

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

**INDIA LYNCH, by her parent,)
SHAWN KING LYNCH; WENDELL)
PRIDE, JR., by his parent,)
WENDELL PRIDE; IVY ROSE)
BALL, by her parent, MIRANDA)
BALL; SLADE BERRYMAN and)
CANNON BERRYMAN, by their)
parent, TYLER BERRYMAN;)
ROCHESTER ANDERSON and)
CEZANNE ANDERSON, by their)
parent, STELLA ANDERSON;)
SHARNAY BROOKS, by her parent,)
MICHAEL BROOKS; ZEKEIAH)
ORMOND, by his parent, BARBARA)
L. ORMOND; ADRIAN WIDEMON,)
by his parent, ADA WIDEMON)
JONES, individually and on behalf of)
others similarly situated,)
Plaintiffs,)
v.)
THE STATE OF ALABAMA; BOB)
RILEY, in his official capacity as)
Governor of Alabama; and TIM)
RUSSELL, in his official capacity as)
Commissioner of Revenue,**

**CIVIL ACTION NO.
CV-08-S-0450-NE**

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION TO DISMISS**

Defendants Alabama Governor Bob Riley, Alabama Revenue Commissioner
Tim Russell and the State of Alabama (collectively “Defendants”) submit this

memorandum of law in support of their Motion to Dismiss Plaintiffs' Complaint under the Tax Injunction Act, the principle of federal comity, and a lack of standing.

INTRODUCTION

Plaintiffs, a group of African-American and white students in the Lawrence County and Sumter County public school systems, challenge the validity of the property tax system set forth in the Alabama Constitution and seek the jurisdiction of this Court for declaratory and injunctive relief that, if granted, would constitute one of the most pervasive and disruptive intrusions by a federal court into a state tax system in the history of federal jurisprudence. Plaintiffs' requested relief would decimate the entire Alabama property tax structure and could increase residential property taxes by 1,000%, commercial property taxes by 500% and utility property taxes by more than 300%.¹ To try to save Alabama citizens from the calamity this Court's order would cause were it to take effect immediately, the plaintiffs ask this Court to stay the effects of its proposed declaratory judgment and injunctive relief for one year to let the Alabama Legislature create new tax laws. In effect, plaintiffs solicit this Court to hold a gun to the head of the Alabama

¹ If Plaintiffs are successful in challenging the restrictions on assessment ratios in Amendment 373 to the Alabama Constitution, and an injunction is issued, property in every classification would automatically be assessed at 100%, as opposed to the 10%, 20%, and 30% current ratios for residential, commercial, and utility property, respectively. Millage rates, which Plaintiffs do not attack, would remain constant. By way of example, Alabama taxpayers with a \$100,000 home in a county with a property tax rate of 50 mills would see their annual property tax bill increase from \$300 to \$3,000, after taking into account the homestead exemption and the change in assessment ratio.

legislature while ordering large increases in Alabama's property taxes.

Remarkably, in seeking this relief, Plaintiffs do not assert any rights under any state or federal program, nor is this a desegregation lawsuit. Instead, Plaintiffs claim that they are injured by a number of property tax provisions of the Alabama Constitution which are claimed "vestiges" of racial discrimination and which allegedly "impede [Plaintiffs'] ability and the ability of their elected representatives to raise state and local revenues adequately to fund the public services they need, including education." Compl. at ¶¶ 7-9.

There is no need to even address the merits of these claims – or more appropriately, the lack thereof – as this Court lacks subject matter jurisdiction to entertain this action and to provide the relief plaintiffs seek. First, the plaintiffs have no standing to assert their claims because the restrictions in the Alabama Constitution about which they complain have caused them no injury in fact, and the imaginary injury they allege is not cognizable by a Court for Article III jurisdiction. Moreover, plaintiffs seek a remedy which this Court does not have Article III jurisdiction to provide, both under the doctrine of standing and the Tax Injunction Act. Finally, federal jurisdiction to hear this action is barred by the principle of comity.

In sum, the broad-sweeping remedies are requested by plaintiffs who have no specific injury and would require a massive intrusion by the federal courts into

the Alabama tax structure. This Court does not have subject matter jurisdiction to hear this case, and we respectfully move that the Court dismiss Plaintiffs' claims accordingly.

