

**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,)**

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

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.

**DEFENDANTS’ RESPONSE BRIEF TO PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

Defendants Alabama Governor Bob Riley, Alabama Revenue Commissioner Tim Russell and the State of Alabama (collectively “Defendants”) respectfully submit this Response Brief (“Brief”) to Plaintiffs’ Motion for Summary Judgment and all supporting exhibits and memoranda.

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I. RESPONSE TO PLAINTIFFS' ALLEGEDLY UNDISPUTED FACTS

A. All the claimed undisputed facts (paragraphs 11-131 of Plaintiffs' Brief Supporting Motion for Summary Judgment ("Plaintiffs' Submission" or "Plaintiffs' Brief") are based on inadmissible hearsay and do not constitute facts "that would be admissible in evidence" as required by Rule 56 of Fed. R. Civ. P. See Section V.B. of Brief, *infra*.

B. None of the claimed undisputed facts derive from "discovery and disclosure materials" in this case, nor are any of them stated in affidavits complying with Rule 56(c) of Fed. R. Civ. P. Therefore, all of the claimed undisputed facts (paragraphs 11-131) are insufficient to support summary judgment under Rule 56. See Section V.B.2 of Brief, *infra*.

C. The claimed undisputed facts in the following paragraphs of Plaintiffs' Submission are based on admissions made under Rule 36 Fed. R. Civ. P. in a separate proceeding and thus under Rule 36(b) cannot be used against any of the Defendants in this case. See Section V.B.2.c of Brief, *infra*:

All claimed facts referencing PX 170-177 in paragraphs 11, 12, 13, 14, 15, 17, 20, 25, 27, 32, 34, 35, 36, 37, 43, 44 45, 46, 47, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 75.

D. The claimed undisputed facts in the following paragraphs of Plaintiffs' Submission are based on opinion testimony rendered in a separate case and cannot support summary judgment in this case. *See* Section V.B.2.b of Brief, *infra*:

All claimed facts referencing Thornton Deposition; Exh B pp. 88-134; PX 51; Exh B pp. 8-88; PX 67, Pls' Exhs 36, 37, 38, 41; and Exh B pp. 134; paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 42, 43, 48, 53, 54, 56, 67, 71, 72, 73, 75, 76, 78, 80, 81, 82, 83, 84, 86, 87, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 116, 117, 118, 119.

E. The following claimed undisputed facts have no relevance to this lawsuit:

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131. *See* Section V.B.2.d of Brief, *infra*.

Where reference is made to the text or provisions of the Alabama Constitution or statutory law, such text or provisions speak for themselves. There are many facts relating to revenues, tax rates, tax sources, school children

demographics, school expenditures and the like to which the parties can agree by way of Requests for Admissions, Interrogatories or by stipulation as and when the issues develop in this case, and Defendants' counsel have informed Plaintiffs' counsel of a willingness to cooperate in reaching agreement as and when it is appropriate to do so. *Id.*

II. STATEMENT OF ADDITIONAL UNDISPUTED FACTS

A. Undisputed Facts Stated in the Revised Affidavit of Bill Bass filed June 3, 2008:

1. Lawrence County collected approximately \$2,742,700 in property taxes in fiscal year 2007 which were used for public education. Bass Aff. (Doc. 30), p. 1. If Lawrence County increased its property taxes to the maximum level allowed by Amendment No. 373 to the Alabama Constitution on the basis of assessed property values in 2007, such increase would yield an additional approximately \$14,600,000 annually, which would be available for its public education system. *Id.*

2. Sumter County collected approximately \$1,814,100 in property taxes in fiscal year 2007 which were used for public education. If Sumter County increased its property taxes to the maximum level allowed by Amendment No. 373 to the Alabama Constitution on the basis of assessed

property values in 2007, such increase would yield an additional approximately \$4,800,000 annually, which would be available for its public education system. *Id.*

B. Undisputed Facts Stated in the Affidavit of Greg Pappas filed with Defendants' Memorandum in Support of Defendants' Motion to Dismiss:

3. Since 1978, when Amendment 373 was adopted, in substantially all the instances where a counties or other local taxing authorities have sought approval by the Alabama Legislature of proposed property tax increases under either the Amendment No. 373 procedure or through proposal of appropriate constitutional amendments pursuant to bills introduced in the Legislature, the counties and other local taxing authorities have been successful in obtaining legislative approval, and the tax increases so proposed have been thereafter submitted for local voter approval. Pappas Aff. (Doc. 27-11), p. 2.

C. Undisputed Facts stated in the Affidavit of Mark Dixon filed with Defendants' Memorandum in Support of Defendant's Motion to Dismiss:

4. The average cost (pay and benefits) for a beginning school teacher holding a B.S. degree in Lawrence County is approximately \$52,466.78. Dixon Aff. (Doc. 27-4), ¶3.

5. On May 9, 2008, there were 319 full-time teachers in the Lawrence County school system. There were approximately 5,412 students in that

system. *Id.* at ¶4.

6. The average cost (pay and benefits) for a beginning school teacher holding a B.S. degree in Sumter county is approximately \$49,441.53. *Id.* at ¶6.

