

**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**

**BRIEF IN SUPPORT OF DEFENDANTS’  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Come now the defendants STATE OF ALABAMA, BOB RILEY in his official capacity as Governor of Alabama, and TIM RUSSELL in his official capacity as Alabama Revenue Commissioner and submit the following brief in support of their Motion For Judgment On The Pleadings.

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### **Introduction**

The plaintiffs plead only two bases for the declaratory and injunctive relief they seek in this action: (1) violation of the Equal Protection Clause of U.S. Const. amend. XIV (“the Fourteenth Amendment”); and (2) violation of 42 U.S.C. § 2000d (section 601 of Title VI of the Civil Rights Act of 1964, hereinafter “Title VI”).

The pleadings eliminate the possibility of the plaintiffs’ prevailing under either theory for these reasons:

(1) U.S. Const. amend. XI (“the Eleventh Amendment”) prohibits assertion of the Fourteenth Amendment claim against the State of Alabama.

(2) Title VI is limited to claims against “programs or activities” of a state and does not create an action against the state itself.

(3) Plaintiffs have failed to plead even the existence of any program or activity that (a) is in any way connected to the substance of their Complaint and (b) receives federal dollars. They certainly have not identified any discriminatory use of federal dollars by any program or activity overseen by either the Governor or the Revenue Commissioner. Indeed, the whole of their Complaint is concerned with state and local tax revenues that *do not exist* and the constitutional reasons therefor rather than with any federal dollars that *do exist*. Title VI is concerned solely with the latter, and not at all with the former. It is entirely inapplicable in every respect to the claims these plaintiffs have attempted to advance and thus plaintiffs have failed to state a claim under that statute against any defendant.

(4) Plaintiffs Fourteenth Amendment claims against the Governor and the Revenue Commissioner are -- if they are anything -- claims against the State of Alabama which are barred by the Eleventh Amendment.

In short, plaintiffs' Title VI pleading fails to make out a claim under Title VI, and plaintiffs' Fourteenth Amendment claims are barred by the Eleventh Amendment. There are no other claims in the Complaint, thus the action is due to be dismissed in its entirety.

**I. The State Of Alabama Is Not A Proper Defendant In This Action.**

**A. The Eleventh Amendment Prohibits Assertion of the Fourteenth Amendment Claim Against The State of Alabama.**

The Supreme Court of the United States settled exactly this question, conclusively, in *Alabama v. Pugh*, 438 U.S. 781 (1978), when it held that the Eleventh Amendment barred assertion of claims against the State of Alabama made under the 8<sup>th</sup> and Fourteenth Amendments.

The reasoning is simple. The Eleventh Amendment bar on suits against states in federal courts has been held since the days of *Hans v. State of Louisiana*, 134 U.S. 1 (1890), to prohibit not only claims against a state made by citizens of another state, but also claims against a state by its own citizens. Further, there is nothing in the Fourteenth Amendment that abrogates Eleventh Amendment immunity against the states: "Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the constitution or laws of the United States.'" *R.B. Parden v.*

*Terminal Ry. of the Alabama State Docks Dept.*, 377 U.S. 184, 186 (1964) (citing *Hans*). See also *DeKalb County School Dist. v. Schrenko*, 109 F.3d 680, 688 (11<sup>th</sup> Cir. 1997): “The Supreme Court has found no general abrogation of Eleventh Amendment immunity for claims brought pursuant to the Fourteenth Amendment” (citing *Quern v. Jordan*, 440 U.S. 332 (1979)).

To be sure, Congress may expressly legislate an abrogation of a state’s Eleventh Amendment immunity if it does so pursuant to §5 of the Fourteenth Amendment, but “only by making its intention unmistakably clear in the language of the statute.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Congress has never legislatively abrogated the states’ immunity against Fourteenth Amendment claims, and therefore *Pugh* remains the correct statement of the law to this day.<sup>1</sup>

**B. Title VI Only Authorizes Actions Against “Programs Or Activities.”**

Title VI does not authorize claims against states. It is directed solely at programs and activities of states. Its operative provisions are clear: “No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.” 42 U.S.C. § 2000d. The definition

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<sup>1</sup> Congress has used its Fourteenth Amendment enforcement powers to enact legislation which abrogates Eleventh Amendment immunities that would otherwise bar claims against state programs or agencies *under those statutes*, but as per *Schrenko*, has never opened the door of the federal courts to general claims against states premised on the Fourteenth Amendment itself, as opposed to claims of relief under specific federal statutes.

of "program or activity" in Title VI further emphasizes that the state as a whole is not a proper party under Title VI. Section 2000d-4a(1) defines "program or activity" as:

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.