FACTUAL BACKGROUND

Plaintiffs are public school students in the Lawrence and Sumter County school systems. Compl. at ¶¶ 7-9. The total budget for K-12 public schools in Lawrence County for fiscal year 2008 is approximately \$54 million. *See* Exhibit A to Aff. of Mark Dixon. Lawrence County collects some \$2.7 million in local property tax revenues for the benefit of its public schools. *See* Aff. of Bill Bass. If Lawrence County were to raise its tax rates to the maximum percentage of fair market value allowed under Amendment 373 (the "lid" referred to in Pls.' Compl. at ¶ 2) of the Alabama Constitution, it could raise an additional approximately \$14.6 million annually for the public school system, which would increase its state and local education revenues by approximately 30 percent. *See* Bass Aff.; *see also* Exhibit A to Dixon Aff. (showing that state and local revenues comprise approximately \$48 million of the \$54 million budget). By increasing the tax effort to this level, Lawrence County could hire nearly 300 additional classroom teachers, which would nearly double the current total of 319 teachers employed by the system. *See* Dixon Aff. (assuming an average cost of a teacher salary plus benefits to be roughly \$50,000). Alternatively, Lawrence County could use the additional

revenue to finance bonds that could support approximately \$200 million of new investment into the school system's capital infrastructure.²

The total budget for K-12 public schools in Sumter County for fiscal year 2008 is approximately \$24 million. Sumter County collects some \$1.8 million in local property tax revenues for the benefit of its public schools. *See Dixon Aff.* If Sumter County were to raise its tax rates to the maximum allowed under Amendment 373 of the Alabama Constitution, it could raise an additional approximately \$5.8 million annually for the public school system, which would increase its state and local education revenues by approximately 30 percent. *See Bass Aff.; see also Exhibit B to Dixon Aff.* (showing that state and local revenues comprise approximately \$19 million of the \$24 million budget). By increasing the tax effort to this level, Sumter County could hire nearly 120 additional classroom teachers, nearly doubling the 146 teachers currently employed by the system. *See Dixon Aff.* Alternatively, Sumter County could use the additional revenue to finance bonds of approximately \$70 million for new investment into the school system's capital infrastructure.³

The Alabama Constitution provides two methods by which local governments can raise property tax rates above the levels otherwise allowable by

² This calculation uses a conservative estimate of 14 as the multiplier to determine the amount of bonds that can be supported by a given level of annual debt service. Employing this multiplier, \$14.6 million in annual debt service would support a bond of approximately \$200 million.

³ This calculation uses the same conservative bond multiplier of 14 as was used in the calculation for Lawrence County.

law: constitutional amendment, either locally applicable only or with statewide effect, or through the procedures set forth in Amendment 373. *See* ALA. CONST. art. XVIII § 284; *id.* at amend. 373. Both methods require approval by the State Legislature as well as by the voters in the particular jurisdiction for which the taxes are being proposed. *See id;* *see also* Aff. of Greg Pappas.

Plaintiffs complain that these restrictions prevent local governments and taxing authorities from raising property taxes. Since Amendment 373 took effect in 1978, however, in substantially all the instances where a county or other local taxing authority has sought Legislative approval to hold a referendum on local property tax increases, the counties and other local taxing authorities have been successful in obtaining such approval. *See* Pappas Aff. For example, in the 2007 Regular Session of the Alabama Legislature, the Legislature approved no less than thirteen new or increased property taxes in various local taxing jurisdictions (including counties such as Barbour, Bullock, Wilcox, and Tallapoosa, and cities such as Auburn and Phenix City), subject to a favorable vote of the qualified voters of the affected jurisdictions. *See, e.g.,* 2007 Ala. Acts 295.

Lawrence County, where a portion of Plaintiffs reside, has received legislative approval for at least two local ad valorem tax increases under Amendment 373: one for 3 mills in 1989 and one for 11 mills in 1992. *See* 1989-90 Ala. Acts 30; 1992 Ala. Acts 842. Both proposals were thereafter submitted to

the voters of Lawrence County for approval. Likewise, Sumter County has successfully obtained legislative approval for at least three local ad valorem tax increases since 1978 (11 mills in 1987, 3 mills in 1997, and 15 mills in 2006). *See* 1987 Ala. Acts 829; 1997 Ala. Acts 262; 2006 Ala. Acts 513.

Plaintiffs seek a declaratory judgment that the core property tax provisions of the Alabama Constitution, comprising the essential structure and content of the state property tax system, violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(d) *et seq.* *See* Compl. at 25. The challenged provisions govern such fundamental aspects of the tax structure as assessment ratios, the classification system used in applying those assessment ratios, taxation of residential, farm, and timber property at “current use” value as opposed to “highest and best use” value, the maximum allowable property tax rates, certain exemptions from tax for property held for religious or charitable use, and the democratic right of Alabama citizens to vote locally on property tax proposals. Plaintiffs’ alleged injury from these provisions is a reduced ability on the part of Plaintiffs and their elected representatives to raise what they believe to be adequate revenues for public services. *See* Compl. at ¶¶ 7-9. In addition, Plaintiffs request an injunction prohibiting further enforcement of these constitutional provisions, as well as all statutes and regulations implementing them. *See id.* at 26.

Not only would Plaintiffs' proposed remedies throw the Alabama property tax system into disarray, but they would also create immediate chaos in the Alabama real estate markets. If Plaintiffs' requested declaratory and injunctive relief were granted, property values for all taxable property in the State would be immediately reduced, and real estate markets would be substantially paralyzed because no one would be able to predict the effect of the court order on property tax liabilities. *See* Aff. of Fletcher Majors.

