

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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ARGUMENT

Only the State of Alabama opposes reversal of the district court's judgment. Defendants Alabama A&M University (AAMU) and Alabama State University (ASU), the two historically black state universities, have filed appellee's briefs supporting the Knight-Sims plaintiffs' appeal. None of the other defendants, the Governor, the Alabama Commission on Higher Education, the Alabama State Board of Education, the State Superintendent of Education, the Chancellor of Alabama's Postsecondary System, nor any of the other state universities has filed an appellee's brief. Prominent Alabama law professors and historians have filed an amicus brief supporting appellants.

At the outset, it is important to note that the State does not contest any of the district court's findings of fact, including its findings that all the challenged property tax provisions in Alabama's Constitution are racially motivated and have continuing adverse effects on African-American students. Instead, much of the State's appellee brief raises arguments and cites evidence it did not present in the district court proceedings. Consequently, this reply brief is longer than usual and tries to refocus the issues on appeal in light of the State's fresh – and novel – contentions.

The State's defense of the district court's judgment is based primarily on two misplaced contentions:

First, it argues that the district court had the discretion to deny any declaratory or injunctive relief. But the school desegregation precedents it cites provide standards governing the scope of the district court's equitable discretion when it is fashioning a *remedy* for vestiges of *de jure* segregation, not authority for concluding that in the face of these contrary facts no such vestiges exist or that there is no constitutional *violation* to be remedied.

Second, it argues that the district court's ultimate conclusion that the property tax barriers in the state constitution are not causally related to continuing segregative effects is a finding of fact, subject to the clearly erroneous rule, notwithstanding its placement in the district court's conclusions of law. But the absence of continuing segregative effects cannot be squared with the extensive subsidiary findings of fact, and the district court's holding cannot be allowed to stand, whether this court reviews it *de novo* as a misapplication of controlling law to the found facts or under the clearly erroneous standard as an ultimate finding of fact that is contradicted by the subsidiary findings of fact.

I. THE QUESTION IS WHETHER THE DISTRICT JUDGE ERRED IN CONCLUDING THERE IS NO CONSTITUTIONAL VIOLATION, NOT WHETHER HE ABUSED HIS REMEDIAL EQUITABLE DISCRETION.

Rather than addressing the merits of how facts of racial discrimination as

detailed and unequivocal as those found by the district court can survive constitutional challenge, the State hangs its whole case on a mistaken argument that the district court was exercising its remedial discretion. The statement of issues in the State's brief says it all: "Whether the district court abused its discretion in denying a Motion for Additional Relief filed after the State of Alabama had 'unbegrudgingly complied' with remedial decrees for more than ten years." Thus the State turns to familiar case law dealing with the adequacy of a school desegregation remedy, reminding us that when it is "carrying out its duty to eliminate the vestiges of unlawful segregation in the school system, the district court has available to it the full panoply of remedial powers." State appellee brief at 13 (*quoting Lee v. Anniston City School System*, 737 F.2d 952, 955 (11th Cir. 1984) (*citing Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971))).

The problem with the State's argument, of course, is that in the matter on appeal the district court was not weighing competing proposals to remedy some vestige of segregation it has already found. It never reached questions of remedy. Rather, it concluded that "although the provisions of the Alabama constitution may represent poor public tax policy, the Court finds that those provisions do not violate the Fourteenth Amendment." Doc. 3294 at 90.

A. THE FINDING OF NO LIABILITY UNDER *UNITED STATES V. FORDICE*.

First, the district court held that the State had carried its burden under the second prong of the *Fordice* desegregation standard of showing that the property tax provisions have no continuing segregative effects. Doc. 3294 at 86 (*citing United States v. Fordice*, 505 U.S. 717 (1992)). This holding meant that these provisions of the 1901 Alabama Constitution are not vestiges of de jure segregation and no longer “remain[] in violation of the Fourteenth Amendment.” Doc. 3294 at 83 (*quoting Knight v. Alabama*, 14 F.3d 1534, 1542 (11th Cir. 1994) (*citing Fordice*, 505 U.S. at 727)). The district court never reached the remedy questions in the third prong of *Fordice*, and it never required the State to demonstrate “that none of the full range of less segregative alternative remedies are practicable and educationally sound. . . .” Doc. 3294 at 83 (same citations omitted).