7. On May 9, 2008, there were 146 full-time teachers in the Sumter County school system. There were approximately 2,283 students in that system. *Id.* at ¶7.

8. Virtually all of the Alabama state income tax is earmarked for public education. Most of the state's sales tax dollars also go toward public education. *Id.* at ¶10.

D. Undisputed Facts Stated in the Affidavit of Hartley McLaney filed with Defendants' Reply to Plaintiffs' Brief Opposing Defendants' Motion to Dismiss:

9. Sumter County collected approximately \$5,200,000 in total property taxes in 2007. Of that amount, Class III property generated approximately \$1,592,000. McLaney Aff. (Doc. 33-2), p. 1. Within Class III, current use property accounted for \$935,000, and non-current use property accounted for approximately \$657,000. *Id.*

E. Undisputed Facts Stated in the Affidavit of Bobby Singleton filed with Plaintiffs' Brief Opposing Defendants' Motions to Dismiss:

10. There are approximately 5,870 black registered voters and 2,200 white registered voters in Sumter County. Singleton Aff. (Doc. 31-6), p. 3.

In 1988 the voters approved an 11 mill ad valorem tax increase, and in 1990 the voters approved the renewal of a 3 mill school tax. *Id.* In 1998, another millage increase (amount not shown on the election return) was approved by the voters. *Id.*

11. In 2006, Singleton introduced and obtained passage of Act 2006-513, which submitted a proposed 15 mill increase to the voters of Sumter County as an amendment to the Alabama Constitution. *Id.* at p. 4.

12. After opposition from business owners at the University of West Alabama, the majority-white Livingston City Council and the majority-black Sumter County Commission came out against the proposed increase. *Id.* at p. 6.

13. The referendum eventually failed by a vote of 3,037 to 2,126. *Id.*

F. Undisputed Facts Stated in Affidavit of Dewayne Key filed with the Plaintiffs' Brief Opposing Defendants' Motion to Dismiss.

14. According to the 2000 federal census, Lawrence County had a total population of 34,803 persons, of whom 4,648 or 13.4% were black or African American. Key Aff. (Doc. 31-7), p. 2. There are no separate municipal school systems in Lawrence County. *Id.* In the 2006-07 school year there were approximately 5,500 students enrolled in Lawrence County public schools, of whom 16% were black. *Id.*

15. In 1990 a referendum to increase ad valorem taxes by 3 mills for

fire departments failed narrowly, 2,889 voting yes and 2,998 voting no. *Id.* at p. 3. In 1992 a referendum to increase ad valorem taxes 11 mills for the public schools also failed, with approximately 60% voting no. *Id.*

G. Undisputed Facts Stated in the Second Affidavit of Mark Dixon Filed Concurrently with this Brief:

16. Total per pupil expenditures (PPE) in the Lawrence County public school system are \$8,467. Second Dixon Aff. at ¶4. Of that amount, \$6,004 comes directly from the State of Alabama. *Id.* Lawrence County's state PPE ranks in the top 25% of all school systems in Alabama, and Lawrence County's total PPE ranks in the top 40% of all school systems in Alabama. *Id.*

17. Total per pupil expenditures (PPE) in the Sumter County public school system are \$8,904. *Id.* at ¶5. Of that amount, \$6,067 comes directly from the State of Alabama. *Id.* Sumter County's state PPE ranks in the top 10% of all school systems in Alabama, and Sumter County's total PPE ranks in the top 20% of all school systems in Alabama. *Id.*

18. The weighted (by school system) average total PPE for African-American students in Alabama is \$8,443.¹ *See* Second Dixon Aff., Exhs. A

¹The weighted average calculations use Department of Education spending data and average daily membership ("ADM") data from 2006-2007 for determining the amount spent and the number of students. *See* Exh. A to Second Dixon Aff. The demographic data was then taken from Exhibit A to estimate the number of black students and white students in each school system for the purpose of calculating the weighted average PPE by race. The weighted average PPE for black students was calculated by taking the following steps: 1) multiply the percentage of students in each system who are black, times the ADM for each system to determine the number of black students in

and B. This is two percent (2%) greater than the weighted average total PPE for white students. *See id.* Limiting the PPE to state sources, the weighted average PPE for African-American students in Alabama is \$5,599. *See id.* This is one and one-tenth percent (1.1%) greater than the weighted average state PPE for white students. *See id.*

19. The weighted (by school system) average total PPE for white students in Alabama is \$8,265. *See id.* Limiting the PPE to state sources, the weighted average PPE for white students in Alabama is \$5,536. *See id.*

III. INTRODUCTION

Plaintiffs filed this action for declaratory and injunctive relief in March 2008, challenging the constitutional validity of Alabama's property tax system. Plaintiffs had previously raised and lost this issue in the *Knight* higher education litigation.

