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## I. Introduction

Plaintiffs, a group of African-American and white students in the Lawrence County (a majority white county) and Sumter County (a majority black<sup>1</sup> county) public school systems, filed this lawsuit in March 2008, seeking to invalidate several property tax provisions of the Alabama Constitution of 1901<sup>2</sup>, as amended, on the grounds that they allegedly violate Title VI of the Civil Rights Act of 1964<sup>3</sup> and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

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<sup>1</sup> For the purposes of this brief, the terms “African-American” and “black” will be used interchangeably and will have the same meaning.

<sup>2</sup> The Plaintiffs have challenged six constitutional provisions, Ala. Const. §§ 214, 215, 216, and 269, as well as Amendments 325 and 373. They have also challenged several statutes and regulations that implement these constitutional provisions. See Plaintiffs’ Interrogatory (“Int.”) Responses, Doc. 68, Int. 7. One of these statutes is Ala. Code § 40-7-25-1 (hereinafter referred to as the “Current Use Statute”), which provides for a method of valuing current use property which takes into account the productivity of the land and the soil quality, among other factors. §§ 214, 215, 216 and 269 set limits on the tax rates that state and local governments in Alabama can levy. §§ 325 and 373 amend § 217 and, among other things, set assessment ratios and property classifications, provide exemptions for charitable, religious and educational property, provide the authority and processes by which local governments can initiate tax increases, authorize current use treatment of residential, agricultural and timber property, and sets certain “lids” on tax collections. *See* Alabama Const. of 1901. Collectively, the state laws challenged by Plaintiffs will be referred to herein as the “Challenged Laws.” Amendments 325 and 373 and the Current Use Statute will be collectively referred to herein as the “post-1970 Laws.”

<sup>3</sup> Title VI provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

This Court has previously rejected these claims.<sup>4</sup> For this lawsuit, Plaintiffs reiterated many of their factual allegations from *Knight* and reconstructed their legal argument, invoking *Hunter v. Underwood*<sup>5</sup> as the applicable legal standard for proving their claims, and alleging that they are entitled to relief because the Challenged Laws were enacted with racially discriminatory intent and continue to have a racially discriminatory impact in the form of a reduced ability of African-Americans in Alabama to raise property tax revenues for government services.

Plaintiffs have now had the benefit of a lengthy and thorough discovery period in which they have sought evidence to support their pleadings and their claims. As Defendants will demonstrate in this brief, when viewing the evidence and claims in the light most favorable to Plaintiffs, there is no genuine issue with respect to any material fact, and Defendants are entitled to judgment as a matter of law. Consequently, Defendants are entitled to summary judgment on all claims. See Fed. R. Civ. P. 56(c).

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<sup>4</sup> See *Knight v. Alabama*, 458 F. Supp. 2d 1273, 1314 (N.D. Ala. 2004) (in which this Court considered factual allegations nearly identical to those made in this lawsuit, concluding that “Alabama’s property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure” and holding that “although the [property tax] provisions of the Alabama Constitution may represent poor public tax policy, the Court finds that those provisions do not violate the Fourteenth Amendment.”).

<sup>5</sup> 471 U.S. 222 (1985)

**II. Statement of Allegedly Undisputed Material Facts**

*County-level per capita property tax base analysis*

1. Residents of the eleven majority-black counties in Alabama have a higher per capita property tax base than residents in the eleven counties with the lowest percentage of black residents. Doc. \_\_\_, Bell Rpt. at 6.

2. The statewide weighted average of the per capita county property tax base for public schools is virtually identical for black citizens and white citizens. *Id.* at 7.

3. The correlation coefficient between race and per capita property tax base at the county level is approximately -0.07. *Id.*

4. The 13 counties with the lowest per capita property tax base have roughly the same percentage of black residents as the 13 counties with the highest per capita property tax base. *Id.* at 8.

*School system-level per pupil property tax base analysis*

5. Students in the 33 school systems with the highest percentage of black students have a greater property tax base per student than students in the 33 school systems with the lowest percentage of black students. *Id.* at 9.

6. The correlation coefficient between race and property tax base per student is less than 0.03. *Id.*

7. The statewide weighted average of the property tax base per student at the school system level is higher for black students than it is for white students. *Id.* at 10.

*County-level per capita property tax revenues analysis*

8. The percentage of the population that is black is higher in the 13 counties with the highest property tax revenues per capita for public education than it is in the 13 counties with the lowest property tax revenues per capita for public education. *Id.* at 11.

9. The statewide weighted average of the county-level property tax revenues per capita for public education is higher for black citizens than it is for white citizens. *Id.*

10. The correlation coefficient between race and county property tax revenues per capita for public education is roughly 0.06. *Id.*

*School system-level per pupil expenditure analysis*

11. The percentage of the student population that is black is higher in the 33 school systems with the highest levels of state and local per pupil expenditures than it is in the 33 school systems with the lowest state and local per pupil expenditures. *Id.* at 13.

12. The statewide weighted average of the state and local per pupil expenditures is virtually identical for black students and white students. *Id.*

*Sumter County and Lawrence County analysis*

13. Sumter County's per capita property tax base is higher than the statewide median. *Id.* at 14.

14. The state and local per pupil expenditures for Sumter County and Lawrence County are higher than the statewide median. *Id.*

15. Sumter County's per capita property tax revenues for public education are higher than the statewide median.

*Intent*

16. Plaintiffs have not identified a single written or oral statement from the 1970s or 1980s by a single member of the Legislature that supports the claim that any of the post-1970 Laws was motivated by a racially discriminatory intent. *See* Doc. 68 at Int. 26, 27.

17. Plaintiffs have not identified evidence from any source written before 2003 that supports the claim that any of the post-1970 Laws was motivated by a racially discriminatory intent.

18. There is no testimony from any legislator who served in the Alabama Legislatures that passed any of the post-1970 Laws of any inference of discriminatory intent in the passage of these bills.

19. There is no evidence that any legislator who served in the Alabama Legislatures that passed any of the post-1970 Laws was aware of any potential discriminatory effect that might result from the passage of these bills.

20. The Plaintiffs' historian experts, Drs. Flynt, Norrell, Frederick, and McKiven, have interviewed no legislators that served in the Alabama Legislatures that passed any of the post-1970 Laws.

21. There are no newspaper articles or editorials showing that any of the post-1970 Laws were passed with a legislative intent to discriminate against African Americans because of their race.

22. The legislative records attached herein as Exhibits 21-26 accurately reflect the voting record in the Alabama Legislature during the passage of the post-1970 Laws.

*Data*

23. Officials from the Department of Revenue ("DOR") and the State Department of Education ("SDE") met with Plaintiffs' data consultant Ira Harvey on September 25, 2009, and offered to answer any questions he or Plaintiffs' counsel had about the data relied on by Defendants' to support their case. See Exh. 29, Bass Aff. at ¶¶ 9-10; Exh. 28, Email from Defendants' counsel David Perry to Dr. Harvey; Exh. 32, Email exchange between David Perry and Plaintiffs' counsel Jim Blacksher.

24. At the end of the meeting, Dr. Harvey stated that he had no questions about the authenticity or validity of any of Defendants' data sources, but that if any questions arose, he would contact DOR or SDE or Defendants' counsel. Bass Aff. at ¶ 13.

25. From the date of the meeting through the end of the discovery period, neither Dr. Harvey nor Plaintiffs' counsel alerted Defendants' counsel or state officials to any data-related questions. *See id.* at ¶ 17.

26. With the exception of one summary spreadsheet that has been prepared by DOR at Defendants' counsel's request and that has been provided to Plaintiffs', all DOR data sources relied on by Defendants' expert witness Dr. Michael Bell were prepared by DOR in the ordinary course of business. Bass Aff. at ¶¶ 2, 8 and 16.

### **III. Legal Standard for Summary judgment motions**

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment when the pleadings and supporting materials demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to her case, and on which the plaintiff will bear the burden of proof at

trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). A plaintiff cannot defeat a properly supported motion for summary judgment without an affirmative presentation of specific facts showing a genuine issue, and may not merely rely on the general allegations of the pleadings. *See Anderson*, 477 U.S. at 248. A mere "scintilla" of evidence supporting the plaintiff's position is not enough to survive summary judgment; the plaintiff must produce evidence so the trier of fact could reasonably find for her. *See Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 242).

#### **IV. Summary of Argument**

Plaintiffs have been attempting to craft a valid argument that the Challenged Laws violate the Equal Protection Clause and Title VI since at least 2003. After a lengthy discovery period solely related to addressing this question, Plaintiffs have yet to create a genuine issue with respect to any material fact. No Plaintiff has suffered a particularized injury, nor have the Sumter County plaintiffs shown any harm relative to residents in other counties in Alabama. Plaintiffs have not demonstrated that the Challenged Laws' procedural hurdles have caused them any injuries, nor have they shown that any potential injury, other than the most generalized of grievances in the form of a simple reduction in their per capita property tax base, is redressable by their requested relief.

Even if Plaintiffs could meet the constitutional standing requirements, they have not produced any evidence of a racially disproportionate impact flowing from the Challenged Laws. In addition, they have failed to present any evidence that a single legislator was either motivated by race in enacting any of the Challenged Laws or aware of any potential racially discriminatory effects. Finally, Plaintiffs have failed to substantiate their claims of intentional racial discrimination under a program or activity that receives federal funds.

In short, viewing the evidence and claims in the light most favorable to Plaintiffs, Defendants are entitled to judgment as a matter of law.

**V. Argument**

**A. Plaintiffs' claims fail as a matter of law because Plaintiffs have not satisfied basic standing requirements.**

Any party invoking federal jurisdiction bears the initial burden of proving all elements of Constitutional standing in order to adjudicate a claim. *Bischoff v. Osceola County*, 222 F.3d 874, 877 (11thCir. 2000).

