

**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,)**

Defendants.

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

ORAL ARGUMENT REQUESTED

**DEFENDANTS’ REPLY TO PLAINTIFF’S BRIEF OPPOSING
DEFENDANTS’ MOTION TO DISMISS**

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

submit this reply to Plaintiffs' Brief Opposing Defendants' Motion to Dismiss. Under the doctrine of Article III standing, the Tax Injunction Act, and the principle of federal comity, Plaintiffs' Complaint is due to be dismissed in its entirety.

INTRODUCTION

Plaintiffs imply that Defendants' failure to "challenge here the sufficiency of the merits alleged in the complaint" is an admission of some kind that Plaintiffs' claims are meritorious. *See* Pls.' Brief at 1. Defendants have not dealt with the merits because the merits are not before the court on this Rule 12(b)(1) motion.

However, Defendants want to be absolutely clear that Plaintiffs are absolutely wrong on the merits. This Court has already considered and rejected the exact contention Plaintiffs make here. *See Knight v. Ala.*, 458 F. Supp. 2d 1273 (M.D. Ala. 2004). Plaintiffs argued in *Knight* that the very same property tax provisions they attack here "violate the Fourteenth Amendment by restricting blacks' full participation in the political process." *Id.* at 1313. That is precisely their position in this case. This Court considered and flatly rejected that argument, concluding: "although the provisions of the Alabama Constitution may represent poor public tax policy, the Court finds that those provisions do not violate the Fourteenth Amendment." *Id.* at 1314.

Plaintiffs would have this Court believe their case presents "classic Equal Protection claims," Pls.' Brief at 11, when in fact it does nothing of the sort, as this

Court concluded in *Knight*. Far from protecting minority rights to participate in a democratic society, as a ‘classic’ case of discrimination might, Plaintiffs in this case would actually have the Court override the expressed will of voters across the state, including African-American voters in majority-black counties with majority-black county commissions (e.g. Sumter County), by imposing tax increases that such voters, exercising their right to vote in local referenda on property tax increases, have previously rejected.

Additionally, in contrast to legitimate equal protection claims, Plaintiffs here do nothing more than allege a generalized grievance common to all Alabama citizens, regardless of race, regarding the allegedly restricted ability of elected officials to raise property tax revenues. As recognized by this Court, “Alabama’s property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure.” *Knight*, 458 F. Supp. 2d at 1314.

This case also departs from the ‘classic’ discrimination case in that Plaintiffs seek the most significant intrusion by a federal court into a state’s tax system in history, and if Plaintiffs were to obtain their desired remedy, the resulting tax increase would certainly be the largest ever imposed by a federal court.

Furthermore, even assuming the Court does exactly as Plaintiffs request, there is no substantial likelihood the Plaintiffs would ever personally benefit in a

tangible way from the court's order. Rather, as the Eleventh Circuit recognized, there are "too many unsupported assumptions" incorporated in Plaintiffs' chain of causation, and "there is no way to know what the Alabama legislative response would be." *Knight v. Ala.*, 476 F.3d 1219, 1227-28 (11th Cir. 2007).

In addition, federal district court jurisdiction over this case is independently barred by the Tax Injunction Act ("TIA") and the principle of federal comity. Defendants' arguments on these issues are not vestiges of states' rights arguments made long ago in defense of slavery or Jim Crow laws, as Plaintiffs seem to imply. *See* Pls.' Brief at 29. Rather, they are based on the plain words of a federal statute and the holdings of federal courts regarding the proper role of courts in a democracy, and the proper level of respect for the states' 'fundamental and delicate power of taxation,' as recognized just last year by the Eleventh Circuit on this identical issue. *Knight*, 476 F.3d at 1227. These arguments do not mean there are no avenues of relief for Plaintiffs. They do mean, however, that Plaintiffs cannot make these claims in federal district court.

