of Kent Syverud at 265. The Socratic method, used in most law schools, consciously seeks to make students learn from each other and to see factual situations from several points of view. Id. at 266-67. Justice Powell explicitly recognized the value of diversity in legal education when he noted that "[f]ew students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.'" Bakke, 438 U.S. at 314 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)). Racial heterogeneity, with its concomitant diversity of backgrounds and viewpoints, thus makes better classroom learning for future attorneys.

In addition, many of our leaders come from law schools. Educators have an important stake in ensuring that such leaders can "serve all sectors of society - and be able to work effectively with many different kinds of individuals." The Shape of the River at 93. We believe the available evidence demonstrates that a diverse student body better prepares **all** students to serve their clients and constituents - clients and constituents who are themselves becoming increasingly diverse. See Expert Report of Robert B. Webster at 271. Along with this concrete justification, however, comes the undeniable societal benefit that an ethnically diverse leadership would be more reasonably representative of those they serve, thereby lending

legitimacy to, and respect for, our legal and political institutions. Id.^{1/}

Critics of race-and-ethnicity-conscious admissions policies suggest that any assumption that racial diversity translates into diverse backgrounds and viewpoints is itself a form of stereotyping. See, e.g., The Educational Value of Diversity, 83 ACADEME at 21. The importance of such diversity does not, however, rest on the belief that all members of a particular group think alike. The fact that some individuals from the same racial or ethnic background may not share a common viewpoint is itself a valuable lesson - and a lesson to be learned by **every** student regardless of his or her race or background. Id.; see also The Shape of the River at 280 ("The black student with high

^{3/} Society would likewise benefit from diversity in other professions. See, e.g., M. Komaromy, et al., "The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations," 334 New Eng. J. of Medicine 1305, 1310 (1996) (data suggests that black and Hispanic physicians fill important role in caring for poor people and members of minority groups; decrease in the number of physicians from minority groups is also likely to result in poorer access to health care and may ultimately result in reduced health and well-being for substantial proportion of the population).

grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx"); Bakke's Fate at 1778 (with a diverse student body, white students learn from black students and vice-versa). Moreover, it is a reality of American society that race almost always affects an individual's life experiences and perspectives, and, therefore, what one brings to a learning environment. Note, The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admissions Programs: A Critical Look at Hopwood v. Texas, 48 Case W. Res. L. Rev. 133, 161 & n.171 (1998) ("A Critical Look at Hopwood v. Texas"). To deny this reality is to deny the history and social fabric of this country. Id.

Critics of admissions processes that take race into account also argue that admissions programs which overemphasize race fail to properly consider other factors, such as the ability to play a musical instrument or the ability to play sports, which might create richer "diversity" in a student population. To these critics, "diversity" is a euphemism for racial preferences. See, e.g., D. D'Souza & C. Edley, Jr., Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?, 60 Albany L. Rev. 425, 450-51 (1996). However, we are not advocating, nor do we think it legally sound, that race be considered to the exclusion of all other attributes that an individual might bring to the learning process. Justice Powell

made this point in Bakke when he concluded that “[e]thnic diversity, however, is only one element in a range of factors a University may properly consider in attaining the goal of a heterogeneous student body.” 438 U.S. at 314. Individual admissions programs, including the one at the U.T. School of Law, should be analyzed on a case-by-case basis to be sure that they meet the requirements of Bakke. But the courts should not reject, out of hand, the long-valued educational goal of obtaining student bodies of varied backgrounds and viewpoints. Educators should be permitted to use race as one of many attributes that a student might bring to an educational institution in order to create the richest possible learning environment and the most well-rounded and best prepared leaders and professionals that they can. See, e.g., Bakke's Fate at 1772-73 (admissions process should treat minority students “just like other applicants and the kinds of diversity they may offer assessed alongside other kinds of diversity”).

C. Diversity Does Not Compromise Academic Standards

Considering race as one of myriad factors weighing in favor of an individual’s admission into post-secondary and professional schools does not, as some argue, compromise an educational institution’s academic standards or forever stigmatize minorities. Although the vast majority of law schools rely

primarily on LSAT scores and college Grade Point Averages ("G.P.A.") to determine admissions, they have never used such measures exclusively. Cf. L. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions, 72 N.Y.U. L. Rev. 1, 16-17 (1997) ("The Threat to Diversity in Legal Education") (along with lower-scoring minority applicants, lower-scoring white applicants with certain attributes are also given special consideration in the admission process). Instead, schools that have the luxury of being selective, including the U.T. School of Law, generally end up with a very large group of applicants who are deemed capable of doing good work and whose admission will depend on a variety of factors, including, perhaps, the individual's race. See, e.g., Harvard College Admissions Program, attached as Appendix to Justice Powell's opinion in Bakke, 438 U.S. at 321; Hopwood, 999 F. Supp. at 879-81.^{4/}

^{4/} For instance, in 1992 at U.T. School of Law, black students had a median undergraduate G.P.A. of 3.3 and a median 158 [78th percentile] on the LSAT; for Mexican Americans the medians were

3.24 and 157 [74th percentile], respectively. Such objective numbers make them "extremely well qualified to do the work at UTLS and other elite law schools." M. Olivas, Affirmative Action: Diversity of Opinion: Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education, 68 Colo. L. Rev. 1065, 1117 (1997) ("Admissions Decisions in Higher Education").