This definition speaks of a "department, agency, special purpose district or other instrumentality of a State..." or some other "entity of such state." Therefore, both the language and the structure of the definition exclude the State as a whole from the list of eligible defendants under a Title VI claim. This was acknowledged by the United States Court of Appeals for the Fifth Circuit in an opinion binding in the 11<sup>th</sup> Circuit:<sup>2</sup>

The use of the terms chosen to denote the recipients of the federal financial assistance i.e., "programs" and "activities" connotes some subset or subsets of a greater entity. The State of Mississippi, for example, receives "federal financial assistance" in the generic sense of those words, but no one would contend that section 504 therefore reaches all proprietary and governmental activities of the State of Mississippi.

*Brown v. Sibley*, 650 F.2d 760, 767 (5<sup>th</sup> Cir. July 16, 1981).<sup>3</sup>

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<sup>2</sup> All decisions of the former Fifth Circuit handed down before October 1, 1981, are binding in the 11<sup>th</sup> Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11<sup>th</sup> Cir. 1981 (en banc)).

<sup>3</sup> The Fifth Circuit was speaking to section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) but applying interpretations of Title VI because of what it termed "the virtual identity between the discrimination prohibitions of section 504 and those of Title VI . . ." *Brown*, 650 F.2d at 767-68.

The United States Court of Appeals for the Seventh Circuit – also construing section 504 of the Rehabilitation Act, as amended – has likewise concluded that the definition of “program or activity” was not “intended to sweep in the whole state or local government” and thus that no claim would lie against the state or local government, but only against a program or activity of same. *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7<sup>th</sup> Cir. 1991).

Following *Schroeder*, the court in *Hodges v. Public Bldg. Comm’n of Chicago*, 873 F. Supp. 128 (N.D. Ill. 1995), determined that “program or activity” did not embrace the entire city in a Title VI claim precisely because the city was, obviously, not a subset of itself and therefore no claim could be stated against the city.

No federally-funded program or activity is referenced in the Complaint. There is only a blanket averment in paragraph 10 of the Complaint that the State “has departments, agencies and political subdivisions which are programs or agencies receiving federal financial assistance . . .”. Nowhere in the Complaint are any of these programs or agencies **specified**, nor is **any connection** averred between their use of federal dollars and any of the wrongs claimed or relief requested by these plaintiffs. Certainly the State has not been alleged to be a program or activity of itself.

Thus, no cognizable claim has been or could be stated against the State of Alabama under Title VI for its allegedly discriminatory activity in the adoption of the constitutional provisions challenged in this action.

In addition to Title VI's inapplicability to State governments as a whole, Title VI is substantively inapplicable to the entirety of the plaintiffs' pleading, and under controlling standards for sufficiency of federal pleading,<sup>4</sup> plaintiffs have failed to state a plausible claim under that statute. This will be discussed in greater detail in Section II (regarding the claims against the state officers), below. Those arguments are equally applicable to the State's argument for dismissal and are hereby adopted in addition to those stated in this section.

Because the plaintiffs may not state a claim either under the Fourteenth Amendment or under Title VI against the State of Alabama, and because they have failed to state a claim under Title VI regardless of the identity of the defendant, the plaintiffs' claims against the State are due to be dismissed in their entirety.

## **II. Plaintiffs Have Failed To State a Claim Against The State Officers.**

### **A. Plaintiffs Have Not Stated A Claim For Relief Under Title VI That Is Plausible On Its Face.**

#### **1. Fed. R. Civ. P. 8 Requires A Showing That The Claim of Relief Is "Plausible On Its Face."**

Fed. R. Civ. P. 8(a)(2) (emphasis added) requires that a pleading contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief."

Per the Supreme Court of the United States, Fed. R. Civ. P. 8,

demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986))]. A pleading that

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<sup>4</sup> See *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ U.S.L.W. \_\_\_, No. 07-1015, 2009 WL 1361536 (May 18, 2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.*, at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.*, at 570.

*Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ U.S.L.W. \_\_\_, No. 07-1015, 2009 WL 1361536, at \*12 (May 18, 2009).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court “retired” the oft-quoted language from *Conley v. Gibson*, 355 U.S. 41 (1957) – “a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief” (*Conley*, 355 U.S. at 45-46) – explaining that, “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough” and that, “after puzzling the profession for 50 years, this famous observation has earned its retirement.” *Twombly*, 550 U.S. at 562-63. As per the quotes from *Twombly* in the above-quoted portion of *Ashcroft*, the controlling standard under Rule 8 is one of “plausibility.”

The notion that *Twombly* might be limited to its context – an attempt to state a conspiracy claim under § 1 of the Sherman Act – was put to rest in *Ashcroft*:

Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S. at 554. That Rule in turn governs the pleading standard “in all civil actions and proceedings in the United States district courts.” Fed. R. Civ. P. 1. Our decision in *Twombly* expounded the pleading

standard for “all civil actions,” *ibid.*, and it applies to antitrust and discrimination suits alike. [citation omitted].

