

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHEASTERN DIVISION

INDIA LYNCH, by her parent, SHAWN KING \*  
LYNCH; WENDELL PRIDE, JR., by his parent, \*  
WENDELL PRIDE; IVY ROSE BALL, by her \*  
parent, MIRANDA BALL; SLADE BERRYMAN \*  
and CANNON BERRYMAN, by their parent, \*  
TYLER BERRYMAN; ROCHESTER \*  
ANDERSON and CEZANNE ANDERSON, by \*  
their parent, STELLA ANDERSON; MICHAEL \*  
RAYMOND BROOKS, by his parent, MICHAEL \*  
BROOKS; ZEKEIAH ORMOND, by his parent, \*  
BARBARA L. ORMOND, individually and on \*  
behalf of others similarly situated, \*

Plaintiffs, \*

v. \*

THE STATE OF ALABAMA; BOB RILEY, in his \*  
official capacity as Governor of Alabama; and \*  
TIM RUSSELL, in his official capacity as \*  
Commissioner of Revenue, \*

Defendants. \*

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

**PLAINTIFFS' BRIEF OPPOSING  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs India Lynch et al., through undersigned counsel, submit the following brief in opposition to defendants' motion for summary judgment, Doc. 152, their supporting amended brief, Doc. 157-1, and their supporting evidentiary materials, Docs. 153, 153-1 through 153-36.

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## **I. INTRODUCTION TO DISPUTED FACTS: FRAMING THE ISSUES**

Rule 56 allows a district court to enter summary judgment only if there is “no genuine issue as to any material fact.” This Court’s uniform order, Appendix II, requires the non-moving parties to identify claimed disputed and undisputed facts. Many of the defendants’ claimed “undisputed” facts, will be “disputed” by plaintiffs primarily because they are not “material” facts, not because they are entirely inaccurate. This introduction is intended to explain, in general terms, why many of defendants’ claimed undisputed facts are not “material facts” and thus are disputed.

The defendants persist in their efforts to re-frame the issues in this action. They want to try the case they wish plaintiffs had brought, not the case set out in the complaint. We addressed this problem in the briefs and oral argument regarding plaintiffs’ *Daubert* motion challenging defendants’ expert witness Michael Bell. Compare Doc. 128 at 8-12 with Doc. 131 at 7-9. Therefore, at the outset, it is important (at the risk of over-simplifying) to outline the issues framed by plaintiffs’ complaint and evidence and to distinguish them from the mistaken issues on which defendants base their facts and legal arguments.

### **A. Plaintiffs’ Theory of the Case**

#### *Intentional Racial Discrimination*

1. The invidious racially discriminatory purpose behind the revenue provisions in Alabama's 1875 and 1901 constitutions has always had two basic objectives:

- a. To shield the wealth of whites from taxation,
- b. the proceeds of which might be used to educate blacks.

2. There were always three main mechanisms for achieving these racially motivated objectives:

- a. Capping millage rates and making it difficult to override the caps,
- b. maintaining political control of county tax assessors to keep valuation of white-owned property artificially much lower than its fair market value, and
- c. maintaining political control of local school authorities to provide white schools disproportionately large shares of state and local school revenues.

3. The principal political impetus for protecting property from taxation and limiting funding for black education came from white landowners in the Black Belt.

*Continuing Discriminatory Effects*

4. Whites' property in the Black Belt is still shielded from taxation.
  - a. Whites in the Black Belt still own disproportionately more valuable

property than do blacks, primarily farm and timber land, which have been almost removed from the tax base by the classification system and current use provisions of Amendments 325 and 373.

b. The millage caps and cumbersome override process embedded in the Alabama Constitution, in conjunction with Amendments 325 and 373, cause **local** school revenues to be regressive and inadequate to fund schools in the **Black Belt**, from which almost all whites have fled to avoid federal court-ordered desegregation.

5. The millage caps and cumbersome override process embedded in the Alabama Constitution, in conjunction with Amendments 325 and 373, necessarily cause **local** school revenues to be regressive and inadequate to fund **rural** schools all over Alabama.

6. Because the millage caps and cumbersome override process embedded in the Alabama Constitution, in conjunction with Amendments 325 and 373, restrict local school revenues all over Alabama, regressive state school revenues must bear a disproportionately large share of total school funding, and the overall amount of revenues for **all** public schools in the state is constricted. Because the poorer school systems are disproportionately black, African Americans are adversely impacted by low total school revenues.

## **B. Defendants' Mistaken Theory of the Case**

### *Intentional Racial Discrimination*

1. Defendants entirely ignore the most important factors established by the Supreme Court for determining whether official actions had an invidious purpose, such as the historical background, the sequence of events, and the racial impact of those actions.

2. Instead, defendants erroneously contend that this Court may find that the challenged state constitutional provisions were enacted for racially discriminatory purposes only if plaintiffs can point to explicit admissions of those racially discriminatory purposes by state officials past or present.

### *Continuing Discriminatory effects*

3. Instead of focusing on the continuing effects of the particular racially motivated provisions in the Alabama Constitution, as did the Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), defendants contend that the entire system of raising revenues and funding public education in Alabama must be shown to have an adverse impact on African Americans. But plaintiffs are not challenging the entire system of funding public education, as the plaintiffs did, for example, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

4. Defendants erroneously contend that the proper way of measuring the

continuing adverse effects of the constitutional property tax restrictions is to conduct a statewide “disparate impact” analysis, which, instead of examining how the challenged restrictions reduce the **amount** of revenues, assumes that total local and state revenues are adequate and asks only whether those revenues are being **distributed** in a racially discriminatory manner. But plaintiffs have not brought another “equity” funding case challenging the distribution of school funds. The proper analysis requires the Court to determine exactly what effects the racially motivated property tax restrictions were intended to have and whether those intended adverse effects, described in I.A. *supra*, persist today.

Summary judgment is inappropriate for this case in particular. As the following sections II. and III. make clear, there are disputed facts covering a time frame of more than a century and analysis of extensive data. As we discuss in more detail in section V.C., the seven-factor standard of *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” 429 U.S. at 266. The defendants’ motion should be denied with little ado, and trial should be scheduled as contemplated by this Court’s final scheduling order. Doc. 138.

## II. PLAINTIFFS' RESPONSES TO DEFENDANTS' CLAIMED UNDISPUTED FACTS.<sup>1</sup>

### *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. 125-1, Bell Rpt. at 6.

**Disputed.** Plaintiffs understand that the data of assessed property values are regularly collected by the Alabama Department of Revenue and accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table but do not dispute the accuracy of those calculations. Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their agricultural land and timberland from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data analyze all property including utility, commercial, and vehicles and, therefore, obscure the assessed value of farm and timber land which is at issue in this case. Second, the divisor, county population, is irrelevant to determining whether the assessed value of such property has been depressed by the racially

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<sup>1</sup> References to Appendix A incorporate all endnotes to designated paragraphs.

motivated property tax provisions challenged in this case. The divisor should be a geographic measure, such as square miles or acres, which would account for the variation in geographic size of the counties. The variation in population of counties is not related to the assessed values of property unless one were trying to analyze the tax burden on the population, or make some similar inquiry. Third, to the extent that defendants contend that population is a proxy for public school students, it is inaccurate both as to size and racial composition. Fourth, ranking counties by racial composition and attempting to draw a comparison is improper, because it must assume that all of the counties are identical on all other relevant differences; for example, the amount of farm and timber land. See the declaration of Dr. Dan Sullivan, PX 21,.

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.

**Disputed.** Plaintiffs understand that the data of assessed property values are regularly collected by the Alabama Department of Revenue and accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table but do not dispute the accuracy of those calculations. Plaintiffs **dispute** this fact because it is not a material fact in

this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their agricultural land and timberland from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data analyze all property including utility, commercial, and vehicles and, therefore, obscure the assessed value of farm and timber land which is at issue in this case. Second, the divisor, county population, is irrelevant to determining whether the assessed value of such property has been depressed by the racially motivated property tax provisions challenged in this case. The divisor should be a geographic measure, such as square miles or acres, which would account for the variation in geographic size of the counties. The variation in population of counties is not related to the assessed values of property unless one were trying to analyze the tax burden on the population, or make some similar inquiry. Third, to the extent that defendants contend that population is a proxy for public school students, it is inaccurate both as to size and racial composition. Fourth, producing a weighted average of per capita assessed values requires assuming that the counties are all equal on the factor upon which they are weighted. In Dr. Bell's case he weights on county population by race. Thus, this analysis runs afoul of Simpson's Paradox.<sup>2</sup> The analysis masks the very difference in treatment that is

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<sup>2</sup>

A "weighted average" assumes that the only difference between the

the subject of this case. See the declaration of Dr. Dan Sullivan, PX 21, especially at paragraph C.2.

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

**Disputed.** Refer to the objections set out in the preceding paragraphs. In addition, using correlations, like the previous measures, requires that the units being measured (in this case, counties) are all equal on the factor upon which they are weighted and thus masks the asset class and racial variation being challenged. See the declaration of Dr. Dan Sullivan, PX 21,.

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.

**Disputed.** Refer to the objections in the preceding paragraphs.

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units being averaged (in this case, counties or school systems) is the factor on which they are “weighted.” The measures developed by Dr. Bell weight on the size (population or number of students). Such a measure requires one to assume that these units are identical on all other factors. Ignoring these other factors leaves one subject to Simpson’s Paradox.... ... Most of Dr. Bell’s conclusions disappear when you take into account differences in the characteristics of school systems across the state, differences that are germane to this case.

PX 21 at 3-4. It is patently untrue that the counties or school systems are all equal in their racial mix, or have equal mixes of property tax classifications, or have school systems with equal cost structures.

