
NO. 05-11527-BB

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA, et al.

v.

THE STATE OF ALABAMA et al.,

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

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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
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27. Calhoun State Community College
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35. Larry E. Craven
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STATEMENT REGARDING ORAL ARGUMENT

The dispositive issues in this appeal have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF THE ISSUES

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.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS IN THE COURT BELOW

This case was filed in January, 1981, attacking vestiges of discrimination in higher education in Alabama. In 1985, the State of Alabama and its responsible officials and agencies were ordered to submit a plan to eliminate all vestiges of the dual system of higher education in Alabama.¹ On appeal, this Court reversed and remanded the case,² and, upon a hearing, the district court ordered a remedial decree in 1991.³ Following an appeal of the 1991 remedial decree, the district court amended, modified and extended its decree in 1995 in accordance with the opinion of this Court.⁴

On July 28, 2003, after remedial decrees had been in effect for almost 12 years, Knight⁵ filed a Motion for Additional Relief With Respect to State Funding of Public Higher Education (hereafter, “Motion for Additional Relief”), (Doc. 3205, p. 2 ¶ 3) contending that a “public school funding crisis” jeopardized the ability of the court to accomplish the remedial objectives of the earlier remedial decrees. The Court held an evidentiary hearing with respect to Knight’s motion on May 4 and 5, 2004, and thereafter, on October 5, 2004,

¹ *United States v. Alabama*, 628 F. Supp. 1137, 1173 (N.D. Ala. 1985).

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

³ *Knight v. Alabama*, 787 F. Supp. 1030, 1377 (N.D. Ala. 1991).

⁴ *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995).

⁵ References in brief to plaintiffs-appellants will be to “Knight.”

delivered its Findings of Fact and Conclusions of Law denying the motion for additional relief. (Doc. 3205, p. 2, ¶ 3). A Motion to Alter or Amend the Order Denying Relief was filed on October 18, 2004, (Doc. 3297) making, for the first time, an argument that the district court had a duty, under *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985), to enjoin enforcement of certain property tax provisions of the Alabama Constitution. That motion was denied on February 10, 2005. (Doc. 3320). A notice of appeal was filed on March 4, 2005. (Doc. 3323).

STATEMENT OF THE FACTS

On December 30, 1991, the district court, having made findings and conclusions that occupy some 346 pages of the Federal Supplement, entered its first remedial decree in this case. *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991). Since the original 1991 decree, the district court has sought to remedy the unconstitutional conditions in Alabama's system of higher education and their vestiges. The district court has also sought to remedy a system of inequitable distribution of available funds. *See Knight v. Alabama*, 900 F. Supp. 272, 307 (N.D. Ala. 1995) (finding discriminatory underfunding of historically black institutions). The district court in 1995 ordered that funding be made more equitable and that the State pay more to Alabama State University and Alabama A&M University to make up for past inequities.

In its consideration of the issues now before this Court, the district court has noted that, over the period of remedial decrees in this case, "black student enrollment and graduation rates at HWIs have increased considerably." (Doc. 3294, p. 86). The district court had before it other evidence of the remarkable progress made in the State of Alabama, and a few items are illustrative of what has been accomplished. New funds to Alabama A&M University associated with the decrees in the *Knight* case totaled \$97,622,519 by 2003. (Doc. 3281, Vol. 1, Annual Compliance Report and Data Summaries, Attachment 16, p. 2).

Total new funds related to *Knight* for Alabama State University over the same period amounted to \$82,583,373. *Id.*, Attachment 16, p. 3.

At Alabama A&M University, new programs were initiated in electrical and mechanical engineering, and minority or diversity scholarships were added. *Id.*, Attachment 16, p. 2. At Alabama State University, a Master of Accountancy Program, Health Information Management Program, Occupational Therapy Program, Physical Therapy Program and a new Ed. D. Program in Educational Leadership, Policy and Law were added, in addition to minority or diversity scholarships. *Id.*, Attachment 16, p. 3.

Of perhaps greater significance than the increased funds allocated to Alabama State and Alabama A&M over the period of remedial decrees is the enormous improvement in access to higher education for Alabama's black students. Total baccalaureate and higher degree completions during the period of the remedial decrees through 2003 showed an overall percentage increase for black students of 96.43 percent while, during the same period, degree completions for white students fell by 13.36 percent. *Id.*, Attachment 13, pp. 14-18. Many other examples could be given, but these generally represent the kind of progress that has been made through more than thirteen years of remedial decrees, during which the State of Alabama has, as the district court

stated, “unbegrudgingly complied” (Doc. 3294, p. 86, ¶ 16) with remedial decrees.

Because much has been said in this matter about Alabama’s property tax, some facts concerning *ad valorem* and other taxes may be useful. Alabama devotes a higher percentage of its total budget to public education than any other state,⁶ and thus Alabama ranks higher in per capita spending for education than it does for overall government spending. Alabama’s state and local government tax revenue as a percentage of personal income in 2000 was 8.9%, rating Alabama 46th among the 50 states. Alabama per capita state and local government expenditures for elementary and secondary education for 2000 was \$1,114, ranking Alabama 39th. Including higher education, Alabama per capita spending was \$1,745, rating Alabama 35th (Alabama ranked 43rd in per capita income in 2001). U.S. Census Bureau, Governments Division, “*State Personal Income*” and “*State and Local Government Finances: 1999-2000*” (<http://www.census.gov/govs/www/estimate00.html>), and U. S. Department of the Treasury, Internal Revenue Service, *Individual Tax Statistics, State Income* (<http://www.irs.gov>), analyzed in K. Morgan and S. Morgan, eds., *State Rankings 2003*, Morgan Quitno Press, pp. 134, 138, 247, and 282.

⁶ *Knight v. Alabama*, 787 F. Supp. at 1208.

