No. 05-11527-BB

IN THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN F. KNIGHT, JR., AND ALEASE S. SIMS et al,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

STATE OF ALABAMA ET AL.,

Defendants-Appellees.

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Knight and Sims v. Alabama, No. 05-11527

CERTIFICATE OF INTERESTED PERSONS

Appellants John F. Knight, Jr., and Alease S. Sims et al., through undersigned counsel, certify that the following persons, firms, and entities have an interest in the outcome of this case:

1. State of Alabama
2. Alabama A&M University
3. Board of Trustees for Alabama A&M University
4. Alabama Commission on Higher Education
5. Alabama Public School and College Authority
6. Alabama State Board of Education
7. Alabama State University
8. Board of Trustees for Alabama State University
9. Edward S. Allen
10. James R. Andrews
11. Athens State College
12. Auburn University
13. Dennis Charles Barnett
14. Ella B. Bell

15. Stephanie W. Bell
16. James U. Blacksher
17. John G. Blackwell
18. Dr. Maree Macon Blackwell
19. David R Boyd
20. J. R. Brooks
21. Hall Bryant, Jr.
22. Paul W. Bryant, Jr.
23. Ralph Buffkin
24. Susan Buskey
25. David F. Byers, Jr.
26. Dr. Taylor Byrd
27. Calhoun State Community College
28. Richard F. Calhoun
29. Frederick Carodine
30. Dr. Mary Jane Caylor
31. Jesse L. Cleveland
32. Bettye Fine Collins

33. Angus R. Cooper II

34. James C. Cox

35. Larry E. Craven

36. Oscar Crawley

37. Vonda Cross

38. Buford Crutcher

39. Thomas P. Davis

40. Elton N. Dean, Sr.

41. Armand Derfner

42. Gerald O. Dial

43. Roy H. Drinkard

44. Judge John H. England

45. Joseph C. Espy III

46. Thomas Figures

47. Jeffery A. Foshee

48. Byron P. Franklin

49. Alma S. Freeman

50. William F. Gardner

51. Edward M. George
52. H. Lewis Gillis
53. Jeremiah Glassman
54. Carlos A. Gonzalez
55. Fred D. Gray
56. Stanley F. Gray
57. Edgar R. Haden
58. Dr. Ethel H. Hall
59. John Harrison
60. R. Douglas Hawkins
61. Lamar P. Higgins
62. Robert Holmes, Jr.
63. Robert D Hunter
64. Andria S. Hurst
65. Johnnie Jackson-McDougald
66. Jacksonville State University
67. Clinton L. Johnson, Sr.
68. Carl E. Johnson, Jr.

69. Dr. Roy Johnson
70. Toreathea M. Johnson
71. Dr. Jeanette Jones
72. Robert Jones, Jr.
73. Bobby Judkins
74. Michael G. Kendrick
75. Olin B. King
76. John F. Knight, Jr.
77. Robin G. Laurie
78. Lawrence J. Lemak
79. Norma M. Lemley
80. Vanessa Leonard
81. Thomas M Lovett
82. Robert E. Lowder
83. Peter L. Lowe
84. Joseph Lowman
85. Gail Main
86. Jim Main

87. Patrick Mallory

88. Alice H Martin

89. Golda A. McDaniel

90. Sidney L. McDonald

91. Candis A McGowan

92. Milton McGregor

93. Randy McKinney

94. John J. McMahon, Jr.

95. Dr. Charles Edwards McMillan

96. Earlon C. McWhorter

97. Emma J. Melton

98. John C.H. Miller, Jr.

99. Pauline Miller

100. Gary Mitchell, Jr.

101. Dr. Joe Morton

102. Hon. Harold L. Murphy, U.S. District Judge

103. C. Charles Nailen, Jr.

104. Demetrius Newton

105. Allen E. Owen, III

106. Tammi Palmer

107. Danny K. Patterson

108. Betty Peters

109. Carl Petty

110. George W. Ponder, III

111. James W. Rane

112. Sandra Ray

113. Joe L. Reed

114. Horace W. Rice

115. Robert W Rieder

116. Bob Riley, Governor of the State of Alabama

117. Braxton Schell, Jr.

118. Stephen W. Shaw

119. Dr. Richard Showers

120. Alease S. Sims

121. Stacey Levise Sims by Her Parents Levi Sims and Alease S. Sims

122. Reginald L. Sorrells

123. Paul J. Spina, Jr
124. Finis E. St. John IV
125. John Russell Thomas
126. William K. Thomas
127. Anthony Y. Lavonne Thompson by His Mother Lois N. Thompson
128. Sarah L. Thompson
129. Dan Tibbs, Jr.
130. Velma Tribue
131. Troy State University
132. Allen Tucker
133. Jean Walker Tucker
134. United States of America
135. University of Alabama
136. University of Montevallo
137. University of North Alabama
138. University of South Alabama
139. University of West Alabama
140. Kreslyon Lynette Valrie by Her Mother Georgia S. Valrie

141. Oliver Washington, III
142. Susan J. Watterson
143. Roberta O. Watts
144. Joe R. Whatley, Jr.
145. James W. Wilson III
146. Ronald W. Wise
147. R. M. Woodrow
148. Catherine W. Wright
149. Frankie Patricia Yarbrough

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents questions of great public importance and legal issues regarding the constitutional duty of the State of Alabama to eradicate vestiges of de jure racial discrimination from its revenue system for funding public education. Oral argument would assist the Court in addressing these issues.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS . . . . C1 of 9

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CITATIONS v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

I. THE COURSE OF PROCEEDINGS 2

A. Statement of Facts. 8

1. The Racially Discriminatory Design of Education Revenues. 9

a. The Alabama Constitution during the regime of slavery. 9

b. The Alabama Constitution during the Civil War and Reconstruction. 11

c. The Redeemer Constitution of 1875. 12

d. The Alabama Constitution of 1901. 14

e. The Civil Rights Era and the Lid Bill Amendments. . . 17

2. The Continuing Adverse Racial Impact of the Property Tax Barriers in the Alabama Constitution. 22

a. Alabama's property taxes are the lowest of all 50 states. 22

b. The adverse impact on majority-black K-12 schools. 23

c. The declining share of the ETF available for higher education. 25

d. The adverse impact on black students' access to higher education. 26

B. Statement of the Standard or Scope of Review 29

SUMMARY OF THE ARGUMENT 31

ARGUMENT 35

I. THE FINDINGS OF FACT ESTABLISH VESTIGES OF DE JURE SEGREGATION UNDER UNITED STATES V. FORDICE 36

A. The Findings of Fact Establish Multiple Causal Connections Between the State Constitution's Property Tax Restrictions and Student Choice in Higher Education. 38

B. The State Utterly Failed To Satisfy Its Burden of Proving the Absence of Continuing Segregative Effects. 44

II. THE DISTRICT COURT COMMITTED FURTHER LEGAL ERROR BY REFUSING TO PROVIDE DECLARATORY AND INJUNCTIVE RELIEF UNDER HUNTER V. UNDERWOOD AND HUNTER V. ERICKSON. 47

III. THE DISTRICT COURT'S CONCLUSIONS OF LAW CONFUSE REMEDY ISSUES WITH LIABILITY ISSUES. 52

A. The District Court Should Have Tailored Relief to Eradicate Continuing Segregative Effects Identified By Its Findings of Fact. 52

B. At a Minimum, the District Court Should Have Enjoined Future Enforcement of the Discriminatory Property Tax Provisions. 57

CONCLUSION 60

CERTIFICATE OF COMPLIANCE 61

CERTIFICATE OF SERVICE 61

TABLE OF CITATIONS

CASES:

Alabama Coalition for Equity Inc. v. Guy Hunt, Governor, No. CV-91-117-R (Cir. Ct., Montgomery County, August 13, 1991) 2

Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237 (1991) 39

Brown v. Board of Education, 347 U.S. 483 (1954) 3, 17, 56

Colonial Pipeline Co. v. Collins, 921 F.2d 1237 (C.A.11 1991) 58

Elsberry v. Seay, 83 Ala. 614, 3 So. 804 (1887) 13

Ex parte James, 836 So.2d 813 (Ala. 2002) 3, 58

Freeman v._Pitts, 503 U.S. 467 (1992) 5, 39, 45

Hawkins v. Ceco Corp., 883 F.2d 977 (11th Cir. 1989), cert. denied, 495 U.S. 935 (1990) 30

Hibbs v. Winn, 542 U.S. 88, 124 S.Ct. 2276 (2004) 58

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 59

Hunter v. Erickson, 393 U.S. 385 (1969) 7, 34, 50, 52

Hunter v. Underwood, 471 U.S. 222 (1985) 2, 5, 8, 14, 33-35, 48-51, 58, 59

International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997) 30

Jefferson v. Hackney, 406 U.S. 535 (1972) 55

Johnson v. Governor of Florida, __ F.3d __, 2005 WL 832357 (11th Cir., April 12, 2005) (en banc) 48-50

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 39

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 36, 39, 44

Knight v. Alabama, 787 F.Supp. 1030 (N.D. Ala. 1991), aff'd in part and rev'd in part, 14 F.3d 1534 (11th Cir. 1994) 2, 5, 10-13, 17, 18, 46, 47

Knight v. Alabama, 900 F.Supp. 272 (N.D. Ala. 1995) 40-42

Lockett v. Board of Educ. of Muscogee County, 111 F.3d 839 (11th Cir. 1997) 39

Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II) 53

Missouri v. Jenkins, 495 U.S. 33, 38 (1990) (Jenkins I) 54-56, 58

Missouri v. Jenkins, 515 U.S. 70 (1995) (Jenkins II) 53, 54, 57

Reynolds v. Sims, 377 U.S. 533 (1964) 20

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 55

Simmons v. Conger, 86 F.3d 1080 (11th Cir. 1996) 30

Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) 57

United States and Knight v. Alabama, 628 F.Supp. 1173 (N.D. Ala. 1985), rev'd and remanded on other grnds, 828 F.2d 1532 (11th Cir. 1987) 42

