

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. *

Civil Action No.
CV-08-S-0450-NE

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, *

Defendants. *

**PLAINTIFFS' BRIEF OPPOSING
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Plaintiffs India Lynch et al., through undersigned counsel, submit the following arguments and authorities in opposition to the identical motions to dismiss filed April 24, 2008, by defendant Riley, Doc. 22, and defendants State of Alabama and Russell, Doc. 24, as supported by defendants' consolidated brief filed May 9, 2008, Doc. 27, and supplemented May 29 and June 3, 2008, Docs. 29 and 30.

OVERVIEW

The complaint alleges that the provisions of the Alabama Constitution this Court has already found to be purposefully designed to discriminate against black Alabamians and that continue to have their intended discriminatory effects violate the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq. *Knight and Sims v. Alabama*, 458 F.Supp.2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007). The defendants, State of Alabama, Governor Riley, and Revenue Commissioner Russell, do not challenge here the sufficiency of the merits alleged in the complaint. Defendants' Brief at 3. Instead, they contend that the property tax restrictions this Court found to be racially motivated have worked just as the

drafters hoped and have so thoroughly infiltrated Alabama's state and local revenue system that it is beyond the power of federal courts to provide any judicial relief to the African Americans who are victims of this discriminatory scheme. So, even though there is no clearer Fourteenth Amendment violation than enacting state laws for a racially discriminatory purpose and no more important judicial remedy than to enjoin future enforcement of those discriminatory laws, and thus bring an end to their continuing discriminatory effects, the four sections and two amendments of the Alabama Constitution challenged here, defendants contend, are immune from attack. Defendants simply are wrong. And before this brief engages the complicated and legalistic jurisdictional issues raised by defendants, it is worth stepping back and taking notice of this ultimate, unprecedented constitutional conclusion defendants are asking this Court to reach.

Defendants assert this Court lacks subject matter jurisdiction under three theories: (1) that plaintiffs lack Article III standing, (2) that the injunctive relief plaintiffs seek is barred by the Tax Injunction Act, 28 U.S.C. § 1341, and (3) that the requested relief is barred by principles of federal-state comity. Defendants are not simply contending that these particular Lawrence and Sumter County plaintiffs lack standing or that the particular relief they seek is barred by the TIA and comity. Their arguments, if accepted, would deny any black citizens of Alabama standing

to challenge these racially discriminatory state constitutional provisions and prevent any federal court from providing judicial relief of any kind with respect to those provisions. In short, it is defendants' position that, because the challenged provisions underpin the state's ad valorem tax system, they are beyond the power of any court to interfere with. The Supreme Court has never so held, and the precedents defendants cite do not support their radical position.

I. Defendants' Affidavits Are Insufficient To Initiate a Factual Attack on Subject Matter Jurisdiction, Which Would Fail Anyway in Light of the Record in *Knight v. Alabama*.

Defendants have submitted four affidavits as bases for initiating a factual attack, under Rule 12(b)(1), Fed.R.Civ.P., on this Court's subject matter jurisdiction. Three of the affidavits are presented to support defendants' argument that the challenged state constitutional restrictions are not causing plaintiffs' ability to raise school revenues, because more property taxes could be raised without reaching the "lid" in Amendment 373. But that evidence does not address the racially motivated barriers that operate to prevent the lid from ever being reached, namely, provisions that restrict the base against which millage rates may be applied to small fractions of the property's fair market value, that burden homeowners in relation to farm and timber land, which are taxed only at low "current use" values, that require proposals to raise millage rates to jump multiple political hurdles at the

local and state levels, and, finally, that require a majority of the local electorate to approve them. The fourth affidavit, which defendants offer to show that real estate markets would be disrupted if this Court granted the relief requested in the complaint, addresses how the remedy should be shaped.

The affidavits of Professor Susan Pace Hamill, Senator Bobby Singleton, and former Lawrence County School Superintendent DeWayne Key submitted with this brief demonstrate that all these barriers are at work in Sumter and Lawrence County and are suppressing school revenues, disadvantaging black students in particular. Their effective tax bases are drastically minimized by the Lid Bill's assessment ratios; residential property is forced to bear a disproportionate burden in relation to larger and wealthier farm and timber lands, which account for less than 6% of property tax revenues; and the voter referendum requirement has submerged the efforts of the black minority in Lawrence to increase funding for their public schools.¹ It is patently unrealistic to expect voters in either county to approve millage rates as high as 100 mills, which would be

¹ The black majority in Sumter County supported all the millage increases proposed except for the last one. The 2006 referendum lost, according to Senator Singleton, because of threats by powerful economic interests in the county, which capitalized on understandable voter confusion about how Alabama's complex property tax system actually works.

required to reach even the relatively low lid amounts of revenue.²

By characterizing their Rule 12(b)(1) motion as a factual attack defendants hope to gain the procedural advantages of requiring plaintiffs to produce evidence at this threshold motion to dismiss stage that the Court must weigh, without the usual presumption that the allegations in the complaint are true, to determine whether it has subject matter jurisdiction. Defendants' brief at 8-9. In considering such a factual attack the Court is free to look "beyond the pleadings." *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001).

But a factual attack on subject matter jurisdiction which "also implicates an element of the [plaintiff's pleaded] cause of action" may be allowed "only in those cases where the federal claim is clearly immaterial or insubstantial," *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). The Eleventh Circuit has "cautioned . . . that the district court should only rely on Rule 12(b)(1) [rather than Rule 12(b)(6)] '[i]f the facts necessary to sustain jurisdiction do not implicate the

² The tables supplied by the Revenue Department that are attached as Exhibits A and B to Professor Hamill's affidavit can be confusing. It is important to distinguish the millage rates shown on the first several pages, which are the rates actually levied by the state or local jurisdictions identified there, from the millage rates on the last page of each table, which combine millage rates levied by all state, county, school district and municipal governments on land located in each jurisdiction listed there. As Professor Hamill says in her affidavit, because of the complexity of the Lid Bill scheme, it is impossible to determine with these limited data exactly how high Sumter or Lawrence County would have to raise its millage rate to reach the revenue lids for each class of property (any millage rate levied by a particular jurisdiction must be applied to all classes of property within that jurisdiction).

merits of plaintiff's cause of action. . . .” *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256, 1261 (11th Cir. 1997). If a jurisdictional challenge does implicate the merits of the underlying claim then:

[T]he proper course of action for the district court ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. . . . Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection for the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) . . . or Rule 56 . . . both of which place great restrictions on the district court's discretion.