*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.

**Disputed.** Refer to the objections in the preceding paragraphs.

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

**Disputed.** This measure is based on the race of school system students and is essentially the same as number 3 above which showed a correlation coefficient between race and per capita property tax base at the county level. Plaintiffs' response is therefore the same as to number 3, except, obviously, this number 6 is based on school systems rather than the county level data used in 3 above.

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.

**Disputed.** This measure is based on the race of school system students and is very similar to the same measure as in number 2 above, which showed a statewide weighted average of the per capita county property tax base for public schools is virtually identical for black citizens and white citizens. Plaintiffs'

response is therefore the same as to number 2, except, obviously, this number 7 is based on school systems rather than on the county level data used in 2 above.

*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.

**Disputed.** Refer to the objections in paragraphs 1 and 2 above. In addition, Plaintiffs understand that the data of local property tax are regularly collected by the Alabama Department of Revenue and accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table but do not dispute the accuracy of those calculations. Plaintiffs' further understand that these data are only aggregated at the county level, are not broken down at the school system level, would not reflect tax revenues actually collected, and would not include property taxes passed through from other local taxing jurisdictions such as a county or municipality.

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.*

**Disputed.** Plaintiffs understand that the data of local property tax are regularly collected by the Alabama Department of Revenue and accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table but do not dispute the accuracy of those calculations. Plaintiffs further understand that these data are only aggregated at the county level, are not broken down at the school system level, would not reflect tax revenues actually collected, and would not include property taxes passed through from other local taxing jurisdictions such as a county or municipality. Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their farm and timber land from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data analyze property taxes in each county, including taxes on utility property, commercial property, and vehicles and, therefore, obscure the assessed value of farm and timber land which is at issue in this case. Second, the divisor, county population, is irrelevant to determining whether the tax revenues have been depressed by the racially motivated property tax provisions challenged in this case. The divisor should be a geographic measure, such as square miles or acres, which would account for the variation in geographic size of the counties. The variation in

county population is not related to the assessed values of property unless one were trying to analyze the tax burden on the population, or make some similar inquiry. Third, to the extent defendants contend that population is a proxy for public school students, it is inaccurate both as to size and racial composition. Fourth, producing a weighted average of per capita tax revenues requires assuming that the counties are all equal on the factor upon which they are weighted. In Dr. Bell's case he weights on county population by race. Thus, this analysis runs afoul of Simpson's Paradox. The analysis masks the very difference in treatment that is the subject of this case. See the declaration of Dr. Dan Sullivan, PX 21, especially at paragraph C.2.

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

**Disputed.** This correlation is based on the race of a county's population and a measure of per capita county property tax and is essentially the same as number 3 above, which offered a correlation coefficient between race and per capita property tax base at the county level. Plaintiffs' response is therefore the same as to number 3, except, obviously, this number 10 is based on a per capita measure of county property tax revenues rather than the county assessed value used in 3 above.

*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.

**Disputed.** Plaintiffs understand that the data of school expenditures are regularly collected by the State Department of Education, though that is not noted in the referenced report of Dr. Bell. As noted at the *Daubert* hearing on January 22, 2010, Dr. Bell's table does not clearly identify the specific sources in the data that are included, and plaintiffs are unable to determine whether all the correct data points have been included. Further, plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their farm and timber land from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data include expenditures from all state and local revenue sources, including sales taxes, use taxes, all types of property taxes, lunch money, and football ticket sales. This is far removed from plaintiffs' claim in this case. Second, ranking school systems requires an assumption that school systems are the same when obviously they are not. School systems vary greatly on many factors, for example, by size. See the declaration of Dr. Dan Sullivan, PX 21.

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

**Disputed.** Plaintiffs understand that the data of school expenditures are regularly collected by the State Department of Education, though that is not noted in the referenced report of Dr. Bell. Nevertheless, Plaintiffs accept the data as authentic and do not challenge the accuracy of the data. As noted at the *Daubert* hearing on January 22, 2010, Dr. Bell's table does not clearly identify the specific sources in the data that are included, and plaintiffs are unable to determine whether all the correct data points have been included. Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their farm and timber land from taxation in order to prevent public tax support of public education for black students, for the following reasons. First, Dr. Bell's data include (he gives us no detailed description of the expenditures included) expenditures from all revenue sources, including sales taxes, use taxes, all types of property taxes, lunch money and football ticket sales . This is far removed from plaintiffs' claim in this case. Second, producing a weighted average of per capita tax revenues requires assuming that the counties are all equal on the factor upon which they are weighted. In Dr. Bell's case he weights on county population by race. Thus, this

analysis runs afoul of Simpson's Paradox. The analysis masks the very difference in treatment that is the subject of this case. See the declaration of Dr. Dan Sullivan, PX 21, especially at paragraph C.2.

*Sumter County and Lawrence County analysis*

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

**Disputed.** Plaintiffs understand that the data of assessed property values are regularly collected by the Alabama Department of Revenue and accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table at page 14 of Dr. Bell's report but do not dispute the accuracy of those calculations. Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their farm and timber land from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data analyze all property, including utility, commercial, and vehicles, and, therefore, obscure the assessed value of farm and timber land which is at issue in this case. Second, the divisor, county population, is irrelevant to determining whether the assessed value of such property has been depressed by the racially motivated property tax provisions challenged in this case.

The divisor should be a geographic measure, such as square miles or acres, which would account for the variation in geographic size of the counties. The variation in population of counties is not related to the assessed values of property unless one were trying to analyze the tax burden on the population, or make some similar inquiry. Plaintiffs' analysis of the same data shows that Sumter county is the third lowest county in the state with an assessed value of \$171,000 per square mile. See PX 20 and Attachment B, page 6. Third, to the extent defendants contend that population is a proxy for public school students, it is inaccurate both as to size and racial composition. Fourth, without any description of the distribution of the data set, looking at the median is meaningless. See the declaration of Dr. Dan Sullivan, PX 21.

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

**Disputed.** Plaintiffs understand that the data of school expenditures are regularly collected by the State Department of Education, though that is not noted in the referenced report of Dr. Bell. Nevertheless, Plaintiffs accept the data as authentic and do not challenge the accuracy of the data. Plaintiffs have no calculations to assess, nor have we tried to duplicate, the calculations reflected in the bar chart, but plaintiffs do not dispute the accuracy of those calculations.

Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their agricultural land and timberland from taxation in order to prevent tax support of public education for black students, for the following reasons. First, even though Dr. Bell gives us no detailed description of the expenditures included, his data appear to include expenditures from all revenue sources, including sales taxes, use taxes, all types of property taxes, lunch money and football ticket sales. This is far removed from plaintiffs' claims in this case. Second, to the extent that defendants contend population is a proxy for public school students, it is inaccurate both as to size and racial composition. Third, without any description of the distribution of the data set, looking at the median is meaningless. See the declaration of Dr. Dan Sullivan, PX 21.

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

**Disputed.** Plaintiffs understand that the data of local property tax are regularly collected by the Alabama Department of Revenue, accept the data as authentic, and do not challenge the accuracy of the data. Plaintiffs have not tried to duplicate the calculations reflected in the table but do not dispute the accuracy of those calculations. Plaintiffs further understand that these data are only aggregated

at the county level, are not broken down at the school system level, would not reflect tax revenues actually collected, and would not include property taxes passed through from other local taxing jurisdictions such as a county or municipality. Plaintiffs **dispute** this fact because it is not a material fact in this case, where plaintiffs claim that white landowners in the Black Belt sought to protect their agricultural land and timberland from taxation in order to prevent tax support of public education for black students, for the following reasons. First, Dr. Bell's data analyze property taxes in each county, including taxes on utility property, commercial property, and vehicles and, therefore, obscure the assessed value of farm and timber land which is at issue in this case. Second, the divisor, county population, is irrelevant to determining whether the tax revenues have been depressed by the racially motivated property tax provisions challenged in this case. The divisor should be a geographic measure, such as square miles or acres, which would account for the variation in geographic size of the counties. The variation in county population is not related to the assessed values of property unless one were trying to analyze the tax burden on the population, or make some similar inquiry. Third, without any description of the distribution of the data set, looking at the median is meaningless. We note that Dr. Bell calculated Sumter County's per capita property tax revenues at \$133 per person, above the state median he

calculated at \$118 and below the state mean he calculated at \$196. See his report at p. 11. See the declaration of Dr. Dan Sullivan, PX 21.

*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. **Disputed.** Appendix A, ¶ 73 et seq.

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. **Disputed.** Appendix A, ¶ 73 et seq.<sup>3</sup>

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<sup>3</sup> See generally the declarations and reports of plaintiffs' history experts, PX 1, 4, 5, 7, 8, 10, 11, and 13. For example:

Though it is true that I also discussed rural-urban conflict in the late 20th century (pp. 86-87), as does Bass, it is important to note that I did so in a long section of my chapter on politics under the subheading, "The Politics of Race, 1958-2000" (p. 76). It was also within that subheading that I discussed John Dorrill, Jr., and his central role as a lobbyist for the most significant of the planter oriented, agricultural lobbies, the Alabama Farm Bureau (later renamed the Alabama Farmers' Federation or ALFA), p 82. Within that section also, I discussed Baker v. Carr, Reynolds v. Sims, Bolden v. Mobile and other rulings that threatened planter hegemony in Alabama politics and especially Black Belt white legislators who dominated the legislature (p. 87). This section of my book also contains a section on the racism of Gov. George C. Wallace (pp. 88-89), the role of Wallace's 1972 presidential campaign which centered not on the overt racial rhetoric of his 1964 and 1968 presidential races but on a more covert and nuanced opposition to

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. **Disputed.** PX 14 and 15; Appendix A, ¶ 73 et seq.