United States and Knight v. Alabama, 828 F.2d 1532 (11th Cir. 1987) 1

United States v. Fordice, 505 U.S. 717 (1992) . 1, 4, 33, 34, 36, 38-40, 42, 44, 47, 53

United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir.1981), cert. denied, 455 U.S. 920 (1981) 30

Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971) (3-judge court) . . . 19, 20

Worthington v. United States, 21 F.3d 399 (11th Cir.1994) 30

CONSTITUTIONS AND STATUTES:

28 U.S.C. § 1291 1

28 U.S.C. § 1292(a)(1) 1

Acts of Alabama (1832), § 10, p. 16 10

Constitution of Alabama (1819) 9

Constitution of Alabama (1861) 11

Constitution of Alabama (1865) 11

Constitution of Alabama (1868) 11, 13

Constitution of Alabama (1875) 12, 13, 15, 21

Constitution of Alabama (1901) 14, 15, 21, 22, 31

Constitution of Alabama (1901), Amend. 111 . . . . 3, 17, 18

Constitution of Alabama (1901), Amend. 325 . . . . 4, 19, 20, 23

Constitution of Alabama (1901), Amend. 373 . . . . 4, 21, 23

Constitution of Alabama (1901), § 214 4

Constitution of Alabama (1901), § 215 4

Constitution of Alabama (1901), § 216 4

Constitution of Alabama (1901), § 217 19

Constitution of Alabama (1901), § 256 3

Constitution of Alabama (1901), § 269 4

Constitution of the United States, Amend. XIV 2, 7, 35, 50, 51, 54

Tax Injunction Act, 28 U.S.C. § 1341 58

Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq. 30, 35, 54

Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. 20

RULES AND REGULATIONS:

Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education, 43 Fed. Reg. 6658 (Feb. 15, 1978) 42

Rule 54(c), Fed. R. Civ. P. 59

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal from an interlocutory order refusing to modify existing injunctions and refusing to grant an additional injunction, both of which are appealable under 28 U.S.C. § 1292(a)(1).

By the same reasoning this Court applied to accept jurisdiction over an earlier appeal in this action, the subject district court orders are also appealable under 28 U.S.C. § 1291. United States and Knight v. Alabama, 828 F.2d 1532, 1536-37 (11th Cir. 1987).

STATEMENT OF THE ISSUES

Where the district court made findings of fact that the provisions in Alabama's Constitution which restrict the ability of state and local governments to levy property taxes were enacted for racially discriminatory purposes and that these racially motivated constitutional barriers continue adversely to impact black students:

1. Did the district court commit error by ruling that, notwithstanding the findings of racially motivated state constitutional provisions and their continuing adverse impact on black students, it would not order additional relief, under United States v. Fordice, 505 U.S. 717 (1992), with respect to eradicating vestiges

of segregation from Alabama's system of public higher education?

2. Did the district court commit error by ruling that its findings of racially motivated state constitutional provisions and their continuing adverse impact on black students did not compel it to enjoin future enforcement of those provisions under the Fourteenth Amendment? Hunter v. Underwood, 471 U.S. 222 (1985).

STATEMENT OF THE CASE

I. THE COURSE OF PROCEEDINGS

In its December 30, 1991, opinion, the district court made reference to a state trial court decision entered four months earlier in what was known as Alabama's "Equity Funding Case." Knight v. Alabama, 787 F.Supp. 1030, 1104 n.24 (N.D. Ala. 1991), aff'd in part and rev'd in part, 14 F.3d 1534 (11th Cir. 1994) (citing Alabama Coalition for Equity Inc. v. Guy Hunt, Governor, No. CV-91-117-R (Cir. Ct., Montgomery County, August 13, 1991)). This state trial court decision was cited in support of the federal district court's finding that Amendment 111 to the Alabama Constitution was adopted for the racially discriminatory purpose of preserving school segregation in Alabama. 787 F.Supp. at 1104. The state trial court had found that Alabama's inadequate and inequitable

funding of public education violated "a 'fundamental right to education' for 'all of Alabama's children between the ages of seven and twenty-one years,' allegedly guaranteed in Art. XIV, § 256 of the Alabama Constitution of 1901, as originally adopted," a right that Amendment 111 had struck from the state constitution in response to Brown v. Board of Education, 347 U.S. 483 (1954). Ex parte James, 836 So.2d 813, 815 n.1 (Ala. 2002). The state trial court ordered the Legislature to propose a suitable remedy, but the Legislature repeatedly failed to act. Finally, on May 31, 2002, the Alabama Supreme Court dismissed the Equity Funding Case on grounds that separation of powers provisions in the state constitution bar the state judiciary from ordering any remedy. Ex parte James, supra.

On July 28, 2003, the Knight-Sims Plaintiffs filed the motion for additional relief with respect to state funding of higher education which is the subject of the district court's orders reviewed in this appeal. Doc. 3205. The motion alleged that, in light of the dismissal of the state Equity Funding Case, "the principle of federal deference to state judicial consideration of state law issues, which previously made it premature to raise claims regarding Alabama's school funding system in this action, no longer prevents review by this Court of the impact of state constitutional and statutory restrictions on revenues for funding public higher education and on the remedial objectives of this Court's decrees." Id. at 2. The

motion identified six provisions[1] of the Alabama Constitution that the Knight-Sims Plaintiffs alleged are vestiges of de jure segregation that the State has a duty to eradicate under the federal constitutional standard enunciated in United States v. Fordice, 505 U.S. 717 (1992).

The State Defendants[2] and the University of Alabama filed oppositions to Plaintiffs' motion for additional relief, Docs. 3215 and 3216, and the Knight-Sims Plaintiffs filed a motion for partial summary judgment. Doc. 3230. On January 8, 2004, the district court held a hearing on the pending motions, and by order entered January 30, 2004, it scheduled an evidentiary hearing on Plaintiffs' motion for additional relief. Doc. 3252. This order rejected the State Defendants' arguments that Plaintiffs were procedurally barred from challenging vestiges of segregation in Alabama's property tax system:

> [T]he Court finds that the doctrines of res judicata and law of the case do not bar the Court from further considering the Knight-Sims Plaintiffs' Motion. Specifically, the Court concludes that inasmuch as the Court has not declared the Alabama system of public

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[1] Sections 214, 215, 216 and 269 of the original Alabama Constitution of 1901, Amendment 325 (1971) and Amendment 373 (1978).

[2] The "State Defendants" are the State of Alabama, the Governor, the Alabama Commission on Higher Education and its members, and the Alabama Public School and College Authority and its members (hereafter sometimes the "State").

> higher education unitary, the Court retains the power and authority to modify its remedy. See generally Freeman v. Pitts, 503 U.S. 467, 486 (1992).

Doc. 3252 at 1-2. Plaintiffs' motion for partial summary judgment was denied without prejudice. Doc. 3256.

A two-day evidentiary hearing was held on May 4-5, 2004. Doc. 3274-75. Plaintiffs presented the testimony of two historians, Dr. J. Mills Thornton, Professor of History at the University of Michigan and the preeminent authority on the history of Alabama[3], whose day-long deposition was admitted in evidence, PX 66, and Dr. Robert J. Norrell, Professor of History at the University of Tennessee and formerly of the University of Alabama, a leading authority on Alabama history, who testified live. Plaintiffs also presented the live testimony of Susan Pace Hamill, Professor of Law at the University of Alabama and a leading authority on taxation in Alabama; Dr. Daniel J. Sullivan, Professor of Economics at the University of Minnesota and a national expert on funding higher education; Dr. Donald E. Heller, Associate Professor of Education at Penn State University

[3] Dr. Thornton is the historian the Supreme Court cited in Hunter v. Underwood, 471 U.S. 222, 231 (1985), aff'g, 730 F.2d 614 (11th Cir. 1984). In that case, Dr. Thornton had been called as an expert witness by the lawyer representing the election officials of the State of Alabama. He testified in the 1990 trial of the instant action for the Knight-Sims plaintiffs, and his testimony was cited at length by the district court. Knight v. Alabama, 787 F.Supp. at 1065-1227.

and a national authority on financial access to higher education; Dr. Henry C. Mabry, III, former Director of Finance for the State of Alabama; John F. Knight, Jr., lead plaintiff in this action and currently Chair of the Government Finance and Appropriations Committee of the Alabama House of Representatives; and Elva Bradley, a student aid administrator at the University of Alabama. In addition to Dr. Thornton's deposition, Plaintiffs introduced the depositions of Dr. Ed Richardson, President of Auburn University, and Dr. Michael E. Malone, Executive Director of the Alabama Commission on Higher Education. PX 67 and 68. Alabama A&M University, a defendant in this action, called in support of Plaintiffs' motion for additional relief Dr. Carlos Clark, its Director of Financial Aid. Counsel for Alabama State University called no witnesses, but he actively participated in questioning most of the witnesses called.

The State Defendants were the only parties opposing Plaintiffs' motion at the evidentiary hearing. They called two witnesses, Dr. William Stewart, a Political Science Professor at the University of Alabama, and, by stipulation after the hearing, Bill Newton, Assistant Finance Director for the State of Alabama. Doc. 3272. None of the other defendants, including all the other state universities, the Alabama State Department of Education and the Chancellor of Postsecondary Education, participated in the May 4-5 evidentiary hearing, and they took no

position on Plaintiffs' motion for additional relief.

After post-trial briefs were filed by the Knight-Sims Plaintiffs and the State Defendants, Docs. 3277, 3278, 3302, the district court on October 5, 2004, entered a ninety-page opinion and order denying the motion for additional relief. Doc. 3294. The findings of fact described in detail how each of the challenged provisions in Alabama's Constitution restricting property taxes were racially motivated to deny African Americans equal access to public education and how they continue adversely to impact black students. Those findings will be summarized in the statement of facts infra. Nevertheless, the district court concluded as a matter of law that "[d]efendants have satisfied their burden [under United States v. Fordice] to demonstrate that the challenged provisions of the Alabama constitution do not continue to have a segregative effect on student choice." Doc. 3294 at 86 (footnote omitted). The court went on to reject Plaintiffs' additional contention that the racially designed state constitutional provisions violate the Fourteenth Amendment under Hunter v. Erickson, 393 U.S. 385 (1969), and related Supreme Court precedents. Doc. 3294 at 87-90.