Morrison v. Amway Corp., 323 F.3d 920, 925 (2003) (quoting *Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir.1981)).

Defendants present affidavits in support of their contention that plaintiffs lack Article III standing because there is no causal connection between the racially discriminatory state constitutional provisions they challenge and any injury they are suffering. But, causation also is an element of the plaintiffs' equal protection cause of action, as demonstrated by this Court's conclusion in *Knight* that, even though “the current property tax system in Alabama has a crippling effect on the ability of local and state government to raise revenue adequately to fund K-12 schools,” when it came to higher education, “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.” 458 F.Supp.2d at 1312.

Thus, under governing precedent in this Circuit, the “facts” advanced by defendants here fall far short of showing that plaintiffs’ federal claims are clearly immaterial or insubstantial. They are in fact central to both the merits of this matter and to defendants’ contentions that the Court lacks subject matter jurisdiction. Therefore, plaintiffs are entitled to the usual presumption of correctness with respect to the allegations of the complaint.³

Moreover, plaintiffs have already introduced the complete record of the property tax proceedings in *Knight v. Alabama*, and this Court found that the evidence it contains satisfies the preponderance standard when it entered its findings of fact. Thus all of the *Knight* findings of fact and the evidence on which they are based must be taken into account in considering defendants’ contention that this Court lacks subject matter jurisdiction in the instant action. Indeed, if, as

³Even if the Court allowed defendants to pursue their factual attack on subject matter jurisdiction, it would make little difference, procedurally or substantively. Because of the overlap between subject matter jurisdiction and the merits of plaintiffs’ causes of action, even though defendants’ Rule 12(b)(1) motion may not be converted into a motion for summary judgment, *Goodman, supra*, 259 F.3d at 1332 n.6 (citation omitted), “the district court should apply a Rule 56 summary judgment standard,” and plaintiffs are entitled to “the full panoply of protections afforded the party opposing such a motion.” *Lawrence, supra*, 919 F.2d at 530 (citations omitted).

plaintiffs allege in their motion for summary judgment and supporting brief, Docs. 10 and 20, defendants are bound by the *Knight* findings of fact under principles of collateral estoppel, a causal linkage between the challenged state constitutional provisions and plaintiffs' ability to raise adequate K-12 revenues has already been established, and defendants' challenge to plaintiffs' standing must fail. Thus, by insisting on a factual attack on subject matter jurisdiction, defendants are asking this Court to reconsider its order of May 9, 2008, Doc. 26. The appropriate course for the Court may be to consolidate the hearing on defendants' Rule 12(b)(1) motion with the hearing on plaintiffs' Rule 56 motion.

II. Plaintiffs Have Standing To Prosecute This Action.

Contrary to defendants' abbreviated analysis of relevant Supreme Court decisions concerning Article III standing, plaintiffs and the members of the class they seek to represent are adversaries of defendants in a live controversy about the real harms they suffer due to the continued operation of Alabama constitutional provisions whose purpose and effect have already been determined by this Court in the *Knight* case to be racially discriminatory. Defendants' arguments that plaintiffs have not alleged – or, if this Court allows a factual attack on jurisdiction, cannot prove – that they are suffering some concrete, particularized injury that is causally

linked to the challenged state constitutional provisions, and that can be redressed by the relief they request, all are based on the same misrepresentation of the complaint's allegations, namely, that the relief plaintiffs seek depends on "subsequent action by state authorities." Defendants' Brief at 17. To the contrary, the immediate result of enjoining future enforcement of the six state constitutional provisions and their enabling legislation, as defendants recognize, would be both the elimination of the post-legislative passage referendum requirement on any tax increase not within the constraints of those provisions, and also (absent valid legislative action to the contrary) an "increase [in] most property taxes across the board by some 500% to 1,000%." *Id.* That is because existing state and local millage rates would have to be applied to the full market value of assessed property once the assessment ratios in the Lid Bill amendments are struck down. Using defendants' figures, see Exhibits A and B to the affidavit of Susan Pace Hamill, state and local property taxes dedicated exclusively to K-12 schools in Lawrence and Sumter Counties would go up as follows:

County	Class	Current School Revenue	Current Assessment Ratio	School Revenue with 100% Assessment Ratio
Lawrence	I	\$1,000,968.74	30%	\$3,336,562.47
Lawrence	II	\$7,791,059.80	20%	\$38,955,299.00
Lawrence	III	\$6,737,042.06	10%	\$67,370,420.60
Lawrence	IV	\$2,694,390.31	15%	\$17,962,602.07
Lawrence	Total	\$18,223,460.91		\$127,624,884.13
Sumter	I	\$678,614.13	30%	\$2,262,047.10
Sumter	II	\$1,367,179.66	20%	\$6,835,898.30
Sumter	III	\$2,523,873.09	10%	\$25,238,730.90
Sumter	IV	\$573,076.73	15%	\$3,820,511.53
Sumter	Total	\$5,142,743.61		\$38,157,187.83

This would increase school revenues by themselves to levels roughly eight times the amounts defendants show now can be collected under the lids established by Amendment 373.⁴ Defendants' Brief at 4-5 (as amended).