I. Defendants' Factual Attack on Subject Matter Jurisdiction is Appropriate.

Plaintiffs contend that Defendants improperly characterize the 12(b)(1) motion at issue as a factual attack, and argue it should be treated under the Rule 56 summary judgment standard because the motion allegedly implicates the merits of Plaintiffs' underlying claims. *See* Pls.' Brief at 3-8. Moreover, Plaintiffs argue that

a 12(b)(1) motion to dismiss which implicates an element of the cause of action is appropriate only where the federal claim is clearly immaterial or insubstantial. *See id.* at 5.

This argument is erroneous. Plaintiffs fail to cite a single case relating to standing, which is the issue before this Court. Rather, the subject matter jurisdictional question involved in each of Plaintiffs' authorities centered on the definition of terms in the federal statute forming the jurisdictional predicate of the plaintiff's cause of action. *See Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990) (where the jurisdictional issue was whether an employee acted within the scope of his employment under the Federal Tort Claims Act); *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256 (11th Cir. 1997) (where the jurisdictional issue centered on the definition of "employee" under the ADEA); *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) (where defendants alleged a lack of subject matter jurisdiction because the plaintiff employee was not an "eligible employee" under the FMLA); *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981) (where the jurisdictional issue centered on the definition of "securities" under federal securities laws).

At this stage Defendants do not ask the court to decide the merits of Plaintiffs' claims. Rather, Defendants submit supporting affidavits and ask only that the court perform its Article III duty to determine Plaintiffs' standing before

addressing the merits of Plaintiffs' claims.¹

Standing is the core jurisdictional question that all Article III courts must answer first. Indeed, “[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.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The mere fact that factual issues relevant to the merits of Plaintiffs’ claims are also relevant to the standing inquiry, does not relieve the court of the necessity of first deciding the standing question. Therefore, Plaintiffs’ argument that this factual attack is improper is plainly misguided and should not prevail.

Accordingly, no presumption of truthfulness attaches to the allegations in Plaintiffs’ complaint, and the burden is shifted to Plaintiffs to prove by a preponderance of the evidence that this Court does in fact have subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990); *McMaster v. United States*, 177 F.3d 936, 940 (11th Cir. 1999).

¹ In rebuttal, Plaintiffs ask this court to consider the factual findings from *Knight v. Alabama* in determining if subject matter jurisdiction is appropriate. We waive no argument and preserve every position relating to the inadmissibility of these findings, but note that if these findings are binding on Defendants, the Court’s conclusion in *Knight* that there is no merit to Plaintiffs’ claims is equally binding on Plaintiffs. *See infra* at pp. 2-3. At this stage in the litigation the Court need not consider questions of preclusion. But even if this Court were to consider its findings in *Knight* in ruling on Defendants’ 12(b)(1) motion – which Defendants submit would be entirely inappropriate – the Defendants’ motion is still due to be granted.

II. Plaintiffs Have No Standing to Bring Their Claim.²

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). Plaintiffs cannot meet any of these requirements, much less all three.

A. Plaintiffs’ alleged injury is nothing more than a generalized grievance.

Plaintiffs allege that they are injured by the impeded “ability of their elected representatives to raise state and local revenues adequately to fund the public services they need, including public education.” Pls.’ Compl. at 5. Thus, Plaintiffs’ alleged injuries stem only from the alleged restrictions imposed by the Alabama Constitution on the ability to raise property taxes.

² In an effort to have their alleged injury seem more ‘particularized,’ Plaintiffs claim their injury is analogous to the injury alleged in *Hunter* and “other cases where victims of racial discrimination were found to have standing.” Pls.’ Brief at 19. Plaintiffs realize that the white Plaintiffs involved in this action could not allege such an injury and therefore argue that the white Plaintiffs can “piggyback” on the standing of the black Plaintiffs. Plaintiffs cite *Dillard v. Chilton County Comm’n*, 495 F.3d 1324 (11th Cir. 2007) to support this position. However, *Dillard* stands only for the proposition that an *intervening* party may “piggyback” on the standing of an original party who has satisfied all standing requirements. *See Dillard*, 495 F.3d at 1330, 1336-37 (emphasis added). An original party may never “piggyback” on the standing of another party because all original parties must satisfy all standing requirements on their own. *See Dillard*, 495 F.3d at 1330. Indeed, there is a significant distinction between whether a plaintiff has proper standing before the court and whether an individual is entitled to intervene. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1212 n.16 (11th Cir. 1989). Accordingly, all Plaintiffs in this action, black and white, must satisfy all standing requirements and no party may “piggyback” on the standing of another and thereby circumvent Article III standing.