**1. Plaintiffs have suffered no particularized injury.**

The core of Constitutional standing is that plaintiffs have suffered, or imminently will suffer, an injury that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural or 'hypothetical'' or a 'generalized grievance.' *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted); *Valley Forge Christian Coll. v. Am.*

*United for Separation of Church & State*, 454 U.S. 464 (1982)<sup>6</sup>. Plaintiffs bear the burden of proving they have suffered actual or imminent injury by alleging “specific concrete facts” establishing an “actual, concrete, or particularized injury.” See *Bischoff*, 222 F.3d at 877 (11th Cir. 2000); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

In *Hunter v. Underwood*, the Supreme Court considered the constitutionality of § 182 of the Alabama Constitution, which prohibited individuals convicted of misdemeanors involving “moral turpitude” from voting in state elections. *Hunter*, 471 U.S. 222 (1985).<sup>7</sup> The Court allowed plaintiffs to pursue their claim because they had suffered a “distinct and palpable” injury – being blocked from voter registration – which required no speculation or conjecture to identify. Accordingly, the *Hunter* plaintiffs had clear standing to sue. *Id.* at 223-224.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, plaintiffs challenged, on Equal Protection grounds, a zoning board’s decision not to rezone certain property from single-family to multiple-family in

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<sup>6</sup> Holding that plaintiffs lacked standing to challenge a federal government grant because they sued solely as taxpayers alleging a ‘generalized grievance’ to require the government to follow the law.

<sup>7</sup> Plaintiffs, a black male and white male who had been blocked from voter registration pursuant to § 182 because they had been convicted of a misdemeanor involving “moral turpitude,” sued the Montgomery County and Jefferson County Boards of Registrars under 42 U.S.C. §§ 1981 and 1983 seeking a court declaration invalidating §182 as applied to individuals convicted of misdemeanors and an injunction against future application of §182 against the same group.

classification. *Village of Arlington Heights*, 429 U.S. 252 (1977)<sup>8</sup>. The Court found that standing existed for at least one of the prospective tenants because he demonstrated that he lived 20 miles away from his place of employment, that the proposed development was closer to his job, that he would qualify for the proposed housing development if it were built, and that he would probably move to the new development if it were built because of its proximity to his job. <CITE> In other words, his injury was not a generalized grievance because the injury to him was specific and particularized when compared with other potential applicants.

Here, Plaintiffs' alleged injuries are neither concrete, particularized, nor real. Plaintiffs have not suffered an injury remotely analogous to the type of clear and specific injury suffered when an individual is denied the right to vote. Nor have Plaintiffs demonstrated an injury comparable to losing a specific opportunity to move closer to the workplace. Instead, Plaintiffs have merely alleged that they are injured because the challenged tax provisions "impede their ability and the ability of their elected representatives to raise state and local revenues adequately to fund the public services they need, including public education." Comp. at ¶¶ 7-9. Plaintiffs' alleged injury could not be more 'generalized' and does not constitute an injury sufficiently specific to confer standing on them. Rather, Plaintiffs'

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<sup>8</sup> A nonprofit developer wanted the property rezoned in order to build multi-family housing units for low- and middle-income tenants. Roughly 40% of the qualified applicants were projected to be African-American, while only 18% of the general population in the area was African-American. *Id.*

generalized grievance is that their property tax base is not as high as they would like it to be.

Unlike the types of particularized injury that were alleged, substantiated, and found sufficient in *Arlington Heights* and *Hunter*, Plaintiffs in this case have not even alleged a single injury that is any different than that which any student, black or white, in any resource-poor school system in Alabama faces. See, generally, Doc. 68, Int. 40; Complaint at ¶¶43-57; Doc. 44, Section V.

Defendants contested Plaintiffs' standing in a Motion to Dismiss in 2008. Docs. 22 and 24. This Court determined that because many of Defendants' arguments relating to standing were intertwined with the merits of Plaintiffs' claims, Plaintiffs were entitled to proceed to discovery. The facts that have come to light during the discovery period have significantly strengthened Defendants' arguments.

Every single one of the plaintiffs testified through his or her parent that he or she either has not yet been injured or that any alleged injuries are no different than those faced by students in any rural or poor school system:

- **India Lynch:** plaintiff's injury is a general lack of resources. Lynch Dep. at 22:23-23:2, id. at 27:12-20.
- **Wendell Pride:** plaintiff's injury is a general lack of school funding in Lawrence County. See Pride Dep. at 19:21-21:4.

- **Ivy Rose Ball:** plaintiff is affected no differently by the challenged tax provisions than any other child in a rural area of Alabama. Ball Dep. at 37:21-38:1. Indeed, Ms. Ball testified that her daughter has not yet even been injured by the challenged tax provisions. See Ball Dep. at 21:10-21:14<sup>9</sup>; see also id. at 38:7-11.
- **Slade and Cannon Berryman:** plaintiffs' only injuries are a general instability of school funding and a general shortage of school funding from local property taxes. Berryman Dep. at 31:12-19.
- **Rochester and Cezanne Anderson:** plaintiffs' injuries are a general shortage of education funding in the Lawrence County school system and are no different than any injuries to children in other poorly-funded school systems around the state. Anderson Dep. at 14:18-23; 24:16-21.
- **Michael Brooks:** plaintiff *might* be injured by a general lack of resources for local public education in Sumter County. Brooks Dep. at 17:11-17.<sup>10</sup> Mr. Brooks further testified that his son has not yet been injured by the challenged tax provisions. Brooks Dep. at 29:14-30:2.<sup>11</sup>

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<sup>9</sup> "Q: Do you feel that Ivy Rose is injured as a result of the property tax structure in Alabama? A: I think that she – being in first grade, not yet. But it's coming."

<sup>10</sup> Q: Do you think that your son, Michael, has been injured by the property tax structure in Alabama? A: I feel that – as far as injury-wise, I feel like it might be like a down side to the situation because of the funding ... is not there ..."

<sup>11</sup> Plaintiffs may attempt to argue that Mr. Brooks did not understand what was meant by the word "injury," but "injury", "injuries", and "injured" had already been used more than a dozen

- **Zekeiah Ormond:** “it is too soon to tell” whether plaintiff has been injured in any way by the challenged tax provisions. Ormond Dep. at 10:14-12:6.

From the generalized nature of the allegations in Plaintiffs’ complaint and from the plaintiffs’ own deposition testimony, it is clear that Plaintiffs have no “actual, concrete and particularized” injury. *See Lujan* 504 U.S. at 560-61.<sup>12</sup>

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times by both Mr. Brooks himself and by Defendants’ counsel without any suggestion from Mr. Brooks or from Plaintiffs’ counsel that Mr. Brooks did not understand what was meant by the term. See Brooks Dep. at 17:12, 17:14, 18:14, 18:17, 20:13, 20:22, 21:14, 21:15, 28:11, 28:15, 29:3, 29:6. Brooks’ testimony that his son has not been injured yet is also corroborated by his earlier description of the injury (see Brooks Dep. at 17:11-16: “I feel that – as far as injury-wise, I feel like it might be like a down side to the situation because of the funding...”) and by his statement that “I’m just claiming that if he get the basics here at the high school level, then he’ll be able to take off just like that. But if he misses it at the high school level, then he’s got to play catch up, and the other kids are way ahead of him.” Brooks Dep. at 29:6-29:13. At any rate, it is undisputed, that to the extent Brooks has alleged an injury at all, that injury is no different that that faced by any student in a resource-poor school system.

<sup>12</sup> Perhaps recognizing that they could not otherwise establish a cognizable injury, Plaintiffs argued in their response to Defendants’ Motion to Dismiss that:

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

Doc. 31 at 21 (citing *Northeastern Florida Chapter, Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993)).

The problem for the Plaintiffs is that in this case, there is no unequal treatment, nor is there a claim of unequal treatment, so Plaintiffs cannot rely on the *Jacksonville* line of reasoning to establish an injury. In their response to Defendants’ interrogatories, Plaintiffs explicitly disavow any contention that the challenged tax provisions “erect a barrier that makes it more difficult for members of one group (such as African Americans) to obtain a benefit than it is for members of another group (such as whites) to obtain the same benefit.” Doc. 68, Int. 20. As Plaintiffs readily admit, they are claiming not that the challenged tax provisions treat blacks any differently than whites, but that the provisions were enacted with a racially discriminatory intent and that they have a racially discriminatory impact on blacks. Therefore, the *Jacksonville* quote cited by Plaintiffs and appropriate for discriminatory treatment cases is simply inapplicable to Plaintiffs’ allegations of a discriminatory impact. See *Arlington Heights*, which required

Accordingly, Plaintiffs' claims are due to be dismissed in their entirety as a matter of law.

**2. Plaintiffs in Sumter County are not disadvantaged in comparison to other counties in Alabama.**

Plaintiffs alleged that the named Plaintiffs, all of whom reside in Sumter and Lawrence counties, are particularly injured by the allegedly discriminatory effects of the Challenged Laws. Comp. at ¶ 49.<sup>13</sup> However, Plaintiffs have not created an issue of material fact as to whether residents of Sumter County are at a disadvantage when compared to residents of other counties across the state in terms of their ability to raise revenues for government services.

A comparison of Sumter County's local property tax base per capita to other counties' local property tax capacity per capita for county government services reveals that Sumter County's capacity actually exceeds the statewide median for counties by more than 5%.<sup>14</sup> See Bell Rpt. at 14. Similarly, state and local

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individual plaintiff to establish a particularized injury rather than allowing a mere allegation of generalized unequal treatment.

As a result, Plaintiffs must establish the type of particularized, concrete, injury proven in discriminatory impact cases like *Hunter* and *Arlington Heights*. Construing all allegations and facts in the light most favorable to Plaintiffs, Plaintiffs have failed to establish such an injury.

<sup>13</sup> By including majority white Lawrence County, Plaintiffs only highlight the fact that this lawsuit is about wealth, not race.

<sup>14</sup> By alleging that the challenged tax provisions impede their ability to raise revenues "adequately to fund the public services they need, *including* public education," Comp. at ¶¶ 7-9, and by defining "public service[s]" to mean "public school educational resources of every kind and *all other services and facilities provided by county government*," Doc. 68 at Int. 41(iii), Plaintiffs have made clear that they are concerned with citizens' abilities to raise property tax

expenditures per pupil on K-12 public school students in Sumter County exceed the state median for school systems by roughly 8%. *Id.* These facts are undisputed, and they clearly demonstrate that residents in Sumter County have not been harmed relative to other counties by the challenged tax provisions.<sup>15</sup>

Construing all allegations and facts in the light most favorable to Plaintiffs, Plaintiffs have failed to establish any injury which can sustain their causes of action.<sup>16</sup>

Accordingly, Plaintiffs' claims are due to be dismissed in their entirety as a matter of law.