LEGAL STANDARD FOR EVALUATING SUBJECT MATTER JURISDICTION

The former Fifth Circuit and the Eleventh Circuit have drawn a distinction between a "facial attack" and a "factual attack" on subject matter jurisdiction. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *accord Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990); *McMaster v. United States*, 177 F.3d 936, 940 (11th Cir. 1999). In a facial attack, the defendant relies on the four corners of the pleadings to support a 12(b)(1) motion. *Patterson*, 644 F.2d at 523.

In this case, Defendants make a 'factual attack' on the Court's jurisdiction, supporting their claims with several Affidavits filed with this brief. A factual attack does not seek adjudication on the merits, but instead a determination by the court that there is an absence of subject matter jurisdiction. *See Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001).

Four principles apply to a factual attack on jurisdiction. First, the burden is shifted to the plaintiff to prove by a preponderance of the evidence that the trial court does in fact have subject matter jurisdiction. *Patterson*, 644 F.2d at 523. Second, plaintiffs are required to submit facts through some evidentiary method to prove that subject matter jurisdiction in fact exists. *Id.* Third, no presumption of truthfulness attaches to plaintiffs' allegations in their complaint. *Lawrence*, 919 F.2d at 1529; *McMaster*, 177 F.3d at 940. Fourth, the existence of disputed material facts will not preclude the Court from evaluating whether subject matter jurisdiction exists. *Patterson*, 644 F.2d at 523; *Lawrence*, 919 F.2d at 1529; *McMaster*, 177 F.3d at 940.⁴

ARGUMENT

Plaintiffs seek to achieve through this Court what Alabama voters have chosen through the political process not to do: comprehensively revise the state property tax system so as to theoretically make it produce more revenue. Plaintiffs' claims are barred from consideration by this Court for three independent and sufficient reasons. First, Plaintiffs lack standing to assert their claims. Second, Plaintiffs' claims run afoul of the Tax Injunction Act. Third, exercising jurisdiction over this action would violate the principle of federal comity.

⁴ At this early stage of litigation, Defendants are limited in their ability to respond to Plaintiffs' vague allegations and hereby explicitly reserve the right to contest any new factual allegations offered by Plaintiffs as they arise.

I. THIS ACTION IS NOT AN ARTICLE III CASE OR CONTROVERSY

Article III of the Constitution restricts federal courts to adjudicating “actual cases and controversies.” *Allen v. Wright*, 468 U.S. 737, 750 (1984). Indeed, “[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). The Supreme Court has consistently emphasized that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies” because the requirements under Article III assure that the “Federal Judiciary respects ‘the proper – and properly limited – role of the courts in a democratic society.’” *Id.* Absent Article III limitations, the judicial power would extend to subjects appropriate only for the legislative and executive branches,⁵ thereby destroying the “‘tripartite allocation of power’ set forth in the Constitution.” *Id.*

Therefore, any party invoking federal jurisdiction bears the initial burden of proving all elements of Constitutional standing in order to adjudicate a claim.

⁵ Justice Marshall, under whose leadership the power of judicial review was recognized, was keenly aware that judicial power must be confined to actual cases and controversies. In a speech to the House of Representatives, he observed:

“If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if [the power extended] to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power could exist no longer, and the other departments would be swallowed up by the judiciary. *See Cuno*, 547 U.S. at 341.

Bischoff v. Osceola County, 222 F.3d 874, 877 (11th Cir. 2000). A plaintiff's failure to prove any one of the standing requirements deprives the federal court of jurisdiction. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 332 (5th Cir. 2002).

A party has standing to bring a claim only when that party can show the existence of three requirements: (1) an actual, concrete and particularized 'injury in fact' – an 'invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. Plaintiffs Have No Legally Cognizable Injury

The core of Constitutional standing is that plaintiffs have suffered, or imminently will suffer, an injury to a legally protected right, which is "real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Plaintiffs bear the burden of proving they have suffered actual or imminent injury by alleging "specific concrete facts" establishing an "actual, concrete, or particularized injury." *See Bischoff*, 222 F.3d at 877 (11th Cir. 2000); *Warth v. Seldin*, 422 U.S. 490, 508 (1975). A particularized injury "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely

‘[a]bstract,’ and the alleged harm must be actual or imminent, not ‘conjectural or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). Thus, a plaintiff must allege “specific concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court’s intervention.” *Warth*, 422 U.S. at 508.

In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court considered whether plaintiff taxpayers had standing to challenge an Ohio tax incentive program, which gave tax breaks to DaimlerChrysler to establish an assembly plant in Ohio. 247 U.S. 332 (2006). Plaintiffs claimed that they were injured by state tax incentives granted to DaimlerChrysler because the tax breaks “diminished the funds available to the city and State, imposing a ‘disproportionate burden’ on plaintiffs.” *Cuno*, 547 U.S. at 340. The Court dismissed the case for lack of standing, emphasizing that the alleged injury was “conjectural or hypothetical” rather than “concrete and particularized” as required by Article III. *Id.* at 344. In so holding, the Court noted that establishing the alleged injury depended upon “how legislators respond to a reduction in revenue” and required “speculating that elected officials will increase a taxpayer-plaintiff’s tax bill to make up a deficit.” *Id.* The Court held that such a speculative injury is categorically insufficient to support standing.