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. **Disputed.** Appendix A, ¶ 73 et seq.

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. **Disputed.** PX 4 at 12.

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

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“forced busing” (pp. 99, 104-105 emphasize the importance of race in Alabama politics in the late 20th century).

Flynt, PX 7 at 7. Or, as Dr. Jeff Frederick puts it:

In essence, the defense motion states that since no legislator admitted to nefarious racial intent, racial discrimination did not exist. This is little more logical than a hunter who travels to the woods and states that deer do not exist in Alabama because he did not see one that day. In fact, a thorough hunter would check for rubs and scrapes, scat, bedding areas, tracks, and other contextual factors that explain the presence of deer in the woods, even if the bucks, does, and fawns could not be observed on a given day.

Frederick, PX 10 at 3.

African Americans because of their race. **Disputed.** PX 31-35; Appendix A, ¶ 73 et seq.

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. **Not disputed.**

*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. **Not disputed.** But this does nothing to relieve the defendants of their burden clearly to identify their sources when they present their evidence.

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. **Not disputed.** But this does nothing to relieve the defendants of their burden clearly to identify their sources when they present their evidence.

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. **Not disputed.** But this does nothing to relieve the defendants of their burden clearly to identify their sources when they present their evidence.

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. Plaintiffs **do not dispute** the statements of Mr. Bass in at ¶¶ 2, 8 and 16, but plaintiffs neither admit nor deny the accuracy of Mr. Bass' affidavit with respect to what Dr. Michael Bell relied upon. Dr. Bell must state what he relied upon.

### **III. PLAINTIFFS' ADDITIONAL CLAIMED DISPUTED MATERIAL FACTS.**

#### *Intent*

1. In 1875, whites from the Black Belt, concerned that a black majority might regain political power and raise taxes, placed in the constitution millage caps for both state and local property taxes. Appendix A at ¶¶ 1-33.

2. The 1875 Constitution thus became the first Alabama constitution to place strict constitutional limits on the ability of both the State and local

governments to tax property. Appendix A at ¶¶ 1-33.

3. Racial motives permeated the establishment of constitutional caps on millage rates in 1875. Appendix A at ¶¶ 1-33.

4. Whites living in the Black Belt counties also used their influence over local tax assessors to reduce property assessments in the Black Belt far below market value, which disadvantaged other white counties. Additionally, the legislative sessions that followed ratification of the 1875 Constitution further lowered the millage rate from 7.0 mills in 1877 to 4.0 mills in 1890 so as to shield property from taxation. Appendix A at ¶ 41.

5. From 1875 to 1891, by law black schools were supposed to receive a proportionate amount of school funding. In 1891, however, the Apportionment Act was enacted, thereby giving discretionary authority to local school trustees to apportion funds among schools. As a result, funding destined for black schools was diverted to white schools all over the State, although it disadvantaged schools in the white counties of North Alabama. “But of course in the majority Black Belt townships, ... this ha[d] an enormous and devastating effect on black education.” Appendix A at ¶ 44 .

6. The 1891 Apportionment Act also had an impact on the politics of property taxes. By diverting funds from black schools to white schools, there was

less of a need for additional property taxes in Black Belt counties because white schools were being funded adequately. Consequently, the Black Belt whites, due to total-population apportionment of the legislature, were able to thwart attempts by reformers in urban areas and in white counties to raise taxes to increase funding for public schools. Appendix A at ¶ 45.

7. Black Belt whites had successfully invoked white supremacy to protect their economic interests in the 1875 Constitution. Soon thereafter, agitation for another revision of the constitution pitted whites in urban counties against rural Black Belt counties and whites in North Alabama rural counties against whites in South Alabama rural counties. The millage caps in the 1875 Constitution prevented the urban and North Alabama counties from raising local taxes for both economic development and education. They argued that the racial reasons for adopting the millage caps were no longer a threat. Appendix A at ¶ 42.

8. The public school funding provisions of the 1901 Constitution are directly traceable to the 1875 Constitution, and propertied interests in the State, by invoking white supremacy, were successful once again in protecting their financial interests. Appendix A at ¶¶ 1-65.

9. The ensuing compromise between the whites in the 1901 constitutional convention was that the white counties would effectively control the executive

offices of the State, while the Black Belt counties would control the Legislature. This arrangement assured that the Black Belt could thwart attempts to increase property taxes. The refusal of the Alabama Legislature to reapportion itself during the twentieth century (until federal courts ordered reapportionment of seats beginning in the late 1960s), actually made Black Belt control of the Legislature even stronger. Appendix A at ¶ 52 .

10. White delegates from black counties defeated the racial apportionment of taxes because it was against those whites' interests in securing a greater share of school revenues, which the whites were already allocating disproportionately to their white schools. The 1901 Constitution incorporated the phraseology of the 1891 Apportionment Act to insure the continued redirection of funds from black schools to white schools, thus making explicit apportionment of taxes on the basis of race, which might invite U.S. Supreme Court scrutiny, unnecessary. Appendix A at ¶ 56 .

11. The general hostility to home rule in the 1901 Constitution, as well as the 1875 Constitution, was motivated at least in part by race: "white control of the state government ... is an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties. And so it's important not to have too much power in the hands of the counties, or to make sure that the

power ... that is at the local level is in safe, that is, Democratic and white hands.”

Appendix A at ¶ 59 .

12. As it turned out, many whites (and blacks outside the Black Belt) voted against ratifying the 1901 Constitution, and once again the Black Belt “counted in” their black voters to provide the margin of victory. As a result, almost all blacks and many whites were disfranchised. Appendix A at ¶ 64 .

13. The 1901 Constitution succeeded in its purpose of perpetuating the power of the Black Belt oligarchy over the Alabama Legislature. Appendix A at ¶ 65.

14. The Supreme Court’s decision in *Brown II* had an immediate negative impact on the willingness of white Alabamians to raise school revenues. On December 20, 1955, the voters approved Amendment 111, which this Court found to have “adopted most of the recommendations of the 1954 Interim Legislative Committee report for the racially discriminatory purpose of preserving segregation in the public elementary and secondary schools of the state.” (*Knight v. Alabama*, 787 F.Supp. at 1104). Amendment 111 is unchanged today, and the support of public education is constitutionally permitted but not required in Alabama.

Appendix A at ¶ 75.

15. As the threat of school desegregation intensified, legislative enthusiasm

for funding public schools sharply diminished. Particularly in the Black Belt, whites were committed to the idea that public education could not continue if it were ordered to operate on an integrated basis. The schools would simply have to be closed; public education would have to end because an integrated education was not acceptable. With that as a fundamental first priority, any efforts to raise property tax, increase any kind of funding of schools, was in serious trouble and of great question until the matter of school integration was settled. Appendix A at ¶¶ 76-164.

16. Nevertheless, so long as Black Belt whites retained local control over the valuation of their property and attempts to raise millage rates, they continued until 1969-70 to support efforts to increase state funding for schools, including the black schools that were being built in the last gasp of separate but equal. Appendix A at ¶ 83; PX 13.

17. For Black Belt landowners the connection between legislative reapportionment, the rise of the black vote, and fear of increased property taxes was particularly strong. Appendix A at ¶ 85.

18. The Alabama Farm Bureau represented Governor George Wallace's core constituency, and Wallace could always be counted on to promote the Farm Bureau's economic interests. Appendix A at ¶ 89.

19. Federal court-ordered merger of black and white student bodies turned white voters against increased revenues for public schools, and, because of whites' hostility to federally ordered school desegregation, Governor Brewer's proposed constitutional amendment to raise income taxes was soundly rejected in the same November 1970 general election that brought George Wallace back to the Governor's office. These circumstances made it unlikely that the 1971 Legislature would be willing to raise new school revenues of any kind. Appendix A at ¶¶ 92-108; PX 13.

20. After he was elected Governor in November 1970, George Wallace put aside explicit references to race and resorted to code words that had clear racial connotations to white Alabamians and tailored his rhetoric toward a national audience as he prepared to run again for President. Appendix A at ¶ 110.

21. Two weeks after the *Weissinger* decision, Governor Wallace told private school patrons in Bibb County, "I think it's a horrible thing that you people have to pay taxes to support public schools. Then you have to dig in again to pay for quality education for your children in a private school." He continued to link opposition to federal court school desegregation orders with resistance to increased school taxes. And he repeatedly vowed to "veto any direct taxes" for schools, including any bill which would raise property taxes. Appendix A at ¶ 113.

22. By September 1971, about 25,000 white students, including most white students in the Black Belt, were attending private schools to avoid school integration. Appendix A at ¶ 113.

23. As successive legislative reapportionment plans increased the number of legislators from urban areas and decreased the number from rural areas, Black Belt whites relied more and more on Governor Wallace to defend their historical interests. Appendix A at ¶ 115.

24. The Alabama Farm Bureau enjoyed some of its most powerful influence during the Wallace years. Appendix A at ¶ 115.

25. The Alabama Farm Bureau drafted, negotiated and managed through the legislative process the bills that became Amendment 325 and Amendment 375. Appendix A at ¶¶ 90, 94-97, 103-05, 120-26, 130-51, 158, 166, 170.

26. The special session in which Amendment 325 passed was an exercise in the raw power of Governor George Wallace, his Farm Bureau constituents, and Black Belt legislators to ram through a complicated tax measure that very few legislators even understood. Appendix A at ¶¶ 110-151.

27. The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama Legislature, fair reassessment of all property subject to taxes, and school

desegregation, created a “perfect storm” that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students. Appendix A at ¶¶ 1-155.