*Ashcroft*, 2009 WL 1361536 at \*16.

The process of reviewing a complaint on the “plausibility” standard was explained in *Ashcroft* as one of first determining which averments must be taken as true, and then determining if those averments are sufficient to support “the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at \*12.

“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at \*13.

Once the reviewing court has set aside the conclusory, legal allegations from the factual averments that must be taken as true, “a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*

“But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – that the pleader is entitled to relief.” Fed. Rule Civ. P. 8(a)(2).” *Id.*

**2. Plaintiffs Have Not Shown Any Entitlement To Relief Under Title VI And Have Not Even Directed Their Complaint To The Legal Area In Which Title VI Operates.**

**a. What Plaintiffs Have Pleaded:**

There are only two paragraphs in the Complaint in this action that reference

Title VI:

10. Defendant State of Alabama has departments, agencies and political subdivisions which are programs or activities receiving federal financial assistance within the meaning of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d and 2000d-4a. Congress has abrogated the Eleventh Amendment immunity of the State of Alabama with respect to plaintiffs' claims in this action. 42 U.S.C. § 2000d-7.<sup>5</sup>

\* \* \*

58. The racially motivated state constitutional property tax provisions challenged herein violate plaintiffs' federal statutory rights guaranteed by Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq.

Both of these recitations are, at most, "threadbare recitals" and under *Ashcroft* therefore deserving of the label "legal conclusion" and the consequent treatment that they need not be taken as true. They contain only (using *Ashcroft*'s language, cited in the preceding section) "labels and conclusions," but do not even rise to the still-insufficient level of "a formulaic recitation of the elements of a cause of action" due to the absence of a number of necessary elements of a Title VI claim. They are perfect examples of "naked assertions devoid of further factual enhancement" (*Ashcroft*, 2009 WL 1361536 at \*12). Indeed, paragraph 58 appears in the Complaint under the heading, "**ALLEGATIONS OF LAW.**"

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<sup>5</sup> In actuality, Congress has only purported via 42 U.S.C. § 2000d-7 to abrogate the States' Eleventh Amendment immunity with regard to the specific statutes referenced therein (including Title VI). As per *DeKalb County School Dist. v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997), Congress has never attempted to abrogate Eleventh Amendment immunity against a Fourteenth Amendment claim. Thus, to the extent that plaintiffs are arguing in their Complaint that Eleventh Amendment immunity is abrogated with respect to *all* of their claims in this action, their legal argument is patently incorrect.

But even if these two fact-free averments were to be taken as true, they would come nowhere close to making out a plausible claim of violation of Title VI, especially in light of the factual context of the lengthy averments in the Complaint, all of which go to allegedly discriminatory behavior in the adoption of limitations on state and local property taxes. “The Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.” *Ashcroft*, 2009 WL 1361536 at \*17.

“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’ [citation to *Twombly* omitted].” *Ashcroft*, 2009 WL 1361536 at \*12.

The claims that plaintiffs have attempted to state in their Complaint – that certain limitations on property tax found in Alabama’s Constitution are the result of impermissible, racial, discriminatory motive and thus may not be enforced – are entirely outside the purview of Title VI, which exists solely to prevent the use of federal dollars in a racially discriminatory manner. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 (1979). Accordingly, plaintiffs’ Complaint does not plausibly show any entitlement to relief under that statute.

**b. The Necessary Elements Of A Title VI Claim That Plaintiffs Have Not Pleaded And, Within The Factual Context Otherwise Averred, Cannot Plead:**

**i. Plaintiffs Have Not Pleaded Discrimination Under A Program Or Activity.**

Title VI's operative provision, 42 U.S.C. § 2000d (quoted in section I above), prohibits (1) exclusion from participation in, (2) denial of benefits of, and (3) discrimination under any program or activity that receives federal, financial assistance if any of those three things is done on the ground of race, color or national origin. At least one of these three must be alleged in order to state a claim under the statute. *See Hodges v. Public Bldg. Comm'n of Chicago*, 873 F. Supp. 128, 132 (N.D. Ill. 1995) (plaintiffs' complaint was due to be dismissed for failure to allege their status as intended beneficiary of, applicant for, or participant in a federally funded program). Plaintiffs have alleged none of the three. On this basis alone, apart from numerous other deficiencies, plaintiffs' Title VI claim is due to be dismissed.