So, with respect to *Fordice* desegregation principles, the State’s effort to shift this Court’s review away from the legal standards for determining whether current policies *violate* the Fourteenth Amendment by perpetuating vestiges of segregation fails. Consequently, its appellee’s brief makes no attempt to respond to the exploration of the applicable legal standards at pages 38-42 of the Knight-Sims appellants’ brief, which we briefly recapitulate:

The district court’s examination of the evidence to identify vestiges of *de jure* segregation must consider “a **wide range** of factors . . . **in any facet** of [the

State's] institutional system.” *Fordice*, 505 U.S. at 728 (citations omitted) (emphases added).

[“C]ourts must consider the effect of the policy as it operates **in combination with any other challenged policies.**” *Knight*, 14 F.3d at 1541 (*citing Fordice*) (emphasis added).

There is no suggestion in *Fordice* that the district court may ignore policies or practices traceable to official discrimination if the passage of time or the impact of these policies on other governmental functions makes their impact on higher education only marginal or attenuated. The amicus brief of the law professors and historians correctly points out that the onerous legal standard of causation the district court applied cannot be defended. As the district court noted in its 1991 opinion: “Applying *Brown II* in *Green v. County School Board*, 391 U.S. 430 (1968), the Supreme Court made it clear that state authorities had to act affirmatively to dismantle existing vestiges of segregation resulting from the prior dual system ‘root and branch.’” *Knight v. Alabama*, 787 F.Supp. 1030, 1356 (N.D. Ala. 1991), *aff’d in part and rev’d in part*, 14 F.3d 1534 (11th Cir. 1994) (*quoting Green*, 391 U.S. at 437-38).

Discriminatory financial barriers to equal access to higher education at all levels of public education are one of the most important factors a court must

examine in the search for vestiges of segregation that continue to influence student choice. *Knight v. Alabama*, 900 F.Supp. 272, 282, 285 (N.D. Ala. 1995); Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education, 43 Fed. Reg. 6658 (Feb. 15, 1978) (*cited in 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).

B. THE FINDINGS OF NO LIABILITY UNDER *HUNTER V. ERICKSON* AND *HUNTER V. UNDERWOOD*.

Second, the district court held that the *liability* standards enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Hunter v. Underwood*, 471 U.S. 222 (1985), are “inapplicable under the circumstances of this case.” Doc. 3320 at 5; Doc. 3294 at 90 (“the Court does not find that the circumstances of this case trigger the applicability Hunter[v. Erickson] and its progeny”). In its appellee’s brief, the State compounds its misapplication of desegregation remedial law by arguing that the district court could exercise its equitable discretion not even to address whether the findings of fact establish a violation of the Fourteenth Amendment under *Underwood* and *Erickson*.

With respect to both the *Hunter v. Underwood* and *Hunter v. Erickson* claims, the State argues that, because this action is the Alabama higher education

desegregation case, the district court could exercise its discretion to disregard fact findings of all the continuing adverse racial effects that it refused to call segregative effects. State appellee's brief at 30-32, 37-38. The State cites no authority for this remarkable proposition. Putting aside the district court's error in failing to categorize its many findings of adverse racial impact as segregative in nature, the law is clear that a federal court does not have discretion to ignore patent constitutional violations solely because they expand the subject matter of the original complaint. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978), and pages 57-59 of the Knight-Sims appellees' brief.

So the district court did not have discretion to ignore the controlling principles of law that when applied to its own findings of fact establish clear violations of the Equal Protection Clause and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d. The issue in this appeal, as appellee ASU accurately states it, remains: "Has any court of the United States ever held that a provision with an invidious, racially discriminatory purpose and a racially discriminatory effect may nonetheless be held to be constitutional?" ASU appellee's brief at 1.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE RACIALLY MOTIVATED PROPERTY TAX PROVISIONS HAVE NO SEGREGATIVE EFFECTS, EITHER AS A FINDING OF FACT OR AS A CONCLUSION OF LAW.

The State's appellee brief makes no attempt to square the district court's conclusion of no segregative effects with its findings of fact. Instead, the State simply argues that the no segregative effects holding must be upheld under the clearly erroneous standard of Rule 52(a), Fed.R.Civ.P. But it does not matter which standard of review applies, because the district court clearly erred, whether its no segregative effects holding is viewed as an ultimate finding of fact that is inconsistent with its subsidiary findings of fact, or whether it is viewed as a misapplication of controlling law to its findings of fact.