28. In August 1978 Governor Wallace’s Lid Bill package was passed in the minimum five days required of a special session. The legislators essentially rubber-stamped everything that Wallace asked for. Sen. Joe Fine was quoted saying, “Wallace could have saved money if he had put all of that in an executive order and let the presiding officers of both houses sign the thing.” Appendix A at ¶ 162.

29. There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. “[T]he fact is, that this is a set of assumptions and a set of institutional relationships and a set of social relationships that ... is created by historical events, that is historically created and ... interrelated so that the events feed onto each other and it makes a single understandable whole.” The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978. (“The limits are always associated with

white supremacist intent, and that occurs in 1875, strongly reinforced in 1901, and essentially uninterrupted, unbroken, ... as main public policy commitments of the state through the 1970's.”.) Appendix A at ¶¶ 1-167.

30. Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments. Appendix A at ¶¶ 1-168.

*Continuing adverse effects*

31. The facts and data set out in the declaration of Dr. Ira Harvey, PX 20, are accurate and correct.

32. The facts and data set out in the declaration of Dr. Dan Sullivan, PX 21, are accurate and correct.

33. Whites in the Black Belt still own disproportionately more valuable property than do blacks, primarily farm and timber land. Doc. 78-2; PX 22, 24.

34. The classification system and current use provisions of Amendments 325 and 373 lower the tax base in Black Belt counties, including Sumter County, disproportionately more than they do in other Alabama counties. Doc. 78-2; PX 22, 24.

35. A higher percentage of white students have left the public schools in Sumter County and other Black Belt counties than in any other Alabama counties. PX 29; Doc. 125-2 at 19 (Dr. Bell's report).

36. The millage caps and cumbersome override process embedded in the Alabama Constitution, in conjunction with Amendments 325 and 373, depress **local** school revenues in **rural** school systems in the Black Belt more than they depress local school revenues in other rural and urban school systems in Alabama. PX 20, 21, 25, 26.

37. The millage caps and cumbersome override process embedded in the Alabama Constitution, in conjunction with Amendments 325 and 373, depress **local** school revenues in **rural** school systems all over Alabama more than they depress local school revenues in urban school systems. PX 20, 21, 25, 26.

38. Local school revenues are critically needed by public school systems in Alabama for costs that state funds do not cover, such as unfunded mandates, capital construction and improvements, and debt service. PX 20 at 3-5.

39. This will be true no matter how well the 1995 Minimum Foundation Program works to redistribute state revenues on an equitable basis. Id.

40. The racially motivated property tax restrictions in the Alabama Constitution continue to have their intended discriminatory effects, namely,

inadequate revenues currently collected from local property taxes, the resulting underfunding of the state's K-12 public school system, particularly rural and majority-black schools, the over-dependence of K-12 on the Education Trust Fund and the consequent underfunding of Alabama's entire system of public education, including higher education.

[O]ne of the most important changes needed in Alabama is a substantial increase in property taxes because in Alabama, the property tax revenue is so low the state has to pick up the bulk of the cost of the public schools from regressive sales and income taxes; moreover, inasmuch as higher education is funded from the same source as K-12, the monies available to higher education are substantially reduced.

458 F.Supp.2d at 1304 (citing PX 17).

*Knight v. Alabama*

41. Judge Harold Murphy's findings of purposeful discrimination in *Knight and Sims v. Alabama*, 458 F.Supp.2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11<sup>th</sup> Cir.), *cert. denied*, 127 S.Ct. 3014 (2007), are supported by the evidence.

Appendix A; Docs. 10 (including subparts) to 18.

**IV. PLAINTIFFS' STATEMENT OF ADDITIONAL UNDISPUTED FACTS.**

1. The State, the Governor, and the Revenue Commissioner all are receiving

and/or distributing federal funds. Doc. 93 at 20-24.

## V. ARGUMENT

### A. Defendants Are Attempting to Evade the Law Governing Purposeful Racial Discrimination By Advancing an Erroneous Theory of Injury and Continuing Discriminatory Effects.

1. *The correct legal standard for determining continuing adverse effects of particular racially motivated state laws.*

The plaintiffs in this action can prove, as they have alleged, that six specific provisions were written into the Alabama Constitution by members of constitutional conventions, governors, and legislators representing white landowners in the Black Belt for the invidious purpose of shielding their property from being taxed to pay for the education of blacks. African Americans in the Black Belt counties that were targeted by the drafters of these constitutional provisions continue to suffer from inadequate local revenues to fund their (almost all-black) public schools. In addition, black and white students of public schools in other rural counties suffer a similar lack of local revenues, because the facially neutral devices written into the state constitution to accomplish the purposeful discrimination necessarily removed the same kinds of property from all rural tax bases and revenues.

So this case is just like prior federal court decisions that struck down

provisions in Alabama's constitution that were intended by their drafters to disfranchise African Americans, even though the facially neutral devices adopted to accomplish this purpose actually disfranchised more whites than blacks.<sup>4</sup> In none of those prior cases did judgment depend on a showing that more blacks than whites were injured. If the African Americans who were the original targets of the

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The disfranchisement of the whites under the Constitution of 1901 increased with the passage of time. A study made by the Alabama Policy Conference, based on the census of 1940 and registration and poll tax statistics from the offices of secretary of state and state comptroller, showed that in 1941-1942, some 600,000 whites and 520,000 Negroes were disfranchised, whether voluntarily or involuntarily. Supposedly designed to disfranchise the Negro, the poll tax and other deterrents had disfranchised more whites than Negroes. By contrast, there were only 440,291 registered voters in the state. In most counties more whites were disfranchised than were registered. In Jefferson County only 65,000 of a potential white voting population of 175,584 were registered. Some 110,584 whites and 108,775 Negroes were disfranchised. In the North Alabama white county of Winston, 3,600 were registered; 5,378 whites and 75 Negroes were disfranchised. In the adjoining county of Cullman 9,000 were registered; 14,899 whites and 335 Negroes were disfranchised. In the Black Belt County of Dallas 4,741 were registered; 4,589 whites and 20,863 Negroes were disfranchised. By far the most important constitutional deterrent in the case of the whites was the poll tax. In the case of the Negro so many constitutional requirements and even extralegal restraints were involved as to lessen the importance of the poll tax. These figures indicate that the Constitution of 1901 restricted the voting franchise to a select white minority and eliminated the Negro voter.

McMillan at 353-54 (footnotes omitted).

purposeful discrimination continue to suffer the injury intended by the racially motivated provisions, those provisions violate federal constitutional and statutory equal protection law and must be struck down, even if the number of victims in the target population has diminished, and even if the number of whites similarly injured, past or present, is much larger.

The Supreme Court's reasoning in *Hunter v. Underwood* is not to the contrary. The Court's observations that 10 times as many blacks as whites had been disfranchised by certain misdemeanors in 1903, and that 1.7 times as many blacks as whites (in Jefferson and Montgomery counties only – not statewide) were disfranchised at present, were cited as proof of official intent, not as proof of continuing adverse effects. 471 U.S. at 227-28. Unlike the poll tax and other provisions that were explicitly aimed at blacks in the proceedings of the 1901 constitutional convention,<sup>5</sup> the plaintiffs in *Hunter* had to rely primarily on the

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<sup>5</sup> In *United States v. Alabama*, 252 F.Supp. 95 (M.D. Ala. 1966) (3-judge court), Judge Rives quoted delegate Hood:

Now in my judgment, this poll tax qualification is the most important provision in this entire article. We are told that in the Black Belt and that in many counties in the state, there is a large percentage of those young Negroes who are coming of age that will be able to read and write, therefore will be qualified under the provisions of this article. The only safety valve, Mr. President, that is contained in this article after 1903 for a large proportion of the Negroes in this State is this Poll tax of \$1.50.

Id. at 99 (footnote omitted).

discriminatory impact of the enumerated crimes of “moral turpitude” to establish the drafters’ racial motivations.<sup>6</sup> Continuing discriminatory effects are discussed further down in the *Hunter v. Underwood* opinion:

Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*[*v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)].

471 U.S. at 233. Here the Court was referring to the fact that African Americans continued to be disfranchised as the drafters intended. It did not suggest that the original racially discriminatory intent would have been expunged if 1.7 times as many whites as blacks were being disfranchised today. To the contrary, it held that the discrimination against poor whites did not save § 182 from violating the Fourteenth Amendment.<sup>7</sup> Nor would it have been relevant if the State had offered

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<sup>6</sup> The Eleventh Circuit’s opinion, affirmed by the Supreme Court, clearly placed these references to discriminatory impact in its discussion of the drafters’ intent: *Underwood v. Hunter*, 730 F.2d 614, 619 (11<sup>th</sup> Cir. 1984), aff’d 471 U.S. 222 (1985) (“While there is scant record of the debates over section 182, the sources of the crimes selected for inclusion in and exclusion from section 182 shed light on the motives of its drafters.”).

<sup>7</sup>

In their brief to this Court, appellants maintain on the basis of their expert’s testimony that the real purpose behind § 182 was to disenfranchise poor whites as well as blacks. . . . Even were we to accept this explanation as correct, it hardly saves § 182 from

evidence comparing the total number or percentages of whites and blacks who were registered to vote or who were disqualified from voting by all other constitutional provisions. A showing that there was still some significant number of blacks who were not eligible to vote because of the racially motivated misdemeanor sections of the 1901 constitution established the requisite continuing adverse racial effects.

Similarly, the court in *United States v. Alabama*, 252 F.Supp. 95 (M.D. Ala. 1966) (3-judge court), did not require the Justice Department to prove that more blacks than whites were unable to pay the poll tax. To the contrary, it held:

There is nothing in the subsequent history of the poll tax that would indicate sufficient change in its purpose for us to overlook its inherent defects. **Nor would an injunction of its present discriminatory application serve to eliminate the inconsistency between any allegedly valid motivation and the present poll tax exemptions.**

252 F.Supp. at 104 (emphasis added). Rather, evidence of the discriminatory application of the poll tax requirement by local registrars merely “magnif[ied] its injustices.” *Id.*

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invalidity. The explanation concedes both that discrimination against blacks, as well as against poor whites, was a motivating factor for the provision and that § 182 certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation.