**B. Plaintiffs' claims fail as a matter of law because the Challenged Laws do not operate to the disadvantage of a suspect class of citizens and are rationally related to a legitimate government purpose.**

Plaintiffs and Defendants agree that in order for their claims to be successful, Plaintiffs must prove, in addition to many other elements, both racially discriminatory effect and racially discriminatory intent.<sup>17</sup> However, only if a law is

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revenues to fund all types of government services, not just education. Therefore, the most relevant measure is the property tax base per capita for all government services in the county.

<sup>15</sup> The fact that Lawrence County, a disproportionately white county, has a significantly lower property tax base than both Sumter County and the statewide median further undercuts Plaintiffs' argument that Plaintiffs' alleged injuries have anything to do with race.

<sup>16</sup> In addition, Plaintiffs reincorporate their causation and redressability arguments from their Motion to Dismiss and Brief in support thereof as if fully set forth herein. If the Court would find a more detailed discussion of causation and redressability issues as clarified by discovery that has been exchanged, please see Appendix A.

<sup>17</sup> *See, e.g., U.S. v. Armstrong*, 517 U.S. 456, 465 (1996) (describing "ordinary equal protection standards" as requiring both discriminatory effect and discriminatory purpose); *Palmer v.*

shown to have a discriminatory impact on a suspect class of citizens is it necessary to consider allegations of discriminatory intent.<sup>18</sup>

**1. *Rodriguez*, not *Hunter*, controls Plaintiffs' Equal Protection claims**

Despite Plaintiffs' insistence to the contrary, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), not *Hunter v. Underwood*, is the controlling precedent under which Plaintiffs' Equal Protection claims should be analyzed. The allegations made in *Rodriguez* are virtually identical to Plaintiffs' claims in this lawsuit in all material respects. The *Rodriguez* plaintiffs, a group of Mexican-American parents of school-age children who lived in the Edgewood school district's geographic limits, brought an equal protection challenge to Texas' system of financing K-12 public schools, which relied heavily on local property taxes. *Rodriguez*, 411 U.S. at 4. The Edgewood school system was more than 96% minority and had one of the lowest property tax bases in the state, as measured by assessed values per pupil. *Id.* at 12. Substantial disparities existed between school systems in Texas in terms of the value of property that was available to tax. *Id.*

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*Thompson*, 403 U.S. 217, 224 (1971) (noting that a law cannot violate equal protection "solely because of the motivations of the men who voted for it").

<sup>18</sup> See *Coleman v. Miller*, 117 F.3d 527, 529 (11thCir. 1997) (rejecting an Equal Protection claim arising from Georgia's adoption of a state flag that incorporates a confederate symbol, the court stated that plaintiff "must *first* demonstrate that the flying of the Georgia flag produces *disproportionate effects along racial lines*, and *then* must prove that racial discrimination was a substantial or motivating factor behind the enactment of the flag legislation") (citations omitted).

The *Rodriguez* plaintiffs sought to certify three classes of plaintiffs: 1) all Mexican-American students and parents living in the Edgewood school district, 2) all students and parents of any race living in the Edgewood school district, and 3) all other students and parents who were minorities or who were poor and living in school districts with lower property tax bases. See *Rodriguez* Complaint, attached as Exhibit 30, at ¶¶ 3-5. They alleged that they were injured because the low property tax base and low family incomes in the area precluded the Edgewood district from raising revenues from local property taxes in a sufficient amount to fund their schools at the same level as schools in other school districts. *Id.* at ¶ 8(b). They further alleged that districts with smaller percentages of minority students had higher levels of per pupil school expenditures. The plaintiffs explicitly alleged a “pattern of discrimination against Mexican-Americans” in Texas, that Mexican-Americans were disproportionately poor compared to whites, and that the racial discrimination they alleged was “willful.” *Id.* at ¶ 13.

The claims in *Rodriguez* could hardly be more similar to the claims in this case.

In analyzing the claims in *Rodriguez*, the Supreme Court stated:

We must decide, *first*, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny ... If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute

an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

*Rodriguez*, 411 U.S. at 17 (emphasis added).

The Court in *Rodriguez* ultimately held that neither a suspect class nor a fundamental right was at issue. A primary basis for this holding was that, just as in this case, “[t]he case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.” *Id.* at 19. The class was described as “schoolchildren throughout [Texas] who are *members of minority groups* or who are poor.” *Id.* at 5 (emphasis added).<sup>19</sup> The Court also rejected the idea that “a class of this size and diversity could ever claim the special protection accorded ‘suspect’ classes.” *Id.* at 26. Similarly, the class sought here is one of all public school students and residents of Alabama, black and white, who claim to be “injured” by the Challenged Laws. This amorphous “classification” is no classification at all. In short, the class sought in *Rodriguez* was unacceptably indistinct; the class sought in *Lynch* is even broader and less distinct.

Of such “classes,” the *Rodriguez* court stated:

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a *large, diverse, and amorphous* class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts . . . We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class.

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<sup>19</sup> Compare Plaintiffs' Complaint in this lawsuit at ¶46 (“low-income citizens and poor, rural counties”) and ¶43 (“particularly rural and majority-black schools”).

*Id.* at 28 (emphasis added). So too, the class here is large, diverse and amorphous, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts, and the Challenged Laws do not operate to the peculiar disadvantage of any suspect class.

The *Rodriguez* Court saw no reason to stray from the century-old deference traditionally afforded state legislatures in matters of taxation:

This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause: ‘The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . [I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . .’

*Rodriguez*, 411 U.S. at 40-41 (citation omitted).

Plaintiffs in this case argue that *Hunter* controls because of the alleged racial animus behind the challenged Alabama laws, but the plaintiffs in *Rodriguez* also alleged willful racial discrimination to no avail. That African-Americans *can* constitute a suspect class is indisputable. The Court in *Rodriguez*, however, made clear that the first step in an equal protection analysis is to determine whether the challenged law “operates” to the disadvantage of a suspect class, not whether it is *alleged* to so operate. See *id.* at 17. As in *Rodriguez*, these Plaintiffs have failed to

establish that the Challenged Laws operate to the peculiar disadvantage of any identifiable and definable group in Alabama that can be considered “suspect.”

**2. The Challenged Laws have a constitutionally rational basis.**

Because the Challenged Laws do not operate to the peculiar disadvantage of a suspect class, rational basis review is appropriate. This rational basis inquiry in this case is quite simple, as the Eleventh Circuit has already conducted the analysis with respect to many of the restrictions in Amendments 325 and 373 and determined that those restrictions are rationally related to achieving a permissible state purpose.<sup>20</sup> Furthermore, the U.S. Supreme Court has held that general restrictions or procedural hurdles to raising taxes do not constitute a denial of equal protection.<sup>21</sup>

**C. Plaintiffs’ claims fail as a matter of law because the Challenged Laws do not have a discriminatory impact on African-Americans in Alabama.**

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<sup>20</sup> See *Weissinger v. White*, 733 F.2d 802, 806 -807 (11thCir. 1984) (upholding Amendment 373 against an equal protection challenge) (“The state is free to enact measures that attempt to perpetuate certain desirable uses of its land in the face of economic pressures to convert the property to other more lucrative pursuits. Institution of a favorable tax system is one rationally related means by which to effect that end. A formula for the evaluation of farm and timber property that routinely holds assessment values below the normal selling price will certainly encourage the continued use of land for its present purpose. Therefore, in view of Alabama’s legitimate goal to preserve land for agriculture and forestry, we conclude that any disparity in the valuation of two of the types of Class III property is rationally related to the achievement of a permissible state purpose.”); see also *McCarthy v. Jones*, 449 F. Supp. 480 (S.D. Ala. 1978) (upholding Amendment 325 against an equal protection challenge).

<sup>21</sup> See *Gordon v. Lance*, 403 U.S. 1, 5-6 (1971) (rejecting an Equal Protection challenge to a supermajority requirement and stating that the level of importance of “severely limit[ing] the power of [state] legislature[s] to levy new taxes ... is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment.”)

Even if *Hunter*, not *Rodriguez*, were to control, Plaintiffs' claims still fail because the challenged laws have no discriminatory impact on blacks in Alabama. After *Rodriguez*, Plaintiffs cannot viably argue that demonstrating the existence of a discriminatory impact on the basis of poverty, wealth, or geography is sufficient to sustain an equal protection claim, at least when no fundamental right is abridged and when the law challenged has a rational basis. As a result, Plaintiffs have nominally sought to plead their case as one of racial discrimination. However, to establish the existence of a discriminatory impact in a race-based Equal Protection claim, it is not enough to show that African-Americans as a class are harmed by the challenged laws; rather, they must be harmed disproportionately relative to whites.<sup>22</sup>

Plaintiffs apparently understand that they cannot establish a racially discriminatory impact unless they limit their analysis to comparisons limited to specific subsets of the black population who also happen to be poor and/or happen to live in areas with a lower than average per capita property tax base. This would explain the conspicuous lack of *a single allegation* in the Complaint that blacks in Alabama are more likely than whites to live in jurisdictions with a low per capita property tax base, that blacks in Alabama are more likely than whites to live in

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<sup>22</sup> See *Hunter v. Underwood*, 471 U.S. 222, 227-228 (1985) (finding "discriminatory impact" and "disparate effect" based on the disfranchisement of more than ten times as many blacks as whites).

jurisdictions with low property tax revenues, or that blacks in Alabama are more likely than whites to be enrolled in school systems that spend less money per pupil. Instead, plaintiffs rely on allegations that combine race with geography or poverty. *See, e.g.*, Comp. at ¶ 43 (alleging underfunding of the state’s public schools, “particularly rural and majority-black schools”); ¶ 49 (“crippling effect on poor, majority black school districts”); ¶ 51 (“low- and middle-income students, especially African Americans,” are disadvantaged).

Perhaps the most revealing allegation in the Complaint is the first sentence of ¶ 46: “This tax system disadvantages low-income citizens and poor, rural counties.” All of Plaintiffs’ arguments regarding disparate impact come back to this central reality – that if the Challenged Laws have a discriminatory impact at all, it is on the basis of wealth, not race. Plaintiffs recognize this fact and are forced to argue that this Court should limit the comparison group in its impact analysis to, not coincidentally, a poor, rural part of the state that happens to be predominantly black.

Even the named Plaintiffs themselves recognize that this case is not about race. Every single named Plaintiff testified to that effect through his or her parent,<sup>23</sup> with the lone exception of Ms. Ormond, who stated that it was “too soon

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<sup>23</sup> Ms. Lynch testified that what she perceives as a lack of education funding resources in Lawrence County is not necessarily related to race, but is instead more closely related to the level of wealth in the community. Lynch Dep. at 21:18-22:10. Mr. Pride put it this way: “it’s

to tell” whether her daughter has been injured yet by the Challenged Laws. *See* Ormond Dep. at 10:14-12:6.