The district court's placement of this holding in its conclusions of law may not of itself be controlling, but it certainly suggests that the district court thought it was basing its holding on the application of desegregation law to its findings of fact. It openly expressed a concern that its findings of fact "do not appear to fit the Fordice mold. . . ." Doc. 3294 at 86-87 n.9. As noted above, this is an erroneous constriction of the scope of policies and practices the Supreme Court directed federal courts to examine in *Fordice*, both standing alone and as those policies and practices interact with other policies.

Specifically, it appeared the district court mistakenly thought that financial barriers denying access to higher education were not among the discriminatory effects *Fordice* includes within the meaning of segregative effects. But in its order

denying plaintiffs' motion to alter or amend, the district court appeared to disavow reliance solely on such a narrow reading of *Fordice* desegregation principles. It explained that its holding of no segregative effects was based on its conclusion that there was too attenuated a causal relationship between the property tax restrictions and "the ability of black students to attend college." Doc. 3320 at 6. This is more clearly an ultimate finding of fact about causation, which, like subsidiary findings of fact, are subject to the clearly erroneous rule. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982).

However, to be upheld under Rule 52(a) an ultimate finding of fact must be supported by and consistent with subsidiary findings of fact. *Doe v. DeKalb County School Dist.*, 145 F.3d 1441, 1454 (11th Cir. 1998) ("The district court should make relevant subsidiary findings of fact, as well as an ultimate finding of fact," and it must "clearly explain why" it reached its ultimate finding of fact); *accord, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 568 (1985) ("the court's finding that petitioner had been denied employment by respondent because of her sex rested on a number of subsidiary findings"). In the instant case, the district court's ultimate finding or conclusion that, for purposes of establishing continuing segregative effects, there is too attenuated a relationship between the racially motivated property tax structure and African Americans' access to higher education is flatly contradicted by

its subsidiary findings of fact, some of which we repeat below:

The effect of low property tax revenues has had a crippling effect on poor, majority black school districts.

Doc. 3294 at 55 (citation omitted).

[O]f the forty-four Alabama high schools placed on academic watch in 2002, most had both black student majorities and above average percentages of students participating in the reduced lunch program. Additionally, although forty percent of the students enrolled in Alabama public school were non-white, only thirty-five percent of high school graduates were non-white.

Doc. 3294 at 56-57 (footnote and citation omitted).

Lack of state funding has also adversely impacted funding for financial aid, which disproportionately burdens poor, black families.

Doc. 3294 at 57.

Dr. Richardson also identified 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 (citation omitted).

During the past few years, Alabama's K-12 students had been making tremendous progress increasing their standardized test scores, but recent budget cuts have made that progress unravel. For instance, in the past year, the average high school dropout rate for Alabama students was fourteen or fifteen percent, but for black students it was around the 20 percent range.

Doc. 3294 at 63 (citations and internal quotation marks omitted).

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.

Alabama started from a much lower base than did any other part of the country, ranking, in 2001, forty-sixth out of fifty states in spending on need-based aid, and it actually decreased the amount of spending by a little over a third over those eleven years.

Doc. 3294 at 75 (citations omitted).

Dr. Heller testified that 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.

Doc. 3294 at at 72.

The trend of rapidly increasing tuition and steadily decreasing need-based financial aid in Alabama corresponds with a growing gap between white and black Alabama high school graduates enrolling in the state's public four-year institutions of higher education.¹

¹ The State's appellee brief at page 5 attempts to counter this finding by citing data from the 2004 annual report to the court showing black degree completions increasing by 96% from 1991 to 2003, while white degree completions dropped by 13%. The State contends these percentages show an "enormous improvement in access to higher education for Alabama's black students." *Id.* In fact, they merely reflect corresponding changes in census demographics. According to the U. S. Census Bureau, the black population of Alabama in the age 20 to 25 year-old category increased 19.4% between 1990 and 2000, while the white population age 20 to 25 years old declined 7%. PX 152. The percentage increase in black degree

Doc. 3294 at 76 (citation omitted).

According to Dr. Heller, 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.