*Hunter v. Underwood*, 471 U.S. at 230-31.

So, in the instant case, plaintiffs need only show that challenged property tax provisions continue, as the drafters intended, to minimize the exposure to taxation of whites who own most of the land in the Black Belt and to restrict local school revenues in the target Black Belt counties to establish continuing adverse racial effects. It is not necessary that plaintiffs prove that African Americans in the Black Belt counties are worse off than whites and blacks in other rural counties, who necessarily are suffering the same restrictions on their property taxes. (Although some of the data will show that the Black Belt counties are worse off than other rural counties.)

2. *Plaintiffs have Article III standing.*

Defendants reprise the standing arguments this court rejected when it denied their motions to dismiss. See Memorandum Opinion and Order entered July 24, 2008, Doc. 35. They contend now that facts obtained through discovery “have significantly strengthened Defendants’ [standing] arguments.” Doc. 157-1 at 17. But, once again, defendants misconceive the harm suffered by plaintiffs because of the racially motivated property tax restrictions challenged in this action.

The Sumter County plaintiffs, all of whom are African Americans, each testified that his or her public school child suffers from a lack of physical and

instructional resources because of inadequate local school revenues.<sup>8</sup> The Lawrence County plaintiffs, two of whom are black, and two of whom are white, testified to the same harms.<sup>9</sup>

Defendants miss the point entirely when they argue that plaintiffs lack Article III standing because their claims are no different from those of other students, black and white, who suffer a lack of local school revenues in any other poor, rural school system. When this Court finally addresses the merits of plaintiffs' claims, the evidence will show that the six racially motivated property tax restrictions in the Alabama Constitution **targeted** students in Black Belt counties like Sumter, that those provisions are the proximate **cause** of why their school systems are under-resourced, and that students in rural Lawrence County are among the drive-by victims of the Black Belt scheme to shield white landowners.

For the same reason, defendants' contention that "residents in Sumter County have not been harmed relative to other counties by the challenged tax provisions," Doc. 157-1 at 21, is both incorrect and irrelevant. As a threshold

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<sup>8</sup> E.g, Stella Anderson, Doc. 153-7, at 13:2-15:15; Barbara Ormond, Doc. 153-22, at 10:14-12:6; Michael Brooks, Doc. 153-11, at 13:21-23:5.

<sup>9</sup> Miranda Ball, Doc. 153-8, at 20:12-25:1; Tyler Berryman, Doc. 153-9, at 19:12-21:17; Shawn King Lynch, Doc. 153-20, at 19:5-24:10.

matter, it is irrelevant because, as noted above, plaintiffs' claims are not based on the **distribution** of school revenues or funding among the 67 counties and 131 or so separate school systems in Alabama. Comparisons of Sumter County and/or Lawrence County with other counties and school systems does not address the question whether the six challenged constitutional provisions cause a substantial diminution of the **amount** of local school revenues available to residents and students in Sumter, Lawrence, and other similarly impacted counties and school systems.

In any event, the contention, while irrelevant, is also incorrect. See argument below in section IV.B.

3. *The drafters' racially discriminatory intent establishes the suspect classification of race in this action.*

Defendants' argument in section V.B. of their brief that plaintiffs' claims are based on a classification of wealth, not on the suspect classification of race, is a prime example of their attempt to re-frame the issues in a way they hope will avoid confronting the *Hunter v. Underwood* theory of the complaint. Their assertion that "[t]he claims in [*San Antonio Independent School Dist. v. Rodriguez* [411 U.S. 1 (1973),] could hardly be more similar to the claims in this case," Doc. 157-1 at 23, is at best disingenuous. There was no claim in *Rodriguez* that Texas had enacted a particular law for the invidious purpose of discriminating against Mexican

Americans. The *Rodriguez* plaintiffs challenged the entire “Texas system of financing public education.” 411 U.S. at 4. As defendants admit, the plaintiffs in *Rodriguez* alleged a “pattern of discrimination against Mexican-Americans,” Doc. 157-1 at 23, not that a particular statute – or for that matter, the entire school finance system – had been drafted for an invidious racial purpose. Justice Marshall’s dissent explained why this pattern-and-practice claim was unsuccessful.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members **tend** to live in property-poor districts, **suggesting** discrimination on the basis of both personal wealth and race. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor districts. Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below, I have no need to join issue on these factual disputes.

I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live.

411 U.S. at 94-96 (Marshall, J., dissenting) (citations and footnotes omitted)

(emphasis added). Moreover, *Rodriguez* was about the alleged discriminatory **distribution** of school revenues, not about statutory provisions that restricted the **amount** of revenues that could be collected.

By contrast, plaintiffs’ claims in the instant action are not based on a pattern and practice of discrimination in the distribution of school funds, but on a claim

that six constitutional provisions were enacted for the racially discriminatory purpose of restricting the **amount** of school revenues that would benefit black students, those in the Black Belt in particular. Plaintiffs understand they must prove the alleged racial motives of the drafters, using the *Arlington Heights* standards. But once they do so, they will have established the suspect classification of race. *Rodriguez*, 411 U.S. at 61 (Stewart, J., concurring) (“Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently ‘suspect.’ Because of the historic purpose of the Fourteenth Amendment, the prime example of such a ‘suspect’ classification is one that is based upon race.”) (citations omitted).

4. *Defendants continue to deploy an erroneous theory for examining the continuing adverse effects of racially motivated laws.*

Section V.C. of defendants’ brief, citing *Rodriguez*, applies their misplaced pattern-and-practice “discriminatory impact” standards to this action: “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.” Doc. 157-1 at 27 (citing the language in *Hunter v. Underwood* that was directed at proof of intent, not at proof of continuing adverse effects). Plaintiffs’ claims in the instant action, unlike the claims of the *Rodriguez* plaintiffs, are not based on evidence that “**subsets** of the black population ... **happen** to be poor and/or **happen** to live in areas with a lower than average per capita property tax base.” Doc. 157-1 at 27 (emphasis added). Rather, plaintiffs here will prove that the “subset” of the black population residing in the Black Belt was purposefully targeted for restricting property tax revenues, and that the Black Belt counties continue to suffer precisely the injury the constitutional drafters intended. Plaintiffs’ claims focus on the Black Belt not because it is “a poor, rural part of the state that **happens** to be prominently black,” as defendants assert, Doc. 157-1 at 28 (emphasis added), but because it is where white landowners throughout Alabama’s history purposefully enslaved, terrorized, segregated, placed in peonage, disfranchised, and denied school resources to African Americans.

As shown above, the continuing adverse racial effects of this intentional discrimination embedded in the state constitution by representatives of Black Belt whites are not measured by a statewide analysis, as defendants persist in arguing. Doc. 157-1 at 29-34. The fact that the challenged constitutional provisions necessarily depress school revenues in the rest of Alabama, particularly in rural

school systems, is a secondary consequence of the purposeful discrimination aimed primarily at African Americans in the Black Belt.

**B. The Adverse Racial Effects Intended by the Drafters of the Challenged Provisions in the Alabama Constitution Continue Today.**

The continuing effects of protecting white-owned land from taxation and denying local property tax revenue to educate black children could not be more stark. It is difficult to imagine an asset class that is so disparately associated with one race as rural land ownership is associated with whites. There are several regularly conducted surveys of farm and timber land ownership that record race of the property owners. A 2006 study from the U.S. Department of Agriculture Forest Service found that 335,000 whites in Alabama owned 13 million acres of forest land, whereas 10,000 blacks owned 276,000 acres of forest land. PX 24. While Alabama's black population is 26% of the total state population in the 2000 U.S. Census, blacks constitute only 2.9% of all owners of timberland. If one looks at the number of acres of forest land owned by whites and blacks, the black-owned acreage was about 2% of the combined total acreage.

Another Forest Service report shows almost 23 million acres of forests in Alabama. The Black Belt counties are particularly high in their proportion of timberland acres. Other south and southwestern Alabama counties also have

significant amounts of timberland. Eight of the Black Belt counties have more than the state proportion of seventy-one percent of their total land area in timberland. Clarke County is highest in the state at ninety-one percent timberland, followed by Choctaw and Washington Counties. Sumter is seventy-four percent timberland. PX 23.

The 2007 U.S. Census of Agriculture found 8,655,000 acres of farmland owned by 45,124 white farmers in Alabama. PX 22. By comparison there were 266,637 acres of farmland owned by 2,709 black farmers. Thus, much like ownership of timberland, whites owned 32.5 times more acres of farmland than blacks owned, and there were 16.6 times more white farmers than black farmers. Most farms owned by blacks were between 10 and 49 acres, while most white-owned farms were larger, between 50 and 179 acres. Alabama's total land mass is about 32.5 million surface acres, including water, cities, and highways. Thus, the 22.7 million acres of timberland and 8.6 million acres of farmland constituted approximately 96% of the total surface area of the state. PX 22. Only four counties (Greene, Sumter, Macon, and Choctaw) have more than 10% of their farm acreage operated by blacks, and none has more than 17.4%. PX 22.

The historic antipathy to black education in the Black Belt is multilayered and long standing. From making it a crime to teach blacks to read in antebellum

days, to providing grossly unequal funding, facilities, and programs during de jure segregation, or to the creation of private white schools and the abandonment of public schools after *Brown*, Black Belt whites have made their attitudes about educating blacks abundantly clear: they wanted little of it, and they did not want to pay for it.