This alleged injury is no more than a generalized grievance common to all citizens of Alabama, and therefore fails to meet the standing requirement that Plaintiffs present an “actual, concrete, and particularized injury” specific to them and not to the population at large. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). It is a well-settled principle of law that plaintiffs lack standing when alleging a generalized grievance common to all individuals affected by a particular action. *See Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464 (1982).

In fact, this Court has confronted allegations identical to those presented in this case and concluded that “Alabama’s property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure.” *Knight*, 458 F. Supp. 2d at 1314. Plaintiffs’ alleged injury could not be more ‘generalized’ and does not constitute an injury sufficiently specific to confer standing on them.

Plaintiffs compare their alleged injuries to those found in *Hunter v. Underwood*, 471 U.S. 222 (1985). Plaintiffs’ claims, however, are nothing like those in *Hunter*. In *Hunter*, the Supreme Court considered the constitutionality of § 182 of the Alabama Constitution, which prohibited individuals convicted of misdemeanors involving “moral turpitude” from voting in state elections. Plaintiffs, sued, seeking a declaratory judgment invalidating §182 and an

injunction against future enforcement of the provision.

In *Hunter*, the plaintiffs had suffered the requisite actual, concrete and particularized injury. Indeed, each plaintiff had been blocked from voter registration pursuant to § 182 because they had been convicted of a misdemeanor involving “moral turpitude.” This was a “distinct and palpable” injury that had been specifically suffered by the plaintiffs and it required no speculation or conjecture to identify. The *Hunter* plaintiffs had clear standing to sue.

In contrast, Plaintiffs in this case have not suffered an injury remotely analogous to the clear and specific injury suffered when an individual is denied the right to vote. Plaintiffs have failed to allege an injury sufficient to confer standing.

B. Plaintiffs’ chain of causation is too attenuated to support standing.

For this Court to have subject matter jurisdiction, even if Plaintiffs could assert more than a generalized grievance, which they cannot, 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). As previously discussed, Plaintiffs’ Complaint characterizes their injury as the hindered “ability of their elected representatives to raise state and local revenues adequately...” Pls.’ Compl. at 5. However, Plaintiffs fail to explain how alleged restrictions on raising revenues are directly responsible for Plaintiffs’ alleged, generalized injury, and any attempt to do so is entirely futile.

Plaintiffs argue that, because they are “attacking specific, concrete state laws,” Pls.’ Brief at 18, their claims are sufficient to provide standing. However, the relevant question is not whether a particular law is attacked, but whether the alleged injury is actually caused by Defendants. Plaintiffs simply fail to address this point.

As discussed in Defendants’ previous brief, Sumter and Lawrence counties can raise \$4.8 million and \$14.6 million, respectively, in property taxes for public schools without exceeding the so-called limits Plaintiffs complain about, should the voters and elected officials there decide to do so. These facts are essentially uncontroverted and show the alleged limitations of Alabama law regarding higher property taxes to be illusory.³

Plaintiffs present several affidavits in an attempt to support their underlying position that they are injured by the Constitutional impediments to elected officials raising taxes.