In this case, Plaintiffs lack standing because they assert no right a court can protect. Plaintiffs allege the Alabama property tax structure creates inadequate

funding for Alabama's public schools. Without discussing whether this conclusory statement is true, the Supreme Court has explicitly held that there is no fundamental right to an education under federal law. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Even assuming, *arguendo*, that plaintiffs have some legally protected right to an adequate public education under federal law, they still fail to allege a sufficient injury for standing. Indeed, Plaintiffs must prove concrete facts to show in a particularized way how the alleged deficiencies in the Alabama tax structure harm them. *See Warth*, 422 U.S. at 508. Plaintiffs' allegations do not suggest an "actual, concrete, and particularized" injury. *See Lujan* 504 U.S. at 560-61. Plaintiffs merely allege that they are injured by the allegedly "racially discriminatory property tax restrictions in the Alabama Constitution," because those restrictions "impede the ability of [Plaintiffs'] elected representatives to raise state and local revenues adequately to fund the public services they need, including public education." Compl. at ¶¶ 7-9. In essence, plaintiffs assert only a generalized grievance that they would like the government to collect more taxes for unspecified 'public services.' *See Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464 (1982) (holding plaintiffs lacked standing to challenge a federal government grant because they sued solely as taxpayers alleging a generalized grievance to require the government to follow the

law). As in *Cuno*, Plaintiffs' claimed injury is based on speculation that they are harmed by the current restrictions on elected officials' ability to raise revenues. As the Supreme Court decided in *Cuno*, the speculative nature of the Plaintiffs' injury renders their injury inadequate to support standing.

Because Plaintiffs have no "actual, concrete and particularized" injury, this Court has no jurisdiction to exercise the power of judicial review. *See Lujan* 504 U.S. at 560-61.

B. Plaintiffs' Cannot Satisfy The Causation Requirement For Standing⁶

Not only must plaintiffs specifically prove an actual or imminent injury, which they have not, Plaintiffs must also prove that the injury is "fairly traceable to the defendant's allegedly unlawful conduct..." *Allen v. Wright*, 468 U.S. 737, 751 (1984). In other words, Plaintiffs must establish a causal link between Defendants' alleged unlawful conduct and plaintiffs' actual or imminent injury. In this case, Plaintiffs' alleged injury revolves solely around the alleged inability of Plaintiffs and their elected representatives to raise state and local revenues. Allegations that restrictions on raising revenues are directly responsible for Plaintiffs' alleged injury are nothing more than pure speculation. Due to the speculative nature of

⁶ The "fairly traceable" and "redressability" components of standing were originally articulated as two elements of a single causation requirement. However, in *Allen v. Wright*, Justice O'Connor illuminated the importance of addressing causation and redressability separately in the standing inquiry because often "the relief requested goes well beyond the violation of the law alleged." That is, many times the relief requested could remedy an alleged injury even though the injury is not traceable to the conduct of the defendants. Accordingly, causation must be addressed apart from redressability. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984).

plaintiffs' allegations, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain [plaintiffs'] standing." *Allen*, 468 U.S. at 759.

In *Allen v. Wright*, parents of black public school children brought a class action suit challenging the failure of the Internal Revenue Service to deny tax-exempt status to racially discriminatory private schools. The plaintiffs alleged, among other things, that the IRS policy interfered with the ability of their children to receive an education in desegregated public schools. The Court denied plaintiffs standing because plaintiffs could not show that their injury was traceable to defendant's conduct. *Allen*, 468 U.S. at 758. Specifically, the Court determined that plaintiffs' injury created too tenuous of a chain of causation, involving "numerous third parties...who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive desegregated education." *Id.* at 759. *See also Warth*, 422 U.S. at 505-06 (holding that plaintiffs lacked standing because they could not demonstrate that the challenged zoning ordinance restrictions were responsible for the lack of appropriate housing of which plaintiffs complained); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (holding that plaintiffs lacked standing because they could not show that an IRS policy revision affecting the amount of free medical care required from tax-exempt hospitals was

responsible for the denial of medical care to plaintiffs).

More importantly, as a factual matter, if Plaintiffs' education or other government services are underfunded, such underfunding is not caused by the constitutional limits in the Alabama property tax.⁷ Here, the vast majority of Alabama counties, including Lawrence and Sumter, are well below the constitutionally prescribed "lid" on allowable property tax rates as a percentage of market value. *See* ALA. CONST. amend. 373; *see also* Bass Aff. For example, in Sumter County, even under the restrictions of which Plaintiffs complain, property taxes relating to schools could be raised by \$5.8 million, increasing state and local education revenues by 30 percent. *See* Bass and Dixon Affs. The same situation is present in Lawrence County, where school property taxes could be raised by \$14.6, increasing their state and local education revenues by 30 percent.