Thus, viewed as an ultimate finding of fact, the district court's "conclu[sion]

completions seems large because, at only 2,378, the 1991 starting number was so small. The census further shows that the percentage of black graduates over 25 years of age increased from 9% in 1990 to 11% in 2000, while white graduate percentages in the same age group increased even more, from 17% to 21%. Of course, for equal protection purposes, the relevant question is the black-white gap, and the district court properly relied on graphs introduced by the higher education expert, Dr. Donald Heller, that plainly demonstrate that the black-white enrollment gap actually increased over this period of time. As the district court pointed out, quoting Dr. Heller, all demographic groups have raised their college graduate numbers because of increases in "what economists call the college wage premium, the difference between a high school graduate, what he or she earns, and a college graduate." Doc. 3294 at 79.

that the segregative effect of the challenged constitutional provisions is too attenuated to support a finding that those provisions violate Fordice,” Doc. 3320 at 6, which is “based on the Knight-Sims Plaintiffs’ failure to show that the ability of black students to attend college . . . has been unconstitutionally stymied by the property tax system,” *id.*, is clearly erroneous. A closer reading of the order denying plaintiffs’ motion to alter or amend indicates that the real concern of the district court was not the factual question of continuing segregative effects but the manageability of equitable relief.

III. THE DISTRICT COURT’S PREMATURE CONCERNS ABOUT THE MANAGEABILITY OF A JUDICIAL REMEDY IMPROPERLY DISTORTED ITS LIABILITY CONCLUSIONS.

In the section addressing *Hunter v. Underwood*, the February 10, 2005, order expressly links the district court’s attenuation concern with the scope of relief:

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. The State’s appellee brief reiterates its contention below that, regardless of the adverse impact on African-Americans’ access to higher education

caused by the constitutionally entrenched property tax system, the district court is powerless to provide any relief, because property taxes also impact Alabama's K-12 public school system and non-education state and local government functions. In short, the State's contention is that the racially discriminatory design of the property tax system is so pervasive and deeply rooted that it is insulated from federal court intervention.

The State argues out of both sides of its mouth. It contends on one hand, that any relief the district court ordered would be ineffective and, on the other hand, that the relief would be overly broad. First, addressing the most straightforward and simplest remedy, enjoining future enforcement of the challenged property tax provisions in the Alabama Constitution, the State warns: "A legislature free to tax without limitation might, however, choose not to exercise that power, or to exercise it in ways unsatisfactory to Knight." State appellee's brief at 36. The State does not address the fact that lifting constitutional constraints on legislative choice and empowering representatives of a re-enfranchised black electorate (and white electorate) would at least open the door to rational property tax reform and finally undermine the racially discriminatory design of the constitution's drafters to keep this door as tightly shut as possible.

Then, taking the opposite tack, the State complains that any federal court

oversight of the policy choices made by the Legislature “would cause the federal courts to become deeply enmeshed in the machinery of state government involving choices about the raising and allocation of public funds.” *Id.* By crying wolf, the State would keep the district court from even investigating ways to supervise the wide range of reform options the Governor and Legislature could make through ordinary lawmaking processes. Obviously, the district court would have to give great deference to the State’s policy choices, particularly as tax laws affect non-education services. But it could at least ensure that they did not perpetuate the existing racially discriminatory barriers to higher education. Requiring a sufficient share of Education Trust Fund appropriations to moderate the annually occurring tuition hikes and to raise need-based financial assistance at least to the level of amounts being provided in all the other states unburdened with state constitutional restrictions are examples – and we emphasize they are examples only – of the kind of guidelines the district court might impose in a remedial decree.

The central point of this appeal is that the district court never explored the practicability and educational soundness of anyone’s remedial proposals, because it stopped its examination of the issues with a faulty finding of fact or conclusion of law that there is no constitutional violation, that there is no actionable causal connection between the racially motivated property tax system and black students’ access to

higher education. When its judgment on liability, on its holding that no federal constitutional violation exists, is reversed, the district court's first task on remand will be to receive evidence and arguments on how to craft a remedy. Until the district court fully and fairly addresses the scope of an appropriate remedy, the issue of what would or would not exceed the scope of the constitutional violation is not before this Court. If this Court were to uphold the judgment below based on the State's position, which was adopted by the district court, it effectively would be holding, as the amicus law professors and historians point out, that purposeful racial discrimination by the State is immune from constitutional challenge if it implicates tax laws -- at least if the tax laws' racially discriminatory design is too pervasive and the tax laws sweep too broadly for any one federal court easily to manage.