The Declaration of Ira Harvey, PX 20, shows the effects of two of the main devices for limiting taxation of real property: the classification system and the current use provision. Farms and timberland are given a Class III designation and are assessed at 10% of current-use value, whereas all other commercial property is assessed at 20% of fair market value (“FMV”). To compare whether assessed valuations of property were lower in the Black Belt, Dr. Harvey divided the assessed value by the number of square miles in the county and sorted the counties into three groups: 12 Black Belt counties, 14 urban counties<sup>10</sup> and 41 other rural counties. The 12 Black Belt counties had an average assessed value of \$230,990 per square mile, whereas the 14 urban counties, which have much less Class III

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<sup>10</sup> The “Black Belt” (for these purposes) consists of the following 12 counties: Barbour, Bullock, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Perry, Pickens, Sumter, and Wilcox. “Urban” refers to the 14 “Central counties of the Metropolitan Statistical Areas of Alabama.” They are Calhoun, Lee, Jefferson, Shelby, Russell, Morgan, Houston, Colbert, Lauderdale, Etowah, Madison, Mobile, Montgomery, and Tuscaloosa. See, <http://www.whitehouse.gov/omb/infoeg/statpolicy.html#ms>.

property, have an average of \$3,645,244 per square mile. All counties with significant timberland and farm land have lower assessed values. The 41 counties that are not in the Black Belt and not Urban have an average assessed value of \$819,827 per square mile. Black Belt property has an assessed value per square mile that is 6.3% of the value of property in the 14 Urban counties and 28% of the value of property in the other 41 non-Urban counties. All of the counties are shown in Attachment B to PX 20.

The timberland and farm land of the Black Belt are also further shielded from taxation by the current use provision, which allows land owners to claim a property value determined by a statutorily required schedule issued by the Alabama Department of Revenue. PX 25. The value of current use property is approximately one third the value of the FMV. The 10% assessment ratio then must be applied to the current use value. For illustrative purposes, assume 100 acres of timberland have a FMV of \$2,000 per acre or \$200,000 for the 100 acres. If the owner applied for current use, the property would be valued at about \$500 per acre or \$50,000 for the 100 acres.<sup>11</sup> Applying the 10% assessment ratio would yield a total assessed value of \$5,000. If the millage rate was 10 mills, the property

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<sup>11</sup> Detailed property data from Sumter and Lawrence Counties actually show that in Lawrence County current use value represents 31% of FMV or \$517 per acre, and in Sumter County the current use value represents 57% of FMV or \$526 per acre. PX 26.

owner would owe \$50 in taxes on the \$200,000 piece of property. No other commercial property gets either current use valuation and a Class III 10% assessment ratio. Farm land and timberland get both. Dr. Sullivan, PX 21 and Attachment A thereto, estimates that removing these two provisions and treating current use property as Class II commercial property would increase the tax base in most of the Black Belt counties an additional 69% to 138%. Non-Black Belt but rural counties with large amounts of current use property, such as Geneva and Conecuh, would see their tax base increase by 127% and 120% respectively. Dr. Sullivan summarizes the effects of these two provisions on a statewide basis, which also shows a sharp contrast between the adverse effects in the Black Belt counties and other rural counties:

[M]y current estimate is that on an overall statewide basis, these provisions reduce the property tax base by roughly 10 percent. However, in 6 counties they reduce the tax base by more than 100 percent; in another 6 counties they reduce the tax base by 80 percent or more; and in 8 other counties, they reduce the tax base by 60 percent or more (see Attachment A, table 1). As table 1 also shows, 10 of these 20 counties are in the Black Belt and 15 have school systems whose students are predominantly black.

PX 21 at 2. This means that Perry County, with the greatest amount of current use land of any county, would see the total value of its assessed property increase from \$94 million to \$224 million. Statewide the total value of assessed property would increase from \$67 billion to about \$74 billion. While the statewide increase of

about \$7 billion would be very significant, the effects on the Black Belt and other rural counties like Perry would be transformative. This estimate is based on Dr. Sullivan's figures referenced above and on the assessed values shown in Dr. Harvey's spreadsheet at PX 20, Attachment 2.

The Black Belt counties are particularly affected by the current use provision and the Class III assessment ratio. But, of course, all counties have some current use property and are impacted to that extent. Dr. Harvey's declaration with the attached spreadsheet describes the effect on Black Belt counties as follows:

The Black Belt is 15.6 times more reliant on Current Use Class III property than the Urban counties and 4.25 times more reliant on Current Use Class III property than the Other Counties. Of the 12 counties with the highest percent of Current Use property 9 of them are Black Belt counties. The other three counties, Geneva, Conecuh, and Monroe, are closely situated to the Black Belt and by various definitions sometimes included. Perry County is most dependent on Current Use property at 17.5%. Sumter County is the fifth most dependent on Current Use property at 13.3%. Lawrence County is thirty-third ranked and has 3.2% CU property. See Attachment B.

PX 20 at 2.

The classification system, current use provision, multi-step override provisions, and caps have all combined to produce very low taxes on property in the Black Belt. Dr. Harvey, using data from the Alabama Department of Revenue and the State Department of Education, looked at property taxes raised locally in each of the 131 school districts in Alabama. The revenue was divided by the

number of students in each system, known in the education community as Average Daily Membership or ADM.

The twelve Black Belt county school systems raise an average local net ad valorem tax of \$663 per student whereas the state average, including the Black Belt, is \$1,340 per student, 102% higher than the Black Belt, a difference of \$677 per student. ... Sumter County raises \$730 per student of local ad valorem taxes and ranks 73rd among the 131 ranked systems. Hale County is the lowest at \$367 per student. Lawrence County has \$450 per student of local ad valorem taxes and ranks 119 among all school systems.

PX 20 at 2.

The public school systems in Black Belt counties are starved for funds, and those systems are now very disproportionately black. Most whites living in the Black Belt have abandoned public education, and the white students are mostly going to private schools. In seven of the ten Black Belt county school systems shown in Dr. Sullivan's Table 1 (PX 21, Attachment A, Table 1), white students are less than three percent of all students. In all of the Black Belt counties, the percentage of whites going to private schools (as shown by the 2000 Census) was at least 19%; in eight of the 12 counties it was 42-88%. See PX 29, pages 8-10. There may be even more Black Belt whites in private schools now. Defendants' own expert, Dr. Bell, in his table 2, shows seven Black Belt school systems with less than one percent white students. Doc. 125-2 at 19.

In summary, whites own nearly all of the farms and timberlands, avoid most

ad valorem taxes on such properties, and have created a de facto segregated school environment in which the black (public) schools are starved for funds, while white (private) schools receive their backing from white parents and other patrons.

These adverse racial effects are precisely what the drafters of the six challenged state constitutional provisions intended.

While the plaintiffs do not assert a claim in this case that the State is responsible for the overwhelmingly white ownership of farm and timber property (a fact that is demonstrably true in the long view of Alabama history), the state has arranged its taxation system to favor those white owners. At the same time, the State has designated ad valorem taxes (among others) for the public schools. In the Black Belt, those public schools are predominately black (as we note above), and those are the counties with greatest concentrations of current-use property. Thus, the six racially motivated property tax provisions have accomplished their two-pronged racially discriminatory purpose: whites are favored with lower taxes, and blacks are burdened with less funding for schools.

Local school revenues are critically needed by public school systems to pay for costs that state funds do not cover, such as unfunded mandates, capital construction and improvements, and debt service. PX 20 at 3-5. This will be true no matter how well the 1995 Minimum Foundation Program works to redistribute

state revenues on an equitable basis. *Id.* The Court can take judicial notice that local revenues are particularly important in economic down times, like the present, when proration cuts back state school funding year after year.

**C. Defendants Totally Ignore the Controlling Standards For Determining Purposeful Discrimination, Which Clearly Establish the Racially Discriminatory Intent of the Drafters of the 1971 and 1978 Lid Bill Amendments.**

Defendants' discussion of discriminatory intent totally omits any reference to *Arlington Heights*, which sets out the Supreme Court's criteria governing this action for assessing the motives behind official state action. *Hunter v. Underwood*, 471 U.S. at 227. Undoubtedly, that is because application of those standards to the evidence here fully substantiates the findings of racial motivation Judge Murphy made in *Knight*.

*Arlington Heights* holds that “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,” 429 U.S. at 266, and sets out the following evidentiary factors to be considered:

1. “The impact of the official action whether it bears more heavily on one race than another may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the

state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare.” 429 U.S. at 266 (citations and internal quotation marks omitted).<sup>12</sup>

2. “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.” 429 U.S. at 267 (citations omitted).

3. “The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” *Id.* (citations omitted).

4. “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” *Id.*

5. “Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” *Id.*

6. “The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” 429 U.S. at 268.

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<sup>12</sup> “This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause.” *Id.* at 266 n.14.

7. “In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.” *Id.* (citations omitted).

The central role of the Alabama Farm Bureau is relevant,<sup>13</sup> because official purposeful discrimination may be found if plaintiffs show that the “decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens.” *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1284 (11<sup>th</sup> Cir. 2006) (quoting *United States v. Yonkers*, 837 F.2d 1181, 1225 (2d Cir.1987); *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 n. 3 (8th Cir.1975); *Jackson v. City of Auburn*, 41 F.Supp.2d 1300, 1311 (M.D. Ala.1999)).

The first six *Arlington Heights* factors are especially important, “[b]ecause explicit statements of racially discriminatory motivation are decreasing....”