When Plaintiffs raised the tax issue in *Knight*, they introduced voluminous

each system; 2) multiply the number of black students from step 1 times the PPE for each system, which produces the amount of money spent on black students in each system, 3) aggregate the results of step 2 for all systems, which produces the amount of money spent on black students statewide, 4) divide the result from step 3 by the total number of black students statewide, which produces a weighted average (by system) PPE. The same method was then used to calculate the PPE for white students. As an example, consider a state with two school systems. Assume System 1 has 5 black students and 10 white students. Assume that System 1 spends \$10,000 per student. Now assume System 2 has 10 black students and 5 white students. Assume System 2 spends \$5,000 per student. The statewide average PPE would be \$7,500, but the numbers will be different by race. Following the formula explained above, add \$50,000 for black students in System 1 (5x\$10,000) to \$50,000 for black students in System 2 (10x\$5,000) for an aggregate of \$100,000 spent statewide on 15 black students. The weighted average PPE for black students would be \$6,667 (\$100,000/15). Now add \$100,000 for white students in System 1 (10x\$10,000) to \$25,000 for white students in System 2 (5x\$5,000) for an aggregate of \$125,000 spent statewide on 15 white students. The weighted average PPE for white students would be \$8,333 (\$125,000/15). This fictional example demonstrates how a weighted average can measure potential disparities in funding that might not otherwise be evident.

deposition and trial testimony and exhibits relating to the history and results of the adoption of the challenged property tax provisions. As explained more fully below, the tax issue was immaterial to the *Knight* litigation, though the *Knight* plaintiffs insisted on litigating it fully, and the Court consented. The State of Alabama, represented by a different counsel team, largely conceded the historical issues relating to the allegedly discriminatory intent behind the adoption of the challenged tax provisions. Nevertheless, as its findings make clear, the Court carefully reviewed the plaintiffs' allegations and arguments in *Knight*, identical to those made in this case, and all of the plaintiffs' evidence, and concluded that all of it fell short of proving a violation of the Fourteenth Amendment to the Constitution: "In conclusion, therefore, although the [challenged tax] provisions of the Alabama Constitution may represent poor public tax policy, the Court finds that those provisions do not violate the Fourteenth Amendment." *Knight and Sims v. Alabama*, 458 F.Supp.2d 1273, 1314 (N.D. Ala. 2004).

After losing on the property tax issue in *Knight*, Plaintiffs have now filed an independent action to relitigate precisely the same claims. Before Defendants answered the Complaint, Plaintiffs filed this summary judgment motion supported by a ten-inch thick stack of hundreds of pages from the *Knight* record. Defendants have had no practical opportunity to conduct any discovery or, more specifically, to depose the witnesses whose testimony form the basis for Plaintiffs' summary

judgment motion. Defendants, therefore, have been faced with a difficult task in responding to the motion in a manner contemplated by the rules laid out in the Northern District of Alabama's Uniform Initial Order relating to summary judgment briefs.

Defendants have made every effort to comply with those rules. For the reasons laid out in this brief, Defendants have not, and in these circumstances could not have, presented independent evidence to rebut every alleged statement of fact contained in Plaintiffs' brief. Instead, because every one of them is inadmissible and inappropriate on multiple grounds for consideration in a summary judgment context, Defendants have moved to strike or exclude the entirety of the Plaintiffs' alleged factual statements and the *Knight* record. *See* Defendants' Motion to Strike or Exclude, filed concurrently with this brief.

As explained in this brief, contrary to Plaintiffs' arguments, Defendants are not precluded by collateral estoppel from litigating the issues addressed by the *Knight* Findings of Fact (more to the point, as Defendants will establish when they file their own summary judgment motion, Plaintiffs are precluded by *res judicata* from bringing this action and relitigating their *Knight* claims). For the purposes of responding to Plaintiffs' summary judgment motion, it is sufficient to say that Plaintiffs have not presented any evidence or argument that justifies summary judgment on their claims. Plaintiffs' motion for summary judgment has no merit

and should be denied.

IV. LEGAL STANDARD

In considering Plaintiffs' motion, this Court must view all facts in the light most favorable to Defendants "so that any doubt as to the existence of a genuine issue of material fact will be resolved in favor of denying the motion." *Howard v. BP Oil Company, Inc.*, 32 F.2d 520, 524 (11th Cir. 1994) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). Further, the Eleventh Circuit has made clear that "[i]t is not part of the court's function, when deciding a motion for summary judgment, to decide issues of material fact, but rather [to] decide whether such issues exist to be tried. The Court must avoid weighing conflicting evidence or making credibility determinations." *Id.*

V. ARGUMENT AND SUPPORTING AUTHORITIES

A. This Court's Findings in *Knight* Have No Binding Effect on Defendants Here.

Plaintiffs devote 39 single-spaced pages of their summary judgment brief to findings of fact reprinted from this Court's opinion in *Knight*². They argue that Defendants are collaterally estopped from relitigating the issues underlying those findings. This argument is meritless.

Collateral estoppel is appropriate only when the issue in the second suit is 1)

² Unless otherwise noted, all references to the district court opinion in *Knight* refer to the opinion reported at 458 F. Supp.2d 1273 (N.D. Ala. 2004), and all references to the Eleventh Circuit's opinion in *Knight* refer to the opinion reported at 476 F.3d 1219 (11th Cir. 2007).