These affidavits not only fail to show that the alleged Constitutional

³ Contrary to Professor Hamill’s assumption in her affidavit attached to Plaintiffs’ brief, the \$4.8 million and \$14.6 million estimates already take into account the effects of the Lid Bill that she notes would impact the actual amount collectable from an increase in property tax rates. *See* Hamill Aff. at 8; Affidavit of Hartley McLaney. Furthermore, Professor Hamill’s estimates of the portion of Class III property taxes paid by current use landowners compared with non-current use landowners are not accurate. *See* Hamill Aff. at 11-12. For example, she claims that, in Sumter County, homeowners contribute 33% of property taxes, compared with timber and farm owners contributing only 6%. According to Dept. of Rev. figures for the 2007 tax year, Class III property taxes as a whole generated 31% of the total property taxes collected in Sumter County, but of that amount, less than 38% came from non-current use property (residential property is non-current use property), whereas more than 62% came from current use property (farm and timber land). *See* McLaney Aff. Therefore, a maximum of 12% (38% of 31%) of the property taxes collected in Sumter County are paid by homeowners on their residential property. Thus, homeowners can hardly to be said to ‘overwhelmingly bear the lion’s share’ of the property tax burden, as Professor Hamill argues. *See* Hamill Aff. at 10.

restrictions cause Plaintiffs any injury but actually bolster Defendants' claim that there is no causal link between the alleged restrictions and any injury. Indeed, the affidavit offered by Professor Susan Pace Hamill expressly acknowledges that it is the voters' preferences in local referenda, rather than the Constitutional restrictions, that are to 'blame' for the Plaintiffs' alleged injury. Professor Hamill opines that "[i]t is politically unrealistic to assume that voters would agree to a rate as high as 100 mills" even though that rate would fully comply with the constitutionally proscribed "lid" on allowable property tax rates as a percentage of market value.⁴ *See* Aff. of Susan Pace Hamill at 9. The simple fact is that the citizens of Lawrence and Sumter counties, where all the Plaintiffs live, have freely voted to reject proposed tax increases and instead have determined to keep their property taxes at levels they deem desirable, as Plaintiffs' affidavits show. *See* Aff. of Sen. Bobby Singleton; Aff. of DeWayne Key.

In Sumter County, with an African-American voting majority of roughly three to one, the electorate in 2006 soundly defeated, by a 60-40 margin, a modest proposal to increase property taxes by 15 mills. The Sumter County Commission, comprised exclusively of African-American commissioners, also opposed the tax

⁴ Professor Hamill's discussion of millage rates in other jurisdictions in Alabama is misleading. *See* Hamill Aff. at 9-10. Her figures fail to account for the total millage rate (including all levels of government) paid by those taxpayers. Doing so would yield a total millage rate of 99 for Mountain Brook, 92 in Vestavia Hills, 80 in Pleasant Grove, and 75 in Fairfield. Thus, some communities in Alabama do choose to pay high millage rates, these jurisdictions are not limited to those with wealthy voting populations, and raising property tax rates to a total of 100 mills in Sumter and Lawrence Counties would not put taxpayers there in the position of paying twice the level of the taxes paid by citizens in the wealthiest jurisdictions.

increase. *See Singleton Aff.* The voters of Lawrence County similarly rejected proposed tax increases of 3 mills and 11 mills in 1990 and 1992, respectively. *See Key Aff.*

Thus, in declining to raise their own taxes, it is the voters who have caused Plaintiffs' alleged injury, not any illusory Constitutional restrictions on local elected officials' ability to raise taxes. As a result, Plaintiffs cannot show that their alleged injury is caused by constitutional limits.

C. Plaintiffs' alleged injuries are not redressable by their proposed remedy.

Plaintiffs have similarly failed to meet their burden on the requirement of redressability. Unless the Plaintiffs can show that their alleged injury is in fact redressable, this Court has no jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As the Eleventh Circuit expressly recognized, there are "too many unsupported assumptions" imbedded in Plaintiffs' chain of causation, and "there is no way to know what the Alabama legislative response would be" if Plaintiffs prevailed. *Knight*, 476 F.3d at 1227-28.

Plaintiffs seek to disguise the speculative nature of their proposed remedy when they assert that while "the results of future legislative action are unpredictable...the results of future legislative *inaction* are not." Pls.' Brief at 11. Plaintiffs miss two key points here. First, the unpredictability in redressing Plaintiffs' injury lies not only in the *results* of future legislative action or inaction,

but also in *whether* the legislature will act *at all*. Second, regardless of whether the Legislature takes any action in response to a Court order, the results remain highly speculative.