Almost all of the state income tax is earmarked for public school teachers' salaries, (Doc. 3294, p. 23, ¶ 41) and most of the state sales tax goes to general educational purposes. (Doc. 3248, p. 53-54). In 2000, the Alabama Education Trust Fund received 54% of its revenue from income taxes, 32% from state sales taxes, and only 14% from other sources.⁷ The state's 6 1/2 mill property tax levied pursuant to Constitution of Alabama §§ 214 and 260 generated for that year approximately 1.4% of overall revenue. *State of Alabama Comprehensive Annual Financial Report, 2000 P. 196.*

At the local level, the percentage of revenues derived from property taxes is higher, varying substantially among taxing jurisdictions, as does the percentage of local tax revenues devoted to public schools. The State of Alabama, Department of Examiners of Public Accounts, *Report on the Financial Statements, All Counties*, pp. 9-12 (2004) shows total tax rates (not including municipal taxes) varying from a high of 52.3 mills in Morgan County to a low of 21 mills in Marion County. Non-municipal school taxes are highest in Shelby County (36 out of a total of 47 mills) and lowest in Wilcox County (6 out of a total of 24 mills). Some of Alabama's poorest counties have relatively

⁷ Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 42 n. 131 (2002).

high school tax rates, e.g., Bullock (21.5 of a total 43.5 mills) and Macon (25 out of 41 mills). *Id.* Significant changes to the existing tax structure have not been favored by the Alabama legislature (Doc. 3275, p. 58, 65), and several major proposed alterations have been rejected by the voters in recent years, most recently in 2003. (Doc. 3294, p. 89, n. 10).

Alabama's relatively low property taxes are part of an overall tax structure that may be viewed in comparison with what is found in other states, some of which rely more heavily on property taxes but have no income tax at all, such as Florida or Washington, or no sales tax such as Oregon or New Hampshire.⁸ Property taxes today are unpopular not just in Alabama, but also in other parts of the country.⁹ Nevertheless, during the pendency of this case, property tax assessed valuations in Alabama have, since 1995, increased from \$25.5 billion to \$46.6 billion, generating concomitant increases in *ad valorem* tax revenues.¹⁰

⁸ See generally, the comparison of all states at <http://ftp2.census.gov/govs/statetax/04staxss.xls>

⁹ See W. Schneider, *Revolt of the Propertied Class*, THE ATLANTIC MONTHLY ONLINE (April 2005) http://www.theatlantic.com/doc/prem/200504u/nj--schneider_2005-04-26; Anne Preston and Casey Ichniowski, *A National Perspective on the Nature and Effects of the Local Property Tax Revolt 1976-1986*, 44 NAT'L TAX J. 123-45 (June 1991).

¹⁰ See State of Alabama, Department of Finance, Office of the State Comptroller, *Comprehensive Annual Financial Report* (2004), p. 261, available online at <http://www.comptroller.state.al.us/pdf/cafr%202004%20final%20pluscover.pdf>

Three factors are responsible for Alabama's relatively small proportion of total governmental revenues derived from property taxes. First, there are generally low rates of taxation (usually expressed in "mills" or dollars per thousand of assessed value). Under Alabama Constitution art. XI, § 214, the state ad valorem tax is limited to 6.5 mills. Under Article XIV, § 215, counties may only impose a 7.5 mill tax for roads and general purposes. Counties may also impose a 1 mill school tax (Article XIV, § 269), as well as a 3 mill county school tax under Amendment 3, Sec. 1, and another 5 mills of county school tax under Amendment 202. Numerous constitutional amendments do allow additional property taxes for particular counties, school districts and municipalities.

Second, Alabama differentially assesses classes of property. Property of utilities is assessed at 30% of market value, other business property at 20%, automobiles at 15%, and single family homes, farms and timber lands at 10%. Amendment 373(a). Local taxing authorities may vary these ratios in certain situations. *See* Amendment 373(c).

Third, Alabama law provides for significant exemptions from taxation. Homesteads up to an assessed value of \$4,000 (equivalent to \$40,000 fair market value based on the 10% assessment ratio discussed above) are exempted from State tax, (ALA. CODE § 40-9-19(a)) and homesteads up to \$2,000 in

assessed value are exempt from county taxes, other than school taxes. ALA. CODE §40-9-19(b). Homesteads of up to \$5,000 assessed value (\$50,000 market value) of persons over 65 who have met certain income tests, or who are blind or disabled, are exempted from all county taxes and the full value is exempt from State taxes. ALA. CODE, § 40-9-19. Business inventories are exempt from all taxes, § 217(k) as amended by Amendment 373, as are intangibles (stocks, bonds, money), ALA. CODE, §§'s 40-9-1(1) and 40-9-32, and many other items ranging from poultry to churches to intercollegiate athletic stadiums to HUD 202 property to nuclear fuel assemblies to the property of airline hub operators. ALA. CODE, Chapter 9 of Title 40.

All of these factors were impacted at the time of the ratification by Alabama voters of Amendment 373 in 1978, popularly referred to, along with various contemporaneous implementing legislation, as the “Lid Bill,” so called because of a provision (Amendment 373(i)) limiting tax collections in any one year on any particular property to certain percentages of the fair market value thereof, depending on classification.

The effect of the “Lid Bill” on revenues has to be considered in the light of state law requirements that valuations be updated annually, ALA. CODE, § 40-7-2 and -25, which has been enforced following the decision in *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971)(3-judge court). In *Weissinger*, the

court held that county-by-county variations in assessed values of property having identical market values were unconstitutional. Following the orders of the *Weissinger* three-judge court, uniform statewide reassessment was instituted, and annual reappraisal has continued since, with the result that property tax receipts rise as reappraisal results in increases in appraised values. The Lid Bill altered the existing property tax law by ameliorating tax increases resulting from reassessment, while also containing provisions protective of local revenues, for the first time freeing local governments to raise property taxes beyond the constitutionally set maximums without the necessity for a statewide vote.

The Lid Bill also adjusted previously existing assessment ratios for properties of various classes (effectively placing a higher percentage burden of the total tax on commercial and utility property by reducing the pre-existing assessment ratios for those properties by a smaller amount than the reduction for homeowners, personal use automobile owners and farm and timberland owners), expanded the homestead exemption to some county taxes, increased the amount of homestead exemptions available to lower income and older taxpayers and provided for the establishment by statute for the differential valuation of homes, historic sites and farm and timber property on the basis of its actual and not its potential use. Enacted in its present form in 1982 as ALA. CODE § 40-7-25.1, so-called “current use” valuation was upheld by this Court against an equal

protection challenge brought against the Lid Bill in general in *Weissinger v. White*, 733 F.2d 802 (11th Cir. 1984).