For admissions purposes, "merit" has never been "a simple function of quantifiable criteria." Shape of the River at 26. Schools routinely include subjective considerations when making admissions decisions because they recognize that GPAs and standardized tests are imperfect predictors of future academic performance and do not capture all of the qualities that make for a qualified, vibrant student body. See, e.g., Admissions Decisions in Higher Education, 68 U. Colo. L. Rev. at 1071-80; Expert Report of Claude M. Steele at 245. In truth, "[h]eavy reliance upon standardized test scores and cutoff marks and the near-magical properties accorded them inflate the narrow, modest use to which any standardized scores should be put." Admissions Decisions in Higher Education, 68 Colo. L. Rev at 1117-18.

Finally, studies on the performance of minorities admitted into selective undergraduate and professional schools demonstrate that they are able to meet the rigorous academic demands of these schools and compete successfully in the professional world. One study shows that even at some of the most selective colleges and universities in the country, the graduation rate for black matriculants of the class of 1989 was 75 to 79 percent and for Hispanic matriculants 81 to 90 percent. The Shape of the River at Chapters 4 & 5. While not as high as the graduation rate for 1989 white matriculants (86 to 94 percent) (id.), these graduation rates compare very favorably with the national rates for both minority and white matriculants at less selective

schools, demonstrating that blacks and Hispanics are not "dropping out" of highly selective schools in greater numbers because they cannot do the work. And while black students tended to fall lower in the class rankings at highly selective institutions, these candidates appeared extremely motivated to pursue and obtain professional degrees and to make significant contributions to society after graduation. See The Shape of the River at Chapters 4 & 5.

On the professional level, a vast majority of students of color pass the bar examination. L. Wightman, LSAC National Longitudinal Bar Passage Study, LSAC p. viii (1998) ("The eventual [bar] passage rate for study participants of color was 84.7 percent"); R. Delgado, Affirmative Action: Diversity of Opinions: Why Universities Are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action, 68 U. Colo. L. Rev. 1165, 1171 (1997) ("Restoring the Remedial Rationale for Affirmative Action") (students of color passed state bar examination at rates similar to those of their classmates at large). Moreover, like their undergraduate counterparts at selective institutions, minority law students do very well after graduation, obtaining prestigious positions and contributing greatly to their communities. See, e.g., Restoring the Remedial Rationale for Affirmative Action 1171-77. In short, there is every indication that minority applicants admitted to selective undergraduate and professional schools succeed and that

educational institutions are not "wasting" admissions slots on such applicants but rather are giving them, and their white classmates, the benefits of a rigorous education which includes a rich and diverse learning environment.

Because educational institutions perceive racial and ethnic diversity as such an important educational goal, and because they are committed to preserving a reputation of accessibility, openness and inclusiveness, it is likely that, if all forms of race-conscious admissions are declared unlawful, they will seek to find other, albeit less satisfactory, ways to achieve the goal of diversity and to make clear that their doors are still open to everyone. See, e.g., B. Wildavsky, "What Happened to Minority Students?," U.S. News & World Report 28-29 (March 22, 1999) (in those states in which affirmative action is under attack, schools are trying to come up with other ways to boost minority enrollment; Texas, for instance, has implemented a rule accepting all in-state students for undergraduate admissions who graduate in the top ten percent of their respective high school class into the University of Texas system). Studies have also shown that class-based affirmative action, for example, does not come close to replicating the levels of racial diversity that race-based affirmative action has achieved, especially for African-Americans. See D. Malamud, Assessing Class-Based Affirmative Action, 47 J. Legal Ed. 452, 464-71 (1998) (explaining why class-

based affirmative action is a poor tool for achieving racial goals); D. Malamud, A Response to Professor Sander, 47 J. Legal Ed. 472, 497 (1998) (acknowledging that "for blacks, there were only costs" when UCLA Law School moved from race-based to class-based affirmative action). Ironically, attempts to achieve diversity under a race-neutral system might have the effect of compromising currently high academic standards by lowering threshold admissions standards without requiring the concomitant subjective attributes that promise future achievement. The Shape of the River at 271-74; see also "What Happened to Minority Students?," U.S. News & World Report at 29 (using high school class rank as sole criterion for admissions to achieve diversity in race-neutral manner may have perverse incentives such as causing students to take easier classes or to transfer to easier schools).