The essential truth is that citizens of Lawrence and Sumter Counties and their elected representatives have opted to have lower property taxes than Plaintiffs would like. Plaintiffs need to take their complaint to their elected representatives, not to a federal court.

⁷ *See Knight v. Alabama*, 476 F.3d 1219, 1227-28 (11th Cir. 2007). In *Knight*, the court addressed and rejected the same strained causation argument that Plaintiffs make before this Court:

Plaintiffs chain of causation silently incorporates too many unsupported assumptions. First, plaintiffs assume that the abolition of Alabama's constitutional limitations on property taxation will result in increased tax revenues. Second, plaintiffs assume that legislative decisions regarding the allocation of these putative increased revenues will result in increased funding of higher education. Even a cursory examination reveals that neither of these assumptions is unproblematic.

C. Plaintiffs' Cannot Satisfy The Redressability Requirement For Standing

Finally, just as Plaintiffs fail to satisfy the constitutional standing requirements of injury and causation, it is impossible for them to satisfy the redressability requirement. The Supreme Court has made clear that the redressability test is not met where plaintiffs ultimately depend on some *potential* subsequent action by state authorities to remedy the alleged violation. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). For their alleged relief, Plaintiffs in this case depend precisely on that which the Supreme Court rejected in *Cuno*: potential subsequent action by state authorities. Plaintiffs would have this Court enter a declaratory judgment that would increase most property taxes across the board by some 500% to 1,000%. Plaintiffs then ask this Court to stay the effect of that judgment for one year, to give the Alabama Legislature a chance to avert the disaster the declaratory judgment would create. This type of reliance on hypothetical third party intervention to redress an injury is exactly what the Supreme Court sought to prevent in *Cuno*.⁸

This concept is at the heart of redressability and at the core of separation of

⁸ *See also Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (no redressability where a plaintiff mother's relief depended upon the prospect that a court order leading to the father's imprisonment for nonpayment of child support *might* spur the father to pay more child support); *Warth v. Seldin*, 422 U.S. 490 (1975) (no redressability where plaintiff low-income residents' access to suitable housing ultimately depended as much or more on business decisions by construction companies to actually construct the housing plaintiffs desired as on whether a challenged zoning restriction was invalidated); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (no redressability where plaintiffs could not show a substantial likelihood that invalidating the challenged IRS regulation would result in Plaintiffs receiving the hospital treatment they desired).

powers and this Court's Article III powers. The Eleventh Circuit made this abundantly clear when the plaintiffs in *Knight v. Alabama* sought precisely the same relief as Plaintiffs seek in this action. Stressing the speculative nature of the plaintiffs' request, the court stated:

It is not at all clear that the removal of Alabama's constitutional restrictions on property tax rates will necessarily result in either increased tax rates or increased tax revenues. In 2003, for example, proposed changes to Alabama's tax structure, including state and local property taxes, were overwhelmingly rejected by Alabama voters. Even in the absence of constitutional limitations, there is nothing in plaintiffs' request for relief that would inhibit the ability of the people of Alabama to refuse to raise property tax rates.

476 F.3d 1219, 1227-28 (11th Cir. 2007).

Plaintiffs' claim further assumes that even if new tax dollars were raised, they would be used for education and not for some other unknowable needs of the State and local governments, which may or may not affect Plaintiffs. Again, the 11th Circuit addressed this quandary in the *Knight* case. There, the court emphasized that it is wholly speculation to assume that increased property tax revenues would be used to fund K-12 public schools in Alabama:

Furthermore, plaintiffs' demand for the removal of the constitutional property tax restrictions assumes not only that tax revenues will necessarily increase, but that these revenues would automatically go to Alabama's under-funded K-12 schools. But such revenue allocation decisions are the province of the Alabama state and local governments. Even if Alabama's property tax revenues

were to increase, thereby potentially increasing funds for both K-12 and higher education, there is no way to know what the Alabama legislative response would be. Although Alabama presently spends a higher percentage of its total budget on public education than any other state in the union, and ranks higher in per capita spending for education than for overall government spending, there is no way to predict whether these levels of appropriations would continue if Alabama's property tax revenues were to increase.

Many other public programs compete with education for the Alabama tax dollar. Highway construction and maintenance, public safety programs, public health undertakings, and a host of other programs compete for Alabama's tax dollar. Presently, virtually 100% of the state income tax is appropriated to K-12 education (teacher salaries). Most of the state's sales tax revenues also go to general education purposes. If property tax revenues were to rise, it is impossible to say whether the State would continue to allocate the sales and income taxes to education or transfer these revenues to other programs.

Id.

Similarly, plaintiffs argument assumes that other taxes currently devoted to education, such as the income and sales taxes, would not be decreased or redirected to other areas of state government, thereby potentially decreasing funding for Alabama's public schools. In addition, Plaintiffs' argument disregards the potential impact of higher property taxes on commercial activity, an issue recognized by the court in Knight:

Similarly, there is no way to know how the elimination of constitutional limitations on property taxes will affect the willingness of industrial or other commercial activity to

locate or remain in the state. The possibility of business flight, thereby decreasing tax revenues of all kinds, is not addressed by plaintiffs' chain of causation.