Under the Lid Bill, so long as the constitutional maximums of Amendment 373(i) are not exceeded, local taxing authorities may raise the rate of any tax through local initiative and public hearing, a corresponding local act of the legislature,¹¹ and local referendum. This method of raising taxes has been utilized extensively since 1978, and the Lid Bill is thus no insurmountable barrier to any local property tax increase where the political will and popular approval are present. The provisions of Amendments 425 and 555 now also allow local constitutional amendments raising property tax rates to become law through favorable referenda held only in the affected jurisdictions, which allow the Lid Bill property tax limitations to be skirted completely. *See e.g.*, Amendments 551, 554, 576, 721, etc.

¹¹ On bills proposing such acts, only the favorable vote of a majority of the local legislative delegation is required for passage. *See Birmingham-Jefferson Civic Ctr. et al. v. City of Birmingham et al.*, No. 1031522, 2005 WL 1023157 (Ala. May 3, 2005).

STATEMENT OF THE STANDARD OF REVIEW

The standard of review of desegregation remedial decrees is abuse of discretion. *Lee v. Anniston City School System*, 737 F.2d 952, 955 (11th Cir. 1984). This Court has noted that “[i]n 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.” *Id.* (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267 (1971)); *Lee v. Macon County Board of Educ.*, 616 F.2d 805 (5th Cir. 1980)). In reviewing remedial desegregation orders “an appellate court is limited to determining whether the court’s order was an abuse of discretion, and is bound by the district court’s findings of fact unless clearly erroneous.” *Id.* (internal citations omitted).

In *Milliken v. Bradley*, 433 U.S. 267, 288, 97 S. Ct. 2749, 2761 (1977), the Supreme Court, reviewing a remedial decree in a desegregation case, found no “reason to believe that the broad and the flexible equity powers of the court were abused in this case.” From this statement, the Eleventh Circuit fashioned its abuse of discretion standard of review in remedial decree desegregation cases. *See Lee v. Macon County Bd. of Educ.*, 970 F.2d 767, 778 (11th Cir. 1992) (vacated for *en banc* hearing at 987 F.2d 1521 and affirmed *en banc* 995 F.2d 184, 185 (1993)) (“For nearly 30 years, the district court has retained

jurisdiction over this case to enforce the mandates of the 1963 desegregation order. The district court's enforcement powers include the full panoply of equitable powers, and we review that court's use of these powers only for abuse of discretion."); *Johnson v. Florida*, 348 F.3d 1334, 1341 (11th Cir. 2003) ("A district court's decision to modify, or not modify, a consent decree is reviewed for abuse of discretion. *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992). We review for clear error the findings of fact on which a modification decision is based.")

A district court's findings of fact are binding unless clearly erroneous. Fed. R. Civ. P. 52(a). A finding of causation or lack thereof is a finding of fact. In *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), the Second Circuit was faced with determining the correct standard of review for a claim arising under the Fair Housing Act in a school desegregation case. The court concluded that:

A finding of discriminatory intent is a finding of fact, *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90 (1982), as are findings of discrimination, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), and causation, e.g., *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153, 156 (8th Cir. 1973).

Id. at 1218.

In *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985), a case involving discrimination in hiring under Title VII of the Civil

Rights Act of 1964, the Supreme Court noted that discriminatory intent is a factual finding that may be overturned on appeal only if it is clearly erroneous. 470 U.S. at 573, 105 S. Ct. at 1511. The Eleventh Circuit has recognized *Anderson* for the proposition that an issue of causation is a finding of fact to be reviewed under a “clearly erroneous” standard. *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741, 743 (11th Cir. 1986).

In this appeal we must examine the district court's factual findings [which included causation,] under the clearly erroneous standard. In our review we are guided by *Anderson v. City of Bessemer City*, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), in which the Supreme Court stated:

“In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id.

Knight argues that the correct standard for review of the district court's conclusions of law is *de novo*. In support of this assertion, Knight cites three cases: *Simmons v. Conger*, 86 F.3d 1080, 1084 (11th Cir. 1996); *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1551 (11th Cir. 1997); *Hawkins v. Ceco Corporation*, 883 F.2d 977, 982 (11th Cir. 1989). None of these cases involves school desegregation, nor does any involve the modification of, or refusal to modify, a remedial decree.

Two of the cases on which Knight relies, *Simmons* and *International Caucus of Labor Committees*, dealt with First Amendment questions, which involve a different standard of review. "Marking the line between speech protected by the First Amendment and speech which the state may legitimately regulate presents a question of law." *Beckwith v. City of Daytona Beach Shores, Florida*, 58 F.3d 1554, 1560 (11th Cir. 1995). "Although we review First Amendment questions *de novo*, issues of causation in a retaliatory discharge claim present questions of fact." *Id.*

Knight insists in brief that "we do not challenge the district court's findings of fact."¹² Although the district court separated its findings of fact and conclusions of law, both parts of the district court's order contained findings of fact. Among the facts included in the "Conclusion of Law" portion of the order

¹² Brief of Appellants, p. 8.

are, for example, the fact that the State of Alabama has unbegrudgingly complied with remedial decrees (Doc. 3294, p. 86, ¶ 16) and that the amount of money paid to higher education has increased over the period of the remedial decrees. (Doc. 3294, pp. 85-86). The court also found, in the same section of its Conclusions, that proposed changes in Alabama’s tax structure, including state and local property taxes, were “overwhelmingly rejected” by Alabama voters in 2003 (Doc. 3294, p. 89, n. 10) and, finally, 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.” (Doc. 3294, p. 86, ¶ 17). When the district court found that “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,” (Doc. 3294, p. 85, ¶ 14) this was a finding on the issue of causation, which is a finding of fact.¹³

The designation or label under which findings appear is not controlling on the question whether a statement amounts to a finding of fact or a conclusion of law, and the Court of Appeals can make its own independent determination,

¹³ See, e.g., PROSSER AND KEETON ON TORTS, 269 (5th ed. 1984): (“On the issue of the fact of causation, as on other issues essential to the cause of action . . . the plaintiff, in general, has the burden of proof”); *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1560 (11th Cir. 1995); (a retaliatory discharge case also treats causation as an issue of fact).

regardless of the label that the district court may have placed on it. *Benrose Fabrics Corp. v. Rosenstein*, 183 F.2d 355, 357 (7th Cir. 1950). “We look at a finding or a conclusion in its true light, regardless of the label that the district court may have placed on it.” *Tri-Tron Int’l v. Velto*, 525 F.2d 432, 435 (9th Cir. 1975).