“identical to an issue decided in the earlier proceeding; 2) the issue was actually litigated on the merits; [and] 3) the issue was ... a critical and necessary part of the judgment in that earlier decision.” *Bates v. Harvey*, ___ F.3d ___, 2008 WL 565774 (11th Cir., Mar. 4, 2008) at *6 (internal citations omitted). Furthermore, in evaluating whether an issue has been ‘actually litigated’ such that a court can appropriately apply collateral estoppel, the Eleventh Circuit has recognized that the party against whom collateral estoppel is being asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *See In re McWhorter*, 887 F.2d 1564, 1566 (11th Cir. Ala. 1989). Thus, the issue must have been actually and fully litigated in addition to being necessary and critical to the earlier judgment. The party seeking to invoke collateral estoppel bears the burden of proving that the necessary elements have been satisfied. *Id* at 1566.

Plaintiffs have failed to and cannot meet their burden of proof on collateral estoppel for three independent reasons. First, though the plaintiffs insisted on litigating it fully, the issue of whether the property tax provisions challenged in the current lawsuit violate the 14th Amendment to the Constitution was neither “necessary” nor “critical” to the outcome in *Knight*. Second, Defendants cannot be estopped from litigating the issue in this case because their defenses were not fully litigated in the *Knight* case. Finally, nonmutual collateral estoppel, which is the type involved in this case, cannot be applied against a state government.

1. The determination of the property tax issue was not necessary or critical to the *Knight* judgment.

Collateral estoppel is inappropriate in this case because the issue on which Plaintiffs rely was neither necessary nor critical to the judgment in *Knight*.

“[I]t has always been the rule that although an issue was fully litigated and a finding [was] made on the issue in prior litigation, the prior judgment will not act as collateral estoppel as to the issue if the issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment.” *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981). *See also Palciauskas v. INS*, 939 F.2d 963, 966-967 (11th Cir. 1991) (“Even though an issue was fully raised and fully litigated in a prior action, and a finding on the issue was made by the court preliminarily to rendition of judgment, the issue is not concluded by the resulting judgment unless the finding made on the issue was . . . necessary to the judgment.”) (quoting 1B J. Moore, *Federal Practice and Procedure* § 0.443[5.-1], at 781 (2d ed. 1988)). Discussing the rationale of this rule, the former Fifth Circuit Court of Appeals explained:

a decision on an immaterial issue provides the losing party with no incentive to contest an erroneous decision by appeal. If the issue is immaterial, the appeal is probably frivolous, and likely to be so considered by any court reviewing it. Moreover, the losing party is unlikely to appeal a judgment which can have no effect on the outcome of his case.

These same considerations apply equally well in the context of an **alternative ground** of decision which is not appealed by the losing

party. Since one alternative ground will support the judgment, the losing litigant has little incentive to appeal another ground, even if erroneous.

Hicks, 662 F.2d at 1168-69 (emphasis added).

A.J. Taft Coal Co. v. Connors, a closely analogous case to this one, exemplifies how this ‘alternative ground’ principle should be applied. 829 F.2d 1577 (11th Cir. 1987). *Connors* involved a disagreement over the permissibility of certain deductions made in calculating a payment between the parties. The issue was identical to one that had been fully litigated and decided on the merits in a prior action involving the party against whom collateral estoppel was being asserted. The court in the prior action had decided the issue and entered findings of fact and conclusions of law relating to it.

However, the Eleventh Circuit held that collateral estoppel could not be used in the subsequent action because, “[w]hile the resolution of the legal issue of the [deduction] was part of the decision in [the prior action], it was not crucial and necessary to the holding,” which was reached on other grounds. The court reasoned that the party against whom collateral estoppel was being asserted “would not necessarily have found it important enough to expend additional resources to contest at trial or to appeal the unfavorable ruling when they already had obtained a favorable judgment” on another issue in the prior proceeding. *Id.* at 1580-1581.

The holding of *Connors* is directly applicable here. The property tax issue was not necessary to the litigation in *Knight*. This Court need not independently reach this conclusion. Both this Court and the appellate court in *Knight* have already done so, explicitly stating that the property tax issue was beyond the scope of *Knight*. This Court in *Knight*, indulgent to let the plaintiffs have their full day in court and present all of their proof and arguments, nevertheless stated flatly on rehearing that “the relief that the *Knight-Sims* Plaintiffs request is beyond the scope of this litigation – indeed, as Defendants observe in their Response Brief, this case involves desegregation in higher education; this is not a taxpayer action.” See Pls. Comp., ¶3.

The Eleventh Circuit in *Knight* similarly held unambiguously that the tax issue was not germane to the *Knight* case:

Plaintiffs allege that Alabama’s tax policies seriously limit the ability of both the State and its counties to raise revenue from property taxes and, therefore, fund its K-12 schools ... Plaintiffs also allege that these constitutionally enshrined tax policies were adopted for segregative purposes and with discriminatory intent ... **The trouble is that neither of these contentions advance the plaintiffs’ claim ... that these tax policies may be challenged as ... perpetuat[ing] segregation in Alabama’s system of higher education. They may not.**

See *Knight*, 476 F.3d at 1226. The court went on to say, “We conclude, therefore, that plaintiffs’ [property tax claim] claim is not properly brought ... The district

court knew that there was something wrong with this approach, but employed it anyway ... We decline to do so.” *Id.*

As evidenced by the clear statements and supporting logic in both the trial court and the appellate court in *Knight*, the resolution of the tax claim was neither necessary nor critical to the *Knight* judgment. Therefore, collateral estoppel is not applicable in this case.