Plaintiffs timely filed a motion to alter or amend the October 5, 2004, conclusions of law and order denying any relief, contending that the district court's powerful findings of fact plainly establish Fourteenth Amendment

violations that require the same declaratory and injunctive relief ordered in Hunter v. Underwood, 471 U.S. 222 (1985). Doc. 3297. By order entered February 10, 2005, the district court denied the motion to alter or amend. Doc. 3320. It reiterated its conclusion that the racially motivated constitutional provisions "do not have a continuing segregative effect on higher education." Id. at 4. Then it "decline[d the] request" to strike down the challenged provisions under Hunter v. Underwood:

> Moreover, the Court believes that the relief that the Knight-Sims Plaintiffs request is beyond the scope of this litigation – indeed, as Defendants observe in their Response Brief, this case involves desegregation in higher education; this is not a taxpayer action. The relationship between the challenged constitutional provisions and higher education is simply too attenuated to permit the Court to grant the relief that the Knight-Sims Plaintiffs request. Accordingly, the Court finds Hunter v. Underwood inapplicable under the circumstances of this case.

Doc. 3320 at 5. Plaintiffs filed their notice of appeal on March 4, 2005. Doc. 3323.

A. STATEMENT OF FACTS.

In this appeal we do not challenge the district court's findings of fact. They adopt in considerable detail the virtually uncontroverted evidence of historical racial discrimination and their continuing adverse impact on African Americans in

Alabama. This statement of facts essentially will summarize the district court's findings of fact.

1. The Racially Discriminatory Design of Education Revenues.

a. The Alabama Constitution during the regime of slavery.

Land and the revenue obtained from land have historically funded all levels of public education in Alabama. When Alabama was admitted to the Union in 1819, Congress reserved the sixteenth section in every township to fund common schools and two full townships to support a state university. Doc. 3294 at 8. Income from the lease and sale of these dedicated lands was the main source of public financing for local schools and the fledgling University of Alabama during the antebellum period. The 1819 Alabama Constitution directed only the legislative "encouragement" of education, and school revenues were raised entirely at the local level. Id. at 9. The state legislature created local boards of school commissioners to manage school finances and required income from the school lands to be deposited in the state bank for redistribution according to student populations. Id. at 10. But the state bank made the trust fund available to speculators desperate for the capital needed to purchase more land and slaves, the two primary sources of wealth in Alabama's economy. "In 1843, the state bank

failed, and $1.3 million derived form the sales of sixteenth section lands and over $300,000 from the sale of the university lands were lost." Id. at 10-11.

The University of Alabama was the only public institution of higher education before the Civil War, and the only state appropriation it received after failure of the state bank was the six percent "interest" the legislature pledged to pay annually on the nonexistent trust fund. Knight, supra, 787 F.Supp. at 1066-67. The first statewide public school system was established by the legislature in 1854. The statute authorized counties to levy a one mill ad valorem tax, without any voter referendum requirement, to be paid directly to county treasuries for the use of schools. Doc. 3294 at 11.

Before the Civil War, ad valorem taxes on land and slaves were the primary sources of revenue for the counties' non-educational expenditures. Revenues from the slave tax outstripped land taxes until just before the war started, so wealthy plantation owners in the Black Belt bore the brunt of taxes, freeing the many non-slave-holding white farmers from significant levies on their property. Doc. 3294 at 11-12. There were no public schools for free blacks, and in 1832 the Alabama Legislature "enacted a statute making it a crime to instruct any black person, free or slave, in the arts of reading and writing." Knight, supra, 787 F.Supp. at 1067 (citing 1832 Ala.Acts, sec. 10, p. 16).

b. The Alabama Constitution during the Civil War and Reconstruction.

Neither the 1861 nor the 1865 Alabama Constitution contained new provisions regarding education, leaving intact the state legislature's plenary authority over the funding and operation of public schools. Doc. 3294 at 12-13. But the 1868 Radical Reconstruction Constitution, dominated by white Republicans and their newly freed black constituents, made education for all students, black and white, a priority for state government. It created a State Board of Education and gave it legislative powers, which the Board exercised aggressively to increase school revenues through head taxes and ad valorem taxes levied on property accurately and uniformly assessed at its fair market value. Id. at 13-15; Knight, supra, 787 F.Supp. at 1070. These funds were centralized and redistributed to the counties "on a per capita basis, without regard to race." Doc. 3294 at 14. Of course, there was no more slave tax, so property taxes not only had to support all non-education government services but now had to pay for a vastly expanded, racially dual (not racially integrated) public school system. This produced, the district court found, a vigorous white backlash:

> During the Radical Reconstruction, white small farmers found themselves paying substantially higher taxes on their property, yet receiving fewer public benefits because the State was distributing those funds equally among white and black schools. Whites resented

> having to pay for the education of blacks, who paid relatively few taxes, and that resentment fueled accusations of mismanagement and abuse of public funds – i.e. that their increased taxes were simply lining the pockets of white carpetbaggers and radical officials. As a result, poorer white landowners became motivated to cooperate with wealthier whites to form a "sort of all white alliance of the Democratic party," united for reducing taxes and establishing supremacy for whites. On the other side of the political line were the Republicans, who were essentially blacks and a handful of their white allies, carpetbaggers, and scalawags.

Id. at 15 (citations omitted).

The Republican controlled State Board of Education funded (segregated) education for blacks at all levels, including higher education. It accepted financial responsibility for the Marion Institute, the predecessor of Alabama State University (ASU), after a state court ruled that whites in Perry County could not be forced to pay a property tax to support the black school. Knight, supra, 787 F.Supp. at 1075-76. And it established a normal school in Huntsville that eventually became Alabama A&M University (AAMU). Id. at 1075, 1084.

c. The Redeemer Constitution of 1875.

The Democratic Party "redeemed" Alabama from "black rule" and restored white supremacy by capturing the office of Governor and control of both houses of the Legislature in the 1874 state elections. Knight, supra, 787 F.Supp. at 1070-71. Back in power, the Democrats convened to adopt the 1875 Redeemer

Constitution, which abolished the hated State Board of Education, prohibited racially mixed schools, id. at 1070-72, and created constitutional barriers to additional property taxes. The district court found:

> In 1875, whites from the Black Belt, concerned that a black majority might regain political power and raise taxes, placed in the constitution millage caps for both state and local property taxes. The 1875 Constitution thus became the first Alabama constitution to place strict constitutional limits on the ability of both the State and local governments to tax property.
>
> Specifically, the 1875 Constitution established a maximum tax rate of seven and one half mills, which was the same legislatively established rate that had been assessed under the 1868 Constitution, and a maximum tax rate of five mills for counties and municipalities. Racial motives permeated the establishment of constitutional caps on millage rates. . . .

Doc. 3294 at 16-15 (citations omitted). Of equal importance with the constitutional caps was Democratic control of tax assessments, which was used "to reduce property assessments in the Black Belt far below market value, [and] which disadvantaged other white counties." Id. at 17 (citation omitted).

During the Redemption era, ASU and AAMU had to rely entirely on the common school fund for state appropriations, and the Alabama Supreme Court ruled that the 1875 Constitution reserved the common school fund for elementary and secondary schools. Knight, supra, 787 F.Supp. at 1081-82 (citing Elsberry v. Seay, 83 Ala. 614, 3 So. 804 (1887)). This ruling had the practical effect of

limiting the missions of the historically black state colleges to that of normal schools. Id. The share of the common school fund available for the education of blacks was drastically reduced by the 1891 Apportionment Act, which gave local school authorities discretion to divert funds intended for blacks to white schools. Doc. 3294 at 18. In the Black Belt, "this had an enormous and devastating effect on black education." Id. (citation omitted).

> The 1891 Apportionment Act also had an impact on the politics of property taxes. By diverting funds from black schools to white schools, there was less of a need for additional property taxes in Black Belt counties because white schools were being funded adequately. Consequently, the Black Belt whites, due to total population apportionment, were able to thwart attempts by reformers in urban areas and in white counties to raise taxes to increase funding for public schools.

Id. at 18-19.

d. The Alabama Constitution of 1901.

The 1901 Constitution of Alabama is the one currently in force. The district court found that "d]isfranchising blacks and maintaining white supremacy were the central purposes of the 1901 Constitution." Doc. 3294 at 19. These racially discriminatory motives are well established. Hunter v. Underwood, supra. What the findings below add to this familiar story is the linkage between black disfranchisement and the avoidance of property taxes.

> Black Belt whites were willing to support legal disfranchisement of blacks in the 1901 Constitution, and thus relinquish their control over state politics through control of the large black voting populations, out of fear that events at the national level would eventually lead to the re-enfranchisement of blacks, thus placing whites' property in danger of being taxed to support education for blacks. The ensuing compromise between the whites in the 1901 constitutional convention was that the white counties would effectively control the executive offices of the State, while the Black Belt counties would control the Legislature. This arrangement assured that the Black Belt could thwart attempts to increase property taxes.

Doc. 3294 at 19 (citations omitted). The same millage caps placed in the 1875 Constitution were retained in the 1901 Constitution, except that the 7.5 mill cap on state property taxes was reduced to 6.5 mills, with the other 1 mill allocated to counties and dedicated to public schools. Id. at 20.

> The 1.0 mill optional county tax for schools contained for the first time in Alabama history a voter referendum requirement, which was crafted to ensure, with disfranchisement, that only whites could give their consent to higher local property taxes. This general hostility to home rule in the 1901 Constitution, as well as the 1875 Constitution, was motivated at least in part by race: white control of the state government . . . is an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties.