In this case, the extent to which segregative effects have been removed is a matter peculiarly within the ability of the district court to determine, and that determination resolves an issue of fact. For this reason, Knight’s insistence that the district court’s rulings on matters of law should be reviewed *de novo* is not relevant to the issues before this Court.

SUMMARY OF THE ARGUMENT

This is an appeal from an order of the district court holding that the State of Alabama met its burden to demonstrate that certain provisions of the Alabama Constitution do not continue to have segregative effects on higher education. (Doc. 3294, p. 86). Whether the State of Alabama met its burden of proof is an issue entrusted to the sound discretion of the district court, to be overturned only upon a showing of abuse of discretion.¹⁴ This is particularly true in this case, where the district court has already made very extensive findings, conclusions, and decrees, covering well over three hundred pages of the Federal Supplement and has, in addition, required extensive annual reports documenting the progress of institutions of higher education in Alabama in compliance with remedial decrees.

Two of the cases on which Knight relies in brief, *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985), and *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969), are not desegregation cases, do not involve remedial decrees, and do not address the issue of the removal of segregative effects through remedial decrees. Rather, those cases involve situations in which an order enjoining enforcement of certain legislation provided complete relief in favor of victims of discrimination, whereas, in this case, where detailed remedial decrees

¹⁴ *Lee v. Anniston City School System*, 737 F.2d 952 (11th Cir. 1984).

have been in effect for some years, enjoining enforcement of the challenged provisions of law does not, in itself, provide any relief to anyone. Moreover, nothing in either case says that a district court lacks discretion to decide whether to order, as additional relief, the kind of injunction here proposed.

Finally, the proposed relief in this case exceeds the scope of the constitutional violation and therefore exceeds the authority of the courts, as delineated in *Missouri v. Jenkins*, 495 U.S. 33, 1105 S. Ct. 1651 (1990) (*Jenkins II*), and *Missouri v. Jenkins*, 515 U.S. 88, 115 S. Ct. 2038 (1995) (*Jenkins III*).

ARGUMENT

On July 28, 2003, after approximately twelve years of remedial decrees concerning higher education in the State of Alabama, Knight filed a Motion for Additional Relief, alleging that a “public school funding crisis” jeopardized the ability of the district court to accomplish the objectives of its earlier remedial decrees. (Doc. 3205, p. 2, ¶ 3). Notwithstanding the allegation that there was a public school funding crisis, the Motion for Additional Relief nowhere asked for additional funds for higher education. The relief requested is outlined in subparagraphs A through E, asking the court to find that certain constitutional policies and practices in Alabama violate the Constitution of the United States and seeking an injunction against enforcement of certain policies, but the only monetary relief requested anywhere in the motion is in paragraph E asking for an award of attorneys’ fees and expenses. (Doc. 3205, pp. 7-8).

This appeal attacks the most recent Findings and Conclusions made by the district court following an evidentiary hearing in May of 2004. Those Findings and Conclusions can be overturned only upon a showing of abuse of discretion.¹⁵ Rather than demonstrating the required abuse of discretion by the district court, Knight now raises an issue that was not even argued in the district

¹⁵ *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749 (1977); *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987).

court until after the Findings and Conclusions had been entered. This new issue, based on the 1985 decision of the Supreme Court in *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985), could have been, but was not, raised at any point during the many years of remedial decrees in this case, years during which the State of Alabama “unbegrudgingly complied with the Court’s remedial decrees, meeting all its obligations as ordered by the Court.” (Doc. 3294 p. 86, ¶ 16). Further, this new interpretation of *Hunter* was considered and rejected by the district court. (Doc. 3320, pp. 3-5).

In raising a new argument that had never been presented at the evidentiary hearing or argued in their Proposed Findings of Fact and Conclusions of Law, Knight now seeks a remedy that would require taking an entirely new direction after nearly fourteen years of remedial decrees. As the August, 2005 date proposed long ago for ending court supervision in this case draws near,¹⁶ Knight now proposes a new remedy intended to cause drastic changes in the property tax structure of the State of Alabama. Such changes would cause utterly unpredictable consequences affecting numerous interests, organizations, and government entities, of which higher education would likely be one of the least affected.

¹⁶ *Knight v. Alabama*, 900 F. Supp. at 374 (N.D. Ala. 1995) (later extended to September 30, 2005.)

Part of the background of this case, as Knight appears to acknowledge in his Motion for Additional Relief, (Doc. 3205, p. 1, *citing Ex parte James*, 836 So. 2d 813 (Ala. 2002) and *Alabama Coalition for Equity v. Guy Hunt, Governor*, No. CV-91-117 R (Cir. Ct. Montgomery County, August 13, 1991)) and in brief,¹⁷ is an effort to accomplish what he and others failed to do in their effort to achieve finance reform in state courts for the public schools, not higher education: “The Equity Funding Cases had sought to require the State of Alabama to provide the financial and education resources to ensure that all students in Alabama’s K-12 public school system receive an adequate and equal education.” (Doc. 3205, pp. 1-2).

This kind of school finance litigation was largely, if not entirely, ended in the federal courts in 1973 by the ruling in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-44, 93 S. Ct. 1278, 1300-1303 (1973), when the Supreme Court decided that school funding schemes are not subject to standards of strict scrutiny since funding decisions involve delicate questions of local taxation, fiscal planning, educational policy and federalism. After *Rodriguez*, advocates for higher taxes to support public schools turned their attention to state constitutions and state courts, arguing, in earlier cases, for

¹⁷ Brief of Appellants, pp. 2-3.

equalization of resources,¹⁸ and later, for “adequacy” in school funding.¹⁹ It is thus not entirely surprising, in view of *Rodriguez*, that Knight now seeks a remedy that would have a greater effect on K-12 education than on higher education.

REMEDIAL DECREES HAVE REMOVED SEGREGATIVE EFFECTS ON HIGHER EDUCATION

The district court was correct in ruling that, although Knight was able to demonstrate that constitutional restrictions on property tax authority in Alabama are “traceable to” an earlier system of *de jure* segregation, those restrictions do not have continuing segregative effects. The remedial decrees that have been in place for many years in this case have had the purpose of removing any continuing segregative effects of the past, and the State of Alabama has previously emphasized in this brief the extent of the progress that has been made in higher education over more than twenty years.

Knight’s claim that the Alabama Constitution of 1901 was born of prejudice was long ago considered by the district court in fashioning its remedial decrees. In fact, when this case reached the Eleventh Circuit in 1991, the district

¹⁸ See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258-72 (1999).