2. The property tax issue was not fully litigated in *Knight*.

Another prerequisite to the application of collateral estoppel is that the issue must have been actually and fully litigated in the prior action. *See Richardson v. Ala. Bd. of Ed., et al.*, 935 F.2d 1240, 1245 (11th Cir. 1991); *In re McWhorter*, 887 F.2d at 1566. Plaintiffs’ summary judgment motion must be denied because the defense of the property tax issue, for valid reasons, was not fully litigated in *Knight*.

“[T]here may be special difficulties in precluding a party who did not have the initiative in the prior action...Such a party may have been defending only against a relatively small claim in the prior case and thus may not have been motivated to litigate as vigorously as he would have had the subsequent case been tried first...” *Johnson v. United States*, 576 F.2d 606, 614-15 (5th Cir. 1978). For example, “it would be unfair to apply collateral estoppel to preclude relitigation of an issue actually litigated and necessary to the judgment in a prior action when one

of the parties had no incentive to ... vigorously litigate an issue ...” *Palciauskas*, 939 F.2d at 966-967 (quoting *Deweese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982)).

This case provides a perfect example of a party with no incentive to litigate an issue fully in a prior action. *Knight* was fundamentally about desegregation in higher education in Alabama. Plaintiffs’ current claim is about Alabama’s property tax system, which, as recognized by the Eleventh Circuit in *Knight*, “has almost nothing to do with higher education policies.” *See Knight*, 476 F.3d at 1229.

The property tax issue was not raised in *Knight* until the case had been ongoing for 12 years and a remedial decree had been in place for over 10 years. *Id.* at 1223. The State was interested in moving on from the litigation it had been mired in for over a decade, providing a strong incentive to get the peripheral issues in the case behind it.

The property tax claim was exceedingly complex and could have been defended on a number of different grounds. The State focused primarily on the irrelevance of the tax issue to higher education, a defense accepted as meritorious by both the trial and appellate courts. The State also defended on the issues of causation and the alleged continuing segregative effects of the property tax system on higher education. Under such circumstances, it is understandable that the State would not have had the incentive to litigate the issues relating to the alleged

vestiges of discrimination in the property tax system over a period of more than a century, and the State in fact did not fully litigate them.

Indeed, the district court vindicated the State's strategy by dispositively ruling for the defendants both on the relevance and on the causation issues, and the State consequently had absolutely no incentive to appeal the court's findings of fact which are now at issue in Plaintiffs' assertion of collateral estoppel. Applying collateral estoppel in a case like this one would set a precedent that would force the government (and private parties) to waste enormous resources by litigating every issue and appealing every unfavorable portion of every decision, simply to prevent potential estoppel in later cases in which peripheral issues could form the core of a new action, as the property tax claim has here.

In sum, though Plaintiffs aggressively litigated the property tax claim in *Knight*, and this Court carefully considered and rejected it, the State lacked the incentive to litigate vigorously the issue at the heart of this case. As a result, the State did not fully litigate the issue, and Defendants cannot now be collaterally estopped from relitigating the issue.

3. Offensive nonmutual collateral estoppel is not applicable against governmental entities.

Independently of the conclusion by two separate courts that the issue was neither necessary nor critical to the *Knight* judgment, and independently of the fact that Defendants had no incentive to fully litigate the property tax issue in *Knight*,

offensive nonmutual collateral estoppel is not available in this case because it is being asserted against a governmental entity. The Supreme Court held in *U.S. v. Mendoza* that “**nonmutual offensive collateral estoppel simply does not apply against the Government.**” 464 U.S. 154, 162 (1984). “Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the Government to abandon virtually any exercise of discretion in seeking to review judgments favorable to it.” *Id.* at 163.

The Eleventh Circuit has since applied the rationale of *Mendoza* to state governments, noting that there was nothing to suggest that the Supreme Court’s concerns were limited to the federal government. *Hercules Carriers, Inc. v. State of Florida et al.*, 768 F.2d 1558, 1579 (11th Cir. 1985). Therefore, nonmutual collateral estoppel “simply does not apply to the States.” *In re: Employment Discrimination Litigation Against the State of Ala., et al.*, 453 F.Supp.2d 1323, 1329 (M.D. Ala. 2001).

Applying the *Mendoza* line of cases to this action, collateral estoppel cannot be used to preclude Defendants from relitigating the issues encompassed by the *Knight* findings of fact on which Plaintiffs base their summary judgment motion. The collateral estoppel asserted in this case is nonmutual: the presence of the white plaintiffs in this case is more than sufficient to defeat any mutuality of parties, because they had no opportunity to litigate the issue in *Knight*. See *Clark v.*

Watchie, 513 F.2d 994, 998 (9th Cir. Wash. 1975) (noting that for collateral estoppel purposes in class actions, the important inquiry is to determine whether the plaintiffs in the subsequent suit had the opportunity to litigate the issue in the prior suit).

* * *

In conclusion, collateral estoppel is simply not applicable. The property tax issue was neither necessary nor critical to the outcome of *Knight*; the issue was not fully litigated by the *Knight* defendants; and regardless, nonmutual collateral estoppel cannot be applied against state governments.