Plaintiffs’ counsel are essentially trying to convert a case of wealth and/or geographic discrimination into a case of race discrimination. Neither the law, the facts, nor the named plaintiffs’ representatives’ sworn testimony support their argument. Plaintiffs are fundamentally wrong about what is required to demonstrate the existence of a discriminatory impact, and when viewing the undisputed facts in the light most favorable to Plaintiffs, the Challenged Laws have no discriminatory impact on blacks in Alabama.

**1. Establishing a disparate impact requires analyzing all blacks and all whites in Alabama.**

It is undisputed that the Challenged Laws are applicable to all counties in the state. Indeed, Plaintiffs alleged in their interrogatory responses that the Challenged Laws have a racially discriminatory effect in all 67 counties in Alabama,<sup>24</sup> and Plaintiffs further alleged that even students in school systems with some of the

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really not to me a discriminatory situation. . . . I don’t think color has anything to do with it.” Pride Dep. at 44:7-44:19. Ms. Ball does not believe that black students suffer more than white students under the Challenged Laws. Ball Dep. at 21:3-21:9 (Q: Do you feel like African American children suffer more than white children under the present system? A: No, no.). Mr. Berryman does not believe his sons’ injuries are related to race in any way. Berryman Dep. at 28:20-23 (Q: . . . Do you think the injury to your children is based on race in any way? A: No. No.). Similarly, Mr. Brooks does not believe that race has anything to do with any potential injuries his son has suffered in connection with this lawsuit. *See* Brooks Dep. at 20:20-22:14.

<sup>24</sup> Doc. 68, Int. 81(iii): “Do Plaintiffs contend that there is a discriminatory effect in all counties of Alabama, and if not, in what counties [is it] claimed that such a discriminatory effect exists?” RESPONSE [to 81(iii)]: “Yes.”).

largest per pupil property tax bases in the state (specifically, Homewood, Mobile, Birmingham, Huntsville, and Montgomery) suffer from the same discrimination. *See* Doc. 68, Int. 49. Yet Plaintiffs insist that a statewide disparate impact analysis is somehow inappropriate. Instead, Plaintiffs would have this Court limit its disparate impact analysis to a comparison group of a small geographic portion of the state that contains less than 10% of the Alabama population. This position is contrary to logic and to equal protection law.

Whether the existence of a disparate impact in this case is properly measured using the entire population of African Americans in Alabama, or merely subsets of the population that are not representative of the entire population, is a question of Equal Protection law settled by federal case law. Plaintiffs have cited *Hunter* and its predecessors extensively as providing the appropriate legal standard by which Plaintiffs' claims should be analyzed. Plaintiffs are unwilling, however, to abide by that line of cases' use of holistic disparate impact calculations singularly focused on race.

In *Rodriguez*, the district court relied on a comparison (offered by an expert witness for the plaintiffs) of the *ten* school systems with the highest per capita property tax base with the *four* school systems with the lowest per capita property tax base in reaching its conclusion that poor citizens suffered a discriminatory impact under the Texas school finance system. *See Rodriguez*, 337 F.Supp. 280,

282 (W.D.Tex. 1971). The Supreme Court criticized and rejected the district court's selective reliance on an asymmetrical comparison involving just 10% of the school systems in the state, and proceeded to analyze the statewide impact, noting that when the other 90% of the state was added to the analysis, the correlation relied on by the district court, and factual basis for the plaintiffs' claims of wealth discrimination, disappeared. See *Rodriguez*, 411 U.S. at 26-27.

Plaintiffs in this case similarly argue that because a discriminatory impact can allegedly be shown by comparing less than 10% of the state's population (that happens to be predominantly poor, predominantly rural, and predominantly black) with the other 90% of the state's population, the challenged laws can be considered to have a discriminatory impact for the purposes of an equal protection analysis. Just as the Court in *Rodriguez* rejected that line of argument, this Court must reject these Plaintiffs' attempt to exclude the vast majority of the state's population from the disparate impact analysis.

*Hunter v. Underwood* supports the same conclusion. In *Hunter*, the Supreme Court relied on a statewide analysis by Professor J. Mills Thornton, III, of the impact of Section 182 of the Alabama Constitution of 1901, which showed that shortly after the challenged law was passed, African-Americans constituted a minority of the state's population, but constituted over 90% of the Alabama citizens who were disqualified from voting as a result of Section 182. See *Hunter*,

471 U.S. at 228; Brief of Plaintiffs-Appellees (in *Hunter v. Underwood*) by Edward Still, 1985 U.S. S. Ct. Briefs Lexis 1462, 23. There was no suggestion whatsoever in *Hunter* that the analysis should be limited to residents of the Black Belt, which these Plaintiffs insist was the target of the 1901 Constitutional provisions. Nor was there a suggestion in *Hunter* that the disparate impact analysis should separate rural voters from urban voters or rich voters from poor voters. The simple question in *Hunter* in this regard was whether or not the end result of the voting restriction demonstrated the existence of a racially discriminatory impact.

The Court in *Hunter* also relied on then-current voter registration statistics from Jefferson County and Montgomery County,<sup>25</sup> but only after a class certification hearing in which the district court had found those counties to be representative and typical of the situation in the rest of the state. *See* 1985 U.S. S. Ct. Briefs Lexis 1462 at 23. A statewide analysis (and analysis that was found to be representative of the statewide impact) was proper in *Hunter* because the challenged law applied to all voters in Alabama. Similarly, the Challenged Laws in this lawsuit apply to the entire state.<sup>26</sup>

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<sup>25</sup> Those were the counties in which the plaintiffs had been blocked from voter registration.

<sup>26</sup> *See also Harper v. Board of Regents, Illinois State University*, 35 F.Supp.2d 1118, 1124 (C.D.Ill. 1999) (In a Title VI and Equal Protection challenge in which both sides agreed that Illinois State's decision to eliminate certain athletic programs resulted in a reduction in minority participation from just under 28% (27.8%) to 27% in all sports, Plaintiff suggested that the true indicator of the impact was the decline from 17% to 14.6% in nonrevenue sports. The court, however, found for the defendant, concluding that there was no principled reason for focusing solely on the non-revenue sports when the inquiry is whether the decision to eliminate

It is clear from these cases that the relevant population to analyze is the population which is subject to the law, policy, or decision at issue. In this case, as in *Rodriguez* and *Hunter*, the Challenged Laws apply to all citizens throughout the state.<sup>27</sup> As a result, the inquiry into whether the provisions have a discriminatory impact must be done on a statewide basis as well.

Furthermore, Title VI and the Equal Protection Clause protect the rights of individuals, not the rights of school boards or county governments. *See, e.g., African American Legal Defense Fund, Inc. v. New York State Dept. of Educ.*, 8 F.Supp.2d 330, 337-38 (S.D.N.Y. 1998) (“it is the students, not the schools, who are the members of minority groups with cognizable interests under Title VI”). Therefore, a discriminatory impact analysis must measure the effect of the

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two intercollegiate programs had a disparate impact on minority athletic participation opportunities *as a whole* at the university) (emphasis added); *Hazelwood School Dist. v. U.S.*, 433 U.S. 299 (1977) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976), discussing as a given that the proper analysis for the purpose of establishing discriminatory impact in an employment discrimination case against a school district must include the entire population of minorities in the workforce in that school district as opposed to subsets of the workforce in particular schools or particular portions of the district); *Robinson v. Kansas*, 117 F.Supp.2d 1124, 1140 (D.Kan. 2000) (stating that in order to properly analyze claims of racial disparities in funding levels between school districts, the comparison must be “statewide”); *Otero v. Mesa County Valley School Dist. No. 51*, 470 F.Supp. 326, 335 (D.C.Colo. 1979) (“plaintiffs presented nothing touching upon the size or ethnic composition of the total pool of applicants. This, in my judgment, is an approach absolutely required . . .”).

<sup>27</sup> *See Knight*, 458 F. Supp. 2d at 1314 (“Alabama’s property tax structure uniformly affects all citizens of Alabama, regardless of race...”).

challenged law or policy on individuals, not on school boards or county governments.<sup>28</sup>

**2. It is undisputed that there is no disparate impact when comparing African Americans statewide with whites statewide**

Viewing the undisputed facts in the light most favorable to Plaintiffs, it is clear that the Challenged Laws have no racially discriminatory impact. Defendants' expert Michael E. Bell, Ph.D., performed a thorough analysis of data from the Alabama State Department of Education ("SDE"), the Alabama Department of Revenue ("DOR"), and the U.S. Census Bureau using several generally accepted econometric methods including symmetric comparisons of the "tails" of the distribution, correlation coefficients, and weighted averages, to test whether there is any basis to conclude that African-Americans in Alabama are discriminatorily impacted by the Challenged Laws. The results of Dr. Bell's calculations have not been contested by Plaintiffs, and the calculations demonstrate clearly that there is no such racially disparate impact. Dr. Bell's report establishes the following undisputed facts regarding the potential existence of a racially discriminatory impact:

*County-level per capita property tax base analysis*

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<sup>28</sup> Compare to Plaintiffs' expert Daniel Sullivan's method of analysis, which he said was to focus on the school board level, not the individual level. Exh. 30, Sullivan Dep., at 83 (analysis is impact on school boards), 113 (no consideration of school system size to compare effect on individuals across state), 211 (school board's ability to raise revenue is the bottom line).

1. Residents of the eleven majority-black counties in Alabama have a higher per capita property tax base than residents in the eleven counties with the lowest percentage of black residents. Bell Rpt. at 6.

2. The statewide weighted average of the per capita county property tax base for public schools is virtually identical for black citizens and white citizens. *Id.* at 7.

3. The correlation coefficient between race and per capita property tax base at the county level is approximately -0.07. *Id.*

4. The 13 counties with the lowest per capita property tax base have roughly the same percentage of black residents as the 13 counties with the highest per capita property tax base. *Id.* at 8.

*School system-level per capita property tax base analysis*

5. Students in the 33 school systems with the highest percentage of black students have a greater per capita property tax base per student than students in the 33 school systems with the lowest percentage of black students. *Id.* at 9.