¹⁹ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

court had already found that there were vestiges of segregation remaining in the Alabama public university system and that the Constitution of Alabama reflected a policy of racial discrimination.²⁰

When this Court remanded the case in 1994 for reconsideration of “a few discrete elements” of the district court opinion, the Court noted that plaintiffs took issue with only a few isolated rulings and that this “bears witness to the wisdom and fairness manifested in the Court’s decision.”²¹ This Court then went on to review parts of the district court opinion under the legal standards announced by the Supreme Court after the district court opinion had been issued. Upon remand to the district court, the existing remedial decree was altered in various respects in accordance with the opinion of this Court.²²

The opinion of the Supreme Court that caused both the court of appeals and the district court to reconsider certain parts of the 1991 remedial decree was *United States v. Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992). As both this Court and the district court have noted, *Fordice* does not require dismantling a policy that is “traceable to” an earlier system of segregation if the challenged

²⁰ *Knight v. Alabama*, 787 F. Supp. at 1090 n. 22.

²¹ *Knight v. Alabama*, 14 F. 3d 1534, 1540 (11th Cir. 1994).

²² *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995).

provisions do not have a continuing segregative effect.²³ Further, as the district court has recognized, *Fordice* dealt with policies that “influenced student enrollment decisions” in two ways: (1) by discouraging blacks from attending HWIs, and (2) by discouraging whites from choosing to attend HBIs. (Doc. 3294, pp. 85-86, n.9). *Fordice* is a decision manifestly concerned with free choice in enrollment decisions, an issue that has been addressed at length in remedial decrees, and therefore it is doubtful, as the district court noted, whether *Fordice* applies at all to the kinds of claims at issue in this appeal. *Id.* p. 86, n. 9

The district court also noted that, although Knight claims that a “public school funding crisis” requires additional relief with respect to funding of higher education, the actual amount of money appropriated annually to higher education in Alabama increased over the period from 1990 to 2004 from \$820,063,882 to \$1,160,033,885. *Id.* p. 85, ¶ 15. The district court properly concluded that the relationship between the funding of higher education and the ad valorem property tax structure in Alabama is “marginal” and “too attenuated to form a causal connection between the tax policy and any segregative effect on school choice,” (*Id.* p. 85, ¶ 14) and that “Defendants have satisfied their burden to demonstrate that the challenged provisions do not continue to have a segregative effect on school choice.” *Id.* p. 86, ¶ 17.

²³ *Knight v. Alabama*, 14 F. 3d at 1541; Doc. 3294, p. 81-82.

The district court was correct in examining the obvious requirement of a “causal connection” between tax policy and segregative effect. Even assuming that there is a showing of discriminatory intent or motive and segregative effect, there must also be a showing of a causal link between the two. “That a plaintiff, claiming a violation of his voting rights under the Fourteenth and Fifteenth Amendments, must show that an injury is caused by the government conduct he seeks to challenge is hardly a novel proposition.”²⁴ In this case, the district court found that the relationship between funding of higher education was “marginal insofar as ad valorem property tax is concerned,” and that “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.” (Doc. 3294, p. 85, ¶ 14). Knight argues that revision of Alabama’s property tax laws would provide more revenue to the State, but nowhere in this case has it been shown that there is a causal connection between Alabama’s ad valorem property taxes and *higher education*.

²⁴ *Johnson v. DeSoto County Bd. of Com’rs.*, 204 F. 3d 1335, 1345 (11th Cir. 2000).

Knight's argument that revision of Alabama's property tax laws to increase the revenue yield, thereby improving public education to the ultimate benefit of black students seeking to attend institutions of higher education, makes a key assumption: it assumes that the present tax system's dedication of a substantial portion of property tax revenues to public education would remain unchanged and that the new tax dollars raised would not be used to satisfy other needs of the State. It assumes that other taxes devoted to education, such as the income tax or the sales tax, would not be eliminated or that their revenues would not decrease. The only way to assure a result that would meet these unfounded assumptions would be to require not just court-ordered changes in the complicated revenue-raising process, but also intimate judicial involvement in the legislative function of allocating resources among competing needs.

Over the more than thirteen years of remedial decrees, the district court has considered the full range of remedies available to it to achieve the best possible results in eliminating segregative effects to the extent practicable and educationally sound. The district court has then selected, in its discretion, the most effective remedies to apply. These remedies have involved significant and effective changes in faculty and administrative employment, funding, facilities, admissions policies, program duplication, and student recruitment.²⁵

²⁵ *Knight v. Alabama*, 787 F. Supp. at 1378-1381.

To ensure compliance with the detailed remedies ordered by the district court, it implemented a policy of monitoring and yearly reporting to ensure compliance with its decrees. These remedies were expanded in 1995 with the creation of the Alabama State University Trust for Educational Excellence and the Alabama A & M University Trust for Educational Excellence funded from Alabama's Education Trust Fund.²⁶ A new program in Allied Health Sciences was initiated at Alabama State, and a new program in electrical engineering was begun at Alabama A & M.²⁷ Many other changes, some of which are described in the Statement of Facts, were ordered and carried out. If the district court, in its discretion, felt that additional measures, including increased funding, were required to remove segregative effects in higher education in Alabama, it could have issued additional orders at any time.

THE REQUESTED RELIEF IS NOT SUPPORTED BY *HUNTER V. UNDERWOOD*

Knight argues that the challenged provisions of Alabama law must be invalidated under the authority of *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985). The argument based on *Hunter* fails for several reasons, any one of which would be sufficient to deny the relief requested.

²⁶ *Knight v. Alabama*, 900 F. Supp. at 349-356.

²⁷ *Id.* at 370-372.

First, the district court correctly declined to invalidate the challenged constitutional provisions, finding that they do not have a continuing segregative effect on higher education. (Doc. 3320, p. 4). Without a showing of segregative effect, or impact, on higher education, nothing in *Hunter* or *Fordice* requires invalidation of the challenged provisions of the Constitution of Alabama , because there must be a showing of both discriminatory motivation *and* racially discriminatory impact.

Hunter declared unconstitutional a provision of the Constitution of Alabama disenfranchising persons convicted of certain crimes. The Supreme Court noted that § 182 of the Alabama Constitution was enacted with an impermissible racial *motivation* and also that the provision had a racially discriminatory *impact*.²⁸ The court also stated that, once racial discrimination was shown to have been a “substantial” or “motivating” factor behind enactment of a law, the burden would shift to the State to demonstrate that the law would have been enacted without this factor.²⁹ This has been called a “two-step test” to analyze whether there is a violation of the Equal Protection Clause, but *Hunter* does not dispense with the requirement to show disparate impact, or effect, as the discussion that follows will demonstrate.