Id. at 20-21 (citation and inner quotes omitted).

With blacks finally removed from the electoral process, white Alabamians during the Progressive Era renewed their efforts to increase revenues for public schools and other government services. But the combination of voter approval for

any millage increases, either by constitutional amendments for particular counties and municipalities or by exercise of the local constitutional option, and the pattern of unequal and unfair property assessments carried over from the nineteenth century stymied the efforts of white school reformers. Neither creation of a state board of equalization, nor the enactment of a statutory assessment ratio of only 60% of fair market value, nor a statewide constitutional amendment authorizing slightly higher millage rates proved effective. Doc. 3294 at 22.

By the late 1920s, Alabama's public school system was in such desperate financial straits that state government turned from property taxes to other revenue sources to increase school funds. First, in 1927, the Legislature created the Special Education Trust Fund (SETF) (now called simply the Education Trust Fund), then in 1933 it got voters to ratify a constitutional amendment authorizing a state income tax, and then in 1935 it enacted the first state sales tax. Proceeds from the income tax and sales tax, after paying off the floating debt, went mainly to the SETF. Doc. 3294 at 23. In 1947, the state income tax was constitutionally earmarked for K-12 teacher salaries. Id. "Prior to the establishment of the income tax, sales tax, Special Educational Trust Fund, and the Minimum Program Fund, state universities had received appropriations from other state revenues—i.e. the State property tax." Id. Now appropriations for higher education would come

exclusively from the Education Trust Fund (ETF), which must be shared with the state's underfunded K-12 system. It was during this period, according to the district court's 1991 findings of fact, that ASU and AAMU suffered financial deprivation so severe that by the early 1960's they had lost their accreditation. Knight, supra, 787 F.Supp. at 1099-1104.

e. The Civil Rights Era and the Lid Bill Amendments.

Alabama's constitutional development since Reconstruction had been driven by its policy of shielding property from taxation that whites in the Black Belt feared could be imposed for the benefit of black public school students by democratically elected state and local governments potentially influenced by a re-enfranchised black electorate. The two main mechanisms of this policy were constitutionally entrenched millage caps and artificially low property assessments. This century-old scheme came under attack on several fronts after Brown v. Board of Education, 347 U.S. 483 (1954).

The opening salvo in Alabama's campaign of massive resistance was the adoption in 1956 of Amendment 111, which struck from the 1901 Constitution the requirement of state support of public education, empowered state government to lease or sell public school resources to private schools, and gave parents the right to send their children to "schools provided for their own race." Ala. Const.,

Amend. 111. The district court found in 1991 and reiterated in 2004 that Amendment 111 was adopted for racially discriminatory purposes. Knight, supra, 787 F.Supp. at 1104; Doc. 3294 at 26.

Federal intervention in Alabama's racially segregated society came at a time of unprecedented economic growth during the 1950's and 1960's that placed great demands on the state for expansion and improvement of its system of elementary, secondary and higher public education. See generally Knight, supra, 787 F.Supp. 1119-33. But the efforts of public school advocates to raise additional education revenues were stymied by public opposition to desegregation encouraged by the Legislature and Governors Patterson and Wallace. Doc. 3294 at 26-27; Knight, supra, 787 F.Supp. at 1103-05. Attempts to raise constitutional limits on millage rates were defeated, so education forces refocused their efforts on aspects of the property tax system not restricted by the 1901 Constitution, primarily the low and unfair property assessments that varied in crazy quilt fashion from county to county. But state initiatives aimed at enforcing uniform assessments of all property even at a low 30% of fair market value were defeated by wealthy landowners in the Black Belt and urban industrialists. Doc. 3294 at 27-37.

Finally, a three-judge federal district court led by Judge Frank Johnson struck down the irrational property assessment system on non-racial equal

protection grounds. Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971) (3-judge court). The Weissinger court gave the State one year to create a uniform property assessment system and threatened to impose the 60% assessment ratio provided by the 1935 statute if equalization was not achieved. The 1972 deadline later was extended to 1979 because of difficulties in conducting a statewide property reassessment. Doc. 3294 at 37-38.

The State's immediate response to the Weissinger decision was to adopt in 1971 the first "Lid Bill," Amendment 325 to the 1901 Constitution, which was ratified by the voters in June 1972. Doc. 3294 at 41. Until now there had been a state constitutional requirement that all property be assessed uniformly for tax purposes. Ala. Const., § 217. Amendment 325 adopted the first property classification system in Alabama history: a 30% of fair market value assessment ratio to be applied to utilities property, 25% to all other business property, and 15% to residential, farm and forest lands. And it imposed an absolute "lid" on all ad valorem taxes of 1.5% of fair market value. Ala. Const., Amend. 325.

The purpose of Amendment 325 "was to legalize the de facto classifications in effect when Weissinger was filed in 1969." Doc. 3294 at 43. Governor Wallace linked it expressly to opposition to federally ordered school desegregation. Id. at 42. Legislative supporters of landed interests, especially in

the Black Belt, also linked the Lid Bill to increasing black voter registration following passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., and to federal court-ordered reapportionment of the Legislature to comply with the one-person, one-vote requirement of Reynolds v. Sims, 377 U.S. 533 (1964). Rising African-American political empowerment rekindled historical fears in the Black Belt of tax increases. The district court quoted Black Belt Senator Sam Engelhardt as expressing the typical attitude of white Alabamians: "He based his concern about who was tax assessor on a racist assumption. 'If you have a nigger tax assessor,' he rhetorically asked a journalist in 1956, 'what would he do to you?' The obvious answer, to Engelhardt, was that a black tax assessor would try to exploit white landowners." Doc. 3294 at 31 (citation omitted). Indeed, Amendment 325 was the product of many historical forces coming to a head:

> The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama Legislature, fair reassessment of all property subject to taxes, and school desegregation, had thus created a "perfect storm" that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.

Doc. 3294 at 44 (citations omitted).

In 1978, before the Weissinger deadline expired, agricultural and business interests, with the support of Governor Wallace, got the Legislature further to

amend the Lid Bill. Over the opposition of the recently integrated Alabama Education Association, which "was viewed as a liberal, pro-black lobby," Amendment 373 to the 1901 Constitution was enacted and ratified by the voters. Doc. 3294 at 45. Amendment 373, among other things, lowered the assessment ratio for residential, agricultural and forest land to 10% and made that low ratio applicable not to fair market value of the property but to its "current use" value. Ala. Const., Amend. 373, § (j).

The district court summarized its findings of fact in a powerful and unequivocal indictment of the racial motives behind the property tax provisions in the Alabama Constitution:

> There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. . . . The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978.
>
> . . . Indeed, Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.

Doc. 3294 at 47-49 (citations omitted).

2. The Continuing Adverse Racial Impact of the Property Tax Barriers in the Alabama Constitution.

The district court's findings of fact, supported by the overwhelming weight of evidence, describe the paltry revenues currently collected from property taxes, the resulting underfunding of the state's K-12 public school system, particularly rural and majority-black schools, the over-dependence of K-12 on the Education Trust Fund and the consequent underfunding of higher education, the resulting adverse impact on black students' access to and ability to complete higher education, and the damaging effects lack of funding will have on the desegregation objectives of the 1991 and 1995 remedial decrees.

a. Alabama's property taxes are the lowest of all 50 states.

The racially motivated property tax barriers in the Constitution of 1901, as amended, have done the work they were intended to do. At $250 per person, Alabama's state and local property taxes are the lowest of all fifty states, six times lower than the three top ranked states, three times lower than the national average, and two times lower than the next lowest states. Doc. 3294 at 50-51. Property taxes account for only five percent of Alabama's revenue sources, more than half of which are collected from sales taxes as high as eleven percent and from a

regressive income tax.[4] Id. This tax system punishes low income citizens and poor, rural counties. Id. at 51. It is neither just nor practical to seek more education revenues through sales and income taxes; "a greater reliance on sales taxes cannot compensate for disproportionately low property taxes." Id. at 51-52.

Seventy percent of Alabama's land mass is forest land, but due to the 10% assessment ratio and current use provisions of the 1971 and 1978 Lid Bill Amendments, forest land contributes only 2% of all property tax revenue. Id. at 52. Merely raising millage rates won't produce substantially higher property tax revenues when they are applied to an average of only 8.33% of the fair market value of all residential, forest and agricultural lands. Id. at 53. By contrast, raising the assessment ratio to 30% of fair market value at current millage rates would generate an additional $1.68 billion, and a 60% ratio would generate an additional $5.09 billion.[5] Id. at 53-54.

b. The adverse impact on majority-black K-12 schools.

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[4] Alabama's income tax has an obscenely low threshold of $4,600, and, according to a national study published after trial, Alabama this year became the only state to tax family incomes at less than half the poverty level. See http://www.cbpp.org/4-12-05sfp.htm.

[5] By comparison, the total amount requested by Governor Riley for the 2006 Education Trust Fund is $5.18 billion. See http://www.budget.state.al.us/ETF2006.pdf.

The district court's findings could not be more definitive: "The effect of low property tax revenues has had a crippling effect on poor, majority black school districts." Doc. 3294 at 55 (citation omitted). These majority-black school districts are primarily in the rural Black Belt, and the court found:

> In rural areas of the state, most local school districts simply do not have a critical mass of valuable commercial property and residential homes–the two types of property shouldering eighty-five percent of the property taxes–to raise adequate funds for public education. Moreover, in areas where the significant source of wealth is timber, the property tax structure bars taxation above ten percent of the current use value of such areas; consequently, that property does not provide much property tax revenue.

Id. (citations omitted).

Because of the anemic property taxes available to most local school systems, low-income students throughout Alabama, who are disproportionately black, suffer from underfunding. "In 2003, Alabama spent $5,908 per K-12 student, compared with a national average of $7,376 per student." Id. at 60. The reserve funds of 100 of the 128 local school systems are being depleted, and state appropriations for textbooks and remedial programs have been cut. Id. at 61. Even though the financial need of black students is greater, Alabama provides them fewer resources, with predictable results.