In short, the benefit plaintiffs and the class they seek to represent would get

⁴ These increases in school revenues would be reduced if the Court concludes that enjoining the statutes implementing Amendment 373 reinstates the 1935 law providing a uniform 60% assessment ratio for all property, which the challenged statutes purported to repeal. That is what the court did in *Weissinger v. Boswell*, 330 F.Supp. 615, 619 n.9, 625 (M.D.Ala.1971) (3-judge court), (citing Ala. Acts 1935, No. 194, § 6, at 263). In that event, for example, the increase in school revenue from what is now Class III property in Sumter County would be 60% of \$25,238,730.90 or \$15,143,238.54. This figure would rise even further once farm and timber lands are assessed at fair market value rather than at current use value.

from the straightforward injunction they are requesting would not be uncertain and perhaps too little, as defendants suggest; rather it would be all too certain and too much, as defendants exclaim in horror. The complaint requests that the injunction be stayed for a reasonable period, not because school revenues would not increase without future action by the Governor and Legislature, but because state authorities should have the opportunity to use their plenary legislative powers to moderate the impact on taxpayers. Of course it is true that the results of future legislative action are unpredictable, but the results of future legislative *inaction* are not. That was exactly the case with the remedy prescribed by the court in *Weissinger v. Boswell*, 330 F. Supp. 615, 625 (M.D. Ala. 1971) (3-judge court) (cited in *Knight, supra*, 458 F.Supp.2d at 1292).⁵ In fact, it is the case with every judicial order that declares a state law unconstitutional and unenforceable, even if the benefits of future legislative inaction are not as certain as they are here.

This action presents classic equal protection claims, in which members of a racially defined group who have been purposefully targeted by state legislative action, and who continue to be disadvantaged in exactly the way the laws' drafters

⁵ As this Court found in *Knight*, at a time when black Alabamians were just beginning to be able to elect candidates of their choice to the Legislature, legislative action subsequent to the *Weissinger* injunction produced the Lid Bill amendments, which restored the racially discriminatory *status quo ante*. As the affidavits of Representative John Knight and Senator Bobby Singleton state, in the present circumstances of black proportional representation it is highly unlikely that the Legislature could restore the Lid Bill scheme.

intended, invoke longstanding federal anti-discrimination protections to enjoin future enforcement of those laws. Plaintiffs in the instant action are like the plaintiffs in *Hunter v. Underwood*, 471 U.S. 222 (1985), who were “blocked from the voter rolls” by § 182 of the Alabama Constitution, and who sought “a declaration invalidating § 182 as applied to persons convicted of crimes not punishable by imprisonment in the state penitentiary (misdemeanors) and an injunction against its future application to such persons.” *Id.* at 224. This prospective relief was granted notwithstanding the fact that it did not assure that the *Hunter* plaintiffs would thereafter seek to register to vote and would meet all the other qualifications Alabama has established to be eligible to vote. Nor did the injunction issued in *Hunter* preclude the possibility that the Alabama Legislature would re-enact the race-neutral misdemeanor disqualification, this time for nondiscriminatory reasons.

Similarly, the four black school children who through their parents challenged the facially race-neutral School Placement Law the Alabama Legislature enacted to replace the provision in the Alabama Constitution explicitly requiring racially separate schools were found to have standing, *Shuttlesworth v. Birmingham Bd. of Education*, 162 F.Supp. 372, 376 (N.D. Ala. 1958) (3-judge court), *aff’d per curiam*, 356 U.S. 101 (1958) (“That federal jurisdiction exists in

some district court under [28 U.S.C.A. §§ 1331, 1343 and 42 U.S.C.A. § 1983] requires no discussion.”).⁶

Uncertainty about how the State through its legislative or executive branches might respond once the racially discriminatory law presently in place is declared unenforceable does not deprive its victims of Article III standing. In *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), after the City enacted an ordinance requiring “that 10% of the amount spent on city contracts be set aside each fiscal year for so-called ‘Minority Business Enterprises’ (MBE’s),” which resulted in “projects [that] were earmarked for MBE bidding by the city’s chief purchasing officer” being “deemed reserved for minority business enterprises only,”” *id.* at 658, an organization of contractors in Jacksonville brought suit for declaratory and injunctive relief, claiming that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 659. On appeal from the district court’s grant of summary judgment to the contractors’ organization, the Eleventh Circuit reversed on the ground that plaintiff lacked standing to challenge the ordinance,

⁶ This Court actually denied the injunction requested in *Shuttlesworth*, and it was only after Alabama implemented the School Placement Law in a way that preserved segregation that federal courts began to order mandatory injunctive relief. *E.g.*, *Lee v. Macon County Bd. of Education*, 267 F. Supp. 458 (M.D. Ala. 1967) (3-judge court).

because it “ha[d] not demonstrated that, but for the [MBE] program, any AGC member would have bid *successfully* for any of these contracts.” *Id.* at 660 (emphasis added) (*quoting* 951 F.2d at 1219).

The Supreme Court reversed. The opinion of the Court, written by Justice Thomas and joined by six other Justices,⁷ adhered to “the following proposition” that it found to be established by the Court’s earlier decisions:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 666; *accord*, *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003) (“In bringing his equal protection challenge against the University’s use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. . . . He therefore has standing to seek prospective relief with respect to the University’s continued use of race in undergraduate admissions.”); *Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1279 (11th Cir. 2001) (“The Court’s decisions establish

⁷Justices O’Connor and Blackmun would not have reached the standing question but would have dismissed the case as moot in light of Jacksonville’s repeal of the ordinance in question after review had been granted.

that when an applicant competing for a government benefit has been exposed to unequal treatment, it is the exposure to unequal treatment which constitutes the injury-in-fact giving rise to standing. . . . [T]he Supreme Court's standing jurisprudence in this area unmistakably turns the focus away from that kind of *result-oriented* analysis and toward a *process-oriented* analysis that asks whether the plaintiff has actually been *exposed* to unequal treatment.”) (emphases in original).