²⁸ *Hunter*, 471 U.S. at 231-232, 105 S. Ct. at 1921-1922.

²⁹ *Hunter*, 471 U.S. at 228, 105 S. Ct. at 1920.

In a case challenging legislation on equal protection grounds, a court must examine two elements: motive and impact. If a law was enacted without discriminatory motive or intent, disparate impact alone does not make it unconstitutional.³⁰ Conversely, if a law was enacted with discriminatory intent but has no disparate impact, it can hardly be said to deny equal protection or to justify any relief. In *Hunter*, the impact element was not contested,³¹ but the requirement of both elements, motive and impact, is expressly acknowledged in *Hunter*:

“Whether or not intentional disenfranchisement of poor whites would qualify as a ‘permissible motive’ within the meaning of *Palmer* and *Michael M.*, it is clear that where both impermissible racial **motivation** and racially discriminatory **impact** are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis.”³² [Emphasis added.]

In a desegregation case, the “impact” element equates to “segregative effect,” but whatever the effect, or impact, may be, there must be a causal connection between the motivation and the impact. Because both elements are

³⁰ *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2048 (1976).

³¹ “So far as we can tell the impact of the provision has not been contested” *Hunter*, 471 U.S. at 227, 105 S. Ct. at 1919-1920.

³² *Hunter*, 471 U.S. at 232, 105 S. Ct. at 1922.

required to justify relief,³³ the absence of either element suffices to justify denial of relief.

Removal of the “motive” element was what caused this Court to affirm summary judgment for defendants in the recent case of *Johnson v. Governor of Florida*, No. 02-14469, 2005 WL 832357 (11th Cir., April 12, 2005).³⁴ In *Johnson*, the majority held that subsequent re-enactment of challenged legislation without discriminatory intent removed the “motive” element in Florida’s law disenfranchising felons. In the present case, the district court has ruled that the “impact” element has been removed by eliminating segregative effect through fourteen years of remedial decrees. It is this ruling that the Knight plaintiffs must demonstrate to be an abuse of discretion.

The involvement of the district court over a long period of years has been for the express purpose of removing segregative effects on higher education in Alabama, and this is exactly what the district court has done. Despite the years

³³ In *Johnson v. Governor of Florida*, No. 02-14469, 2005 WL 832357, *16 (11th Cir., April 12, 2005) the Court discussed whether discriminatory intent must be proved in a voting rights case, but that issue is not present here.

³⁴ In this April 12, 2005 decision, the Court said that a subsequent legislative re-enactment of a law can eliminate the taint of earlier discriminatory motivation. While the Court in *Johnson* correctly noted that the Supreme Court in *Hunter* found that later actions by the state courts were not sufficient to purge the offending provision of its discriminatory intent, *Johnson* nowhere suggests that federal court remedial decrees cannot remove disparate impact.

of toil invested and the record of accomplishment by the district court, the State of Alabama, and the institutions of higher education, Knight now raises an argument that simply flies in the face of all of the findings of fact and conclusions of law in the 1991 and 1995 decrees, and most recently, the order following the May 4 and May 5, 2004, hearing.

Second, Knight failed to raise his new argument in a timely manner. The *Hunter* argument he now advances – that the court “has a duty, under *Hunter v. Underwood*, . . . to enter a declaratory judgment that the racially motivated property tax provisions . . . violate the Constitution . . .” – was not asserted until after the district court had already denied the requested additional relief. As this Court has said:

We have stated that “[a]n abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or . . . [makes] findings of fact that are clearly erroneous.” *Hatcher v. Miller (In re Red Carpet Corp.)*, 902 F.2d 883, 890 (11th Cir. 1990). “The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory . . . [or] to give the moving party another ‘bite at the apple’ by permitting the arguing of issues and procedures that could and should have been raised prior to judgment.” *In re Halko*, 203 B.R. 668, 671-72 (Bankr.N.D. Ill. 1996) (internal quotation marks and citations omitted).³⁵

³⁵ *Mincey v. Head*, 206 F.3d 1106, 1137 n. 69 (11th Cir. 2000).

The district court, in its findings and conclusions of October 5, 2004, and also in its order of February 5, 2005, found that the challenged constitutional provisions do not have a continuing segregative effect on higher education in Alabama, and nothing has been presented to this Court to show that these findings involve an abuse of discretion. Instead of showing any abuse of discretion, Knight has shown only that his argument based on *Hunter v. Underwood* could have been, but was not, made until after the district court had already denied additional relief and was thus an impermissible “new legal theory” proscribed in *Mincey, supra*.

Furthermore, *Hunter* was decided in 1985, well before the district court’s 1991 and 1995 decrees and nearly ten years before this Court considered the case in the light of *Fordice* and remanded it to the district court. Under the doctrine of the law of the case, challenges to the legality of the funding of higher education in Alabama must have been raised by the time of the 1991 and 1995 decrees unless Knight can now show that there has been a substantial change in the law or the facts.³⁶ The facts concerning racially discriminatory motives of those who developed the Alabama Constitution in 1901 were as well known at the time of the 1991 district court opinion as they are today. The district court in

³⁶ *Wheeler v. City of Pleasant Grove*, 746 F. 2d 1437, 1440-1441 (11th Cir. 1984).

1991 noted the “systematic disenfranchisement of blacks, accomplished by the 1901 Constitution . . .”³⁷ and also commented that “The 1901 Alabama Constitution institutionalized and legitimized white supremacy . . .”³⁸ Thus, at the hearing held in this case in 2004, long after the time of the last published district court decree, the salient facts and opinions offered in support of the relief denied by the district court had not changed in any way since 1991.

Finally, the factual situation in the case now before the Court is significantly different from that in *Hunter*. The remedy in *Hunter* was merely to declare the challenged legislation invalid and to order that members of the plaintiff class otherwise qualified must be allowed to register to vote. In the case now before this Court, the situation is completely different and the remedy vastly more complicated. In this case, as in any typical desegregation case, it has been necessary to fashion a remedial decree involving continuous monitoring of a huge number of details affecting higher education in Alabama. Merely declaring a law unenforceable was a simple and effective remedy in *Hunter*, but not in this case.