IV. THE PANEL OPINION HAS HAD DISASTROUS EFFECTS

This appeal presents a unique perspective for the Court. Enough time has passed since the original Hopwood decision in 1996 to allow concrete analysis of its effects on U.T.'s law school admissions. The results are telling and disturbing. The year after the U.T. School of Law instituted an admissions policy that did not, in any way, consider race in the admissions process, black student admissions fell 83 percent and Mexican American admissions fell 51 percent. A Critical Look at Hopwood v. Texas, 48 Case W. Res. at 133. This precipitous drop cannot

be wholly explained by a lack of minority law school applicants with high enough "objective" numbers. Minority applicants are also perceiving the institution as hostile or isolating for them, and thus are applying elsewhere. See P. Applebome, "Universities Report Less Minority Interest After Action to Ban Preferences," The New York Times B12 (Mar. 19, 1997). The same drastic reduction in the number of minorities was noted in the University of California's three law schools and the University of Washington law school the year after state citizens voted to end race preferences there. See R. Whitman, Affirmative Action on Campus: The Legal and Practical Challenges, 24 J.C. & U. L. 637, 663 (Spring 1998) (in California, black enrollees dropped 63 percent, Native American enrollees dropped 60 percent, and Hispanic enrollees dropped 34 percent); J. Selingo, "Minority Applications Plummet at U. of Washington Law School," The Chronicle of Higher Educ., (Today's News, Mar. 17, 1999) (available online) (in Washington, number of black applicants dropped 41 percent; Filipino applicants dropped 26 percent; Hispanic applicants dropped 26 percent).

Studies projecting the effect of a race-neutral admissions process on minority enrollment in professional schools confirm that the alarming numbers in Texas, California and Washington are not aberrations. One study concluded that "the effect of barring any consideration of race [in law and medical school admissions] would be the exclusion of more than half of the existing minority

student population from these professions." The Shape of the River at 282. Such a race-neutral admissions process would reduce the black student population at the most selective law and medical schools "to less than 1 percent." Id. Another study concluded that of the 3,435 black applicants who were accepted to at least one law school to which they applied in 1991, only 687 would have been admitted if LSATs and GPAs were the sole criteria for admissions. The Threat to Diversity in Legal Education 72 N.Y.U. L. Rev. at 15-16. Although less severe, similar patterns emerged for other students of color. Id. This study demonstrates that a nationwide race-neutral law school admissions process would not simply shift minority law school applicants to different, perhaps less selective law schools; it **would result in the significant exclusion of minorities from the legal profession altogether.** Id. at 21. Such a loss of contribution to the educational process, and to society at large, would be nothing short of tragic.

Spurred by the original Hopwood decision, challenges have mounted to other race-conscious admissions programs. See, e.g., Gratz v. Bollinger, No. 97-75321 (E.D. Mich.) (pending); Grutter v. Bollinger, No. 97075928 (E.D. Mich.) (pending); Smith, slip op., No. C97-3352 (W.D. Wash., Feb. 12, 1999); Wooden, 32 F. Supp. 2d 1370 (S.D. Ga. 1999). Within the Fifth Circuit itself, the Hopwood decision has since been applied to prohibit a race-

conscious decision involving a university doctoral program, Lesage v. Texas, 158 F.3d 213, 221 (5th Cir. 1998), petition for cert. filed (Jan. 11, 1999), and to imply an end to race-conscious decisions in the private sector, see Messer v. Meno, 130 F.3d 130 (5th Cir. 1997), cert. denied, 119 S. Ct. 794 (1999). Before affirmative action is declared "dead in the Fifth Circuit," Messer, 130 F.3d at 141 (Garza, J., concurring), the full Court should address this important issue and consider fully the relevant and extensive research demonstrating the profound benefits that racial heterogeneity brings to education. Cf. Making the Case for Affirmative Action, 54 Wash. U. J. U. & C.L. at 77 (courts have thus far largely failed to acknowledge research on benefits of diversity).

CONCLUSION

The Court should hear this appeal *en banc* and reverse the district court's injunction.

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CERTIFICATE OF SERVICE

I hereby certify that two paper copies and one computer readable disk copy of the foregoing Brief of the Association of American Law Schools, the American Council on Education, the American Association of University Professors, and the Law School Admission Council as *Amicus Curiae* in Support of the State of Texas, *et al.* Urging Reversal of the District Court's Injunction and in Support of *En Banc* Review, have been served by first-class mail, postage pre-paid, this the ____ day of April, 1999, on each of the following counsel:

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