This is not a case like *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), on which defendants rely to argue that plaintiffs cannot establish personal, concrete, and particularized injury they suffer because of the challenged state laws. Plaintiffs in *Cuno* sought to challenge in federal court the Ohio Legislature's decision to establish a program offering state and (where locally authorized) local “tax breaks” to companies that establish new facilities in the State or relevant municipality. The complaint was that this reduced the amount of state or local funds available to be expended in ways or on projects which the plaintiffs there favored. In other words, plaintiffs in *Cuno* attacked a legislative decision to enact a program that they didn't like on the ground that the appropriation of monies for that program would make it harder for them to convince the legislature to pass programs that they preferred. There was no supervening, limiting constitutional

provision at the heart of the case, merely the operation of a democratically elected representative body. That could not be more unlike the present suit, which seeks to remove a set of Alabama constitutional provisions rooted in historic racially discriminatory policies and practices that directly creates multiple barriers to the ability of black citizens to obtain school revenues through ad valorem taxes.

And the present case could hardly be more different from *Allen v. Wright*, 468 U.S. 737 (1984), on which defendants principally rely. That case involved an attack upon the adequacy of the Internal Revenue Service's implementation and enforcement of procedures for identifying private schools with discriminatory policies which, the plaintiffs claimed, interfered with or diminished their children's opportunity to attend desegregated public schools. The plaintiffs in *Allen* were found to lack Article III standing "because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful." 468 U.S. at 757. The government "conduct" challenged was inadequate "IRS regulations and practices" that failed to deny tax exempt status to every racially segregated private school. *Id.* at 788 n.23. There was no allegation that the IRS was guilty of racial discrimination, nor that the number of discriminatory private schools with tax-exempt status in the areas where plaintiffs resided was sufficient to have an impact on the racial composition of local public schools. The alleged injury plaintiffs

suffered, the Court held, was not sufficiently “concrete,” and the “line of causation” was “attenuated” at best. *Id.* at 752. “From the perspective of the IRS, the injury to respondents is highly indirect and ‘results from the independent action of some third party not before the court.’” *Id.* at 757 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). This lack of concreteness and causation created a problem of redressability, because whether court-ordered, stronger, more aggressively enforced IRS regulations would have forced whites to remove their kids from private schools was “highly speculative.” 488 U.S. at 758 and 759 n.24 (citation omitted).

In *Allen*, the plaintiffs claimed two injuries, neither of which the Supreme Court viewed as sufficiently concrete to give them standing, and neither of which is anything like the injuries claimed by plaintiffs here. First, the *Allen* plaintiffs claimed they were injured by the federal government’s allegedly inadequate activities to enforce the federal policy that denied tax exemption to racially discriminatory private schools. 468 U.S. at 752-53. This alleged injury, the Court said, was nothing more than a generalized grievance based on the interest every citizen has in having the Executive Branch enforce the laws, which the Court had often found inadequate to confer Article III standing. *Id.* at 754-55. Second, the *Allen* plaintiffs said that the IRS’ lax enforcement made it easier for discriminatory

private schools to operate and impaired the plaintiffs' ability and opportunity to receive a desegregated public education. This claim of injury, the Supreme Court found, was fatally undermined by the absence of allegations and/or proof that the plaintiffs' children did not in fact attend desegregated public schools in their localities, or that denial of tax-exempt status to additional private schools in those communities would result in the private schools' closure and consequent return of their students to public education systems, a chain of causation the Court found unavoidably speculative. *Id.* at 756-58. The *Allen* plaintiffs were challenging "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Id.* at 759-60.

By contrast, plaintiffs in the instant action are attacking specific, concrete state laws, namely, §§ 214, 215, 216 and 269 and amendments 325 and 373 of the Alabama Constitution, which have already been found to have been enacted for the racially discriminatory purpose of shielding whites' property from taxation to pay for the education of blacks. If the court enjoined future enforcement of these constitutional restrictions, as we showed above, there is nothing speculative about the relief plaintiffs would receive. This Court will not be called upon to be a

“continuing monitor[.]” of executive action. *Allen*, 468 U.S. at 760. The Alabama Legislature will retain its “power of the purse,” *id.*, and it can choose to act or not to act to restructure the tax system. Taxation, as defendants’ cases say, is a fundamental legislative responsibility. But the State may not choose to enact tax laws that have the purpose and the effect of discriminating against members of a racial minority.

So the complaint does not allege merely a “generalized grievance” that the State of Alabama is not complying with federal law. *Lance v. Coffman*, 127 S.Ct. 1194, 1198 (2007). Rather it alleges “the sorts of injuries alleged by plaintiffs in voting rights cases” and other cases where the victims of racial or other invidious discrimination were found to have standing. *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 207-208 (1962); accord, *Dillard v. Chilton County Comm’n*, 495 F.3d 1324 (11th Cir. 2007) (cert. pending, No. 07-1124)).⁸

In this matter, plaintiffs have both alleged and provided evidentiary support for their claims of legally cognizable injury, causation, and redressability.

Accordingly, they have amply established their standing to prosecute this action.

⁸ Without waiving the contention that the white public school children who are plaintiffs in this action can assert standing in their own right to challenge the racially discriminatory state constitutional provisions which also injure them, it is not necessary to reach that issue, because the white plaintiffs clearly can “piggyback” on the standing of the black plaintiffs. *Dillard v. Chilton County Comm’n*, 495 F.3d at 1336-37 (citations omitted).

III. The Tax Injunction Act Does Not Bar This Suit.

A. The Tax Injunction Act applies only to efforts to restrain collection of state taxes.

The Tax Injunction Act, 28 U.S.C. § 1341, provides, “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” The defendants correctly cite *Hibbs v. Winn*, 542 U.S. 88 (2004), as the most recent U.S. Supreme Court case interpreting the Tax Injunction Act, but then argue that the case should be ignored. The defendants would relegate most of the *Hibbs* Court’s reasoning to the level of *dicta*. In short, the defendants argue that this Court should look only to the narrowest holding of the Supreme Court and ignore all of its reasoning.

In *Hibbs*, the Court analyzed the purposes of the Anti-Injunction Act (AIA) and the Tax Injunction Act (TIA):

In both 26 U.S.C. § 7421(a) [the AIA] and 28 U.S.C. § 1341 [the TIA], Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs...* were outside Congress’ purview.