If, during Plaintiffs' proposed one year stay of any injunction issued by this Court, the Legislature were to fail to take action – which is quite possible, given that it could not even pass an education budget in this year's regular legislative session – then elected officials in counties and school districts across the state would scramble to determine if and how they could reduce millage rates to avoid the incalculable damage to their citizens that would result from 1,000% property tax increases.⁵ The “results of future legislative inaction,” to use Plaintiffs' words, are wildly unpredictable, *see* Aff. of Rep. Richard Laird, but local officials would certainly understand that they would be voted out of office unless they acted to alleviate the severe pain and anxiety which would be caused by this Court's order.

Even if the Legislature were to act, there are several levels of speculation required to get from Plaintiffs' proposed remedy to any tangible individualized benefit for Plaintiffs. First, it is extremely unlikely that the Legislature would take any substantive action relating to property taxes without allowing Alabama citizens to vote on those changes. *See* Laird Aff. Therefore, any substantive legislative

⁵ It should be noted that many local property taxes are imposed at specific millage rates pursuant to locally-applicable constitutional amendments, and the ability of local authorities to override the constitutional mandates of such amendments would be highly problematic, as the general authority of localities to reduce property tax rates is embedded in Amendment 373, which Plaintiffs seek to invalidate.

action would almost certainly have to be approved by the state's voters, African-American and white, who have time and again shown a lack of interest in raising their own property taxes. *See* Affs. of Knight, Singleton, Key, and Hamill. This could place the voters in the impossible and repugnant situation of being forced to choose between voting in favor of a legislatively-drafted tax increase, or else being subjected to a draconian judicially-imposed tax increase and court-ordered loss of local voter referenda on proposed property tax increases.

Additionally, even if the Legislature were to change the property tax system in a manner pleasing to Plaintiffs and the voters were to approve such changes, there is no guarantee that the new laws would provide revenues in a way that would benefit Plaintiffs. Local officials could raise taxes, allocate revenues, or otherwise act in a myriad of ways that would not personally benefit Plaintiffs. Such an attenuated chain of causation for redressability cannot form the basis for Article III standing.

Finally, the scope of the proposed injunction is completely arbitrary and punitive in relation to the alleged, non-particularized injury. According to the Plaintiffs' own calculations, the enormous size of the tax increase at issue here would result in revenues far exceeding the Plaintiffs' most extravagant dreams.⁶ If

⁶ Relying on *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971), Plaintiffs suggest that this Court could reduce the catastrophic impact of the requested injunction by reinstating a 1935 law providing for a 60% property tax assessment ratio. *See* Pls.' Brief at 10, n. 4. However, to the extent the 1935 Act retained any validity at the time of the *Weissinger* decision, it was repealed by the Legislature when it enacted the Code of Alabama 1975

the Legislature and local officials were to take no action in response to the Court's order, and if all of the new revenues were used for education, public school spending would increase by more than \$15,000 and \$20,000 *per student* in Sumter and Lawrence Counties, respectively.⁷ This would result in Sumter and Lawrence Counties spending roughly twice as much per student as the highest-spending state in the country.⁸ Such an arbitrary, punitive tax increase cannot be said to redress Plaintiffs' injuries.⁹

As a result, Plaintiffs lack standing, and this action must be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs' Claims are Barred by the Tax Injunction Act

Despite Plaintiffs' attempts to remove their claims from the scope of the Tax Injunction Act, the plain language of the Act requires the court to dismiss this action for lack of jurisdiction. The Act provides that "District Courts shall not

(specifically providing in 1977 Ala. Acts 20 § 4 that "all statutes of a general and permanent nature not included in the Code of Alabama 1975 are repealed on the date on which such Code becomes operative and effective..."). Therefore, if the current statutory assessment framework is found unconstitutional, there is simply no statute in place in Alabama providing for an assessment ratio of less than 100%.

⁷ See Plaintiffs' Brief at 10, estimating the tax increase would generate nearly \$110 million annually in additional school revenues for Lawrence County, and more than \$33 million annually in new revenues for Sumter County schools. See also *Aff. of Mark Dixon*, showing 2,283 students in the Sumter County system and 5,412 students in the Lawrence County system.