Id.

In short, there is no guarantee, or even likelihood, that Plaintiffs' requested remedy would actually provide them with the legislative relief they hope for. As a result, Plaintiffs lack standing, and this action must be dismissed for lack of subject matter jurisdiction.

II. THIS ACTION SEEKS TO DRAW THIS COURT INTO STATE GOVERNMENT LEGISLATIVE FUNCTIONS IN VIOLATION OF THE TAX INJUNCTION ACT

Plaintiffs' requested remedies fly in the face of the Tax Injunction Act ("TIA" or "the Act"), which provides that "District Courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341 (2006).

The principal purpose of the Act, which reflects the "fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,'" is to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408-09, 413 (1982) (internal citations omitted). Thus, the Court has declared that the Act recognizes "the imperative need of a

State to administer its own fiscal operations.” *Tully v. Griffin*, 429 U.S. 68, 73 (1976). Because a declaratory judgment action invalidating a state tax law could “in every practical sense operate to suspend collection of the state taxes until the litigation is ended,” the Supreme Court has explicitly held that, in addition to barring injunctive relief, the Act “also prohibits a federal district court from issuing a declaratory judgment holding state tax laws unconstitutional.” *Grace Brethren*, 457 U.S. at 408.

Grace Brethren involved a First Amendment challenge by several California churches and religious schools to the State’s failure to exempt them from liability under the Federal Unemployment Tax Act. The federal district court enjoined the State from further collection of the tax from the plaintiffs, finding the TIA inapplicable to constitutional challenges to state tax laws. The Supreme Court, however, declined to exclude constitutional challenges from the reach of the TIA. Doing so would “undermine significantly” Congress’ primary purpose of preventing federal court interference with the assessment and collection of state taxes. *Id.* at 411. Consequently, the Court held that the TIA deprived the Court of jurisdiction to issue declaratory or injunctive relief in that action.

The most recent decision of the U.S. Supreme Court interpreting the TIA is *Hibbs v. Winn*, 542 U.S. 88 (2004). *Hibbs* involved a challenge to the constitutionality of an Arizona statute that authorized tax credits for contributions

supporting religious schools. The federal district court granted the defendant's motion to dismiss on the grounds that the TIA prohibited the court from exercising jurisdiction over the case. The Ninth Circuit reversed, emphasizing that the Act does not prohibit jurisdiction over actions challenging state tax *credits*. Both parties agreed that neither the *collection* nor the *levy* of taxes was at issue in *Hibbs*. Rather, the only dispute was whether the challenge would restrain the *assessment* of taxes. The Supreme Court defined an assessment as the "official recording of liability that triggers levy and collection efforts," and determined that enjoining the State from issuing tax credits would not qualify as the assessment, collection, or levy of taxes. *Id.* at 101.

Hibbs, in dictum, discussed the distinction between suits brought by taxpayers to contest either their own tax liability or the validity of the tax as applied to them, as compared with third party challenges to the tax liability or the validity of a tax as applied to others. The Court noted that third party challenges may fall outside the purview of the Act and stated that where the effect of the proposed remedy would be to increase state tax receipts through the elimination of a tax credit, the Act may not apply. However, the Court's discussion was limited to the specific context of a tax *credit*, the operation of which did not involve the assessment, collection, or levy of state taxes, and the removal of which would indisputably cause an increase state tax receipts. *Id.* at 104-112.

Accordingly, courts considering the applicability of the Tax Injunction Act post-*Hibbs* have interpreted *Hibbs* as standing for the proposition that the Act will not be used to bar suits challenging state tax credits or benefits on constitutional grounds, but have emphasized that the essential reach of the Act remains the same. For example, the Tenth Circuit considered and rejected an argument that *Hibbs* prohibits application of the Tax Injunction Act to third party challenges, such as we have here, to tax assessments:

Nothing in the language of the TIA indicates that our jurisdiction to hear challenges to state taxes can be turned like a spigot, off when brought by taxpayers challenging their own liabilities and on when brought by third parties challenging the liabilities of others. Rather, Congress plainly directed us that we ‘shall not enjoin ... any tax under State law,’ without qualification – and nothing in *Hibbs* commands a contrary result to Congress’s express direction ... Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying, or collecting a tax.

Hill v. Kemp, 478 F.3d 1236, 1249 (10th Cir. 2007).

Our case involves issues altogether different from those of the tax credit in *Hibbs*. First, the tax credit in *Hibbs* affected neither the collection, levy, nor assessment of state taxes, but the challenged provisions in this case unquestionably involve all three of these fundamental aspects of the state tax system protected by the TIA. Second, there was no dispute in *Hibbs* that the requested relief would result in an increase in state tax receipts, whereas here, as the Eleventh Circuit observed in *Knight*, the effect of Plaintiff’s proposed remedy is highly speculative

and may depend on the actions of the state legislature, which may lower tax revenues.