**ii. Plaintiffs Have Not Pleaded Present-Day, Intentional Discrimination.**

There are other necessary elements beyond those referenced in the preceding section which are missing from the plaintiffs' Complaint as well. To make out a private claim under Title VI, intentional discrimination must be alleged. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1202 (11<sup>th</sup> Cir. 1999). Neither the Governor nor the Revenue Commissioner is charged in the Complaint with any intentional act of discrimination. The only intentional discrimination alleged in the Complaint is that of the purportedly racial motives accompanying adoption of property tax limitations in the Alabama Constitution of 1901, as amended. These allegations are premised not on averments of direct

evidence, but on the generalized notion that because racial motivations were present in other issues in Alabama politics and at other times in Alabama history, racial motivations must also be responsible for the property tax provisions.

The *Burton* court rejected the use of such historical generalizations to satisfy the requirement of pleading a present-day, discriminatory intent on the part of state actors:

This evidence is far too remote and attenuated to be probative of any discriminatory purpose in 1995. Simply put, we fail to see how evidence of past residential discrimination in housing, which ended almost twenty years before the decision at issue, and which is wholly unconnected to any annexation decision, or a prior refusal to annex standing alone establishes *any* intent, let alone a discriminatory one in 1995. As we said in *Holder*, “past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.”

\* \* \*

Lastly, Appellants’ historical evidence, which at most arguably raised an inference of the City’s discriminatory intent in the 1960s and 1970s, offers no plausible connection between any conceivable discriminatory intent rooted in the past and the 1995 act at issue today.

*Id.* (emphasis in original).

What *Burton* teaches is that in order to state a Title VI claim against the Revenue Commissioner and the Governor, there must be at least an allegation that they intentionally discriminated against *these plaintiffs* -- on the ground of race, color or national origin – in the administration of a federally funded program or activity. The allegation of historic discrimination does not suffice. The most recent constitutional enactment challenged by these plaintiffs was in 1978. Plaintiffs do not even pretend to allege that the Revenue Commissioner or the Governor are today

discriminatorily assessing or collecting taxes with the aid of federal grants. They do not, unlike the plaintiffs in *Burton*, even specify a present-day act on the part of these defendants. This is not the factual context they attempt to create with their averments of historical discrimination in tax policy. In other words, they are not making a Title VI claim despite their labeling.

*Ashcroft* has direct application to this element of intentional discrimination, as that was the primary element of the claim at issue in that case. There, plaintiff alleged that U.S. Attorney General John Ashcroft was liable for a constitutional tort because plaintiff had allegedly been mistreated while imprisoned. Despite allegations that Ashcroft “ ‘knew of, condoned and willfully and maliciously agreed to subject [plaintiff]’ to harsh conditions and confinement “as a matter of policy, solely on account of [his] religion, race and/or national origin” (*Ashcroft*, 2009 WL 1361536 at \*14) and that Ashcroft was the “principal architect” of this policy (*Id.*), the Court found that plaintiffs had failed to adequately, factually allege intent on the part of Ashcroft and therefore that plaintiff’s complaint did not “ ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’ [citation to *Twombly* omitted].” *Id.* at \*15.

Note how much less detail is present in the instant plaintiffs’ allegations of a purported violation of Title VI.

As a corollary to the requirement that a Title VI claim against these State officers be predicated on intentional discrimination, plaintiffs may not satisfy that

element with a disparate impact theory. *Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private action exists for enforcement of “disparate impact” regulations questionably promulgated under Title VI). Thus the attempt to (implausibly) connect some sort of attenuated impact of 1901 (or 1978) tax policy on present-day educational opportunity or tax administration cannot be used to satisfy the requirement that plaintiffs plead present-day, intentional discrimination on the part of the Governor and/or Revenue Commissioner.

**iii. Plaintiffs Have Not Pleaded Any Connection, Logical Or Otherwise, Between Any Identified, Federally Funded, Program Or Activity And Any Alleged Discrimination.**

Beyond the general requirement of pleading present-day, intentional discrimination on the part of a federally funded program or activity are the more **particular requirements** of (1) specifying *which* program or activity; (2) identifying the source of the federal funds; and (3) describing the logical connection between that program or activity and the exclusion, denial, or discrimination claimed.

The former Fifth Circuit, in the above-cited (and binding in the 11<sup>th</sup> Circuit) case of *Brown v. Sibley*, 650 F.2d 760 (5<sup>th</sup> Cir. July 16, 1981), after noting that the Rehabilitation Act’s operative language is identical to that of Title VI and Title IX, spoke to the requirements of identifying the program or activity and showing the connection between the program or activity and the plaintiff:

A private plaintiff in a section 504 case [footnote omitted] *must show* that the *program or activity with which he or she was involved, or from which*

*he or she was excluded*, itself received or was directly benefitted by federal financial assistance.

*Brown*, 650 F.2d at 769 (emphasis added).