B. Plaintiffs' Evidentiary Support is Inadmissible and Inappropriate for Use in a Summary Judgment Context.

Because collateral estoppel cannot be applied against Defendants in this case, the findings of fact from *Knight*, which constitute Plaintiffs' entire Statement of Allegedly Undisputed Relevant Material Facts, are not binding in this case.

We turn now to the issue of whether the findings, together with the Plaintiffs' evidentiary submissions, without preclusive effect, can nevertheless support Plaintiffs' motion for summary judgment. They cannot. First, the law in this Circuit is clear that findings of fact from prior cases are inadmissible hearsay in subsequent actions. Second, the evidentiary submissions Plaintiffs rely on to support their allegedly undisputed facts are inadmissible and inappropriate for consideration in a summary judgment context.

1. This Court's Findings in *Knight* are inadmissible hearsay.

The Eleventh Circuit has made clear that it is reversible error to admit into evidence findings of fact made by a trial court in a different case. In *United States v. Jones*, the district court admitted factual findings made by a trial court in a different case. 29 F.3d 1549, 1551 (11th Cir. 1994). On appeal, the court concluded that such factual findings were inadmissible hearsay, rejecting the Government's arguments that they were admissible via judicial notice or under the public records exception to the hearsay rule." *Id.* at 1553-54. The court reasoned that "when the drafters of the Federal Rules of Evidence wanted to allow the admission of judgments or their underlying facts, they did so expressly." *See* Fed.R.Evid. 803(22) (previous conviction); Fed.R.Evid. 803(23) (personal, family or general history and boundaries). Because the factual findings at issue in *Jones* did not qualify expressly for a hearsay exception, they should not have been considered by the district court, and the grant of summary judgment in the Government's favor was vacated. *Id.* at 1554-55.

This case falls squarely within the purview of *Jones*. Plaintiffs attempt to rely on factual findings from another case (*Knight*) to support their summary judgment motion in this case. Such findings constitute inadmissible hearsay and should not be considered by this Court.

In *LLC v. Tieco, Inc.*, the trial court in the Northern District of Alabama

admitted into evidence the opinion, including factual findings, of a trial court in a separate case. Not only were the findings of fact “an exhaustive account that neatly conformed to Appellees’ allegations,” but they were “prepared entirely by Appellee’s counsel.” 261 F.3d 1275, 1287 (11th Cir. 2001).³

Despite the fact that appellants did not raise a hearsay objection when the factual findings were introduced (an objection that, according to the appellate court, if raised, should have been sustained), the court on appeal nonetheless found that the district court had abused its discretion in admitting the findings. *Id.* at 1288. The court found the factual findings to be inadmissible under both 801(c) and 403 because they constituted unfairly prejudicial hearsay. *Id.*

Just as in *Tieco*, allowing findings of fact into the record here would be unfairly prejudicial. As discussed above, the State of Alabama had little incentive in *Knight* to contest the issue on the facts, and in fact did not mount a vigorous defense on the factual issues relating to the tax claim because they were immaterial to the *Knight* decision and would have no bearing on the outcome. In short, the “findings of fact” entered by the *Knight* district court are precisely the type of evidence that the hearsay rule was meant to exclude.

³ We also note that the Findings in *Knight* were taken in large part – most of them essentially verbatim – from the proposed findings submitted by Plaintiffs’ lead counsel in *Knight* and in this case. The Eleventh Circuit has observed that allowing findings of fact into evidence under these circumstances is equivalent to “permit[ting] counsel to testify on his client’s behalf.” See *LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287 (11th Cir. 2001).

2. Plaintiffs' evidentiary submissions are inadmissible and inappropriate for consideration based on a summary judgment motion.

The entire *Knight* record submitted by Plaintiffs in support of their motion for summary judgment is inadmissible hearsay. The policy of Rule 56 of the Federal Rules of Civil Procedure is that in ruling on a summary judgment motion, a trial court should consider only material that would be admissible at trial. Wright & Miller, 10B Fed. Prac. & Proc. Civ. 3d § 2738. Thus, courts should refuse to consider inadmissible hearsay, unauthenticated documents, inadmissible expert testimony, and documents without proper foundation, among others. *Id.* at n. 13. In particular, exhibits attached to a plaintiff's summary judgment brief should be stricken if they have not been authenticated by affidavit or otherwise verified. *See Rogers v. Ford Motor Co.*, 952 F.Supp. 606 (D.C. Ind. 1997). These evidentiary rules governed by Rule 56 preclude consideration of any of Plaintiffs' evidentiary submissions.

a. Hearsay

The *Knight* record on which Plaintiffs rely for evidentiary support consists entirely of out of court statements from another case being offered to prove the truth of the matters asserted. Therefore, the whole record constitutes inadmissible hearsay under Fed. R. Evid. 801, and none of it is authenticated by affidavits that might bring the hearsay within the limits of allowable Rule 56(e) evidence.