6. The correlation coefficient between race and per capita property tax base per student is less than 0.03. *Id.*

7. The statewide weighted average of the per capita property tax base per student at the school system level is higher for black students than it is for white students. *Id.* at 10.

*County-level per capita property tax revenues analysis*

8. The percentage of the population that is black is higher in the 13 counties with the highest property tax revenues per capita for public education than it is in the 13 counties with the lowest property tax revenues per capita for public education. *Id.* at 11.

9. The statewide weighted average of the county-level property tax revenues per capita for public education is higher for black citizens than it is for white citizens. *Id.*

10. The correlation coefficient between race and county property tax revenues per capita for public education is roughly 0.06. *Id.*

*School system-level per pupil expenditure analysis*

11. The percentage of the student population that is black is higher in the 33 school systems with the highest levels of state and local per pupil expenditures than it is in the 33 school systems with the lowest state and local per pupil expenditures. *Id.* at 13.

12. The statewide weighted average of the state and local per pupil expenditures is virtually identical for black students and white students. *Id.*

All of these findings, and all of the underlying data used to reach these conclusions, are unrebutted by Plaintiffs and warrant summary judgment for Defendants on all claims.<sup>29</sup>

**D. Plaintiffs' claims fail as a matter of law because they have not shown discriminatory intent with respect to Amendments 325 and 373 to the Alabama Constitution, or to their implementing statutes and regulations.**

We have already demonstrated that the Challenged Laws do not have a racially discriminatory impact. In this section, we will demonstrate that Amendments 325 and 373 to the Alabama Constitution, along with the Current Use Statute (the "post-1970 Laws"), were not enacted with racially discriminatory intent.<sup>30</sup>

Our argument on intent is simple. No foreseen effect; therefore, no intention. When the facts before the Court are interpreted in a light most favorable to Plaintiffs, the Plaintiffs cannot show racially discriminatory intent for the simple reason that there are no facts which show that before the Motion for Additional

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<sup>29</sup> If this Court would find a more detailed summary and explanation of Dr. Bell's analysis helpful, please see Appendix B.

<sup>30</sup> Because Amendment 373 replaced Amendment 325, if Amendment 373 is valid under the Equal Protection Clause, any alleged Equal Protection problem with Amendment 325 is cured. *See Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1225 (11thCir. 2005). We will show in this section that Amendment 325 is totally free of any Equal Protection issue.

Relief was filed in the *Knight* case, anyone, anywhere, at any time had suggested that any of the property tax provisions might have a racially discriminatory effect. A legislature cannot intend consequences which they do not foresee.

Defendants are aware that in cases where the intent of a legislature is to be determined as a factual question, summary judgment is not preferred. *See Hunt v. Cromartie*, 526 U.S. 541, 542 (1999). Nevertheless, it is appropriate in cases where the evidence presented is so imbalanced in the moving party's favor that no material question of fact remains. *See Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11thCir. 2005). What we show here, however, relates not only to intent as such but also to a necessary precondition to finding intent. We demonstrate here that there was a total absence of any awareness that any of the post-1970 Laws might have a racially discriminatory effect.<sup>31</sup>

In *Hunter*, the Court stated:

Inquiries into congressional motives or purposes are a hazardous matter . . . [W]hen we are asked to void a

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<sup>31</sup> For the purposes of this Summary Judgment Motion, we do not argue that Defendants are entitled to summary judgment on the issue of discriminatory intent with respect to the original provisions of the 1901 Constitution which Plaintiffs attack. As we have already shown, Defendants are entitled to summary judgment with respect to these provisions because they create no discriminatory effect. Should this case for any reason go to trial, Defendants will be prepared to show that there was no discriminatory intent in the adoption of these provisions at the 1901 Constitutional Convention.

In this regard, we note that neither Amendments 325 nor 373 amends specific property tax provisions of the 1901 Constitution which are left intact. Amendments 325 and 373 are both stand-alone revisions of Alabama property tax law and Amendment 373 totally replaces Amendment 325. The Current Use Statute was passed pursuant to the authority provided in Amendment 373.

statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it . . . the stakes are sufficiently high for us to eschew guesswork.

422 U.S. at 228.<sup>32</sup>

The standard for discriminatory intent in an Equal Protection case is set forth in *Personnel Administrator of Massachusetts v. Feeney*. 442 U.S. 256 (1979). In *Feeney*, a female employee of the state of Massachusetts claimed that statutory preferences for veterans, in hiring and internally filling open jobs, discriminated against her as a female because most veterans were male. The employee argued that an intent to discriminate against women was proven because the discrimination was clearly foreseeable by the Massachusetts Legislature. *See id.* at 278.

The Supreme Court rejected this argument and ruled that a legislature's mere "awareness of consequences" that are discriminatory is insufficient. To prove discriminatory purpose under the Equal Protection clause, a legislature must be shown to have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect on an identifiable group." *Id.* at 279.

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<sup>32</sup> The Court in *Hunter* also noted that "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.*

In the present case there is not even a shred of evidence that the Alabama Legislature was aware that any of the “post-1970 Laws” might have a discriminatory adverse effect on African Americans generally, or black children specifically. If there was no “awareness” of a potential discriminatory effect on African-Americans, there certainly can be no finding that the Alabama Legislature passed any of the property tax provisions in part because of an adverse effect on African-Americans.

It should come as no surprise that the Legislature had no awareness of a possible discriminatory effect because, as we have already shown, the “post-1970 Laws” in fact do not have a racially discriminatory effect. Even the Plaintiffs’ unfounded allegations, arguments and theories on adverse discriminatory effect were completely unknown when the “post-1970 Laws” were passed. Such effects had never even been suggested or imagined and would not be for another thirty-one years after the adoption of Amendment 325.

To show the completely unfounded nature of the Plaintiffs’ claims that the Alabama Legislature was aware of some possible racial discrimination in the passage of the property tax provisions and intended at least in part to pass a law “because of” racially discriminatory effects, we will examine (1) the testimony of legislators who were in the Alabama Legislature when the property tax provisions were passed; (2) the testimony of knowledgeable observers of the Legislature at

the time; (3) the popular vote in majority-black counties for the constitutional amendments when they were ratified; (4) the litigation prompting and involving the property tax provisions; and (5) the expert reports submitted by Plaintiffs and writings of historians; all to see if in any of these sources there was, before or after passage of the property tax provisions, even a suspicion of possible racially discriminatory effects resulting from any of them. We discuss the sources following passage of the property tax provisions because if there was still no awareness of discriminatory effect years after passage, certainly there was no awareness at the time of passage.<sup>33</sup> In this examination we will find, in the words of former Lieutenant Governor George McMillan, not even a “whisper” of the possibility that anyone was aware these laws might have a racially discriminatory effect. McMillan Aff. at 5.

**1. The Testimony of Legislators Shows That There Was No Discriminatory Intent.**

A number of legislators at the time these bills were passed have offered testimony on whether race was involved in any way in their passage. The Eleventh Circuit has acknowledged the preferred place of legislative testimony in

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<sup>33</sup> In addition, if this Court would find further discussion of the intent issue to be helpful, please see Appendix C for information regarding the lack of indication of racial motivation in newspapers, and Appendix D for information about reform groups’ efforts and their lack of awareness of any racially discriminatory effect.

determining legislative purpose. *See Brooks v. Miller*, 158 F.3d 1230, 1242 (11thCir. 1998).<sup>34</sup>

(a) *Amendment 325 – 1971*<sup>35</sup>

Representative Ben Erdreich voted against the bill that would become Amendment 325 because he thought it would unfairly advantage rural areas over urban areas such as his district in Jefferson County. Erdreich Dep. at 10-11. Erdreich does not recall race ever entering the discussion or consideration of the bill. *Id.*<sup>36</sup>

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<sup>34</sup> In *Brooks*, the conflict was between *post hoc* legislator testimony as to the motivation behind and statute and contemporaneous newspaper accounts. The Eleventh Circuit came down squarely on the side of the legislators' eyewitness accounts: "To the extent that Plaintiffs contend that newspaper evidence is part of the contemporaneous record and should, therefore be the primary source for ascertaining legislative intent, we reject this theory. News articles often contain multiple layers of hearsay and do not trump the sworn testimony of eyewitnesses." *Brooks v. Miller*, 158 F.3d 1230, 1242 (11thCir. 1998). Here, Plaintiffs do not even have hearsay newspaper reports to support their position on legislative intent. They have only historians who admit they know of no newspaper articles which indicate an awareness of unequal treatment of blacks and whites. Furthermore, these historians have not even interviewed the live witnesses. They do not even mention them. Instead they talk in terms of a "single unified whole" as if what the actual legislators or observers might say makes no difference. *See* Appendix E for a discussion of historians' "single unified whole" approach to history; *see also infra* for further discussion of historian expert reports.

<sup>35</sup> On the vote for final passage, 74 Representatives voted for the bill (69.8%) and 24 voted against it (31.1%). *Journal of the House, 1971; Third Extraordinary Session*, pp. 523. In the Senate, 22 Senators voted for the bill (62.9%), and 11 Senators opposed it (31.4%). *Journal of the Senate, 1971; Third Extraordinary Session*, p. 335. Relevant pages of the legislative record are attached as Exhibits 21 and 22, respectively.

<sup>36</sup> Nabers: Did race ever enter the discussion or the consideration of the bill that became Amendment 325? Erdreich: No. No, it did not. Q: Did you have any reason to believe that 325, Amendment 325, would treat blacks differently from whites? A: No. That argument or premise wasn't something I have any memory of. I don't remember any discussion in that regard. *Id.*

Rep. James “Jabo” Waggoner, a second member of the Jefferson County delegation, also opposed the bill because it was an urban-rural issue. Race was simply not a factor. Waggoner Dep. at 10-11.<sup>37</sup>

Senator Joe Fine represented Franklin, Marion, Lawrence, and Winston Counties, all rural and majority white. He voted against the Amendment 325 bill because of his “political differences with the Governor.” Fine Dep. at 11. Fine does not recall race ever entering the discussion of the bill nor any discussion that it might treat blacks differently from whites in any way. *Id.* at 10.<sup>38</sup>

Rep. Richard Manley’s district covered the rural, majority-black Sumter, Marengo, and Perry Counties. Manley supported the bill because it protected rural landowners from higher taxes. Manley does not recall race ever entering the discussion of the bill that would become Amendment 325. Manley Dep. at 13. “It just wasn’t -- it wasn’t a racial issue. It was nothing but dollars and cents, taxes.” *Id.*

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<sup>37</sup> “As I recall, it was never mentioned. It was certainly not an issue.” *Id.* Waggoner believes he voted “no” on the 1971 bill because “it was really an urban-rural issue.” He insisted, “No, I don’t ever recall race being an issue in that legislation. In fact, I am confident it was not.” *Id.* at 10.