> According to a February 23, 2003, "report card" released by the Alabama Board of Education, a "tremendous gulf" exists among

> differing racial and socioeconomic groups in Alabama. The test scores of whites in Alabama's K-12 schools placed them in the 65th percentile nationwide, Hispanics were in the 46th percentile, and blacks in the 39th percentile.

Id. at 61-62. Most of the 44 Alabama high schools placed on academic watch by the State Department in 2002 had black student majorities, and "although forty percent of the students enrolled in Alabama public schools were non-white, only thirty-five percent of high school graduates were non-white." Id. at 56-57 (citations and footnote omitted). The average high school dropout rate is 14%-15%, but for black students it's 20%. Id. at 63.

c. The declining share of the ETF available for higher education.

The district court endorsed the assessments of the present and past Presidents of Auburn to find that

> one of the most important changes needed in Alabama is a substantial increase in property taxes because in Alabama, the property tax revenue is so low the state has to pick up the bulk of the cost of the public schools from regressive sales and income taxes; moreover, inasmuch as higher education is funded from the same source as K-12, the monies available to higher education are substantially reduced.

Doc. 3294 at 65-66 (citations omitted). This funding squeeze continues to worsen. Over the thirteen years since the first remedial decree was entered state appropriations for higher education may have risen in absolute dollar amounts, but

the higher education share of the ETF has decreased from 28.5% to 26.1%. Id. at 71. That represents a loss of over $200 million in the 2002-03 higher education budget. Id. at 66. The findings of fact go on:

> [A]n important consequence of the reduction in the share of ETF revenue appropriated for higher education has been that the gap between what the State appropriates and what ACHE defines as the "need" for the senior institutions, based on the median funding of the SREB[6] region, continues to widen. Since this case was tried in 1990, Alabama's state appropriations to senior institutions have declined from 84.1% of the ACHE regional standard to 55.8% of the ACHE regional standard. In real dollars, these percentages represent a difference of over $650 million between Alabama's state appropriations and the regional standard of need and $400 million less than the 84% level of need that was being met during the 1990 trial.

Id. at 67-68 (citations omitted). While federal funds and tuition have increased over 200%, state appropriations for operations and maintenance of the state's four-year institutions increased by only 60%, and this gap continues to widen. Id. at 70-71.

d. <u>The adverse impact on black students' access to higher education</u>.

To begin with, as noted above, disproportionately more black students fail to get their high school diplomas, thus missing the first step to higher education.

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[6] Southern Regional Education Board, whose member states currently include sixteen Southeastern states.

Even when black students graduate from high school, there are

> two aspects in which the underfunding of K-12 public schools in Alabama has a negative impact on access to higher education: (1) the lack of financial resources results in lower academic achievement in K-12 and less likelihood of success in higher education; and (2) the lack of financial resources prevents poor school systems from offering college preparatory curriculums.

Doc. 3294 at 59-60. As a result,

> more than a third of Alabama's college freshmen are not prepared for college level classes, and the number is rising, even though high school graduation exam scores and some elementary scores are improving. Last school year, thirty-five percent of freshmen at the state's public colleges and universities were enrolled in remedial courses.

Id. at 62. African Americans suffer most from this lack of preparation. There is "a strong correlation among black students, poverty, and low achievement scores." Id. at 56.

The underfunding of public higher education creates additional financial barriers to access for low-income, predominately black students. "Blacks in Alabama have a great deal of financial need in order to be able to attend college, in comparison to white Alabamians and also in comparison to blacks residing in other states." Doc. 3294 at 73. The missing property tax revenues reduce the share of ETF funds available for colleges and universities, causing increases in

tuition and fees at an average rate of 8% to 12% per year. Id. at 55-56.[7] "Lack of state funding has also adversely impacted funding for financial aid, which disproportionately burdens poor, black families." Id. at 57. Over the past decade, as tuition and fees have been rising, Alabama has actually been cutting back on need-based financial assistance. Id. at 75. "During 2003-04, the State appropriated only about $800,000 for need-based financial aid." Id. Many black students are being caught in a financial pincer movement:

> the underfunding of public education in Alabama, the resulting rising tuition and fees at its public universities, and the declining or disappearing availability of need-based state and institutional financial aid seriously impact black Alabamians in particular, as well as other low and middle income students, making it increasingly more difficult for those students to have access to enrollment in and completion of higher education.

Id. at 72. Federal Pell grants cannot cover all the costs of higher education, and "because poor families do not have the ability to assume large indebtedness, those families are increasingly unable to attend institutions of higher education as financial aid remains stagnant while student indebtedness rises." Id. at 57. As a

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[7] "Although the dramatic increase in tuition is certainly not unique to Alabama, the results of the tuition increase are more burdensome in the State because (1) there is not a corresponding increase in need-based scholarship funding to ensure continued access for students from lower income households, and (2) the percent of students in Alabama who would be eligible for such aid (using federal guidelines) is well above average." Id. at 69.

result, there has been “a growing gap between white and black Alabama high school graduates enrolling in the state’s public four-year institutions of higher education.” Id. at 76.

The district court’s findings of fact also acknowledged “the importance of financial resources to the ability of students to persist and graduate after they have enrolled in college.” Doc. 3294 at 78. The “college wage premium” has vastly increased in the past two decades, and the middle class occupations that used to be accessible with a high school diploma now require a bachelor’s degree. Doc. 3294 at 79. Rising tuition and disappearing state financial aid damage black students’ chances of persisting to graduation. At AAMU, for example, “[f]inancial aid has failed to offset the increasing tuition and fees.” Id. at 58. Even though AAMU is now using about $4 million of its institutional funds for scholarships, half of the 475 students it lost between Fall and Spring semesters in 2004 dropped out because of financial difficulties. Id.

B. Statement of the Standard or Scope of Review

The Knight-Sims appellants do not challenge the district court’s findings of fact. To the contrary, we contend that a proper application of constitutional law to the found facts establishes clear violations of the Equal Protection Clause and

Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq., and that the district court committed legal error by refusing to grant relief.

The district court's conclusions of law are reviewed de novo on appeal. Simmons v. Conger, 86 F.3d 1080, 1084 (11th Cir. 1996) (citing Worthington v. United States, 21 F.3d 399, 400 (11th Cir.1994); accord, e.g., International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548, 1551 (11th Cir. 1997) ("we utilize a de novo standard of review concerning issues of law and the district court's application of the law to the facts"); Hawkins v. Ceco Corp., 883 F.2d 977, 982 (11th Cir. 1989), cert. denied, 495 U.S. 935 (1990) ("Conclusions of law are freely reviewable on appeal.") (citingUnited States v. Grayson County State Bank, 656 F.2d 1070, 1075 (5th Cir.1981), cert. denied, 455 U.S. 920 (1981)).

SUMMARY OF THE ARGUMENT

This appeal involves a challenge to racially discriminatory provisions in the Alabama Constitution that restrict the ability of state and local government to raise revenues for public education. It has been prosecuted by the class representatives of black citizens in the Alabama higher education desegregation case.

The material facts are not in dispute. The district court made findings of fact that the original sections of the 1901 Alabama Constitution that limit millage rates state and local governments may levy on real and personal property and the constitutional amendments adopted in 1971 and 1978 that artificially reduce the fair market value of property that millage rates can be applied to all were enacted for the purpose of shielding the property of whites from being taxed to pay for the education of blacks.

The court found that these state constitutional barriers have resulted in Alabama having the lowest property taxes by far of any of the fifty states, which has caused severe underfunding of its public school system, and which has adversely impacted poor, predominately black students, just as the drafters of these provisions intended. Rural, predominately black school districts and other majority black schools have been hit the hardest. They have less money for their regular academic programs and cannot offer college preparatory curricula. As a

result, more black students than white students drop out of high school, and black students are less well prepared for college. It is not practicable substantially to increase funding for public education from other revenue sources, such as the already oppressive sales and state income taxes.

Because local school systems are starved for revenues, state government must shoulder the lion's share of funding for K-12 schools in Alabama. Since public higher education appropriations also come from the same Education Trust Fund that pays for K-12 schools, the higher education share has been steadily shrinking in percentage terms. This has interacted with rising college costs and enrollments to force state universities to increase tuition and fees sharply over the past decade. Instead of increasing to compensate for rising costs, state need-based financial assistance for college students has been reduced to less than $1 million. These worsening financial circumstances have made enrollment in and graduation from college less accessible for predominately black poor and middle income students. Although the number of African Americans attending public universities in Alabama has risen, the gap between black and white college attendance has also grown.

Notwithstanding these extensive findings of racially motivated restrictions in the property tax system and their continuing adverse impact on black students at

both the K-12 and college levels, the district court refused to grant any relief. In its conclusions of law, the district court applied the three-part test of United States v. Fordice, 505 U.S. 717 (1992). It concluded that plaintiffs had satisfied their burden of proving that the challenged provisions in the state constitution and the property tax system they have produced are traceable to racially segregative motives. But it went on to conclude that the State had satisfied its burden under the second part of the Fordice test of demonstrating that the racially motivated property tax restrictions have no current segregative effects on student choice in higher education. It held that the causal connection between the property tax system and segregative effects in higher education is too attenuated. Then, ruling on plaintiffs' motion to alter or amend its order denying relief, it relied on the same conclusion of no continuing segregative effects to refuse to apply the equal protection standard of Hunter v. Underwood, 471 U.S. 222 (1985), to its findings of purposeful racial discrimination in this case.

The district court's conclusions of law are subject to de novo review in this appeal. They cannot be reconciled with its findings of fact. Under Fordice, as the district court found in its 1995 decision, the financial costs of attending and completing college, coupled with the availability of financial aid, are primary factors affecting student choice. It was legal error to conclude that the adverse

racial impact described at length in the findings of fact did not establish continuing segregative effects in Alabama's system of public higher education.