This is the rule in the current Fifth Circuit as well. *See Lightbourn v. City of El Paso, Texas*, 118 F.3d 421, 427 (5<sup>th</sup> Cir. 1997) (to state a claim under analogous section 504, plaintiff must allege a specific program, with which he or she was involved, that receives federal funds). Plaintiffs have alleged none of these things.

Moreover, the plaintiffs' Complaint is concerned with state dollars that *do not come into state coffers* (because of allegedly tainted limitations on state and local property taxes) and not at all concerned with federal dollars that *do* come into state coffers. Title VI has no application whatsoever to the concerns raised by these plaintiffs.

In similar circumstances, a district court within the 11<sup>th</sup> Circuit dismissed a Title VI complaint, holding as follows:

The threshold requirement in a section 2000d suit is proof of a material connection between the federal assistance and the expenditures purportedly due the challenger [citations omitted].

\* \* \*

[Here] there is no showing either that the [defendant] discriminatorily administered the funds or that the plaintiff received, or was to receive, any federal money.

\* \* \*

In short, Plaintiff does not allege, *as section 2000d requires*, that the [defendant] discriminatorily distributed federal funds to which she had a claim of right.

*Stroud v. Seminole Tribe of Florida*, 574 F. Supp. 1043, 1046 (S.D. Fla. 1983) (emphasis added).

A mere allegation that the State receives federal dollars from unspecified grants to unspecified programs or agencies, such as that in paragraph 10 of the Complaint, is entirely insufficient to state a claim against a particular state officer. *See Lightbourn*, 118 F.3d at 427 (emphasis added):

Certainly, a plaintiff may not predicate a § 504 claim against a state actor on the mere fact that the state itself obtains federal money [citation omitted].

\* \* \*

Here, the plaintiffs have not even argued that the Secretary receives federal financial assistance, let alone presented any evidence on this point. Therefore, the plaintiffs have *failed to state a claim* under § 504 against the Secretary.

What is missing in this regard from the plaintiffs' Complaint and what could never be alleged within the factual context they have otherwise averred is – in the words of a sister court within the 11<sup>th</sup> Circuit<sup>6</sup> – a “logical nexus” between: (1) a (non-existent) federally-funded program associated with the limits on property tax and (2) the “discrimination”<sup>7</sup> these plaintiffs claim they are today suffering. The facts they have averred can never be forced into a Title VI mold because the discriminatory animus they allege was on the part of the State of Alabama itself in the adoption of the

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<sup>6</sup> *See Florida A.C.G. Council, Inc. v. Florida*, 303 F. Supp. 2d 1307, 1311 n. 3 (N.D. Fla. 2004) (Title VI claim dismissed due to plaintiffs' failure to allege “logical nexus” that would support its claim).

<sup>7</sup> The only “discrimination” these plaintiffs aver is an across-the-board lack of state spending on their “needs,” and they do not allege that such spending as does occur is done unequally on the basis of race, color or national origin, making it doubtful that they have alleged any discrimination at all.

constitutional provisions, not on the part of some federally funded program or activity of the State. The discriminatory effect they allege is in education, but they do not claim any intentional discrimination on the part of those responsible for administering the education system.

In like circumstances, the court in *Assoko v. City of New York*, 539 F. Supp. 2d 728 (S.D.N.Y. 2008), dismissed a Title VI claim brought against a “housing partnership” with the city, noting that “[p]laintiffs fail to state a claim under Title VI for many reasons,” including that they “fail to specify what federally funded program or activity discriminated against them” and they “do not allege in what manner the City or the partnership intentionally subjected them to discrimination or denied them benefits because of their membership in a protected category.” On this basis, the court deemed that “[a]ll of Plaintiffs’ allegations to this effect are entirely *conclusory*.” *Assoko*, 539 F. Supp. 2d at 740-41 (emphasis added).

**iv. Plaintiffs Have Not Pleaded That The Revenue Commissioner Or Governor Has Engaged In Any Discriminatory Act.**

The factual context of the Complaint – by which the sufficiency of its allegations must be judged under *Ashcroft* -- makes clear that no allegations of intentional discrimination on their part – or even on the part of any programs or activities administered by them -- are even implicitly at the heart of the claims plaintiffs have attempted to state against the Governor and the Revenue Commissioner. The Complaint seeks to enjoin the Commissioner and the Governor

from enforcing the challenged property-tax limitations (they do not explain how one might “enforce” the *absence* of a tax). It does not charge either officer with discriminatorily administering tax assessment or collection – or any federally funded program or activity -- on the basis of race, color or national origin, for instance by assessing property owned by blacks differently than that owned by whites. To the extent that the Complaint alleges any racial, discriminatory impact at all – and this is quite doubtful, given that it specifically claims that the same effects are felt by both black and white students – it alleges that both blacks and whites suffer from a lack of educational services. Yet the relief sought is solely to do with tax administration.