<sup>38</sup> Nabers: Do you recall whether there was any consideration, whatsoever, of race in the passage of 325? Fine: No. Q: Do you recall whether there was any consideration, whatsoever, of race in the passage of 325? A: My opinion, no. Q: Was race ever an issue in matters relating to the counties that you represented? A: No. Q: Was it ever brought to your attention, in any way, that Amendment 325 would treat blacks differently from whites? A: No. Q: Did you ever read any such thing in newspapers? A: No. *Id.*

at 14. Regarding Amendments 325 and 373, Manley could not recall anything being brought to his attention that touched on race in any way.<sup>39</sup>

Rep. Fred Gray voted for the bill that became Amendment 325. Gray represented Macon, Bullock, and Barbour Counties, and he and Thomas Reed, also representing these counties, were the first black members elected to the State Legislature since Reconstruction. Reed also voted for the Amendment 325 bill. By the time Gray took his place in the House of Representatives, he had already participated in a number of landmark civil rights cases.<sup>40</sup> Gray said that he certainly would have been sensitive to any racial issues in legislation if he had been aware of them. Gray Dep. at 23. One of his life's purposes has been to eradicate racial discrimination in Alabama law, and he testified that "those folks

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<sup>39</sup> He added, "Race was never – this was always financial, 'How are we going to save paying taxes?' Race was never an issue in any of it. I never had anyone approach it on a racial issue." *Id.* at 124. "To me," he said, "It was always the tax situation, the cost of property tax for homes, farmland. Of course, the district I represented all the way through [his time in the legislature] was very agricultural and forestry oriented, and homeowners, no major industries. There was a great concern about the increase in property taxes, on agricultural property especially, and forestry." *Id.* at 13-14.

<sup>40</sup> These include *Browder v. Gayle* (1956), to integrate city buses in Montgomery; *Gomillion v. Lightfoot* (1960) to fight gerrymandering of Tuskegee's voting districts; *NAACP v. Alabama* (1958) to allow the NAACP to resume operations in Alabama; *Dixon v. Alabama State* (1961), to reinstate expelled students at Alabama State University; *Williams v. Wallace* (1965), to order the Governor to protect the marchers from Selma to Montgomery; *Smith v. Paris* (1966), to eliminate vote dilution of the issue of involving African-American membership on the Barbour County Democratic Executive Committee; and *Lee v. Macon County Board of Education* (1967), to desegregate at least 99 public systems in Alabama and all institutions under the control of the Alabama State Board of Education. Gray was frequently at the forefront of victories in the struggle for civil rights for African-Americans, and his successful run for a seat in the House of Representatives was no different, founded as it was on earlier victories in black voter registration in and around Macon County and movements to eliminate gerrymandered voting districts.

who were passing those bills and who introduced those bills . . . wouldn't dare put a bill in the hopper and expect me to vote on it if I knew that it had racial motivations." *Id.* at 10-11, 23.

The bill was very popular with legislators, because its impact would be to prevent property taxes from doubling or tripling for owners of homes or land. In the words of Gov. Albert Brewer, "Voting for a bill like this would be like voting for motherhood. It would just be that basic. And the people who were behind this legislation or this Constitutional Amendment were taking advantage of . . . the panic that they sensed from the Court decision in *Weissinger* in '71, I believe." Brewer Dep. at 25-26.

(b) *Amendment 373 – 1978*<sup>41</sup>

George D. H. McMillan, Jr., then a State Senator, saw not a "whisper" of discriminatory intent in or discriminatory effect from Amendment 373. McMillan Aff. at 5.<sup>42</sup>

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<sup>41</sup> On the vote for final passage of the Amendment 373 bill in the House of Representatives, 90 Representatives voted for the bill (84.1%) and 5 voted against it (4.7%). *Journal of the House, 1978; Second Extraordinary Session*, pp. 606. In the Senate, 29 Senators voted in favor of the bill (82.9%) and only 1 Senator opposed it (2.9%). *Journal of the Senate, 1978; Second Extraordinary Session*, p. 459. Relevant pages of the legislative record are attached as Exhibits 23 and 24, respectively.

<sup>42</sup> "My two closest friends in the Alabama State Senate were two other Senators from Jefferson County," McMillan explained, "Senator U. W. Clemon and Senator J. Richmond Pearson, both of whom are African-Americans." *Id.* at 2. On the issue of Amendment 373, McMillan noted, "Senators Clemon, Pearson and I were on opposite sides. One of the reasons for the difference in our perspectives on this issue may have been the fact that I was raised in rural South Alabama on a farm and believed that in the absence of the passage of this measure, property taxes could increase to unconscionable levels." *Id.* "At no point in the debate on this legislation was race

The question of whether race played any role at all in Amendment 373 puzzled Dr. Dewey White, a Senator from Jefferson County in 1978, because it made no sense to him. Race did not enter the discussion of the bill, and there was “no discrimination. There’s nothing in there to make it discriminatory.” White Dep. at 14. White voted for the bill that would become Amendment 373.<sup>43</sup>

Douglas Johnstone, a member of the House of Representatives from Mobile in 1978, also voted for the Amendment 373 bill. Johnstone Dep. at 19. Johnstone maintains that there is no possibility that the bill that became Amendment 373 was intended to discriminate against blacks or black schools in any way.<sup>44</sup>

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ever an issue,” McMillan insisted, “nor was an argument ever made that the passage of the legislation would treat blacks differently from whites.” *Id.* Furthermore, he continued, “As close as Senators Clemon, Pearson, Representative McNair and I were, in none of our private personal conversations regarding this legislation was there ever a contention made to me that I should vote against the Bill because it would have a discriminatory impact from a racial standpoint.” *Id.* at 3. McMillan could not be clearer—race was never an issue in the bill that became Amendment 373.

<sup>43</sup> White said that he was drawn to the bill that would become Amendment 373 because “people that had fixed incomes and had been living in the homestead for, say, fifty, sixty years, had some protection, a lot of protection, more than they did without this bill, for . . . taxes not to be priced more than the amount of their home.” *Id.* at 12. Race was never an issue.

<sup>44</sup> Johnstone does not recall any statement from an African-American legislator to the effect that Amendment 373 would be discriminatory or hurtful to African-American Alabamians. *Id.* at 16-17. He noted that he would have been sensitive to racial issues because he was “good, personal friends” with several African-American legislators, and he found himself voting “with them a lot of times.” *Id.* at 15, 17. “In fact,” he recalled, “when we were – when the House of Representatives was debating a death penalty bill, the Mobile Press-Register furiously reported one that Johnstone . . . and the other blacks are amending the death penalty bill to death. We didn’t. We made some good changes.”<sup>44</sup> *Id.* at 15-16. These African-American legislators supported Johnstone on many issues, and he recalled, “practically all of them would vote with me on preserving the coastal zoning board, on the amendments that I made to the criminal code, and . . . there were so many issues on which they supported me consistently.” *Id.* at 17. If one of these men had told him that defeating property tax legislation “was a matter close to their hearts because of some sort of racial effect,” he said, “I would have remembered that and would have

Rep. Waggoner of Jefferson County saw no racial dimension in any aspect of the bill. Waggoner Dep. at 12-14. Unlike the bill that would become Amendment 325, Waggoner voted in favor of the bill that would become Amendment 373 because he represented “a high per capita income area in my district . . . Vestavia, Hoover, and north Shelby.” *Id.* at 12-14.<sup>45</sup>

Representative Rick Manley was a principal sponsor of the Amendment 373 bill. Manley did not believe that race entered the discussion of the bill in any capacity, nor was there any indication that the legislation might have a disparate impact on different racial groups.<sup>46</sup>

Sen. Ted Little represented Tallapoosa, Randolph, Chambers, and Lee Counties. He did “not recall any statement” that would have led him to believe that the bill might have a discriminatory effect on black people, from anyone in the

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done what I could . . . to help.” *Id.* at 17-18. Johnstone had no reason to believe that the bill that would become Amendment 373 might treat blacks differently from whites or have a racially discriminatory impact. *Id.* at 19-20.

<sup>45</sup> “To the best of my recollection,” he said, “it was never mentioned.” The idea that Amendment 373 would have treated blacks and whites differently was never brought up. “No, it was never an issue,” he said, “I don’t ever recall it being mentioned at all, the race issue, during the debate of either one of these bills.” *Id.* at 13-14.

<sup>46</sup> “Black landowners [and] homeowners would be treated the same way as white homeowners. Race was never an issue, it was always dollars and cents in these legislative acts.” Manley Dep. 21. “I never had anyone approach it on a racial issue,” he explained. Manley Dep. at 124. Race was never “an issue on any of these bills; classification, rate structure, or anything. It was all taxes and cost of owning property.” *Id.* at 22. Though Manley admits that some memories about specific issues in the Legislature in the 1970s have grown distant, “on that issue” of whether race entered the discussion of property tax legislation, it is his clear recollection that “race was never an issue in any of it.” *Id.* at 124.

Senate, on the floor of the Senate, or otherwise. Little Dep. at 17. Little voted in favor of the bill.<sup>47</sup>

Sen. Joe Fine testified that race never entered into the discussion of the Amendment 373 bill, and it was never brought to his attention that the bill might have a racially discriminatory effect. Fine Dep. at 12.<sup>48 49</sup>

(c) *Current Use Statute*<sup>50</sup>

Rick Manley was in the House in 1982 and was a proponent of the Current Use Statute because of the rural composition of his constituency. Manley was also

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<sup>47</sup> “I do not recall that race was an issue from the vantage point that I may have had on the Senate floor. If it was an issue, it did not ever come to my attention,” he said. *Id.* at 17-18.

<sup>48</sup> Fine based his conclusion in part on his relationship with Senators Clemon and Pearson and Representative McNair: “U. W. Clemon and I shared a desk and an office. There were only two, three offices. He was chairman of the rules committee, and he sat across from me every day. And I have a world of respect for him. I think that if it had been an issue, he would have discussed it with me and warned me about it and would have been offended by it, if you know Judge Clemon. J. Richmond was in the Senate and a very good, close friend. I would not knowingly [have] done anything to [have] offended either one of them whether it was voting for this bill or voting against it at that time. I just don’t remember any discussion or any debate. There was a filibuster, as I recall, and we voted cloture on it. But . . . race was not an issue.” *Id.* at 33-34.