Unlike in *Hibbs*, Plaintiffs' requested remedy clearly falls within the plain language of judicial actions prohibited by the Act. In order for the Act to apply, the requested remedy must be to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax." 28 U.S.C. § 1341.⁹ Plaintiffs seek to invalidate by declaratory judgment and then to enjoin further enforcement of six constitutional provisions "and the statutes and regulations that implement these restrictions in the Alabama Constitution." Compl. at 25-26. The application of Plaintiffs' proposed remedy to the challenged constitutional provisions involves not one, but all three of the fundamental aspects of a state tax system that the TIA prohibits federal courts from enjoining. As a result, there is no need even to consider the implementing statutes and regulations that Plaintiffs would have nullified, before concluding that the "assessment, levy, or collection" of taxes will be "enjoin[ed], suspend[ed], or restrain[ed]." See 28 U.S.C. § 1341.

Regarding the "assessment" of taxes under state law, Amendment 373 sets forth the foundation for Alabama's property tax assessments, dividing property

⁹ The Act also requires that a "plain, speedy, and efficient remedy" be available in state court. 28 U.S.C. § 1341. The Tax Injunction Act creates a strong presumption that state remedies are adequate. See *Franchise Tax Bd. of Cal. v. Alcan Aluminum*, 493 U.S. 331 (1990). Furthermore, "mere speculation" that state courts will not entertain the same claims is insufficient to prevent the application of the TIA jurisdictional bar, as are allegations by plaintiffs of a lower likelihood of success in state court. See *Alcan*, 493 U.S. at 341; *Coon v. Teasdale*, 567 F.2d 820, 822 (8th Cir. 1977). In this case, there is nothing preventing Plaintiffs from filing an identical action in state court. Therefore, the "plain, speedy, and efficient remedy" portion of the Act poses no problem for its application in the present case.

into four classes, each with a different assessment ratio. ALA. CONST. amend. 373. Under Plaintiffs' requested remedy, these assessment ratios and provisions would be voided, and the State and its subdivisions and agents would be prohibited from applying them.

As for the "collection" of taxes under state law, the declaratory judgment and injunction sought by Plaintiffs would sweep away the core provisions of Alabama law defining property taxes to be collected in the state and leave standing a vastly different structure for tax "collection," which the Legislature may or may not choose to modify during the proposed one year stay of the injunction.

The proposed remedy would also enjoin the "levy" of property taxes under state law. Section 269 of the Alabama Constitution includes a provision authorizing the collection and levy of a special property tax of one mill for the purpose of benefiting public schools. This provision would be nullified by the proposed declaratory judgment, and the collection and levy of the tax, in the counties that have imposed the special property tax pursuant to this provision's delegation of authority, would be prohibited by the injunction.

It is truly hard to imagine a more invasive use of declaratory judgment and injunctive powers to enjoin, suspend, and restrain the assessment, levy and collection of state taxes under state law than what Plaintiffs seek in this action. The remedy falls squarely within the plain meaning of all the words of the TIA

prohibiting it.

Congress could not have possibly intended that the Act or the words of the Act not apply to a case like this. As Justice O'Connor stated, concurring in *South Carolina v. Regan*, "[t]he language and history [of the TIA] evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration" *South Carolina v. Regan*, 365 U.S. 367, 399 (1984).

The possibility that at the end of the day the Court's enormous intrusion into state affairs would result in increased property taxes of some 500% to 1,000% does not remove the case from the scope of the TIA under *Hibbs*. Indeed, the lack of certainty regarding the effect of Plaintiffs' proposed remedy on state tax receipts is another important distinction between this case and *Hibbs*. In *Hibbs*, the effect on state revenues of abolishing the challenged tax credit was certain, quantifiable, and indisputably positive. In this case, Plaintiffs' proposed remedy would wipe the slate clean on the Alabama property tax system and leave it up to the Legislature (should it choose to and be able to) to start from scratch. While it is certainly plausible that tax revenues would increase, it is by no means guaranteed, and as we have stated previously, the Legislature may in fact lower tax revenues.

In *Hill v. Kemp*, the court considered and rejected the idea of basing jurisdiction under the TIA on a prediction that the effect of the proposed remedy would be to increase state tax receipts:

In any event, there is simply nothing in the TIA or *Hibbs* suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers; rather our jurisdiction is precluded by the plain language of the TIA in *all* cases seeking to enjoin the [assessment,] levy or collection of taxes under State law. Were the case otherwise, judges might be free to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections. But we are not authorized by Congress to be in the business of forecasting the likely fiscal effects of variations on state tax policy; nor do we think ourselves well equipped to do so.

478 F.3d at 1250. The effect of Plaintiffs' proposed remedy in this case is similarly uncertain, speculative, and subject to the subsequent actions of the state legislature. As a result, under the TIA, this Court is without jurisdiction to consider Plaintiffs' claims.