In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping

congressional direction to prevent “federal-court interference with all aspects of state tax administration” [as the Petitioners argued].

Hibbs, 542 U.S. at 104-05 (emphasis in original; citations omitted). The Court also cited with approval a group of lower court decisions, introducing them in this way: “In other federal courts as well, § 1341 has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum.” *Id.* at 108.

The defendants’ attempt to avoid the clear holding in *Hibbs* seems to be based entirely on arguments advanced in Justice Kennedy’s dissent, arguments that were squarely rejected by the Court’s majority. And defendants cite *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Tully v. Griffin*, 429 U.S. 68 (1976); *South Carolina v. Regan*, 365 U.S. 367 (1984); and *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981), all cases relied on by the *Hibbs* dissent. 542 U.S. at 120-27 (Kennedy, J., dissenting). But Justice Ginsburg’s majority view prevailed:

The Director invokes several other decisions alleged to keep matters of “state tax administration” entirely free from lower federal-court “interference.” Brief for Petitioner 17-21; accord *post*, at 2299. Like *Grace Brethren Church*, all of them fall within § 1341’s undisputed compass: All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore, would have operated to reduce

the flow of state tax revenue.

542 U.S. at 106 (citations omitted).

The federal appellate decision relying on *Hibbs* and most applicable to this case is *Luessenhop v. Clinton County, New York*, 466 F.3d 259 (2nd Cir. 2006). The *Luessenhop* court held the TIA did not deprive the district courts of jurisdiction over “a taxpayer’s challenge that the notice of foreclosure provided by the taxing authority of a state is constitutionally inadequate.” The court explained, “*Hibbs* suggest[s] that the challenges here do not trigger the TIA because the taxpayers are not seeking to utilize federal courts as a conduit to empty state coffers.” *Luessenhop*, 466 F.3d at 266. The plaintiffs in the instant action similarly do not seek “to empty state coffers.”

Of the seven federal appellate decisions relying on *Hibbs* in six circuits, only one comes close to agreeing with the defendants that *Hibbs* should be limited to its facts – that is, that *Hibbs* is only applicable to challenges to the provision of a tax credit. *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007). *Hill* was a challenge to a state-sponsored program of specialty license plates – the plaintiffs objected to a “Choose Life” plate. *Hill* held the charge for a license plate is a “tax under State law,” and therefore, the TIA barred federal jurisdiction over the claim.

Similar challenges have been mounted in other states. The Fifth Circuit held

a suit against Louisiana's specialty license plates was barred by the Tax Injunction Act:

Although reasonable minds can differ on both questions, we are persuaded that the additional amounts that the state collects for specialty plates--above handling and ordinary vehicle registration fees--are indeed taxes rather than regulatory fees. Further, *Hibbs's* interpretation of the TIA does not contemplate or authorize **a suit whose object is to diminish the flow of state revenues**. The TIA deprives the federal courts of jurisdiction over Keeler's claim.

Henderson v. Stalder, 407 F.3d 351, 354-55 (5th Cir.2005) (emphasis added). A similar challenge to Tennessee's specialty plates was held not to be barred by the Tax Injunction Act because "[o]rdinary purchase payments are not taxes under the TIA, and neither is the extra payment for a specialty license plate." *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370, 373 (6th Cir. 2006). But the *Bredesen* Court noted,

The [Supreme] Court also noted that cases applying the TIA generally **"involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)."** Plaintiffs in this case are of course not seeking to avoid paying for a "Choose Life" license plate, and it is therefore at least questionable whether the TIA would apply even if the payment for the license plates were a "tax." We need not reach the issue, however, because of our determination that no tax is involved here.

Bredesen, 441 F.3d at 373 n.1 (citation omitted; emphasis added).

The Seventh Circuit held the TIA barred an action which was "essentially a complaint about the loss of tax refunds" and "about delayed refunds and

defendants' ultimate refusal to issue taxpayer refund checks." *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007). The court noted that Levy's complaint was unlike that in *Hibbs* because "[t]he relief Levy is seeking goes to the heart of the County's ability to control its tax revenue by managing its real estate tax refunds." *Id.*

The Ninth Circuit's two cases interpreting and applying *Hibbs* turn on the meaning of the term "state taxes" rather than a distinction between tax collections and tax benefits. In *May Trucking Co. v. Oregon Dep't of Transportation*, 388 F.3d 1261 (9th Cir. 2004), the court held that fuel taxes collected by a state under the International Fuel Tax Agreement are "state taxes." In *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), the court held that a tax collected by an Indian Tribe is not a "state tax." Both cases read *Hibbs* to hold "the dispositive question in determining whether the [Tax Injunction] Act's jurisdictional bar applies is whether "[f]ederal-court relief ... would have operated to **reduce** the flow of state tax revenue." *Wilbur*, 423 F.3d at 1110 (*quoting May*, 388 F.3d at 1267, *quoting Hibbs*, 542 U.S. at 91) (emphasis added).

Finally, defendants repeat their misconceived argument that the relief plaintiffs request is uncertain, unquantifiable and would "wipe the slate clean on the Alabama property tax system. . . ." Defendants' Brief at 26. This appears to be an attempt to lasso this action inside the TIA corral by saying that "the Legislature

may in fact lower tax revenues.” *Id.* But, as defendants circle back to complain, if this Court enters the injunction prayed for in the complaint, property taxes under existing millage rates will go up in quantifiable amounts depending on the size of the assessment ratio that now reduces the taxable value of each class of property. If in the future the Legislature reduces the size of this substantial revenue increase, or even lowers taxes below their current levels, it will not be because this Court’s injunction required it to do so.