<sup>49</sup> Nabers: Did race ever enter into the discussion of Amendment 373 in any of the legislative proceedings? Fine: No. Q: Was it ever brought to your attention that 373 – Amendment 373 would treat blacks differently from whites? A: No. *Id.* at 12.

<sup>50</sup> On the vote for final passage in the House of Representatives, 61 Representatives supported the bill (58.1%), and 33 Representatives opposed it (31.4%). On the vote to pass the bill over the Governor’s objection, 56 Representatives supported the bill (53.3%), and 40 Representatives opposed the bill (38.1%). *Journal of the House, 1982; Regular Session*, pp. 1430, 1779-1780. In the Senate, 20 legislators voted for the current use bill (57.1%), and 11 voted against it (31.4%). On the vote to pass the bill over the Governor’s objection, 19 voted in support of the current use bill (54.3%), and 13 voted against it (37.1%). *Journal of the Senate, 1982*, pp. 1202, 1596. Relevant pages of the legislative record are attached as Exhibits 25 and 26, respectively.

the Speaker Pro-Tem in the House at this time, and Fob James, Jr., was Governor of Alabama.<sup>51</sup>

Rep. Waggoner remembers the current use bill “very well.” Waggoner Dep. 14. Waggoner voted against the bill. Race was “never an issue at all” in the bill, and it was never brought to his attention that blacks and whites might be treated differently. Waggoner Dep. at 15.

Dr. Dewey White was a Senator in 1982, and he strongly opposed the Current Use Statute. Dr. White worked with Dr. Hubbert and filibustered against the bill with Sen. Earl Hilliard. White Dep. at 19. The filibuster group was composed of blacks and whites, and race was not an issue. *Id.* at 27.<sup>52</sup>

Ted Little was also in Senate in 1982. Little voted in favor of the Current Use Statute. He does “not recall that there was any discrimination connotation made whatsoever” in the consideration of the Current Use Statute. Little Dep. at 19.<sup>53</sup>

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<sup>51</sup> Manley had no reason “whatsoever” to believe that the current use statute might treat blacks differently from whites, nor was it ever brought up that this statute might treat blacks any differently from whites. Manley Dep. at 27-28.

<sup>52</sup> The current use filibuster “was a true filibuster. We had less than half-a-dozen people involved, and we went around the clock and stayed right there. We called whoever up.” *Id.* at 22. When Hilliard “was on the floor,” White said “I wasn’t there listening, I was sleeping, so I don’t know all that he said,” but in his interactions with Hilliard about current use, White says they “didn’t discuss race one way or the other.” *Id.* at 28.

<sup>53</sup> To the question of whether race was a factor at all in the consideration of the current use bill, Little said, “It was not – from any vantage point that I had, it was not.” *Id.*

Gray, McMillan, Erdreich, Johnstone, Waggoner, Fine, Manley, White and Little bring a host of different perspectives and vantage points to the issue of whether the Alabama Legislature had any awareness of any potentially racially discriminatory effect resulting from these property tax provisions. These men represented different constituencies geographically, held varying political views, and voted differently on the bills in question. Despite their diversity and differences, they all agree on one thing: no one believed race was a motivating factor in any of these property tax provisions. No legislator had any indication that these provisions had a racial element; that they might affect racial groups differently; or that race was a factor at all in the legislation.

**2. Testimony of knowledgeable observers of the Alabama Legislature shows that there was no discriminatory intent.**

Testimony of non-legislative actors supports the fact that the post-1970 Laws were enacted without any discriminatory intent and without any knowledge of a potential discriminatory impact on black Alabamians.

Dr. Paul Hubbert, an opponent of any bill that limit tax revenues that might support education because of his role in the Alabama Education Association, could not recall any indication that these bills might have a negative effect on black Alabamians.<sup>54</sup> For someone so involved in opposition to Amendment 373, the fact

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<sup>54</sup> Dr. Paul Hubbert, Executive Secretary of the Alabama Education Association since March 1, 1969, was also an active observer of the legislative action in House Bill 56 Amendment 325. In his role as a lobbyist for educational interests in the State, he opposed Amendment 325 because

that Hubbert never heard anything that would lead him to believe that race was a factor or that a discriminatory intent was perceived, strongly supports the lack of any such sentiment in the Legislature.<sup>55</sup> Like the two constitutional amendments discussed above, Dr. Paul Hubbert actively opposed the Current Use Statute, and he does not recall that race was discussed in his presence in relation to current use, or that current use would have a discriminatory impact on African Americans.

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“Lid Bills were a problem to us in the sense that it in effect capped the capacity and ability to raise future revenue for ad valorem taxes.” Hubbert Dep. at 11. He cannot point to any indication of racial motivation in the bill. He did not hear any “verbal comment one way or the other” about race being a factor, concern, or consideration, he said. *Id.* at 15. In fact, speaking in 2009, Hubbert answered the question whether there was any way that he believed that property tax provisions treated black and white citizens differently: “more white people . . . own property, yes, I would say there . . . [are] fewer black people probably on the property tax rolls. . . . So I would say in that sense there . . . [are] disproportionately fewer blacks paying property tax.” *Id.* at 26. In other words, even a man who has represented Alabama educators for over forty years did not observe the type of racial intent or impact that the Plaintiffs allege.

<sup>55</sup> Hubbert was even more active in lobbying the Legislature in 1978 and 1982 than in 1971 because, he said, “we had gotten our feet on the ground a little bit more by then.” *Id.* at 27-28. Hubbert recalled his work against Amendment 373 in the following: “I remember testifying in the House committees. [I] did strongly oppose it along with some of the folks from the League of Municipalities. We were, as I recall, about the only groups that did come out publicly and testify and take positions publicly against it.” *Id.* at 28. Hubbert was in the halls of the Legislature “daily and nightly” while the bill that would become Amendment 373 was being debated and considered, and he generally sent legislators “home at night most of the time” in that year. *Id.* at 28-29.

Still, Hubbert did not witness any indication that race was a factor in the bill. He was “certainly aware of what was going on in my presence,” and he does not recall anymore mentioning that Amendment 373 might have a discriminatory impact against black people. *Id.* at 29. Hubbert said that race was not discussed, at least “not in my presence that I know about,” in relation to Amendment 373. *Id.* at 23. He “heard nobody verbalize” that Amendment 373 might have any different or discriminatory impact on African Americans. *Id.* at 29.

Hubbert Dep. at 27, 29, 32.<sup>56</sup> Dr. Hubbert discussed the bill with longtime fellow AEA official Dr. Joe Reed, and race was not involved in the discussion. *Id.* at 23.

The testimony of Gov. Albert Brewer adds a broader perspective on the workings of the Legislatures during his tenure in state government. Governor Albert Brewer served as Speaker of the House, Lieutenant Governor, and Governor over the course of sixteen years in Alabama government. *Id.* He never saw or heard any indication that these property tax provisions might discriminate against African Americans as compared to whites in any way, nor did he observe any indication of a racially discriminatory motive in any property tax bill considered during his sixteen year tenure in Alabama government. Brewer Dep. at 32-33.<sup>57</sup>

George McMillan was elected Lieutenant Governor in 1978, and thus he oversaw the process of debating the Current Use Statute in the Senate in 1982.<sup>58</sup>

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<sup>56</sup> Race was not mentioned, Hubbert said, “to my recollection in my presence. Whether it came up or not, I can’t speak to it. But I did not witness it.” *Id.* at 27. Hubbert recalled that the current use bill was “filibustered . . . very lengthily in the Senate” and that “there were some nights that we spent there with cots in the back while some folks held forth on the floor.” *Id.* at 30. Even when Hubbert spent 24 hours in the Legislature during the filibuster, no suggestion was made that current use would have a racially discriminatory effect. Considering Hubbert’s enormous influence in the Legislature by 1982, this supports the idea that no one was talking or thinking about race as a potential factor in this legislation.

<sup>57</sup> Gov. Brewer was a political opponent of George Wallace. Gov. Brewer has served on the Board of Directors of the Alabama Citizens for Constitutional Reform Foundation, Inc., for a decade. Still, to him it is clear that the “ratification of that amendment [325] reflects this philosophy of protectionism towards property and ownership of property,” not that race was in any way involved in property tax legislation. *Id.* at 25.

<sup>58</sup> At that time the Lieutenant Governor appointed Senate legislative committees and named the chair of each committee. McMillan chose to name his friends Sen. J. Richmond Pearson as chairman of the Senate Finance and Taxation Committee and Sen. U. W. Clemon as chairman of the Senate Judiciary Committee. In his affidavit, McMillan noted that “if the differences

Though McMillan did not vote on the Current Use Statute, he stated publicly his position “that any fair system of appraising agricultural land for property tax purposes should be based on the economic gain which the property owner realized from the land’s current use,” and “the production of agricultural commodities is one of society’s most essential needs.” McMillan Aff. at 3.<sup>59</sup>

“The implementation of current use appraisal did not result in a decrease in property tax revenues, only a decrease in the increase with perhaps certain exceptions. It is therefore misleading to represent the passage of current use as lessening revenues available for public education, much less to attribute racially discriminatory intent to those of us who supported these measures.” *Id.* at 5. The testimony of Brewer, McMillan, and Hubbert strongly corroborates that of the

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Senators Pearson, Clemon and I had had on certain property tax issues had included any kind of discriminatory racial impulse on my part, it is not likely that I would have appointed Senator Pearson to chair the very committee that would control the fate of property tax legislation that might arise.” McMillan Aff. at 3.

<sup>59</sup> Farming was “not an easy nor particularly profitable way to earn a living,” so McMillan saw current use as a way of protecting farmers from tax increases that would create a situation in which “a significant number of Alabama farmers would no longer be able to afford to farm their land.” *Id.* at 3-4. McMillan acknowledged that “no appraisal system can be perfectly applied” and that “it is constitutionally almost impossible to carve out definitions which prevent other land owners who are only tangentially involved in agricultural production from taking advantage of” the benefits of current use appraisals. *Id.* at 4. Still, he said, “I . . . prefer the possibility of this inequity to a tax system that would economically prevent all but a few wealthy farmers from being able to keep their land in agricultural production.” *Id.* For these reasons, McMillan publically supported the Current Use Statute’s passage. McMillan acknowledges different approaches to and concerns about the current use bill, but none of these approaches or concerns included racially discriminatory intent or effect.

legislators above. No one had any awareness at the time that any of the post-1970 Laws might have a racially discriminatory effect.