III. THIS ACTION IS INDEPENDENTLY BARRED BY THE PRINCIPLE OF FEDERAL COMITY

Completely independent of the Tax Injunction Act, Plaintiffs' claims are barred in their entirety by the broader principle of federal comity. The importance of federal comity in the area of state taxation has been recognized by the Supreme Court since as early as the 1870s. *See Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." Any interference in that arena "may derange the

operations of government, and thereby cause serious detriment to the public.”) (opinion by Justice Field). Prior to the enactment of the TIA, then, federal courts used comity as a guiding principle of restraint in such sensitive areas as state tax policy. *See Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (“The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.”).

Congress passed the Tax Injunction Act in 1937 with the principle of comity in mind, but the passage of the Act neither affected the vitality of the underlying principle of comity nor restricted its scope to the actions enumerated in the Act. *See Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 111 (1981); *DirectTV v. Tolson*, 513 F.3d 119 (4th Cir. 2008) (“[t]he comity principle underlying the [Tax Injunction Act] is broader than the Act itself”). Thus, courts have continued to use federal comity as a jurisdictional bar to suits challenging the constitutionality of state tax laws. *See McNary*, 454 U.S. 100.

In *McNary*, plaintiffs brought suit under 42 U.S.C. §1983, seeking monetary damages against county officials for an alleged denial of due process and equal protection through the unequal taxation of property. The district court and the Eighth Circuit found federal jurisdiction to be barred by both the Tax Injunction

Act and the principle of comity. *Id.* at 101. The Supreme Court, however, found it unnecessary to consider whether the Tax Injunction Act precluded jurisdiction because it concluded the principle of comity provided an independent bar to the Court's ability to hear challenges to state and local tax laws. *Id.* at 111-12. Indeed, "in addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *Id.* at 114. As a result, plaintiffs challenging the constitutionality of state tax laws must either avail themselves of state remedies (provided that those remedies are plain, adequate, and complete), or have no relief at all. *Id.* at 116.

A review of cases in which courts have used comity to prevent federal jurisdiction over challenges to state tax laws shows clearly that the present action is the paradigmatic case for which the principle of federal comity should be used as a jurisdictional bar. The relief sought in *McNary* was nothing more than monetary damages under a § 1983. In the present action, the requested relief is exponentially more intrusive in that it seeks declaratory and injunctive relief that would wipe out the fundamental aspects of the state property tax structure and increase taxes by gargantuan amounts.

In *DirecTV*, the Fourth Circuit concluded that a suit challenging the constitutionality of a 2006 North Carolina state law that restricted certain local governmental taxing authority, sought the type of relief that principles of comity

prevent federal courts from considering. *DirecTV*, 513 F.3d 119, 128 (“We hold that principles of comity prevent the federal courts from ordering North Carolina to restore taxing authority to its political subdivisions that it has seen fit to revoke.”). Just as in *DirecTV*, Plaintiffs in this action would have the Court second-guess the wisdom behind the current distribution of state and local taxing authority under the Alabama Constitution. “It is just this sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid.” *Id.* at 125.

Similarly, the relief sought by plaintiffs in a First Circuit case could have required Puerto Rico to collect a tax its legislature had declined to impose. *U.S. Brewers Ass’n, Inc. v. Perez*, 592 F.2d 1212, 1215 (1st Cir. 1979). The First Circuit appropriately held that jurisdiction to consider the plaintiff’s requested declaratory and injunctive relief was barred by principles of comity. Again, the similarities to the present action are striking, as Alabama voters have overwhelmingly rejected changes to the very same constitutional provisions Plaintiffs seek to have enjoined. *See Exhibits C and D to Dixon Aff.* Furthermore, Plaintiffs’ challenge to the constitutionality of Alabama’s property tax system is much broader than the challenge to the single beer tax law challenged in *Perez*.

In sum, the broad-sweeping remedies requested by Plaintiffs’ Complaint would constitute one of the most pervasive and disruptive intrusions by a federal

court into a state tax system in the history of federal jurisprudence. As a result, this is a particularly appropriate case for federal comity to act as a jurisdictional bar.

CONCLUSION

Plaintiffs come to this Court with an imaginary injury and seek to dismantle Alabama's property tax system. Constitutional standing, the Tax Injunction Act, and principles of comity are interrelated. If this Court is to use its power of judicial review to invade the fiscal affairs of the State of Alabama and in effect hold the Alabama Legislature hostage to the threat of an enormous tax increase in the event the legislators should fail to adopt a new property tax system, certainly the plaintiffs' injury must be sufficiently real, particularized and specific to establish beyond any doubt the constitutional jurisdiction and power of this Court to exercise such invasive authority. Yet here there is no such injury, and the Constitution and statutes of the United States and the judicial decisions interpreting them make clear that this Court has no such jurisdiction and power. Accordingly, in consideration of Article III standing requirements, the explicit jurisdictional bar provided by the TIA, and the principle of federal comity, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted this 9th day of May, 2008.

/s Drayton Nabers, Jr.

Drayton Nabers, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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