Not only have remedial decrees been in effect for many years for the purpose of removing any continuing segregative effects in higher education in

³⁷ *Knight v. Alabama*, 787 F. Supp. at 1090.

³⁸ *Id.* at 1090 n. 22.

Alabama, but the remedy Knight belatedly proposes 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. If a court did grant the kind of relief Knight proposes – essentially dismantling all of the existing property tax laws in Alabama – the results would be unknowable.

Knight suggests that removing constitutional limitations on the power to tax, thereby giving the legislature *carte blanche* in respect of the property tax, could solve what he regards as the problem. A legislature free to tax without limitation might, however, choose not to exercise that power, or to exercise it in ways unsatisfactory to Knight. Presumably, the power to exempt from taxes could still be exercised as freely as it is today, perhaps to the point of eviscerating any tax increase that a change in tax rates or property classification could imply. In all events, the relief requested would involve a protracted entanglement of highly intrusive court-imposed structural remedies compounded with whatever additional measures might be enacted by the legislature in its continuing effort to allocate limited funds among competing interests.

The usual problems the Alabama legislature faces would only be magnified if a court should order the kind of relief proposed here. Where, as here, the State of Alabama has “unbegrudgingly complied” with all remedial

decrees in eliminating the vestiges of segregation in higher education³⁹, the relief proposed here would amount to an improper and unprecedented extension of judicial power if not a departure from the rule of law itself.

HUNTER V. ERICKSON DOES NOT APPLY TO THIS CASE

The district court was correct in concluding that *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969), does not apply to this case. In *Hunter v. Erickson*, an Akron city council enacted a fair housing ordinance which was later effectively nullified when the city charter was amended to prevent the city council from implementing the ordinance without the approval of a majority of the voters of the city. *Hunter*, 393 U.S. at 386, 89 S. Ct. at 558. In other words, legislation specifically enacted for the purpose of preventing discrimination was thwarted by the later amendment to the city charter. Knight points to no legislation specifically enacted for the purpose of preventing discrimination as being nullified, or in any way avoided, by the provisions he attacks.

More importantly, however, Knight's failure to establish any causal connection between the challenged provisions of law and higher education

³⁹ "The causal link between current condition and the prior violation is even more attenuated if the school district has demonstrated its good faith." *Freeman v. Pitts*, 503 U.S. 467, 496, 112 S. Ct. 1430, 1448-1449 (1992).

means that he lacks standing to obtain the relief he seeks. It has long been the law that “the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent equitable remedies.” *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1275-1276 (1971). In this case, the district court has exercised its discretion to fashion remedial decrees that have been carefully tailored to achieve the desired results. In the exercise of its discretion, the district court has selected, among all the possibilities available to it, among the “full panoply of remedial powers,”⁴⁰ certain remedial measures and has rejected others. What Knight seeks in this appeal is an order that the district court has abused its discretion in failing to add to all the other things the court has ordered an additional remedy that the court, in its discretion, has found to be unwarranted. This appeal seeks to shift responsibility away from the district court where it belongs: “Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.” *Brown v. Board of Educ. of Topeka, Kan. (Brown II)*, 349 U.S. 294, 299, 75 S. Ct. 753, 755-756 (1955). In a similar vein, the Supreme Court noted:

Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of

⁴⁰ *Lee v. Anniston City School System*, 737 F. 2d 952, 955 (11th Cir. 1984).

public revenues. . . . No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena . . . the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 41, 93 S. Ct. 1278, 1301 (1973).

THE DISTRICT COURT DID NOT MISPLACE THE BURDEN OF PROOF

Knight argues that the district court erroneously placed the burden on Knight to demonstrate “continuing segregative effects on student choice.” (Brief of Appellants, p. 44). Knight realizes full well, however, that the district court, in its order denying additional relief, stated, more than once, that the burden under *Fordice* to show that the challenged policies no longer have continuing segregative effects rests squarely in this case on the State of Alabama. (Doc. 3294, p. 81, ¶ 4, p. 86, ¶ 17). Given the language of the order denying additional relief, which says 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,” it is hard to see how it can be argued that the district court shifted the burden to Knight.

Knight’s argument about shifting the burden of proof refers to the district court’s order denying his motion to alter or amend the order that denied his motion for additional relief. In that order, (Doc. 3220, p. 6) the district court stated that it reached its conclusion “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.” It is significant that the statement Knight complains of

came after the relief he requested had already been denied and at a time when the question before the district court was whether Knight could make a sufficient showing to cause the district court to amend the earlier order which had unquestionably placed the burden of proof squarely on the defendants. The structure of the district court's order denying Knight's motion to alter or amend the earlier order makes clear that the district court is dealing with each argument Knight advanced in the motion to alter or amend the previous order and is explaining why Knight has failed to convince the court to change its earlier order. When Knight argued that the order denying additional relief was erroneous in some way, surely it was Knight's burden, in his Rule 59 motion to alter or amend, to demonstrate that fact.

THE REQUESTED RELIEF EXCEEDS THE SCOPE OF THE CONSTITUTIONAL VIOLATION

Near the end of its 1991 remedial decree in this case, the district court made the following acknowledgment:

The requirement that the remedy be no broader than the injury means simply that the decree must address the particular violation itself. This principle is a limitation on the Court's equitable powers.⁴¹

⁴¹ *Knight v. Alabama*, 787 F. Supp. at 1377 (quoting *Milliken v. Bradley*, 433 U.S. 282, 97 S. Ct. 2749, 2758 (*Milliken II*)).

This finding, which has never been challenged and thus has become part of the law of the case, anticipates the fatal flaw in the claims that are now before this Court. The United States Supreme Court has long instructed that, in racial segregation cases, “The scope of the remedy is determined by the nature and extent of the constitutional violation.”⁴² Courts are given wide latitude to fashion remedies based on “equitable principles” to address vestiges of racial segregation, but this authority is not without limit. *Milliken II*, 433 U.S. at 280, 97 S. Ct. 2757. The Supreme Court has identified a three-part framework 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

⁴² *Milliken*, 433 U.S. at 270, 97 S. Ct. at 2752 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 16, 91 S. Ct. at 1276.

local authorities in managing their own affairs, consistent with the Constitution.⁴³

In this case, the remedy sought – enjoining enforcement of property taxes in the State of Alabama in their present form and simply removing all limitations on the taxing power of the legislature and local governments– far exceeds the “nature and scope of the constitutional violation,” and does not “address and relate” to the constitutional violation at issue. *Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038 (1995). As the district court correctly found, “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.” (Doc. 3294 at p. 85, ¶ 14). The subject of this suit involves discrimination in higher education. It is not a taxpayers’ action, and Knight does not represent the taxpayers of Alabama.