**3. The popular vote for Amendments 325 and 373 shows that there was no discriminatory intent.**

Amendment 325 and Amendment 373 were submitted to Alabama voters for ratification. Voting patterns show no indication of a racial dimension in either amendment. This provides is strong circumstantial evidence that race was not a factor.

*(a) Amendment 325*

On May 30, 1972, Amendment 325 was put to a popular vote, and 79.0% of voters approved the amendment statewide. The only county in which fewer than 50% of voters supported Amendment 325 was Jefferson County, where only 24.8% of voters were in favor of the amendment.

According to the 1970 Census of Population, there were at that time 10 majority-black counties in Alabama: Macon, Lowndes, Greene, Wilcox, Bullock, Hale, Sumter, Perry, Marengo, and Dallas counties. Within the 10 majority-black counties, 81.7% of voters approved of Amendment 325 in the referendum.<sup>60</sup>

*(b) Amendment 373*

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<sup>60</sup> See the *Alabama Official and Statistical Register* for voter data and the *1970 U.S. Census of Population* for racial demographic data, available online at <http://216.226.178.196/cdm4/browse.php?CISOROOT=/register>.

On November 7, 1978, Amendment 373 was put to a popular vote, and, with 60.4% of voters supporting the amendment statewide, Amendment 373 was ratified. Within the 10 majority-black counties, 82.8% of voters approved of Amendment 373, an increase percentage-wise from the level of approval for Amendment 325.

(c) *Macon County*

Macon County was iconic in the civil rights movement for its early and effective registration of black voters through tireless activism and legal action.<sup>61</sup> On May 30, 1972, 88.7% of those voting in Macon County voted in support of Amendment 325.<sup>62</sup> On November 7, 1978, 93.2% of those voting in Macon County voted in support of Amendment 373.<sup>63</sup>

**4. Federal court litigation relating to Alabama's property tax law shows that there was no discriminatory intent.**

The passage of the bill which became Amendment 325 was the direct result of a decision of a three-judge District Court in *Weissinger v. Boswell*, 330 F.Supp

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<sup>61</sup> Fred Gray, himself active in various aspects of early voter registration battles in the county, recalled that there may have been a black voting majority in Macon County as early as 1966. Gray Dep. at 30. In his work *Reaping the Whirlwind*, Professor Norrell noted that after a large-scale 1966 voter registration campaign in Macon County, black voters in that county outnumbered whites by "almost three to one." Robert J. Norrell, *Reaping the Whirlwind* (Chapel Hill: UNC Press, 1998), 187.

<sup>62</sup> See "Constitutional Amendment Election Recapitulation Sheet, May 30, 1972," *Alabama Official and Statistical Register*.

<sup>63</sup> See "Constitutional Amendment Election Recapitulation Sheet, November 7, 1978," *Alabama Official and Statistical Register*.

615 (M.D.Ala. 1971). In *Weissinger*, Plaintiffs challenged the Alabama property tax system on non-racial Equal Protection grounds based on wide disparities in the assessments of property values from county to county. The Court found in favor of the Plaintiffs and invalidated a 30% (of market value) assessment ceiling and reinstated a prior statute setting the assessment ceiling at 60%. The court gave the State one year, later extended to seven, to complete a reappraisal of Alabama property under a uniform and equal standard, noting, though, that “the Federal Constitution does not prohibit a state from establishing reasonable classes of property and taxing these classes at different rates.” *Weissinger*, 330 F.Supp. at 622. The Alabama Legislature responded to *Weissinger* with Amendment 325.<sup>64</sup>

Amendment 325 was attacked in *McCarthy v. Jones*, 449 F.Supp. 480 (S.D. Ala. 1978) under the Equal Protection Clause on non-racial grounds. *McCarthy* was a class action brought on behalf of some 77,000 school children from a number of Alabama counties including Barbour, Bullock and Wilcox. 449 F.Supp at 481. There was no allegation that Amendment 325 was in any way racially discriminatory. Edward Still represented the plaintiffs in *McCarthy*.<sup>65</sup>

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<sup>64</sup> Amendment 325 established separate property classifications and assessment ratios as permitted under *Weissinger*, certain processes for increasing or decreasing property taxes, and certain caps, all of which applied equally without regard to race to every local tax jurisdiction in the state of Alabama.

<sup>65</sup> If the accomplished lawyers representing thousands of black plaintiffs in *McCarthy* did not see any racial discrimination in Amendment 325 – or if they did and chose not to raise such an issue – the Alabama Legislature can hardly be faulted for not being “aware” of some potential (and wholly illusory) racial consequences that it would take another 25 years to construct.

Plaintiffs in our present case assert that Amendment 325 circumvented the *Weissinger* decision. It did not, and the *McCarthy* court so found. Amendment 325 complied with *Weissinger* and followed its direction.

Under the authority provided by Amendment 373, the Current Use Statute was passed in 1982 while Fob James was Governor, which shifted the appraisal of farm and timber property from a value-based-on-current-use-without-regard-to-potential-use to a value based on a capitalized net income approach.

The Current Use Statute was attacked in *Weissinger v. White*, 733 F.2d 802 (11th Cir. 1984), again on non-racial grounds by plaintiffs represented by some of the most accomplished civil rights lawyers in the State, including Mr. Still. No claim was made in the lawsuit that there was any racially discriminatory effect flowing from the provisions of the Current Use Statute, and the Eleventh Circuit affirmed the District Court's conclusion that it did not violate the Fourteenth Amendment.<sup>66</sup>

By 1984, Alabama property taxes had been the subject of three separate lawsuits in federal court brought under the Equal Protection Clause, yet in none of them had there been the slightest suggestion that the effect of any of the property tax provisions would be or was racially discriminatory. It was not until 2009 in this

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<sup>66</sup> In *White* the Eleventh Circuit explicitly approved the tax policy in the current use statute of creating a favored class of property for farm and timber land as being consistent with the Equal Protection Clause. *See Weissinger v. White*, 733 F.2d at 806 -807.

case, thirty-seven years after Amendment 325 was adopted, that there was any discussion of whether Amendments 325 or 373 or the current use provisions deprived African-Americans equal access to a property tax base because of their race, an illusory construction that Plaintiffs claim should have been apparent to the Alabama Legislature as far back as 1971.

**5. Plaintiffs' expert reports from historians show that there was no discriminatory intent.**

To prove that the Alabama Legislature passed the property tax provisions with an awareness of discriminatory effects and at least in part because of its adverse effects on black Alabamians, the Plaintiffs have submitted the expert reports of four historians. Prior to their testimony in *Knight* or this case, none of the historians had written that any of the post-1970 Laws either had a racially discriminatory impact or were enacted with racially discriminatory intent.<sup>67</sup>

None of Plaintiffs' history experts define the issue they are addressing. The issue relating to legislative intent on this Motion is not whether the racial turmoil Alabama experienced in the 1950s and 1960s—be it from voting enfranchisement and school desegregation or from redistricting—influenced thought or action in Alabama generally or the Legislature specifically. It is whether the Legislatures in 1971, 1978 and 1982 had any awareness that the property tax provisions might

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<sup>67</sup> If the Court would find further development of this point to be helpful, please see Appendix

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adversely effect African Americans compared to whites and passed these laws at least in part because of this adverse effect.

None of the Plaintiffs' history experts addresses this issue. Though all of the professors have substantial connections in Alabama, none has interviewed a single witness who may have helped them understand the legislative process in 1971, 1978 and 1982 relating to property taxes. None identifies a single legislator who was aware of any racial dimension in any of the property tax provisions. None has referenced a single article in any periodical or newspaper which indicates any awareness that any of the property tax provisions may have been racially discriminatory.<sup>68 69</sup>

**E. Plaintiffs' Title VI claims fail as a matter of law because Plaintiffs have not identified or introduced any evidence of a program or activity that intentionally discriminated against them.**

Shortly after the Court's deadline for amendments to the Complaint, Defendants moved for judgment on the pleadings with respect to, among other issues, whether Plaintiffs had properly pled intentional discrimination under a program or activity for purposes of a Title VI claim. This Court denied that motion

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<sup>68</sup> The *Feeney* Court stated that the burden usually and necessarily on plaintiffs in an Equal Protection case was to prove a racially discriminatory intent with "practical," "objective" evidence. 422 U.S. at 279, n.24

<sup>69</sup> Finally, Plaintiffs cite no book or article written by any other historian or any other person in the higher education academy which states or concludes that any of the property tax provisions had a racially discriminatory effect or that the Alabama Legislature in passing any of the property tax provisions was aware that these provisions might have a discriminatory effect or passed them because of an adverse effect on African Americans.

as it related to those arguments. The strength of Defendants' arguments have only been strengthened during discovery, and Defendants hereby incorporate by reference, as if fully set forth herein, their arguments in the Brief supporting their Motion for Judgment on the Pleadings, Doc. 79, and in their Reply Brief supporting the same motion, Doc. 99.

Defendants further direct the Court's attention to Interrogatories 20,<sup>70</sup> 44,<sup>71</sup> and 45.<sup>72</sup> If there was any doubt prior to discovery regarding the validity of Plaintiffs' claims, it is evident from these interrogatory responses that Plaintiffs have not identified any "program or activity" that is covered by Title VI, much less one under which Plaintiffs have been subjected to intentional discrimination.

### **CONCLUSION**

As Defendants have demonstrated herein, there is no genuine issue with respect to any material fact, and Defendants are entitled to judgment as a matter of law.

WHEREFORE, Defendants respectfully request that this Court grant complete summary judgment to Defendants.

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<sup>70</sup> Plaintiffs explicitly admitted in the course of discovery that there is no racial discrimination in the Department of Revenue's assessment, apportionment or collection of property taxes in Alabama.

<sup>71</sup> Plaintiffs admitted that there is no state education program in Alabama that discriminates on the basis of race.

<sup>72</sup> Plaintiffs admitted that there is no state program at all in Alabama that discriminates on the basis of race.

Respectfully submitted by,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of March, 2010, I filed the foregoing with the clerk of the Court using the CM/ECF system, which will provide notice of such filing to all counsel of record.

/s/ David A. Perry