⁸ See <http://www.edweek.org/media/ew/qc/2008/18sos.h27.finance.pdf>, providing state rankings for 2005 per pupil spending, showing no state above \$12,500 after adjusting for cost of living.

⁹ Moreover, this Court should not lose sight of the pain Plaintiffs' requested remedy would cause to the average family's budget. There are few pockets deep enough to bear the punishment and pain the Court's order would impose. For example, for homes worth \$100,000 after taking into account the applicable homestead exemptions in a jurisdiction with a total tax rate of 50 mills, annual property taxes would increase from \$500 to \$5,000 after taking into account the change in assessment ratio. That amounts to \$375 more per month on citizens of Alabama who had no involvement whatsoever in the matters Plaintiffs complain of.

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).

This language could hardly be clearer or more straight-forward. Plaintiffs cannot and do not even attempt to argue that their requested relief would not “enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law.” Instead, Plaintiffs resort to *dicta* from *Hibbs v. Winn*, 542 U.S. 88 (2004), that discusses the legislative history of the TIA.

The Eleventh Circuit has consistently held that “When the language of a statute is clear, the court should not examine legislative history.” *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002). Instead,

When a statute is passed by Congress, it is the text of the statute, and not statements put in some committee report or made on the floor – and certainly not someone's understanding of the circumstances which gave rise to the legislation – that has been voted on and approved by the people's elected representatives for inclusion in our country's laws. *The language of our laws is the law.*

CBS Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1227 (11th Cir. 2001) (emphasis added). *See also In Re Hedrick*, 524 F.3d 1175, 1186 (11th Cir. 2008) (“The court does not assume Congress did not mean what it says in a statute. Instead, the court is bound to assume that Congress means exactly what it says.”); *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (“a court should not be persuaded by legislative history that suggests an intent contrary to the statute’s

plain meaning”).

In *Hibbs*, where the application of the TIA was not clear with respect to whether an injunction against allowing tax credits involved the ‘assessment, levy or collection’ of state taxes, the U.S. Supreme Court’s resort to legislative history was appropriate. However, in this case, as we demonstrated in our previous brief, there is no dispute that the ‘assessment, levy or collection’ of Alabama property taxes is at the heart of this case.

Furthermore, **every single case cited by Plaintiffs** for the proposition that *Hibbs* should be interpreted broadly so as to remove their claims from the scope of the TIA, **actually supports dismissal of this suit. Indeed, the circuit courts in each of Plaintiffs’ cases interpreting *Hibbs* have consistently recognized the TIA as a robust and continuing jurisdictional bar against hearing claims in cases before them, such as this one, that involved an assessment, levy, or collection of a state tax.** Since *Hibbs*, only those claims not found to involve an assessment, levy or collection of state taxes have been allowed to proceed.

Taking the circuit court cases one by one, *Luessenhop* had nothing to do with the ‘assessment, levy or collection’ of state taxes, but instead dealt only with the constitutionality of a notice of foreclosure. *Luessenhop v. Clinton County*, 466 F.3d 259 (2nd Cir. 2006). As a result, the TIA provided no bar to federal jurisdiction. *Id.*

The court in *Stalder* found that the challenged provision in that case did operate as a ‘tax,’ and as a result, the challenge was barred by the TIA. *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005).

The *Bredeson* court exercised jurisdiction to hear a challenge to a specialty license plate law, but only after determining that the law did not involve the operation of a ‘tax.’ *A.C.L.U. of Tenn. v. Bredesen*, 441 F.3d 370, 373 (6th Cir. 2006).

Wilbur found the challenged provisions to involve ‘state taxes;’ thus, the TIA applied and barred federal jurisdiction. *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005).

May Trucking, on the other hand, determined that the challenged provision did not involve ‘state taxes’ and thus the TIA did not bar jurisdiction. *May Trucking Co. v. Oregon Dept. of Transp.*, 388 F.3d 1261 (9th Cir. 2004).