b. Inadmissible Opinion Testimony

Furthermore, Rule 56(e) does not allow opinion evidence but provides instead that supporting affidavits “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(e). The Fifth Circuit has recognized that “the weight to be accorded true opinion evidence is always for the jury or other trier of the facts. In other words, **if opinion evidence is relevant, then the case is simply not one to be determined on motion for summary judgment.**” *Elliott v. Mass. Mut. Life Ins. Co.*, 388 F.2d 362, 365 (5th Cir. 1968) (J. Rives). The vast majority of the expert testimony contained in Plaintiffs’ evidentiary submission constitutes opinion testimony that is not appropriate for consideration in a summary judgment context (*see* Section I.D. of Brief, *supra*, for specific paragraph references). All such testimony should be stricken or excluded.

c. Inappropriate Use of Rule 36 Admissions

Furthermore, there has been no discovery whatsoever in this case. Instead, Plaintiffs rely heavily on discovery from *Knight* and specifically, the *Knight* defendants’ responses to Plaintiffs’ Requests for Admission. However, Rule 36(b) states unequivocally that responses to requests for admission “cannot be used against the [admitting] party in any other proceeding.” Fed. R. Civ. P. 36(b). Therefore, all such references should be stricken or excluded from Plaintiffs’

summary judgment evidentiary submission and should not be given any consideration in this case (*see* Section I.C. of Brief, *supra*, for specific paragraph references).

d. Irrelevant Material

Moreover, many of Plaintiffs' alleged undisputed facts are irrelevant to this lawsuit, either because they relate to Alabama's first five state constitutions, none of which had any force or effect when the presently-challenged constitutional provisions were enacted (*see* ¶¶ 11-31 of Pls.' Summary Judgment Brief), or because they address higher education as opposed to the ability to raise property taxes to fund K-12 public schools. (*See id.* at ¶¶ 106-131). This testimony should be stricken or excluded as well.

* * *

Plaintiffs' argument section in their summary judgment brief relies entirely on the findings of fact from *Knight*. *See* Pls.' Brief at p. 48 ("In *Knight*, this court found ... racially discriminatory motives ... and [disproportionate impact on] African-American students ... These findings of fact establish a 'head-on' equal protection violation, and plaintiffs are entitled to declaratory and injunctive relief."). Because these findings of fact are neither binding on Defendants under collateral estoppel, nor admissible or appropriate for summary judgment consideration under Rule 56, Plaintiffs have no ground on which to support their

summary judgment motion. Furthermore, as demonstrated above, all of Plaintiffs' evidentiary submission (to which no reference is made in the argument supporting summary judgment in Plaintiffs' brief) are inadmissible and inappropriate for consideration on summary judgment. Therefore, Plaintiffs' motion must be denied.

C. Regardless of the Admissibility and Propriety of the *Knight* Findings and the Materials From the *Knight* Record, Summary Judgment Should Still Be Denied.

For the reasons explained above, Defendants firmly believe that Plaintiffs' summary judgment motion should be denied because it lacks any evidentiary support. However, even if this Court were to admit Plaintiffs' entire "Statement of Allegedly Undisputed Relevant Material Facts," which consists entirely of inadmissible hearsay, and Plaintiffs' entire evidentiary submission, all of which is inadmissible because of improper opinion testimony, improper use of Rule 36 admissions, inadmissible hearsay, and/or irrelevance and none of which is properly supported or authenticated under Rule 56, Plaintiffs' Motion is still due to be denied on jurisdictional and causation grounds.

Defendants hereby incorporate all arguments and evidentiary materials from their Motion to Dismiss Brief and Reply Brief (Documents 22, 24 and 33).

Given the unique procedural posture of this case, in which Defendants are filing their response to Plaintiffs' Motion for Summary Judgment on the same day

as their Answer, before any discovery has commenced, Defendants are not yet in a position to file a complete summary judgment motion of their own. Defendants will file such a motion in due course. For present purposes, though, Defendants respectfully submit that although this Court determined that the motion to dismiss did not warrant dismissal of this action at such an early stage of litigation, the evidence and arguments presented therein, as well as those contained in this brief, are more than sufficient to defeat Plaintiffs' summary judgment motion.

Specifically, Defendants have provided ample evidence to raise material questions of fact as to whether the named plaintiffs have satisfied their burden on the jurisdictional issue of standing or the merit-based causation issue. As this Court recognized, the issues relating to standing are enmeshed to some extent with the merits of this case, but for the purposes of defeating Plaintiffs' summary judgment motion, they can be considered together.

1. Plaintiffs Have Alleged No Actual Harm From the Challenged Property Tax Provisions.

Plaintiffs have still not provided any evidence of individualized harm in this action. To the extent they claim to be harmed by a reduced ability to raise sufficient revenues to adequately fund public schools, Defendants have shown that even with the alleged restrictions on the property tax, voters and elected officials in Lawrence County have the ability to raise an additional \$14.6 million and still not violate the maximum effective tax rates under the Lid Bill. This would represent

an increase of 30% over the current state and local revenues for public schools. Similarly, voters and elected officials in Sumter County have the ability under the Lid Bill to raise property taxes by an additional \$4.8 million, which would increase their current state and local school spending by 25%.