*Hallmark Developers*, 466 F.3d at 1283 (citations omitted). These six factors,

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<sup>13</sup> E.g., *Waggoner* at 13:4-8 (“But the Jefferson delegation normally voted together, you know, because it was an urban-rural issue. It was kind of us against the timber people and the Farm Bureau.”); *Little*, Doc. 153-19 at 15:15-16-6; *Johnstone*, Doc. 153-16 at 24:4-13; *Fine*, Doc. 153-13 at 13:2-4; 17:3-18:6.

which address the total context in which official actions are taken, correspond with the methodology of professional historians.<sup>14</sup> Yet *Arlington Heights* factor number 7 is the **only** type of evidence relied on by defendants to support their motion for summary judgment. In fact, defendants admit they cannot presently prove an absence of evidence satisfying factors 1-6.<sup>15</sup> To support their reliance entirely on the deposition testimony of eight legislators, one former Governor, and the AEA executive secretary, and the affidavit of former Senator and Lt. Governor McMillan, defendants cite *Brooks v. Miller*, 158 F.3d 1230, 1242 (11th Cir. 1998), where the Eleventh Circuit affirmed the district court's ultimate reliance on the testimony of Georgia Governor Carl E. Sanders. But both the district court and the Eleventh Circuit in *Brooks* affirmed the necessity of considering **all** the *Arlington Heights* factors:

In our view, the district court's review of the available evidence constituted the "sensitive inquiry" required by *Arlington Heights*. The

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<sup>14</sup> Norrell, PX 4 at 1. "Historical causation is never quite so simple as asking persons why they act in a certain way. Nor is it easily determined by reading contemporary newspapers. Were it that simple, there would be no need for historians at all. Journalists with tape recorders could interview people or even read their own newspapers in order to tell us all we need to know about causality. What separates such activity from history is analysis of context and meaning." Flynt, PX 7 at 2.

<sup>15</sup> "[W]e 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." Doc. 157-1 at 38 n.31.

court analyzed the history of the 1964 majority vote provision and considered the ELSC reports, specifically acknowledging that relevant considerations of discriminatory purpose “include the historical background of the challenged act, the ‘specific sequence of events’ leading up to the act's passage, and the legislative history of the act, ‘especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meeting, or reports.’ ”

158 F.3d at 1242 (quoting *Arlington Heights*, 429 U.S. at 266-68). This Court would commit error as a matter of law if it accepted defendants’ invitation to render summary judgment based solely on the deponents’ testimony.

The evidence of *Arlington Heights* factors 1-6 is set out at length in Appendix A to this brief, and it provides overwhelming support for the findings made by Judge Murphy of purposeful discrimination in the enactment of all six of the challenged state constitutional provisions. Plaintiffs have not moved for summary judgment only because of the judicial disfavor of rendering summary judgment on issues of official invidious intent.<sup>16</sup>

Summary judgment for defendants is especially inappropriate when it is based primarily on the deposition testimony of legislators attempting to recall (here, mostly unsuccessfully) events from thirty to forty years ago.<sup>17</sup> *Brooks v. Miller*, which defendants rely on, acknowledges “that after-the-fact reconstructions

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<sup>16</sup> E.g., *Hunt v. Cromartie*, 526 U.S. 541, 542 (1999), cited in defendants’ brief, Doc. 157-1 at 38.

<sup>17</sup> E.g., Waggoner at 9:19-11:23

of legislative purpose can be self-serving and unreliable and caution[s] that such recollections should be viewed critically.” 158 F.3d at 1242 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The testimony of Governor Sanders the district court relied on in *Brooks* was heard live by the district judge during a bench trial. 158 F.3d at 1232. In *Volpe*, the Supreme Court reversed the district court’s grant of summary judgment based on testimony in the administrative record. It would be clear error, perhaps error of law, for this Court to grant defendants’ motion for summary judgment without hearing these legislators give live testimony, where their credibility can be assessed in the face of a more searching cross-examination, a complete record of countervailing objective evidence, and the testimony of some African-American members of the Legislature.

Even on their face, these depositions of legislators and “observers” cannot support summary judgment for defendants. To begin with, the deponents could not remember most of the events they were asked about.<sup>18</sup> Defense counsel asked

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<sup>18</sup> E.g., Waggoner at 27:8-11 (“I’ve been though lots of special sessions, Jim. I don’t remember one specific one. After so many years, they all run together; okay?”); White, Doc. 153-25 at 11:12-18, 13:14-14:2; Johnstone, Doc. 153-16 at 19:2-12, 21:5-15.

“loaded”<sup>19</sup> questions that either asked whether racial issues were openly and explicitly discussed or that asked the deponent to admit that his own motives were racially discriminatory.<sup>20</sup> In the words of former state Senator Robert Edington, who voted against passage of the Amendment 325 bill,<sup>21</sup> “Race was not mentioned openly, nor was it ever discussed on the floor of the Senate and probably not on the floor of the House. However, everyone understood that race was the underlying issue.”<sup>22</sup>

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<sup>19</sup> Norrell, PX 4 at 12. E.g., Waggoner at 10:8-11, 10:21-23, 13:13-16, 15:16-18; Johnstone, Doc. 153-16 at 16:8-13, 16:23-17:7 (“I don't recall any other black member giving a speech to the effect that it was designed to hold down black people or black schools or I don't recall any of them coming to me and saying, Doug, this is a bill to hold down our people. I don't recall anything like that.”); Fine, Doc. 153-13 at 10:6-12:9; Erdreich, Doc. 153-12 at 11:2-17.

<sup>20</sup> A good example is defense counsel's questions asking Governor Brewer if he ever “observe[d]” racial motives in the consideration of property taxes in the Legislature. Doc. 157-1 at 52, citing Doc. 153-10 at 32-33. But in several places elsewhere in his deposition, Governor Brewer acknowledged the role race played in official tax policy throughout Alabama history. E.g., Doc. 153-10 at 36-44, 64-67, 89-98. And he understood counsel's question to be addressing the open discussion of racial issues. “You know, it's strange. In the major legislation that I recall from that time, I [don't] recall race ever being an issue, just where you introduce the subject of how is this going to affect race relations or is this going to result in more or less integration or whatever treatment there might be. I don't recall that as being a consideration at all.” Doc. 153-10 at 23:5-13.

<sup>21</sup> Doc. 153-28 at 31.

<sup>22</sup> Exh. 15 at 3; accord, e.g., Norrell, PX 4 at 1. “Had overt racial motives been expressed by Black Belt and Farm Bureau leaders, would that have solidified support for the bills among such legislators or made it less likely they would have

Governor Brewer spent his entire public career trying to keep race out of public policy discussions, as did other white moderates, because even though race underlay many issues, once it was raised openly it was a no win proposition.<sup>23</sup>

Governor Brewer thinks Alabama has the nation's lowest property taxes "because our Constitution is so written that it requires the vote of the people to raise ad valorem taxes. . . . And I think it just begs the concept of government to ask people

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voted for them? If the goal was passage of bills protecting the interest of white property owners and shifting the burden of taxation to African Americans through sales taxes, then the last place I would expect to find such rhetoric is in the volatile racial world of the 1970s." Flynt, PX 7 at 3.

<sup>23</sup> Q. [by Mr. Blacksher] And you referred in your direct testimony at one point to demagoguery. It was a fact, wasn't it, that when race became an issue, it was a no win proposition as far as the electorate was concerned? I mean, it was --

A. I think that's a fair statement, yes.

Q. And about the only thing white moderates; that is, white moderates on race, could do would be to make sure to the best they could that race did not creep into the issue?

A. That's right.

Q. And that was true really the entire period that you were in public office?

A. That's true. One would think that it would have been more intense early; that is, around the time *Brown* was decided in 1954. But, in fact, the opposite was true. It seemed to gain momentum and impotence [sic: impetus] as a factor as the reality of the implementation of the decision became more and more apparent.

Doc. 153-10 at 36:22-37:21.

to vote taxes on themselves. It's interesting that our people have done it so very, very many times primarily for education, which I think demonstrates a deep seeded [sic: seated] belief in public education. But I think it goes back to the adoption of the 1901 Constitution." Doc. 153-10 at 26:16-27:9. Governor Brewer has always tried to compartmentalize his progressive efforts to raise school revenues from "the racial front."<sup>24</sup> So, when he was asked by defense counsel to comment on plaintiffs' claims that the property tax limitations in the Alabama Constitution were adopted for racially discriminatory motives, Governor Brewer said, "I think that's a stretch to ascribe our attitudes about property taxation to racial bias or influence in those decisions."<sup>25</sup> But his review of that constitutional history emphasized events that were inextricably related to race.<sup>26</sup> Governor

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<sup>24</sup> It's interesting in '67, the mid '60's and then when I was Governor, it was almost as if there were two public agendas in our state. One was all of the demagoguery about race on one hand, and on the other hand was the administration of state government which carried on virtually oblivious to what was going on over on the racial front. One occupied the legislative process and those activities and the other was out here sort of on the public square where people were talking and discoursing about it.

Doc. 153-10 at 18:8-19.

<sup>25</sup> Doc. 153-10 at 28:4-17.

<sup>26</sup>

This state was in such dire circumstances in 1875 when that

Brewer could not recall George Wallace ever using “what historians and journalists call code words or racial code words” in reference to ad valorem taxes. “[B]ut,” he said, “any Federal court orders on ad valorem taxation probably drew from him the same sort of reaction that all the other Federal court orders did; criticism and

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Constitution was ratified, and many of the prohibitions in the 1901 Constitution had their genesis in the 1875 Constitution on the theory that abolishing a Lt. Governor's office would save money and things of that nature, really sort of frivolous in the arguments. I think there was another motivation in doing that because that was the Constitution that redeemed the state from reconstruction. And so I think it was in an effort to get control of the state back in the planter class that had controlled prior to the Civil War. That Constitution did not go to the extremes that the 1901 Constitution did as far as voting rights and things of that nature, and that was historically premised on what happened between 1875 and 1900 in the political process.