The apparent concern expressed by the district court about the more immediate impact of low property taxes on K-12 public schools and other non-education government services, along with concern about the interplay of property taxes with other revenue sources, properly should be addressed at the remedy stage, where relief must be narrowly tailored to fit the precise nature of the constitutional violation in this school desegregation action, and where state government must be given the opportunity to craft the details of the remedy. Such concerns cannot be relied on to avoid a ruling on liability under Fordice, and the district court committed legal error when it did so.

Furthermore, the district court's reliance on its conclusion of no continuing segregative effects to justify its refusal to apply to its findings of fact the constitutional principles set out in Hunter v. Underwood and Hunter v. Erickson, 393 U.S. 385 (1969), cannot be squared with either the facts or the controlling law. There is no legal basis for restricting the scope of this action to a narrow subject matter or to a particular legal theory after a federal court has conducted a plenary trial on the evidence and has made findings of fact that explicitly link racially motivated state laws to present adverse racial effects. The district court

did not have discretion to decline to provide some relief, at a minimum, declaring the challenged state constitutional provisions to be in violation of the Constitution and laws of the United States and enjoining their future enforcement.

ARGUMENT

After making extensive, damning findings of fact that the property tax provisions in the Alabama Constitution were adopted for racially discriminatory purposes and continue to have racially discriminatory effects, the district court denied any relief, because it concluded, as a matter of law, that "the Knight-Sims Plaintiffs[] fail[ed] to show that the ability of black students to attend college, or to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system." Doc. 3320 at 6. Putting aside the misplacement of the burden of proof on plaintiffs, this conclusion of law is starkly inconsistent with the findings of fact, which establish irrefutable violations of the Equal Protection Clause and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq., under both the school desegregation standards of United States v. Fordice, 505 U.S. 717 (1992), and the universally applicable Fourteenth Amendment standard of Hunter v. Underwood, 471 U.S. 222 (1985).

I. THE FINDINGS OF FACT ESTABLISH VESTIGES OF DE JURE SEGREGATION UNDER UNITED STATES V. FORDICE .

The three-step analysis enunciated in United States v. Fordice was summarized by the Supreme Court as follows: "If policies traceable to the de jure system [of segregation] are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." 505 U.S. at 729 (citations omitted); accord, Knight v. Alabama, 14 F.3d 1534, 1540-41 (11th Cir. 1994); Doc. 3294 at 80-83. Here the district court concluded that the Knight-Sims plaintiffs had borne their burden of proof on the first step, traceability:

> Based on the extensive record before the Court, the Court finds that Plaintiffs have met their burden to demonstrate that the current ad valorem tax structure is a vestige of discrimination inasmuch as the constitutional provisions governing the taxation of property are traceable to, rooted in, and have their antecedents in an original segregative, discriminatory policy.

Doc. 3294 at 83. However, it held that "Defendants have satisfied their burden to demonstrate that the challenged provisions of the Alabama constitution do not continue to have a segregative effect on student choice." Id. at 86.

It is not clear what findings of fact and evidence the district court relied on to reach this holding. The entire explanation in its conclusions of law is as

follows:

> 13. The Court appreciates Plaintiffs' argument, and agrees that the current property tax system in Alabama has a crippling effect on the ability of local and state government to raise revenue adequately to fund K-12 schools. Nevertheless, the Court cannot agree that the property tax structure stymies school choice in such a way that results in an unconstitutional denial of a student's right to make a decision unfettered by vestiges of discrimination.
>
> 14. The Court finds that the relationship between the funding of higher education and finding [sic] of K-12 is marginal insofar as ad valorem property tax is concerned. Put differently, the effect of the state's inability to raise revenue due to the challenged constitutional provisions is simply too attenuated to form a causal connection between the tax policy and any segregative effect on school choice.
>
> 15. Additionally, although the proportion of the ETF allocated to higher education has fallen since 1990, the actual amount of money paid to higher education has increased from $820,063,882 to $1,160,033,885 over that same period. (Defs.' Ex. 04-004.)
>
> 16. Moreover, insofar as Plaintiffs contend that the lack of funding for property taxes somehow works to frustrate the Court's prior remedial decrees, the Court finds that argument unavailing. Rather, the State has unbegrudgingly complied with the Court's remedial decrees, meeting all its obligations as ordered by the Court. Along those same lines, between the 1991-92 and 2002-03 academic years, black student enrollment and graduation rates at HWIs have increased considerably. (Defs.' Exs. 04-001 to 003.)

Doc. 3294 at 85-86. From the above, four reasons may be discerned for the conclusion that the property tax structure has no segregative effects on school choice: (1) an insufficient causal connection between property taxes and funding of higher education, (2) increasing appropriations for higher education in absolute dollars, (3) compliance by the State with the existing remedial decrees, and (4)

increasing numbers of black students attending and graduating from the historically white universities. Reason (1) cannot be squared with the district court's findings of fact, and, taken together, the four reasons do not satisfy the constitutional requirement that policies traceable to de jure segregation must be eradicated root and branch.

A. THE FINDINGS OF FACT ESTABLISH MULTIPLE CAUSAL CONNECTIONS BETWEEN THE STATE CONSTITUTION'S PROPERTY TAX RESTRICTIONS AND STUDENT CHOICE IN HIGHER EDUCATION.

The legal standard the district court applied to conclude there is a "too attenuated" causal connection between student choice and property taxes is impermissibly narrow. There is no reference at all in Fordice to attenuation, nexus or marginality. To the contrary, Fordice says the district court is required to "examine[] a **wide range** of factors to determine whether the State has perpetuated its formerly de jure segregation **in any facet** of its institutional system." 505 U.S. at 728 (citations omitted) (emphases added). There are "many other factors" beyond admissions policies that determine student choice. Id. at 729. Fordice emphasizes the importance of not limiting the search for vestiges to "an exclusive list of unconstitutional remnants," id. at 733, and of considering the segregative effects of each policy not alone but in combination with all other policies. Id. at

741. This Court gave repeated emphasis to the broad reach of this constitutional mandate in Knight v. Alabama, supra: "When gauging whether a policy traceable to segregation has such current [segregative] effects, courts must consider the effect of the policy as it operates **in combination with any other challenged policies**. 14 F.3d at 1541 (citing Fordice). In fact, phrases similar to "in combination with other policies" appear no less than nine times in the opinion. Id. at 1541, 1542, 1545, 1546, 1550, 1551, 1553. The only mention of an attenuated connection or nexus in desegregation jurisprudence are references to the connection between a challenged practice and past or present purposeful discrimination, a causal connection satisfied in the instant case by the district court's holding that the "current ad valorem tax structure" is traceable to "an original segregative, discriminatory policy." Doc. 3294 at 83. E.g., Freeman v. Pitts, 503 U.S. 467, 496 (1992); Board of Educ. of Oklahoma City v. Dowell, 498 U.S. 237, 243 (1991); Keyes v. School Dist. No. 1, 413 U.S. 189, 211 (1973); Lockett v. Board of Educ. of Muscogee County, 111 F.3d 839, 843 (11th Cir. 1997).

In footnote 9 of its conclusions of law, the district court implied that it was reading Fordice to restrict the definition of "segregative effects" to policies and practices that influence the choice about which college to attend and not the

choice whether to attend and to complete higher education at any college at all:

> Plaintiffs' claims that the State is not funding K-12 adequately and that as a result higher education is receiving a lesser share of the ETF, do not appear to fit the Fordice mold, let alone impede black students' free choice in determining **which** university to attend. The Court has previously imposed the requirements of Fordice, and the Court questions whether the issues presently before the Court trigger the application of Fordice.

Doc. 3294 at 86-87 n.9 (emphasis added). However, when Plaintiffs' motion to alter or amend contended that such a cramped construction of Fordice would be erroneous, the district court disavowed such an intention. The February 10, 2005, order states that the court reached its conclusion of no continuing segregative effects "based on the Knight-Sims Plaintiffs' failure to show that the ability of black students to attend college, **or** to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system." Doc. 3320 at 6 (emphasis added).

Indeed, the district court in its 1995 opinion correctly construed the Fordice meaning of segregative effects broadly when it explored at length the factors impacting student choice. "There is a difference between college choice and student choice. Student choice involves broader considerations, from the formation of post- secondary and career aspirations, to issues of institutional access." Knight v. Alabama, 900 F.Supp. 272, 282 (N.D. Ala. 1995) (citation

omitted). “Student choice, in this case, is not just about making AAMU and ASU more desirable places to go, but also about expanding student choice in the system as a whole.” Id. at 284 (citation omitted).

The costs of attending college and the availability of financial aid headed the list of factors the district court found to be controlling student choice: “Research literature on student choice . . . demonstrates that the following factors exert the greatest influence on students' choice: tuition, costs, financial aid, academic reputation, location, size, social atmosphere, and, occasionally, special academic programs.” Id. at 283 (citation omitted). The preparation and encouragement students receive in the K-12 system are also crucial determinants of student choice:

> 9. With some exceptions, most students begin the primary part of the college choice process in the junior year of high school. By this point, students understand from parents the economic parameters of the choices available.
>
> 10. When students are defining a college "choice set," parents establish an explicit cost range they will consider, and indicate the distance from home they think the student should travel for school.
>
> 11. The two most direct ways, external to the family, to influence the process by which students choose colleges are (1) post-secondary encouragement during the middle school years and (2) efforts to lower the price and other costs of a college education.

Id. (citations omitted). The district court’s 1995 opinion cited with approval the view of one expert witness who emphasized that in addressing vestiges of

segregation in Alabama's system of higher education, "the problem should be approached from the point of view of enhancing opportunity and access so that more black students will be eligible for, prepared for and interested in higher education." Id. at 285 n.2 (citing testimony of Dr. Walter Allen).