Each of these cases demonstrates that, following *Hibbs*, courts have continued, and should continue, to follow the plain language of the TIA by employing it as a jurisdictional bar whenever the challenged provision involves the assessment, levy or collection of a state tax, while allowing jurisdiction over claims, such as those made in *Hibbs*, that do not involve the assessment, levy or collection of a state tax.

Pappas is the only case cited by Plaintiffs that appears to deviate from the

text of the TIA, but *Pappas* supports a narrow interpretation of *Hibbs* in Defendants' favor. *Pappas* involved a challenge to the County's practice of withholding or delaying tax refunds which were owed to third party individuals. *Levy v. Pappas*, 510 F.3d 755 (7th Cir. 2007). The challenged practice involved neither the collection, assessment, nor levy of state taxes, but the court nevertheless held that the TIA barred jurisdiction over the claims because the relief sought by the plaintiff "goes to the heart of the County's ability to control its tax revenue by managing its real estate tax refunds." *Id.* at 762.

If the TIA prohibited jurisdiction in *Pappas* because the challenged practice of *delaying tax refunds* went 'to the heart of the County's ability to control its tax revenue,' then surely the TIA forbids the invocation of federal jurisdiction to hear a challenge as central to a state's property tax system as the one at issue here.

Plaintiffs also attempt to remove their claims from the scope of the TIA by disputing the availability of a "plain, speedy and efficient" state remedy. However, state courts are presumed competent to adjudicate federal constitutional claims, and none of the authorities cited in Plaintiffs' brief would prevent Plaintiffs from bringing their claims in state court, or from acquiring a plain, speedy and efficient resolution in the state court system. Consequently, Plaintiffs' claims are covered by both the plain language of the TIA and the case law interpreting that language.

IV. Plaintiffs' Claims Are Barred by the Principle of Comity

To understand why the principle of comity operates to prevent the exercise of federal jurisdiction over Plaintiffs' claims, the Court need not look back to the 18th Century as Plaintiffs urge. Instead, the Court need look no further than the Eleventh Circuit's opinion – on precisely the same issue as we have here – in *Knight*, which admonished that federal courts in the 21st Century should not assume lightly “the fundamental and delicate power of taxation.”¹⁰ 476 F.3d at 1227-28 (citing with approval the Supreme Court's express rejection in *Missouri v. Jenkins*, 495 U.S. 33 (1990), of a federal district court's attempt to remedy school under-funding through the judicial increase of tax rates). *See also DirectTV v. Tolson*, 513 F.3d 119, 128 (4th Cir. 2008) (“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.”).

Comity is meant not only to protect the rights of U.S. citizens in a democracy, but also the broader principles of federalism. As stated by the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*:

The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states ... the need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax ... but the ultimate solutions must come from the

¹⁰ The principle of comity takes on increased importance when considering the massive intrusion and complications that would result from Plaintiffs' proposed remedy in this case, which is anything but ‘delicate.’

lawmakers and the democratic pressures of those who elect them.

411 U.S. 1, 58-89 (1973).

Here, Plaintiffs ask the Court to become deeply immersed in Alabama's fiscal affairs by entering an order that, by virtually any parameter, is so heavily involved in the legislative process and the rights of citizens to vote as to be repugnant to the democratic process. If comity ever had a role for restraint by a federal court, it does so here.

CONCLUSION

Before considering the merits of Plaintiffs' claims and their proposed remedy, which would involve an intrusion of unprecedented magnitude into a state's tax structure, the Court should be absolutely certain that Plaintiffs have the requisite standing to proceed with their claims. In this case, Plaintiffs fail that foundational requirement, at every level of examination. But even if Plaintiffs had standing, their claims would be barred under the TIA. Finally, principles of comity dictate that this Court should not become massively involved in the tax system and fiscal affairs of Alabama.

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety.

Due to the unique complexity and importance of the jurisdictional issues in this case, Defendants also respectfully request oral argument on its Rule 12(b)(1) motion.

Respectfully submitted this 20th day of June, 2008.

/s Drayton Nabers, Jr.

Drayton Nabers, Jr.

One of the Attorneys for the State of
Alabama and Commissioner Tim
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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 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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