There is no precedent for such a radical limitation of constitutional law. To the contrary, 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 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 is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation.”). It should go without saying that this remedial authority is present with stronger force where, as here, the state constitutional barriers to levying adequate taxes for school revenues were themselves installed for racially discriminatory reasons.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), cited in the State appellee’s brief at pages 23-24, actually supports appellants’ position. There a Fourteenth Amendment challenge to inequitable distribution of funds across local school districts in Texas failed because it was based on inequalities in wealth, which the Supreme Court held was not a suspect classification requiring strict scrutiny of state funding mechanisms. 411 U.S. at 18. There was no allegation of intentional racial discrimination, and the Court found no correlation between wealthy school districts and racial concentrations. 411 U.S. at 57. Had a claim of racial discrimination been proved, however, there is no doubt that the Court would have struck down Texas’ school finance system. “Because of the historic purpose of the Fourteenth Amendment, the prime example of such a ‘suspect’ classification is one that is based upon race.” 411 U.S. at 61 (Stewart, J., concurring) (*citing Brown v.*

Board of Education, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964)). There is no basis in law for denying relief in the instant action, where the proof of racial discrimination is incontrovertibly established in judicial findings of fact.

IV. THE DISTRICT COURT PROPERLY REJECTED THE STATE'S CONTENTION THAT THE KNIGHT-SIMS PLAINTIFFS' CLAIMS AGAINST THE PROPERTY TAX PROVISIONS ARE UNTIMELY OR BARRED BY LAW OF THE CASE.

The State's appellee brief, pages 33-35, reasserts arguments about the timeliness of the Knight-Sims plaintiffs' challenge of the property tax provisions in the Alabama Constitution. The district court squarely rejected these untimeliness contentions in its preliminary order entered January 30, 2004:

Additionally, the 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 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). While the Court appreciates the Defendants' argument that the Court's consideration of the Knight-Sims Plaintiff's [sic] Motion is procedurally barred, the Court agrees with the Knight-Sims Plaintiffs that given the nature of the remedy in this case, the Court may examine certain aspects of the Alabama educational system to determine whether vestiges of discrimination remain that adversely impact public higher education in Alabama in a manner that authorizes action by this Court. Consequently, the Court finds that despite the parties' failure to present earlier the issues addressed in the Knight-Sims Plaintiffs' Motion, the Court is not barred procedurally from considering those issues.

Doc. 3252 at 2 (footnote omitted). In so ruling, the district court was simply acknowledging the independent obligation of federal courts in school desegregation cases to examine even policies and practices never previously challenged before declaring a state in full compliance with the Constitution.

The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system **must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn.**

Freeman v. Pitts, supra, 503 U.S. at 486 (emphasis added).

In any event, there were compelling legal and factual reasons why a challenge to the State's revenue sources for funding higher education should not have been raised earlier. First, as we pointed out in our appellants' brief, pages 2-3, until 2002 the issues of adequate funding were being considered in the state courts. It would have been inappropriate for the district court to accept federal jurisdiction over the same or related issues when it was possible that state court proceedings would have rendered them moot or at least might have modified them. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941); *accord, e.g., Growe v. Emison*, 507 U.S. 25, 32 (1993). Indeed, in 2002, the University of Alabama, who did not oppose plaintiffs' claims at the 2004 trial, in response to plaintiffs' objections to the State's

annual report to the court, objected to consideration of property tax questions on the ground that the district court should not attempt to “litigate what is clearly a political state law issue already before the Alabama Supreme Court.” Doc. 3048 at 22. On the very same day UA filed this response, the Alabama Supreme Court effectively dismissed the so-called Equity Funding Cases. *Ex parte James*, 836 So.2d 813 (Ala. 2002). Fourteen months later the Knight-Sims plaintiffs filed the motion for additional relief *sub judice*.