B. The plaintiffs do not “seek[] to stop the collection (or contest the validity) of a tax *imposed on plaintiffs.*”

None of the state constitutional provisions attacked in this suit is designed to increase revenue to the State of Alabama. Sections 214, 215, and 216 of the Constitution of Alabama of 1901 contain limitations on the amount of taxes. Amendments 325 and 373 to § 217 of the Official Recompilation of the Constitution of Alabama of 1901 contain procedural and quantitative limits on additional taxation and exempt great expanses of timber land from the same tax rates imposed on other property owners. Only § 269 allows a tax, but it should be properly read as (1) an exception to the limits imposed by the other challenged provisions and (2) a *limitation* on the rate of local school taxation. If the Court enjoined future enforcement of each one of these provisions in the Alabama

Constitution, none of the statutes and ordinances setting current millage rates would be disturbed. The State would still be able to assess and to collect property taxes under § 211 – and all taxpayers would “forever be taxed at the same rate” under § 217 (once it is stripped of Amendments 325 and 373).⁹

C. There is no “plain, speedy, and efficient remedy” available to the plaintiffs in State court.

Forty years ago another group of school children challenged Alabama’s ad valorem tax program. In refusing to dismiss their claims, the federal district court held,

It should also be noted that defendant’s contention, as a ground for dismissal, to the effect that plaintiffs’ action is barred by the Tax Injunction Act of 1937, 28 U.S.C.A. § 1341, was considered and disposed of by this Court in the October 29, 1969, order. This portion of our order was to the effect that the Alabama courts do not afford plaintiffs a plain, speedy and efficient remedy. In this connection see *State ex rel. Foshee v. Butler*, 225 Ala. 194, 142 So. 533; *State ex rel. Chilton County v. Butler*, 225 Ala. 191, 142 So. 531; *Morrison v. Morris*, 273 Ala. 390, 141 So.2d 169.

Weissinger v. Boswell, 330 F.Supp. 615, 618 n.4 (M.D. Ala. 1971) (three-judge court). The Alabama courts still will not hear a suit seeking to challenge the disparate treatment of different classes of property. *See Ex parte James*, 836 So.2d

⁹ Section 217 formerly read: “The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes.”

813 (Ala. 2002) (holding that Alabama state courts are barred by separation of powers from imposing remedies to correct the underfunding of public education); *Ex parte Melof*, 735 So.2d 1172, 1186 (Ala. 1999) (“there is no equal protection clause in the Constitution of 1901”).

IV. Principles of Comity Do Not Bar This Suit.

The Eleventh Circuit explained the relationship of the Tax Injunction Act and the comity principle in *Williams v. City of Dothan*, 745 F.2d 1406 (11th Cir. 1984):

Although the Supreme Court has recognized that principles of comity may bar federal interference in state tax administration even where the Tax Injunction Act does not, it has relied on comity only to determine whether federal courts should be restrained from awarding forms of relief other than injunctions. The test for the adequacy of the state remedy remains the same.

Williams, 745 F.2d at 1411 n.6 (citations omitted).

The congruity of the TIA and the comity principle is shown in *Hibbs*, where the Court cited non-TIA, comity-principle cases in discussing the contours of the TIA. For instance, the Court stated:

We note, furthermore, that this Court has relied upon “principles of comity,” Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108, 102 S.Ct.

177, 70 L.Ed.2d 271 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

Hibbs, 542 U.S. at 107 n.9. Based on these authorities alone, this Court should hold that principles of comity do not bar the relief plaintiffs are seeking in this action.

But the historical, purposeful racial discrimination embedded in the provisions of the Alabama Constitution here invoke foundational federal protections that make comity concerns especially inapplicable to this case. In *Knight* this Court held that these state constitutional restrictions could be traced directly to the antebellum slave tax and post-Civil War white resentment against the property taxes needed to replace the slave tax. 458 F.Supp.2d at 1281-83. Even as the Supreme Court has cautioned that “the Fourteenth Amendment does not override all principles of federalism,” *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991), that deference to state sovereignty when “deal[ing] with matters resting firmly within a State’s constitutional prerogatives,” *id.*, is not justified when the state exercises its prerogatives to perpetrate invidious racial discrimination. *E.g.*, *City of Rome v. United States*, 446 U.S. 156, 179-80 and n.15 (1980) (“principles of federalism that might otherwise be an obstacle to congressional authority are

necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation’”) (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

These motions to dismiss should be viewed in their historical context. The State’s assertion of federal-state comity as a complete defense against this Court’s power to interfere with provisions of its 1901 Constitution that were designed to keep former slaves and their descendants in a subordinate status, socially, economically, and politically has a long pedigree. Alabama has from its beginning attempted to interpose its sovereignty to defend the institutions of slavery and the vestiges of slavery. In fact, state sovereignty was invoked to establish slavery in Alabama in contravention of federal law even before it became a state.

When the United States declared its independence from Great Britain, Alabama was part of the western territories claimed by the State of Georgia. In 1795, only six years after the Constitution of the United States was ratified, the Georgia legislature sold most of what is now the States of Alabama and Mississippi to speculators for \$500,000, or about 1 ½ cents per acre.¹⁰ All but one of the legislators who voted for passage of the bill of sale received sizeable shares

¹⁰ C. PETER MAGRATH, *YAZOO: THE CASE OF FLETCHER V. PECK* 5-6 (New York: W.W. Norton & Co., 1966). Magrath bases this price on a total of some 35 million acres. Alabama historian Leah Rawls Atkins quotes a smaller acreage, 21,500,00, which yields a unit price of 2 ½ cents per acre. WILLIAM WARREN ROGERS, ROBERT DAVID WARD, LEAH RAWLS ATKINS, WAYNE FLYNT, *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* 43 (Tuscaloosa: The University of Alabama Press, 1994).

in the land companies these speculators had formed to purchase what became known as the Yazoo lands, the western territories of Georgia that stretched from the Coosa River on the east to the Mississippi River on the west and that today comprise the northern two-thirds of Alabama and Mississippi. The Yazoo sale caused an uproar among Georgia's land-hungry white settlers. They promptly elected a new legislature that passed an act in 1796 repealing the 1795 statute. However, by then, many of the Yazoo shares had been sold to New Englanders and other speculators around the nascent United States, and questions about which Georgia statute was valid and who had legitimate title to the Yazoo lands politically polarized the whole country.