Plaintiffs state at paragraph 6 of their Complaint that, “tax reform and the provision of adequate education funding are the responsibility of the *legislative* branch of government.” Despite this, there is no claim against any *educational or legislative* program or activity that might receive federal dollars, only claims against two *executive* officers of Alabama.

There is no allegation that either of these State officers is administering *any* program or activity that both receives federal dollars and discriminates against these plaintiffs in the context of the injury they aver and the relief they seek. Instead what is alleged is that the "racially discriminatory property tax provisions in the Alabama Constitution ...impede...the ability of (plaintiffs') elected representatives to raise state and local revenues to fund the public services they need, including public education." Complaint at paragraphs 7, 8 and 9. The Complaint does not aver that either of these

officers has made any decision or done anything to impede the ability of plaintiffs' elected representatives to fully utilize the political process in an effort to raise revenues. Rather, plaintiffs aver in paragraph 15 of the Complaint that they are "injured by the racially discriminatory provisions of the Alabama Constitution complained of herein," not by any intentionally discriminatory act of the Governor or Revenue Commissioner.

Plaintiffs in the instant action are attempting to predicate a Title VI claim against two state officers on the mere fact that the State of Alabama, in some unspecified programs or activities, receives federal dollars. But they are not seeking relief against any program or activity. They are seeking to judicially re-write Alabama's constitution, not to force an educational agency to expend federally funded resources in a non-discriminatory manner (indeed they do not even allege that educational spending is being done unequally on the basis of race, color or national origin). The "factual context" of the Complaint (in the words of *Ashcroft*) therefore shows that Title VI has absolutely nothing to do with the relief plaintiffs are seeking and the purported bases therefor. In the most literal sense, plaintiffs have utterly failed to state a claim under that statute, certainly not a "plausible" one under *Ashcroft* and *Twombly*.

Accordingly, the plaintiffs' Title VI claim is due to be dismissed.

**B. The Eleventh Amendment Prohibits Assertion of the Fourteenth Amendment Claim Against The Revenue Commissioner and the Governor.**

Plaintiffs' Fourteenth Amendment claim against the Revenue Commissioner and the Governor must also fail. As we have made clear above, the substance of this suit is against the State of Alabama, not the Governor or the Commissioner of Revenue. No program or policy administered or promulgated by either official is the subject of the Complaint. The Constitution of the State of Alabama and its implementing statutes and regulations are the sole subject of the Complaint. And according to the Complaint's allegations, the sole remedy sought is for the Court to strike scores of Constitutional and statutory provisions and hand the remnants over to the State Legislature to try to solve the alleged defects. Or if the Legislature does nothing, then presumably the Plaintiffs would want this Court to do so. Thus, neither the substantive allegations of the Complaint nor the remedies sought have anything to do with the Governor or the Commissioner of Revenue and everything to do with the State of Alabama, its Constitution and statutes.

As noted in Section I, above, the federal courts are not open to suits against states even when brought by citizens of the defendant state. *Hans v. State of Louisiana*, 134 U.S. 1 (1890). Even before *Hans* recognized that the states' immunity extended to suits brought by its own citizens, it was well understood that a suit in federal court against a state officer, in his official capacity, seeking relief against the state itself and not redress for some individual wrong committed by the state officer,

was a suit against a state for Eleventh Amendment purposes and was thus barred. *Ex parte Ayers*, 123 U.S. 443 (1887).

There were always exceptions to this general rule. The Court in *Ayers* recognized that state officers could be sued in federal court for “personal trespasses and wrongs” without transgressing the Eleventh Amendment because in such instances the state was not the real party in interest, but emphasized that, “where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates,” the Eleventh Amendment would act to bar such a suit. *Ayers*, 123 U.S. at 506.

Indeed, the *Ayers* Court reached back approvingly in this context to a quote from Chief Justice John Marshall from his opinion in *Governor of Georgia v. Madrazo*, 26 U.S. 110 (1828):

‘The claim upon the governor is as a governor. He is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. . . . In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made.’

*Ayers*, 123 U.S. at 488-89.

The case today credited with “creating” the major exception to the above, general rule (*Ex parte Young*, 209 U.S. 123 (1908)) did little more in this regard than compile examples of pre-existing exceptions and distinguish them from proper

applications of Eleventh Amendment immunity *which it did not disturb*. Indeed, the *Young* Court said that the injunctive relief it authorized against a state officer was “no new invention.” *Young*, 209 U.S. at 167.