Moreover, as a matter of fact, when the district judge tried this case in 1990-91, the underfunding of higher education had not reached the crisis level that exists today, and it had not become the serious barrier to equal access that developed in the past decade. In 1992, for example, the median undergraduate tuition at 4-year public institutions in Alabama was only \$1,617, 2% below the SREB median. PX 75. But by 2002 Alabama’s median tuition had almost tripled, to \$3,532, 8.6% above the SREB median. *Id.* Meanwhile, Alabama provided only \$4.3 million in need-based financial aid in 1990-91, well below the SREB average. PX 76. By 2001-02, as tuition was rising rapidly, Alabama’s meager financial aid actually dropped by over half to \$1.8 million, while the SREB average increased nearly 300% over the same period. *Id.* The dramatically higher costs of attending state universities in Alabama were noted by Judge Murphy from the bench, addressing Dr. Henry Mabry, former

State Finance Director: “A lot of people in Georgia formerly went to school in Alabama because you had such cheap tuition. Does this chart cover times after the cheap tuition was done away with, real cheap tuition?” Doc. 3274 at 182-83. These are changed circumstances that should prevent the district court from declaring Alabama’s system of public higher education unitary until the most damaging and pervasive vestiges of segregation are removed from the state constitution.

V. THE STATE’S CHALLENGE TO THE CLASS PLAINTIFFS’ STANDING IS WITHOUT MERIT.

The State also apparently argues that the district court had no choice but to disregard the *Hunter v. Erickson* claim because the Knight-Sims plaintiffs lack standing to raise it.² State appellee’s brief at 37-38. Again, no authority is cited for this assertion, and it totally misapplies the law of standing.

The State contends that the class plaintiffs lack standing to challenge any racially discriminatory policies that do not have a causal connection with higher education. *Id.* The district court’s findings of fact do establish causal connections between the property tax provisions of the Alabama Constitution and higher education, and the State’s standing argument fails on that account. Even if the district

² The contention that the Knight-Sims plaintiffs and the class they are certified to represent lack standing to challenge the State’s constitutionally entrenched property tax provisions was not presented to or decided by the district court.

court were correct in reaching the ultimate conclusion that the causal connection is too attenuated to constitute segregative effects, a mere attenuated connection satisfies Article III standing requirements.

Gratz v. Bollinger, 539 U.S. 244, 262-63 (2003), holds that, whether it is considered as an issue of standing or as an issue of adequacy of class representation, an attack on plaintiffs' ability to challenge a state defendant's additional racially discriminatory policies should be rejected if those claims "do[] not implicate a significantly different set of concerns" than those addressed by plaintiffs' original claims of racial discrimination. In the instant action, from the beginning the Knight-Sims plaintiffs have sought to challenge *de jure* segregation in its broadest possible terms. "The Knight Plaintiffs contend that segregation was only one aspect of a broader official state policy of white supremacy and that many of the current institutions, policies and practices of public higher education in Alabama are designed with the specific intent of subordinating black citizens." *Knight v. Alabama*, *supra*, 787 F.Supp. at 1051. The district court gave the Knight-Sims plaintiffs the broadest possible scope of action when it certified them to represent a class consisting not only of black students and faculty, but "all black citizens of Alabama. . . ." *Id.*

Fordice is unequivocal in its command that federal courts must follow the tentacles of racially discriminatory policies as far and as deeply as they go into the

state's institutional structures and to root them out. The district court may conclude that there are no educationally sound and practicable means of eradicating vestiges of segregation, but it has an independent duty to ferret them out, and the class plaintiffs' standing to pursue them is as broad as may be necessary to reach them.

CONCLUSION

The State does not defend the challenged property tax barriers in the Alabama Constitution on the ground that the district court erred in finding that they were motivated by a desire to prevent African Americans from using the legislative process to raise school revenues. It does not defend these provisions on the ground that they no longer have their intended racially discriminatory effects. Rather, the State argues that federal courts are powerless to remedy these discriminatory effects because it would be impossible judicially to tailor a remedial decree and to determine whether the State Legislature's efforts to reform the property tax system eradicate the racial discrimination found by the district court.

Equal protection of the laws guaranteed by the Constitution of the United States cannot be so easily flaunted. The district court's refusal to hold that its findings of fact do not establish a constitutional violation should be reversed, and this matter should be remanded with instructions that the district court conduct such proceedings as it deems necessary to ensure that an effective remedy is crafted that does not exceed the scope of the violation.

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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 5,515 words.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record on July 18, 2005, by first class mail or by hand.

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