⁴³ *Missouri v. Jenkins*, 515 U.S. at 88, 115 S. Ct. 2038 (1995) (*Jenkins III*) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (*Milliken II*); (citations omitted and emphasis in original)). There is some confusion about how to cite to the series of *Missouri v. Jenkins* cases. The Brief of Appellants refers to the case at 495 U.S. 33, 110 S. Ct. 1651 (1990) as *Jenkins I*, but the Supreme Court calls that case *Jenkins II*. In *Missouri v. Jenkins*, 515 U.S. 70, 115 S. Ct. 2038 (1995), for example, the case at 495 U.S. 33, 110 S. Ct. 1651 is referred to as *Jenkins II* at 495 U.S. 90, 99, 133 and perhaps elsewhere, and the case at 491 U.S. 274, 110 S. Ct. 1651 (1989) is called *Jenkins I*. *Id.* at 74. This brief, following the lead of the Supreme Court, assumes that the case at 515 U.S. 70 may properly be called *Jenkins III*.

Although the district court certified a class in which Knight represents “All black citizens of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University and Alabama A&M University,”⁴⁴ Knight plainly represents that class only in connection with claims involving higher education. Knight was not certified as a class representative of black citizens of Alabama for any other purpose, and he therefore has no standing to make any other claims. Despite Knight’s argument in brief that matters of “state and local tax policies,” (p. 52) “oversight of K-12 education,” (p. 53) or “non-education government services funded by property taxes,” (p. 53) have to do with the tailoring of a remedy, not the question of liability, his argument ignores the fact that Knight has standing to raise these issues only to the extent that he can establish a causal connection between those considerations and higher education. It is that causal connection that the district court has determined to be lacking. As indicated earlier in this brief, this is a finding of fact that is binding unless clearly erroneous.

Even assuming that the Alabama property tax system is entirely a vestige of segregation, notwithstanding the attenuation resulting from the passage of time and the change in the identity of the state actors over time, it would not be proper to impose the remedy sought. Knight proposes what is in essence a

⁴⁴ *Knight v. Alabama*, 787 F. Supp. at 1051.

complete overhaul and dismantling of the property tax system in Alabama. Because such a remedy would necessarily affect those who were not victims of desegregation and burden those who were, it fails to be remedial in nature. Moreover, the proposed remedy intrudes on the traditional power of the legislature and impermissibly interjects this Court into a traditional legislative function, the “fundamental and delicate power of taxation.”⁴⁵

For example, in *Jenkins II*, the Supreme Court expressly rejected a district court’s attempt to remedy a desegregation issue through the judicial alteration of taxes. The Court agreed that a federal district court exceeded its authority in ordering the property tax rate of the Kansas City, Missouri School District raised for the following fiscal year.⁴⁶ The Court, after noting that the tax increase was an “extraordinary event,” concluded that the district court failed to ensure that no permissible alternatives were available to accomplish the required task.

It is accepted by all the parties, as it was by the courts below, that the imposition of a tax increase by a federal court was an extraordinary event. In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step the District Court was obligated to assure itself that no permissible alternative would have accomplished the required task. We have emphasized that although the “remedial powers of an

⁴⁵ *Missouri v. Jenkins*, 495 U.S. at 51, 110 S. Ct. at 1663 (1990) (*Jenkins II*).

⁴⁶ *Jenkins II*, 495 U.S. at 58, (Kennedy, J., concurring in part and concurring in the judgment).

equity court must be adequate to the task, ... they are not unlimited.”⁴⁷

Moreover, the Court stated that allowing the local government institutions to devise their own remedies, instead of the Court, would place the responsibility for “solutions to the problems of segregation upon those who have themselves created the problem.” *Jenkins II*, 495 U.S. 33 at 51, 110 S. Ct. at 1663.

In addition, the relief proposed in this case would burden all taxpayers in Alabama, both black and white. The removal of tax rate limitations, the dismantling of the property classifications system and current use method of taxation in Alabama, resulting in taxation of all property at the same rate (and at a drastically higher rate) than that currently imposed, would cause changes of enormous proportions affecting taxation not just for school purposes but for all uses and objects of taxation. All homeowners, landowners, and business owners, white or black, would be burdened with a higher tax rate. Renters would not be exempt as a practical matter, since leases, either by their terms or otherwise, eventually incorporate taxes as a component of the rents charged. Such a broad remedy is not truly remedial in nature; that is to say, it is not

⁴⁷ *Jenkins II*, 495 U.S. at 51, 110 S. Ct. at 1663 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161, 91 S. Ct. 1858 (1971)).

“designed . . . ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’”⁴⁸

⁴⁸ *Missouri v. Jenkins*, 515 U.S. 88, 115 S. Ct. 2038 (1995) (Jenkins III) (citing *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112 (1974) (*Milliken I*)).

CONCLUSION

The authority to impose higher taxes on all the citizens of Alabama is reserved for the people of Alabama through their legislators or to themselves to the extent they place constitutional restrictions on the legislature in this regard. A court may order the property tax system reformed only if such reform would restore the victims of a constitutional violation to a position that they would have enjoyed had there been no violation. Because such a remedial goal is not achieved with the remedy proposed here, and because such a remedy would intrude on the legislative power of taxation, and because the United States Supreme Court has specifically restricted the authority of a district court in a desegregation case, the remedy Knight seeks must be denied. Indeed, the district court in this case anticipated as much in its 1995 remedial decree when it said:

This Court does not intend this Remedial Decree to solve all of Alabama's educational woes or racial tensions. Alabama has much of both that are beyond the scope of the Court's remedial authority. The Court does intend the Decree to eliminate segregative effects remaining within Alabama's system of higher education, as far as practicable and educationally sound.⁴⁹

The district court has been, and is, in the best position to decide what relief is appropriate in this case, and its judgment should be affirmed.

⁴⁹ *Knight v. Alabama*, 900 F. Supp. at 349.

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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 10,511 words.

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CERTIFICATE OF SERVICE

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