What the *Young* Court did not invent, but did reiterate, was that private citizens could seek prospective, injunctive relief in federal court against state officers “who *threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce *against parties affected* an unconstitutional act.” *Id.* at 156 (emphasis added). Whatever it may mean for the instant plaintiffs to ask that the Revenue Commissioner and Governor be prohibited from “enforcing” the fact that Alabama has not levied a tax above a certain amount, it is certain that it does not include an injunction against either’s initiation of an unpleaded and unimagineable civil or criminal action against any of the plaintiffs.<sup>8</sup>

The prospective, injunctive relief that *Young* recognized as an exception to Eleventh Amendment immunity was only that aimed at preventing an unconstitutional (or otherwise federally prohibited) taking of property or liberty (such as enforcing an unconstitutional tax or criminally prosecuting a citizen under an unconstitutional law). This was clear in the pre-existing *Ayers* opinion: “[t]he vital principle in all such

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<sup>8</sup> Plaintiffs also seek declaratory relief; i.e., a declaration that property tax limits adopted in Alabama’s 1901 constitution, and certain revisions to same, none enacted more recently than 1978, were motivated by discriminatory animus and were therefore violative of the federal constitution. *Young* did not authorize such declaratory relief as an exception to Eleventh Amendment immunity. The Court in *Green v. Mansour*, 474 U.S. 64, 67 (1985), specifically held that “declaratory and notice relief related solely to past violations of federal law” is “barred by the Eleventh Amendment.”

cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights *of the complainant . . .*”. *Ayers*, 123 U.S. at 500, emphasis added. It was equally clear in *Young*, which concerned a claim that state officers were threatening to enforce railroad tariffs and legislation that “will, if enforced, deprive *complainants* and the railway company of *their property*.” *Young*, 209 U.S. at 130 (emphasis added).

The “act” the instant plaintiffs appear to complain of is not an “act” at all; rather it is that the State and county governments are *refraining* from imposing a tax greater than that authorized by the state’s constitution. This threatens to take no one’s property or liberty; rather, it accomplishes exactly the opposite. Neither the Revenue Commissioner nor the Governor is pleaded to be on the cusp of *any* illegal action against these plaintiffs which they could attempt to enjoin under *Young*. The Complaint does not seek to prevent any action by either officer, certainly no action that threatens the property, liberty or other rights of these plaintiffs.

Actions to stop threats of unconstitutional actions aimed at deprivations of a plaintiff’s liberty or property comprise the sort of injunctive relief that *Young* acknowledged as permissible despite the Eleventh Amendment. The injunctive relief that the *Young* Court continued to recognize as an impermissible suit against a state is exactly the sort of injunctive relief the instant plaintiffs seek in this action. It was argued to the *Young* Court that the opinion in *Fitts v. McGhee*, 172 U.S. 516 (1899), mandated that *all* injunctive relief against state officers, sought in their official

capacity, was barred by the Eleventh Amendment. The *Young* Court rejected that argument, and distinguished the relief sought in *Fitts* from that sought in *Young*, leaving *Fitts* intact and not overruled (indeed it has not been overruled to this day). See *Young*, 209 U.S. at 155-57.

The claim for injunctive relief sought in *Fitts*, and which the *Young* court acknowledged was indeed barred by the Eleventh Amendment, is best described by the *Fitts* Court itself, which distinguished permissible injunctions from impermissible ones thusly:

There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under sanction of an unconstitutional statute, from committing by *some positive act a wrong or trespass*, and a suit against officers of the state *merely to test the constitutionality of a state statute*, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.

*Fitts*, 172 U.S. at 529-30 (emphasis added).

The *Young* Court did not purport to include the latter formulation of the *Fitts* Court – that of a suit meant merely to test the constitutionality of a state statute – in the category of those to be permitted under the Eleventh Amendment. Rather, it cited *Fitts* approvingly and -- after explaining that the issue in *Fitts* was an allegedly unconstitutional toll, the collection of which had little if any connection to the state officers sued -- added that, “the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, *and there is no*

*principle on which it could be done. A state superintendent of schools might as well have been made a party.” Young, 209 U.S. at 156 (emphasis added).*

That the instant action is exactly of the sort the *Fitts* and *Young* Courts recognized as prohibited by the Eleventh Amendment is demonstrated conclusively by paragraph 6 of the Complaint (emphasis added), in which plaintiffs state,

[t]he *sole purposes* of the instant action are to obtain a declaratory judgment that the property tax restrictions in the Alabama Constitution this Court has already found to be purposefully discriminatory violate Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq., and the Constitution of the United States and to seek a prohibitory injunction against their future enforcement.