Creating equal access to higher education for black students by closing the racial gaps in both high school graduates going on to college and in students graduating from college was a primary objective of the "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education," published in 1978 by the HEW Office of Civil Rights, 43 Fed. Reg. 6658 (Feb. 15, 1978). The district court in its 1985 decision ordered the State to utilize the Revised Criteria in developing its proposed remedial plan. United States and Knight v. Alabama, 628 F.Supp. 1173 (N.D. Ala. 1985), rev'd and remanded on other grnds, 828 F.2d 1532 (11th Cir. 1987). In Maryland, one of the seven states required to revise their higher education desegregation plans to comply with Fordice, a key goal OCR focused on was "[a]ccess for African Americans to Maryland's institutions of higher education, including need-based and other financial assistance programs." Partnership Agreement between Maryland and OCR (1999), http://www.mhec.state.md.us/higherEd/ocrplan/index.asp at 13.

Given the crucial role of financial factors in the legal standards for assessing the continuing segregative effects on student choice, the district court's findings of fact establish a strong, not an attenuated, causal connection between the purposefully discriminatory property tax system embedded in the Alabama Constitution and the lack of equal access to higher education black students suffer. The chain of causation could not be clearer:

(1) The lowest property taxes of all the fifty states have so unbalanced Alabama's revenue system that there is no practicable way of increasing state and local funding for education without property tax reform. Statement of facts, supra, at 22-23.

(2) The resulting underfunding of K-12 public education adversely impacts black students, particularly those in majority-black school districts and majority-black schools. Id. at 24-25.

(a) Fewer blacks than whites graduate from high school. Id. at 25.

(b) Black high school graduates are less well prepared for college than are white high school graduates. Id. at 26-27.

(3) The over-dependence of K-12 public schools on Education Trust Fund appropriations provided from state sales and income taxes severely restricts

funding for higher education, id. at 25-26, as a result of which:

(a) tuition and fees have risen precipitously,

(b) need-based financial aid, instead of increasing to compensate for higher tuition, has declined to less than $1 million,

(c) causing increasing indebtedness and financial burdens that fall disproportionately on black students in Alabama, who have greater financial need than both white Alabamians and blacks in other states, and

(d) which corresponds with a growing gap between whites and blacks enrolling in college. Id. at 26-29.

B. THE STATE UTTERLY FAILED TO SATISFY ITS BURDEN OF PROVING THE ABSENCE OF CONTINUING SEGREGATIVE EFFECTS.

As noted above, the district court erroneously placed the burden on the Knight-Sims Plaintiffs to demonstrate continuing segregative effects on student choice. Doc. 3320 at 6. Once Plaintiffs have carried their burden of tracing the constitutionally entrenched property tax system to racially segregative motives, "the burden of proof [then] falls upon the State, and not the aggrieved plaintiffs, to establish that it has dismantled its prior de jure segregated system." Fordice, supra, 505 U.S. at 739 (quoted in Knight v. Alabama, supra, 14 F.3d at 1541). The State's evidence cited in paragraphs 15 and 16 of the conclusions of law, Doc.

3294 at 85-86, fell far short of its burden of proof, as the findings of fact clearly show.

The increase over a decade in the absolute dollar amounts appropriated to higher education is less relevant to continuing segregative effects than is the decreasing share of the overburdened ETF allocated to higher education. It is the proportionate decline that, according to the findings of fact, has caused steep increases in tuition and fees, lack of need-based financial assistance, increased student indebtedness, and a corresponding growing racial gap in college attendance. Similarly, the reference to rising black enrollment and graduation from the historically white universities is no answer to overall declining black access to higher education.

Nor can the district court's findings of fact be reconciled with its conclusion of law that the underfunding caused by the property tax system does not "work[] to frustrate the Court's prior remedial decrees. . . ." Doc. 3294 at 86. The State's compliance with orders to pay the amounts specified by the decrees is not the only factor the district court must consider when determining whether it should declare the State's system of higher education unitary and relinquish jurisdiction. Ultimately, it must assess whether its decrees have succeeded in eliminating vestiges of de jure segregation to the extent practicable. E.g., Freeman v. Pitts,

503 U.S. 467, 491-92 (1992). Here there was uncontroverted evidence that the endemic underfunding of higher education will prevent the desegregation objectives of the remedial decrees from being realized. The success of the new court-ordered programs at ASU and AAMU is dependent on steadily increasing appropriations, and their other academic programs cannot become competitive and attract other-race students without adequate funding once the court's mandate ends. Doc. 3275 at 105-08; Plaintiffs' Exh. 78. Nor can the historically white universities be expected to eradicate vestiges of segregation in the under-representation of African Americans in their faculties and administrations when, "as a result of the lack of state funding, faculty salaries at Alabama's state universities are well below regional and national averages. . . ." Doc. 3294 at 59; compare with Knight, supra, 787 F.Supp. at 1191 ("Undoubtedly institutions such as Auburn face at best an up-hill battle in attracting qualified black faculty. Without a sincere and genuine effort to do so, Auburn will never be able to eliminate the vestiges of segregation which cling to the racial composition of its faculty to this day.").

For all these reasons, it simply is not possible to reconcile the district court's findings of fact with its conclusion of law that the property tax system has no continuing segregative effects. It is important to recall that, in its 1991

opinion, the district court identified white supremacy and black subordination as the driving force of Alabama's education policy. E.g., Knight, supra, 787 F.Supp. at 1070. As the level of education available to most whites rose over time, so the level of education available to blacks had to be kept several steps behind. Id. at 1097. The district court acknowledged that any desegregation remedy that failed to dismantle all these discriminatory historical policies and practices "would leav[e] in place many of the structures created by the former dual system whose object was--and impact continues to be--the subordination of Alabama's African American citizens." Id. at 1357. Yet it has left in place revenue structures that were at the heart of this racist design, in spite of its finding that "the adverse racial impact of Alabama's revenue and funding policies for higher education perpetuates the state's historical official policies of forcing African Americans into subordinate social and economic roles in the state's civil life." Doc. 3294 at 78. This was clear error.

II. THE DISTRICT COURT COMMITTED FURTHER LEGAL ERROR BY REFUSING TO PROVIDE DECLARATORY AND INJUNCTIVE RELIEF UNDER HUNTER V. UNDERWOOD AND HUNTER V. ERICKSON.

The district court compounded its erroneous conclusion that the State had borne its burden under United States v. Fordice of showing no continuing

segregative effects of the racially motivated property tax system when it relied on the same reasoning to conclude that Hunter v. Underwood is “inapplicable” to this case. Doc. 3320 at 5. This Court, sitting en banc, recently explored the important distinctions between Fordice and Hunter v. Underwood. Johnson v. Governor of Florida, __ F.3d __, 2005 WL 832357 (11th Cir., April 12, 2005) (en banc). The Fordice standards govern the State’s affirmative duty completely to **remedy** the continuing effects of the racially segregated system of higher education it has already been found guilty of maintaining. Id. at *7 and n.22. Plaintiffs are not required to prove that challenged practices are themselves purposefully discriminatory, only that they perpetuate the intentional discrimination inhering in the de jure segregated system. Id. at *8. This Court has been reluctant to apply Fordice outside the education context because of the “heightened” standard of review required by Fordice to ensure that vestiges of segregation have been fully eradicated. Id. at *7-*8.[8]

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[8] And that is why the district court in the instant case erred by refusing to require the State of Alabama to eradicate, to the extent that it is educationally sound and practicable, all the continuing barriers to black students’ equal access to higher education, regardless of how attenuated may be their causal connections to the property tax system in the court’s view. Higher education is where all the underfunded chickens in Alabama’s K-Phd. system of public education come home to roost. There is no statewide K-12 school desegregation case; only in the instant action can the full ramifications of the historical discrimination described in the district court’s findings of fact be confronted and remedied.

Hunter v. Underwood, by contrast, addresses a "question . . . of liability, not remedy." Johnson , supra, 2005 WL 832357 at *7 n.22. It requires federal courts to enjoin continued enforcement of all racially motivated state laws, regardless of the nature of their adverse impact on African Americans, and regardless of whether some whites are similarly disadvantaged by them. Id. at *4 ("A facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group.") (citation and footnote omitted); Hunter v. Underwood, 471 U.S. at 232 ("an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks"). Hunter v. Underwood establishes a "two-step test": first plaintiffs must show that "racial discrimination [has] been a 'substantial' or 'motivating' factor behind enactment of the law, [then] the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." Johnson , supra, 2005 WL 832357 at *5 (quoting Hunter v. Underwood, 471 U.S. at 227-28). The findings of fact in the instant case clearly meet this test: a substantial racially discriminatory purpose was behind each of the property tax provisions in the Alabama Constitution, from 1901 to 1978, and the State was unable to demonstrate that they would have been enacted absent this racial purpose.

In Johnson, this Court held that the felon disfranchisement provisions in

Florida’s 1968 Constitution did not violate the Equal Protection Clause, because the plaintiffs “offer[ed] no contemporaneous evidence from the 1868 constitutional convention demonstrating that racial discrimination motivated the enactment of the 1868 disenfranchisement provision,” and they did “ not allege that racial discrimination motivated the adoption of Florida's 1968 felon disenfranchisement law.” Johnson , supra, 2005 WL 832357 at *3. By contrast, the district court found in the instant action that, based on overwhelming evidence from expert historians, racially discriminatory motives were behind “all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.” Doc. 3294 at 48-49. These findings of fact establish a “head-on” equal protection violation, and the district court committed legal error by “declin[ing]” to grant declaratory and injunctive relief. Johnson , supra, 2005 WL 832357 at *4; Doc. 3320 at 4.

For related reasons, the district court erred as a matter of law when it rejected the Knight-Sims Plaintiffs’ claim under Hunter v. Erickson, 393 U.S. 385 (1969), and its progeny. Both reasons the district court gave for distinguishing the instant case from Hunter v. Erickson cannot be squared with its findings of fact. Doc. 3294 at 89-90.