In the national government the Yazoo dispute became one of the focal points in the battle between Federalists and Jeffersonian Republicans. After Jefferson was elected President in 1800, he appointed a commission headed by Secretary of State James Madison that entered into negotiations with a Georgia commission to resolve the dispute. These negotiations produced an 1802 treaty between the federal and Georgia governments in which Georgia finally became the last of the original thirteen states to cede to the United States its claims to sovereignty over its colonial western territories. But the commissioners left to Congress the task of finally resolving the Yazooist speculators' claims to compensation for their

investments. Republican hostility to the predominately Federalist Yazoo claimants deadlocked the issue in Congress, so the Yazooists put together a friendly lawsuit aimed at getting the Supreme Court to validate their position. The result was Chief Justice John Marshall's famous decision in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

The Court held in *Fletcher v. Peck* that the 1795 Georgia statute was a valid land grant and that the 1796 repealer statute was invalid. The right of the Yazoo speculators to profit from their investment was upheld. In American constitutional law, Chief Justice Marshall's opinion for the Court is frequently cited as the first Supreme Court decision to strike down a state law and for its reliance on the Contract Clause¹¹ to limit state power to modify public contracts or grants.¹² Marshall's interpretation of the Contract Clause was the foundation of federal jurisprudence shielding private business interests from state regulation for over a century.¹³ Usually overlooked, however, is the role *Fletcher v. Peck* played in giving judicial blessing to Georgia's claim of right to extend slavery into its

¹¹ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

¹² E.g., Michael L. Zigler, *Takings Law and the Contract Clause: a Takings Law Approach To Legislative Modifications of Public Contract*, 36 STAN. L. REV. 1447, 1449-50 (1984).

¹³ Zigler; Leo Clarke, *The Contract Clause: A Basis For Limited Judicial Review of State Economic Regulation*, 39 U. OF MIAMI L. REV. 183 (1985).

western territories. The Northwest Ordinance of 1787 enacted by Congress under the Articles of Confederation provided, in Article 6:

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

<http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html>. But the compromise embodied in the 1802 “treaty” ceding to the United States Georgia’s claim to ownership of Alabama and the rest of its western territories expressly excepted them from the prohibition against slavery:

[T]he territory thus ceded shall form a State, and be admitted as such into the Union, as soon as it shall contain sixty thousand free inhabitants, or at an earlier period, if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the thirteenth day of July, one thousand seven hundred and eighty-seven, for the government of the Western Territory of the United States; which ordinance shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.

http://sos.georgia.gov/archives/what_do_we_have/online_records/historic_documents/western_lands_articles_of_agreement/default.htm. In *Fletcher v. Peck*, Justice Marshall had to address the validity of the 1802 treaty of cession in order to resolve the question of which government owned the western territories after the

Revolutionary War:

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

10 U.S. at 142. In this way, *Fletcher v. Peck* endorsed the 1802 articles of cession, including its approval of slavery. The rest, as this Court has found, is history.

Except at Mobile, which was founded by the French in the early eighteenth century, there were no whites in what is now Alabama until the Tombigbee settlement was founded in 1800 in southwest Alabama and the Big Bend settlements in modern Madison County in 1810. After Andrew Jackson's Tennessee militia defeated the Creek Indians in 1814, the United States began selling land in what was then the western territories of Georgia. Settlers poured into Alabama by the thousands during the period between 1816 and 1819. In fact the growth was so rapid that by 1819 Alabama had enough settlers in its territory to petition the Congress for statehood which was granted that same year. The settlers brought slaves with them to the newly open territory in contravention of the Northwest Ordinance. Upon the admission of Alabama into the Union, the provision of the Northwest Ordinance prohibiting the importation of slaves was removed.

Knight, *supra*, 787 F.Supp. at 1066.

Justice John Archibald Campbell, one of three Alabamians to serve on the U.S. Supreme Court¹⁴, clearly was thinking about his home state when he wrote his

¹⁴ Justice Campbell, from Mobile, one of three Alabamians to serve on the U.S. Supreme Court, succeeded Justice John McKinley, from Florence, in 1853. James L. Noles, Jr., *Alabama's Forgotten Justices: John McKinley and John A. Campbell*, 63 ALA. LAWYER 236 (2002). Justice Hugo Black, of course, was from Governor Riley's home County, Clay. The

concurring opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which addressed the question whether “the descendants of . . . slaves, when they shall be emancipated, or who are born of parents who had become free before their birth,” are members of the “sovereign people” who formed the United States. 60 U.S. at 403-04 (opinion of Taney, C.J.). The *Dred Scott* case is most often remembered for Chief Justice Taney’s infamous, Civil War-provoking answer:

We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

60 U.S. at 404-05. Less well remembered is Justice Campbell’s concurring opinion, which cited the “law of nations” and the Tenth Amendment in support of his theory that final sovereign authority resides in the states. 60 U.S. at 495, 502, 506. “It is a settled doctrine of this court,” he wrote, “that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States.” 60 U.S. at 500.

federal courthouse in Mobile is named after Justice Campbell, the federal courthouse in Florence after Justice McKinley, and the federal courthouse in Birmingham after Justice Black.

Justice Campbell's erudite opinion made obvious reference to Alabama's claim of states' rights over slavery by citing the 1802 Georgia articles of cession of its western territories: "The compacts of cession by North Carolina and Georgia are subsequent to the Constitution. They adopt the [Northwest] ordinance of 1787, except the clause respecting slavery." In support, he quoted the passage set out above from Chief Justice Marshall's opinion in *Fletcher v. Peck*. 60 U.S. at 502 (*quoting* 10 U.S. at 142).