Just as the *Young* Court said of the *Fitts* case, the State Superintendent of Schools might as well have been made a party to the instant action for all that it has to do with any official duties of the Revenue Commissioner or the Governor. The enforcement of a tax which *does exist* cannot logically be equated with a state officer’s simple awareness that a different, hypothetical tax *does not in fact exist*. A person *who is not taxed* is not having his or her liberty or property threatened in any way that *Young* would allow as a basis for a suit against a state officer in a federal court.

In the intervening century since *Young* was decided, the Supreme Court of the United States has decided numerous cases under the doctrine the *Young* Court recognized and refined. None of those cases has overruled *Young*. None of those cases has overruled *Fitts*. Many have paraphrased *Young*, purporting to say what that

case said. *See, e.g., Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635 (2002) (injunction for “prospective relief” allowed over Eleventh Amendment challenge where plaintiffs sought to block enforcement of commission order that required them to pay compensation to another telecommunications carrier); *Papasan v. Allain*, 478 U.S. 265 (1986) (action to prospectively enjoin discriminatory spending of school funds was allowable).

In the most recent of these, the *Verizon* opinion, the Court was concerned with a claim for injunctive relief against officers of the Maryland Public Service Commission who sought to enforce a ruling that would have required the plaintiff to pay compensation to another carrier. In keeping with *Young*, the injunction at issue was one to block a positive action of a state actor threatening to violate the property rights of the plaintiff in a manner alleged to violate federal law. In that context, Justice Scalia wrote that, “[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’ ” *Verizon*, 535 U.S. at 645.

Justice Scalia, in explaining the reasoning behind the holding (that the Eleventh Amendment did not bar the plaintiff’s suit for an injunction against the Commission’s acts to enforce its ruling against the property of the plaintiff), did not disturb the Court’s earlier pronouncement regarding analysis of *Young*-doctrine questions, made in *Papasan v. Allain*, 478 U.S. 265, 279 (1986). There, the Court said that in

determining allowable forms of injunctive relief against a state officer on an Eleventh Amendment challenge, the Court is “guided by the policies underlying the decision in *Ex parte Young*,” i.e., the policies discussed above.

None of the cases citing *Young* in the intervening century since its decision has ever upheld, over an Eleventh Amendment challenge, the right of a private plaintiff to sue a state officer in federal court for the purpose of ordering him or her not to respect a limitation on state taxes. No such thing has ever been deemed a permissible injunction under the *Young* doctrine.

Instead, in *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952), the Court acknowledged the difference between what the instant plaintiffs seek, and a true, *Young*-type injunction to prohibit enforcement. On the way to holding that the Eleventh Amendment permitted a claim for injunctive relief against the State Revenue Commissioner – who was “threatening to act . . . by proceeding against *the appellant* for the *collection* of ad valorem taxes” (342 U.S. at 300, emphasis added) – the Court explained why *Ayers* was not a contrary holding; i.e., because:

[i]n that case, complainant had *not* alleged that officers threatened to tax its property in violation of its constitutional rights. As a result, the Court held the action barred as one in substance directed at the State . . . .

*Georgia R.R.*, 342 U.S. at 305.

The instant plaintiffs do not plead that either the Revenue Commissioner or the Governor is threatening to take any action whatsoever with respect to collection of any allegedly unconstitutional tax from them. It is clear from their -request for a one-

year “stay” of a ruling not yet made – in order to allow the Alabama Legislature to seek by alternate means an avoidance of the effect that nullification of the Lid Bill limitations would have – that these plaintiffs are seeking no specific remedy whatsoever and certainly not a prospective injunction of the type allowed under *Young*.

Plaintiffs do not wish to enjoin any threatened action by the Governor or the Revenue Commissioner; rather, they wish to force the Alabama Legislature and conceivably the People of Alabama themselves to take up an issue that the political process has not caused to be taken up; i.e., the raising of property taxes and the rewriting of the Alabama Constitution. Because they have not sought to prospectively enjoin some positive act of enforcement against them -- but instead merely to test the constitutionality of state constitutional and legislative provisions under the Fourteenth Amendment – this suit is not one against the Governor and the Revenue Commissioner, but against the State of Alabama itself.

Accordingly, plaintiffs’ Fourteenth Amendment claims are barred by the Eleventh Amendment.

### **Conclusion**

The plaintiffs have failed to state a Title VI claim, not because of mere technical deficiencies, but because the substance of their claim has nothing to do with any federally funded program or activity.

Plaintiffs may not state a claim in this court based on the Fourteenth Amendment because the Eleventh Amendment denies them a federal forum in which to do so.

These are the only claims they have attempted to state. The failure of both is discernible solely from the pleadings themselves. Accordingly, this action is due to be dismissed, in its entirety, as against all defendants.

Respectfully submitted by,

*/s Drayton Nabers, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of June, 2009, I served the foregoing via electronic mail upon the following:

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