First, as the Supreme Court held in Hunter v. Underwood, the fact that the

state constitutional barriers to levying property taxes burden all Alabama citizens, regardless of race, does "not render nugatory the purpose to discriminate against all blacks." 471 U.S. at 232. The district court's detailed findings of fact vividly display the sad reality that throughout the history of Alabama the privileged few have been able to use the race card to convince poor and middle class whites to set aside their recurring agenda for adequate education funding and to support constitutional revenue restrictions that hurt other whites, all for the sake of denying black students equal opportunity. But racial discrimination that sweeps so broadly that many whites also must suffer violates the Constitution of the United States just as much as do discriminatory measures that more efficiently target their racial victims. It is an unfortunate fact that for nearly a century federal court enforcement of the Equal Protection Clause has been needed to remove the roadblocks historical white supremacy has placed in the path of progress for all Alabamians.

Second, the conclusion that "the challenged constitutional provisions were not ratified with the intent to foreclose legislation specifically tailored to remedy discrimination," Doc. 3294 at 90, is inconsistent with the district court's finding of fact that all the challenged provisions were intended to foreclose ordinary legislation that "threatened the historical constitutional scheme whites had

designed to shield their property from taxation by officials elected by black voters for the benefit of black students." Doc. 3294 at 44 (citations omitted). In short, just like the laws challenged in the Hunter v. Erickson cases, the millage caps and Lid Bills in the Alabama Constitution were carefully tailored for the purpose of preventing state and local legislators elected by re-enfranchised black voters from remedying nearly two hundred years of discrimination against African Americans in funding public education.

III. THE DISTRICT COURT'S CONCLUSIONS OF LAW CONFUSE REMEDY ISSUES WITH LIABILITY ISSUES.

A. THE DISTRICT COURT SHOULD HAVE TAILORED RELIEF TO ERADICATE CONTINUING SEGREGATIVE EFFECTS IDENTIFIED BY ITS FINDINGS OF FACT.

The district court's conclusions of law do not refer back to its findings of fact and explain how it could conclude that the causal connections between Alabama's constitutionally restricted property tax system and continuing segregative effects in public higher education are too attenuated. But implicit in this cryptic conclusion is a concern that any relief aimed at eradicating the vestiges of segregation inhering in the property tax system would inject the court too deeply in state and local tax policies that should be determined by the political branches of government, not by the judiciary; or that it would impact areas beyond

the scope of this action, involving the court in the oversight of K-12 education and non-education government services funded by property taxes. With due respect, these are legitimate concerns that bear on the proper tailoring of a remedy, not on the question of liability.

The district court's concerns about staying within the scope of this action are not novel; they inhere in every major school desegregation case. But the Supreme Court has repeatedly provided guidance for managing the problem of potential judicial overreach while carrying out the constitutional command of eradicating vestiges of segregation "to the extent practicable and consistent with sound educational practices." Fordice, supra, 505 U.S. at 729. The broad, three-part guidelines for crafting a judicial remedy aimed at eliminating vestiges of de jure school segregation were repeated in Missouri v. Jenkins, 515 U.S. 70 (1995) (Jenkins II):

> [I]n Milliken v. Bradley, 433 U.S. 267[, 280-81] (1977) (Milliken II), we articulated a three-part framework derived from our prior cases to guide district courts in the exercise of their remedial authority.
>
>> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to the condition alleged to offend the Constitution. Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of

> discriminatory conduct to the position they would have occupied in the absence of such conduct. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

515 U.S. at 88 (internal quotations and citations omitted) (emphases in original).

The condition that offends the Fourteenth Amendment and Title VI in the instant case begins, of course, with the series of provisions restricting property taxes that were entrenched in Alabama's constitutions from 1875 to 1978 and that the district court found to be traceable to racially segregative motives. The fact that they have broad implications for the state's revenue system does not vitiate the district court's duty to eliminate the vestiges of segregation they have for so long perpetuated. Indeed, the Supreme Court has affirmed the duty of federal courts to enjoin enforcement of state constitutional and statutory limits on local property tax levies that interfere with implementation of school desegregation decrees, even when those state tax laws have not themselves been proved to be racially discriminatory. Missouri v. Jenkins, 495 U.S. 33, 38, 57 (1990) (Jenkins I) (authorizing district court to set aside state constitutional caps and voter referendum requirements when directing local school district to raise property taxes sufficient to pay for court-ordered K-12 school desegregation remedy). It

should go without saying that this remedial authority is present with stronger force where, as here, the state constitutional property tax restrictions were themselves installed for racially discriminatory purposes. The Supreme Court rejected Missouri's argument that ordering an increase in property taxes somehow exceeds federal court authority under the U.S. Constitution. Jenkins I, 495 U.S. at 55 ("a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court") (citation omitted).

The Supreme Court also has provided guidance on who should design the property tax remedy. In Jenkins I, the Court acknowledged that "[t]he very complexity of the problems of financing and managing a ... public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that ... 'the legislature's efforts to tackle the problems' should be entitled to respect." 495 U.S. at 52 (quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42 (1973) (quoting Jefferson v. Hackney, 406 U.S. 535, 546-547 (1972)). Thus, the district court should give the Governor and the Alabama Legislature the opportunity to formulate a remedy in a manner that promises realistically to eradicate the vestiges of segregation. What Jenkins I says about local government responsibilities applies even more to the state legislature's duty here: "Authorizing and directing local government institutions to devise and

implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems." 495 U.S. at 51.

However, turning the remedial task over to the Legislature does not relieve the district court of all further responsibility. "By no means should a district court grant local government carte blanche . . . ." Jenkins I , 495 U.S. at 52 (citation omitted). There remains the judicial obligation of ensuring that state government's statutory and/or constitutional response begins to address in a convincing way the kind of tax reform that will provide additional funding for higher education adequate to the task of remedying a century and a half of racial discrimination, taking into account the corresponding need of adequate and equitable funding for K-12 schools. The district court must be mindful that reforms aimed at remedying vestiges of school segregation in Alabama's property tax system may interact with a wide range of state and local revenue policies involving governmental services other than public K-12 and higher education. "It would not serve the important objective of Brown [v. Board of Education, 347 U.S. 483 (1954),] to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on

other forms of discrimination." Jenkins II, 515 U.S. at 87 (quoting Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 22-23 (1971)). State government's ability and duty to attend to the full range of public services and obligations is precisely why the Supreme Court has directed federal district courts to provide the State the first opportunity to propose remedies for systemic vestiges of school segregation and to give great deference to the government's policy choices.

The district court's opinion summarizes the relief the Knight-Sims plaintiffs requested. Doc. 3294 at 6-7. See Doc. 3278 at 125-27 for the details. In the exercise of its equitable discretion, the district court might have granted more, less or different relief than what we requested, but, in light of its findings of fact connecting intentional racial discrimination with continuing discriminatory effects, it did not have discretion to refuse to grant any relief at all.

B. AT A MINIMUM, THE DISTRICT COURT SHOULD HAVE ENJOINED FUTURE ENFORCEMENT OF THE DISCRIMINATORY PROPERTY TAX PROVISIONS.

However mistaken it may be, the district court's conclusion of law that the State satisfied its burden under Fordice of showing that the challenged property tax provisions in the Alabama Constitution have no segregative effects on higher

education is a ruling on liability. It was not necessary that the court proceed to the third Fordice step, which arguably is remedial in nature, to determine whether there are educationally sound and practicable alternatives to the current revenue policies.

But, as we have shown above, the conclusion there is too attenuated a causal relationship between the racially motivated property tax provisions and continuing segregation in higher education cannot justify refusal at least to enjoin future enforcement of those provisions, as required by Hunter v. Underwood, in light of the findings of continuing adverse racial impact in other areas of public education and civil society.[9] By concluding that such relief is beyond the scope of this

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[9] Because the declaratory and injunctive relief plaintiffs requested would not enjoin the collection of any state or local taxes and, instead, would open a legislative avenue to increasing property taxes, the Tax Injunction Act is not implicated. Indeed, because existing property tax statute law would remain undisturbed, the requested injunction would not immediately affect any taxes. The Tax Injunction Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Supreme Court has recently made clear that an action, such as the instant one, which alleges federal constitutional grounds for striking down barriers to raising taxes or distributing their benefits does not fall within the Act's scope. Hibbs v. Winn, 542 U.S. 88, 124 S.Ct. 2276, 2290-91 and nn. 11 and 12 (2004) (overruling, e.g., Colonial Pipeline Co. v. Collins, 921 F.2d 1237 (C.A.11 1991), and citing, e.g., Missouri v. Jenkins, 495 U.S. 33, 57 (1990)). Even if our requested relief was construed to involve the collection of taxes, there is no "plain, speedy and efficient remedy [that] may be had in the courts of [Alabama]." 28 U.S.C. § 1341. See Ex parte James, 836 So.2d 813 (Ala. 2002) (holding that

action, the district court effectively held that, notwithstanding the clear equal protection violations established by its findings of fact, relief is unavailable because the Knight-Sims Plaintiffs had limited their demands for relief to desegregation of higher education. This holding violated Rule 54(c), Fed. R. Civ. P., which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 65-66 (1978), the Supreme Court construed Rule 54(c) to mean "that a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." 439 U.S. at 65-66 (citation omitted). The Court affirmed dismissal in Holt Civic Club, because, it held, the plaintiffs' "claim lack[ed] substantive merit. . . ." 439 U.S. at 66. They had "alleged no claim cognizable under the United States Constitution." Id. By contrast, in the instant case, the district court refused to address the substantive merits of plaintiffs' equal protection claims under Hunter v. Underwood. It is impossible to deny that the found facts establish a constitutional violation, and the district court

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Alabama state courts are barred by separation of powers from imposing remedies to correct the underfunding of public education).

committed legal error by refusing to grant declaratory and injunctive relief.

CONCLUSION

The orders denying relief should be reversed, and this action should be remanded to the district court with instructions that the property tax provisions of the Alabama Constitution be enjoined and that the Governor and Legislature be given an opportunity to enact in timely fashion practicable and educationally sound measures that promise realistically to eradicate vestiges of segregation in the state's property tax system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), Fed.R.App.P. This brief contains 13,617 words.

CERTIFICATE OF SERVICE

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