Furthermore, as shown by figures from the Alabama Department of Education, total per pupil expenditures on public school students in Lawrence County ranks in the top 40% of all systems statewide, and the Sumter County per pupil expenditures rank in the top 20% of all systems statewide. These figures are hardly indicative of any harm or disproportionate impact compared to other groups or school systems in Alabama.

To the extent Plaintiffs argue there is a racially disproportionate impact in public school funding resulting from the alleged property tax restrictions, the most current statistics from the Department of Education refute it. In fact, by calculating the weighted average per pupil expenditures by race, which adjusts for differences in student population numbers and demographics among school systems, it becomes clear that Alabama school systems actually spend more on African-American students as a whole than they do for white students as a whole. *See* Section II.G. of Brief, *supra*. This is true for total expenditures and when limited to expenditures from state government sources.

2. Plaintiffs Have Failed to Prove Causation.

Even if Plaintiffs could point to some concrete, individualized harm or discriminatory impact (which they have not and cannot), they have not shown and cannot show that it is caused by the challenged tax provisions. In fact, Plaintiffs themselves have put forth evidence that disproves their theory of causation. Plaintiffs' affidavits from state legislators in both Lawrence County and Sumter County demonstrate that to the extent the citizens of either county have been thwarted in attempts to raise property taxes, they have been thwarted by the voters themselves. Defendants have shown through the Affidavit of Greg Pappas that both Sumter County and Lawrence County have successfully gained legislative approval for property tax referenda to increase revenues, and legislators from both counties have confirmed.

Simply put, any failure by Plaintiffs to raise sufficient revenues for adequate public services is attributable not to the challenged property tax provisions, but instead to the will of the voters in their own counties. Plaintiffs' references to a disproportionate impact on African-American voters' ability to raise property taxes are defeated by evidence of voters in majority-black counties such as Sumter County, with majority-black elected officials, defeating local property tax referenda by large margins. *See Singleton Aff.*

In addition, as explained in Defendants' Brief in Support of Its Motion to

Dismiss, pp. 14-20, Plaintiffs have not addressed the gaps in causation and redressability created by the role of other revenue sources and the role of state and local officials in the revenue allocation process. In other words, Plaintiffs cannot show that any alleged harm they claim to have suffered (Defendants, of course, maintain that Plaintiffs have not identified any harm at all) is caused by restrictions on the property tax, or can be resolved by removing those restrictions, when there are so many steps between a property tax restriction and increased funding for public schools (e.g., voter approval, state legislative appropriations, local government implementation, etc).

3. Defendants Do Not Concede the Issue of Discriminatory Intent

Moreover, Defendants by no means concede the issue that the property tax laws Plaintiffs challenge are vestiges of discrimination. As stated in the Affidavit of Drayton Nabers, Defendants' counsel has not had time to develop fully Defendants' defenses on the merits in this case, and the issue related to the charge that Alabama's property tax laws are vestiges of discrimination is a complex one involving many years of Alabama history, from the pre-Civil War era through 1978 and beyond.

* * *

In conclusion, as Defendants have shown, even if this Court considers all of Plaintiffs' supporting evidence (which it should not), there are still multiple

questions of material fact surrounding multiple issues, each of which independently warrants a denial of Plaintiffs' summary judgment motion.

D. Summary Judgment with Respect to Class Certification Is Unwarranted.

Plaintiffs also ask this Court to enter summary judgment certifying them as “representatives of the plaintiff class of all public school students and citizens of Alabama who are injured by the racially discriminatory property tax provisions in the Alabama Constitution and the subclasses of similarly situated African-American and white public school students and citizens of Alabama...” *See* Pls.’ Motion for Summary Judgment, p. 2. Plaintiffs seek class certification despite the fact that no discovery has been conducted, no class certification hearing has been held, and no admissible evidence has been submitted by Plaintiffs for the purposes of this summary judgment motion to determine who, if anyone, has actually been injured by the challenged tax provisions, how and to what extent the putative class members were allegedly injured, and how similar the alleged injuries are across different school districts. Plaintiffs’ request for class certification must be denied accordingly.

“For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b).” *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir.

2004). The burden of proof for establishing a proper class lies with the party seeking class certification. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003).

In this case, Plaintiffs have made no attempt – other than a bald allegation in the Complaint that “they satisfy the requirements of Rule 23(a) and Rule 23(b)(2)” (see Compl. at g. 13) – to explain how they have met the Rule 23 requirements of numerosity, commonality, typicality, and adequacy of representation. See Fed. R. Civ. P. 23(a). At the very least, there are material questions of fact surrounding the propriety of class certification in this case. For example, the determination of who, how, and the extent to which anyone is injured by the challenged constitutional provisions will require independent analysis and unique considerations in every school system. The court will need to examine property values, tax exemptions, millage rates, revenues from other sources, K-12 public school spending, and many other factors at the local government and individual level in order to determine whether class certification is appropriate.

In addition to the broader class certification issues, Plaintiffs have still not shown that the named Plaintiffs have standing sufficient to maintain their individual claims.

For all of these reasons, class certification is wholly inappropriate at this time, especially on a motion for summary judgment given the current procedural

posture of this case.

CONCLUSION

For the reasons stated herein, Plaintiffs Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted this 21st day of August, 2008.

/s Drayton Nabers, Jr.

Drayton Nabers, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 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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