The Civil War and ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments changed everything, in Justice Campbell's view, about the location of sovereignty. He had resigned from the Supreme Court during the Civil War, and when it was over he went to New Orleans and resumed the practice of law. It was former Justice Campbell who represented the independent butchers of New Orleans in a challenge to the constitutionality of Louisiana's grant of a monopoly to a single company of butchers in the first major Supreme Court case to interpret the Reconstruction Amendments. *Slaughter-House Cases*, 83 U.S. 36 (1873). Acknowledging that his reasoning in *Dred Scott* was no longer valid, Campbell argued that the Thirteenth Amendment had adopted and extended throughout the nation the Northwest Ordinance's prohibition of slavery. 83 U.S. at 49. In fact, he contended, the prohibition of slavery "comprises much more than the abolition or

prohibition of African slavery” and prohibits even economic forms of slavery such as the exclusion from their profession of the New Orleans butchers. 83 U.S. at 50. The Fourteenth Amendment, Campbell told the Court, had rejected the compact theory of state sovereignty and had created “one people,” each one of whom enjoyed all the privileges and immunities of citizens of the United States. 83 U.S. at 52-53.

The Court majority in the *Slaughter-House Cases* rejected Justice Campbell’s expansive interpretation of the Reconstruction Amendments. Instead, it retained the concept of dual sovereignty and read the Privileges and Immunities Clauses in § 1 of the Fourteenth Amendment and in Article IV, § 2 virtually out of the Constitution. 83 U.S. at 76-80.¹⁵ The Thirteenth, Fourteenth, and Fifteenth Amendments, the Court held, were adopted, first and foremost, to provide freedom and equality to African Americans.

[N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

¹⁵ E.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1303-11 (3d ed., 2000).

83 U.S. at 71.¹⁶

Nevertheless, for years Alabama was still successful in asserting its sovereignty as a bar to federal court relief, even when the descendants of slaves invoked their rights under the Reconstruction Amendments. Immediately after adoption of the 1901 Alabama Constitution, a black plaintiff suing on behalf of 5,000 black citizens in Montgomery County brought a federal court challenge to the provisions of the new state constitution designed to disfranchise blacks.

Writing for a Supreme Court majority, over the dissents of Justices Harlan, Brewer and Brown, Justice Holmes held that, since the state could not be made a party under the Eleventh Amendment, a federal court was powerless to grant the relief requested. *Giles v. Harris*, 189 U.S. 475 (1903).

The circuit court has no constitutional power to control [the state's] action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them.

¹⁶ Justice Campbell's biographer in 1920 "point[ed] out that of the more than six hundred cases in which its protection has been invoked, only twenty-eight involved racial rights of the colored man, and quotes from a North Carolina lawyer, as a not inapt statement of its effect, that it was made 'for the protection of the negro, but has become the asylum of the multi-millionaire'" Simeon E. Baldwin, *Review of HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 1853-1861*, 19 YALE L.J. 946, 947 (1920) (citations omitted).

Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.

189 U.S. at 488.

Eventually, the Supreme Court overcame its reluctance to enforce the Reconstruction Amendments in the face of assertions of state sovereignty. In *Lane v. Wilson*, 307 U.S. 268, 272-73 (1939), the Court distinguished the ruling in *Giles v. Harris* and held that a federal district court was empowered to provide relief under 42 U.S.C. § 1983 in an action at law by a black citizen who had been denied the right to vote in Oklahoma. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court enjoined enforcement of the statute creating the infamous Tuskegee gerrymander notwithstanding Alabama's contention that federal courts have no authority to interfere with a state's sovereign power to determine the boundaries of its municipal corporations. Justice Frankfurter's opinion for the Court held that the Fifteenth Amendment is "a specific limitation upon State power. . . ." 364 U.S. at 343. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected

right.” *Id.* at 347.

Judge Frank Johnson, citing *Lane v. Wilson* and *Gomillion v. Lightfoot*, brought *Giles v. Harris* full circle when he entered a decree that undertook court supervision of the voter registration process in Macon County, the very relief Justice Holmes had refused to grant in 1903. *United States v. Alabama*, 192 F.Supp. 677, 682-83 (M.D. Ala. 1961), *aff’d*, 304 F.2d 583 (5th Cir.), *aff’d per curiam*, 371 U.S. 37 (1962). Then in *United States v. Alabama*, 252 F.Supp. 95 (M.D. Ala. 1966) (3-judge court), the court enjoined future enforcement of §§ 178 and 194 of the 1901 constitution, which required the levy and collection of a poll tax as a qualification for voting. As this Court noted in *Knight v. Alabama, supra*, 458 F.Supp.2d at 1281 and n.1, the poll tax, which actually was a head tax that originally had no connection with voting qualifications, first had been levied by the 1868 Alabama constitution to provide additional funding for public schools. The three-judge court in *United States v. Alabama* nevertheless overruled the state’s Tenth Amendment defense and its contention that payment of the poll tax showed “concern for education. . . .” 252 F.Supp. at 97, 100. The court drew a parallel between the State’s attempt to invoke its sovereignty in defense of the poll tax with the way the Governor and Legislature of Alabama had attempted to interpose the state’s sovereignty to declare “null and void and of no effect” the Supreme Court’s

desegregation command in *Brown v. Board of Education*, 347 U.S. 483 (1954).
United States v. Alabama, 252 F.Supp. at 102 (footnotes omitted).

Finally, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the chief precedent upon which plaintiffs rely in the instant action, Alabama again attempted to interpose its sovereign authority to establish qualifications for exercise of the franchise, citing the Tenth Amendment. 471 U.S. at 233. And again the Court refused to withhold relief. “For the reasons we have stated, the enactment of § 182 [of the Alabama Constitution] violated the Fourteenth Amendment, and the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment.” *Id.* The racially discriminatory property tax restrictions in the Alabama Constitution cause greater injury to many more African Americans (and whites) than did the misdemeanor disqualification struck down in *Hunter v. Underwood*. Acceptance of defendants’ claim here of immunity based on federal-state comity would be contrary to all the modern precedents enforcing the foundational protections of the Equal Protection Clause and Title VI of the Civil Rights Act on behalf of black citizens.

CONCLUSION

For the foregoing reasons the motions to dismiss should be denied.

Respectfully submitted this 14th day of April, 2008,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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