But also there in that same period of time we had the influence of [agrarianism] or populism on the political process, and it was really a fight to the death between the [Bourbons] or the planter class of people and the populist or the yeoman farmers of that time. And the Constitution of 1901 was really an effort to disenfranchise or take away any influence from this upstart group of people representing populism in that broad sense. ... The planter class had pretty well by this time reestablished itself and its strength and power primarily in the Black Belt and had married this new emerging industrial complex in Jefferson County and to some lesser extent in Anniston and Gadsden – yeah, those areas particularly.

So these lines that were drawn long ago have just persisted in Alabama politics right on up to the present time.

Doc. 153-10 at 28:17-30:16.

reflections on intelligence of the judges and so on.”<sup>27</sup>

To the extent the deponents could recall anything, their answers about the facts surrounding the enactment of Amendments 325 and 373 support *Arlington Heights* factors 1-6 and demonstrated their awareness of the objective facts that underlay the intended discrimination in the Black Belt.<sup>28</sup>

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<sup>27</sup> Doc. 153-10 at 31:22-32:22.

The Defendants’ Motion presumes a break of thought and action that did not exist between the “turmoil Alabama experienced in the 1950s and 1960s” and the 1970s when new property tax limits were enacted. One powerful continuity was the demonization of federal courts that Governor George Wallace had perfected when he attacked federal judges like Frank M. Johnson, who made the statewide school desegregation order in *Lee v. Macon*. He connected Judge Johnson to the US Supreme Court that had ruled in the *Brown* decision and to other courts that had enforced equal protection against disfranchisement and segregation in public accommodations in Alabama. The assault on federal judges became a coded message for defense of white supremacy, and it was a message that was delivered by Wallace and others in the 1970s.

Norrell, PX 4 at 6.

<sup>28</sup> E.g., Waggoner at 21:8-23:9, 25:15-26:7.

Q. How were the rural legislators able to overcome the opposition of the urban legislators, to pass this Lid Bill?

A. In 1971 they still dominated, really, number-wise. They had an advantage as far as the numbers, the House and Senate. Urban Alabama still was in the so-called minority, so they passed or defeated just about what they wanted to, because they dominated the flow of legislation. Rankin Fite was speaker in the sixties, but then Sage Lyons came in, and he was from urban Alabama; but still, the strength

Only two of the deponents, Rep. Rick Manley and Lt. Gov. George McMillan, were sponsors or managers of the Lid Bill amendments, and even they did not participate in drafting them. The other legislators deposed were not

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of the legislature was still in rural Alabama, so they were able to pass it.

Q. When did that balance of power shift, in your memory, to give more power to the urban legislators?

A. I would say probably in the late seventies, maybe early eighties. A lot would have depended on the governor, the lieutenant governor, and the speaker of the House as far as who dominated the flow of legislation.

Q. Well, Jere Beasley was lieutenant governor on both occasions in '71 and '78; wasn't he?

A. Yes.

Q. What about in '82?

A. McCorquodale?

Q. No, I'm talking about lieutenant governor. I'm sorry. He was still lieutenant governor then; wasn't he?

A. I don't remember.

Q. Wasn't, in fact, the shift to give more power to the urban areas, in proportion to the numbers, didn't that come about as a result of that plan you had to run under in 1983?

A. Yes. Yes. That's when it really got to be somewhat equitable in the House and Senate, was after '83.

Doc. 153-24 at 32:19-34:14. See also Little, Doc. 153-19 at 17:4-10; Fine, Doc. 153-13 at 13:23-16:21, 21:14-24:2 (“Q. What kind of code words were used then? A. Larry, you're going to have to go back and read the newspapers. I don't recall those. [Wallace] had great body language and great code words. He was a master of touching the nerves. Q. And did he do a lot of that through code words? A. Oh, sure. He did that in the north. Q. The kind of things I recall were things like federal judges and federal courts and interventions and – A. Well, he did all that. But in '70, when they ran, it was a little more pointed than that.”); Erdreich, Doc. 153-12 at 11:18-12:19, 15:18-21:3.

personally involved in any of the negotiations leading up to passage of the Lid Bills.<sup>29</sup>

Rep. Manley is a native of Sumter County and a lawyer in Demopolis, Marengo County. He represented western Black Belt counties and was a sponsor and/or manager of both the Amendment 325 and 373 bills, as well as the 1982 bill that amended the current use provisions in the implementing statute. Doc. 153-21 at 31:5-33:10. His family owns 1100 acres in Sumter County. Id. at 49:15-50:8. He has represented the Alabama Farm Bureau for 35 to 40 years, worked with Farm Bureau lobbyists John Dorrill and Milton Parsons and with Sen. Walter Givhan, and received regular campaign contributions from the Farm Bureau and Alabama Forestry Association. Id. at 52:4-53:1; 61:23-66:15. Rep. Manley sponsored the Lid Bill amendments because they were supported by his constituents with whom he discussed the bills, all of whom were white, and none of whom were in favor of raising school revenues during that time. Id. at 16:2-16:19, 105:8-107:12. He testified that the Lid Bills were strongly supported by counties in and surrounding the Black Belt.

Q. As you understand the black belt in the state of Alabama, do you think this map accurately depicts the band of land that was known as the black belt?

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<sup>29</sup> Johnstone, Doc. 153-16 at 22:19-23:11; Erdreich, Doc. 153-12 at 20:11-22.

A. Much broader than that, I would view it. Choctaw County, Clarke County, Monroe County, Conecuh County; they are all small counties, very rural, same approaches as the black belt area. Over on the far side, Coosa County, Clay County, those are counties I remember their legislators very strongly supporting the issues I was handling. I mean, the black belt area was definitely for the issues we were talking about, but there were a number of other counties around.

Q. Rural counties; is that correct?

A. Rural counties primarily.

Id. at 17:12-18:6. More specifically, Rep. Manley said it was big landowners in the Black Belt who were behind these bills, almost all of whom were white. Id. at 22:9-18; 54:6-59:10. The black landowners Manley represented owned only “small farms, very small ... 25-30 [acres], small pieces like that, and smaller.” Id. at 55:5-12.

Rep. Manley understood that the urban-rural conflict over property assessment equalization was based on the artificially low valuations of property “in our area, [where] before these [*Weissinger*] lawsuits land was not appraised maybe as equitably as it has been....” Doc. 153-21 at 66:23-68:10. As counsel for the Pickens County Board of Education, Mr. Manley warned the federal court in 1970 that its desegregation orders would result in all the white students leaving the public schools. Id. at 70:23-74:3.<sup>30</sup> And, Rep. Manley was very much involved in

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<sup>30</sup> Mr. Manley was counsel for the Pickens school system in *Lee v. Macon (Pickens)*, 317 F.Supp. 95, 98 (M.D. Ala. 1970):

The Board argues that the implementation of the plan as proposed by the United States in the Southern Zone of Pickens County will result

the reapportionment of the Legislature, serving as co-chairman of the Joint Legislative Reapportionment Committee in 1982, when the three-judge federal court in *Burton v. Hobbie*, 543 F.Supp. 235 (M.D. Ala.) (3-judge court), aff'd 459 U.S. 961 (1982) (interim court-ordered plan), on remand, 561 F.Supp. 1029 (M.D. Ala. 1983) (3-judge court) (approving new, precleared, statutory plan and ordering mid-term elections), was forcing the Legislature to increase the number of majority-black single-member districts. Doc. 153-21 at 43:10-48:23. Manley retained his seat only so long as his district remained majority-white. *Id.*

Notwithstanding these objective facts demonstrating Rep. Manley's awareness of the historical, political, and racial context of the Lid Bills, he denied there were any "racial issues" in response to defense counsel's carefully worded questions:

Q. Do you remember whether race ever entered into the discussion of Amendment 325 as it moved through the house?

A. No, sir. To me, it was always the tax situation, the cost of property tax for homes, farmland. Of course, the district I represented all the way through 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.

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in all the public schools in this zone being attended only by Negro students. The argument is based upon the thesis that, when a student body is composed of predominantly Negro students, the white students will flee.

Q. Was it ever brought to your attention that Amendment 325 would treat blacks differently from whites?

MR. BLACKSHER: I object to the form.

A. I don't recall any such issue being raised individually with me or in the legislature at that time. It just wasn't -- it wasn't a racial issue. It was nothing but dollars and cents, taxes.

Q. Did you have any information that would lead you to believe that Amendment 325 might treat blacks differently from whites?

A. Not that I recall.

Doc. 153-21 at 13:15-14:23.<sup>31</sup>

But in most respects, Rep. Manley could not remember what went on during this time, even when he was the chief sponsor and manager of the 1978 Lid Bill amendment and the 1982 current use statute. Doc. 153-21 at 22:4-8; 25:10-11; 26:7, 28:7, 97:18-23 (Q. Do you recall negotiating with anyone about – A. No, if I wasn't handling the bill. You know, generally during negotiations, the bill sponsor is usually the one that does that.); 98:19-99:9 (Q. It resulted in the passage of what became Amendment 325, which is within PX 1, third special session. A. Okay. Q. It was called by the governor to consider specifically a property tax question. Do you remember that? A. No. Q. You don't? A. You're not going to

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<sup>31</sup> See also Doc. 153-1 at 20:16-21:6 (Q. To your recollection did race ever enter the discussion of Amendment 373 as it passed through the house of representatives? A. Not at all. Q. Was it ever brought to your attention in any way that Amendment 373 would treat blacks differently from whites? A. No. Black landowners would be treated the same way, black 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.)

remember a bill twenty or thirty years ago, unless you had the bill and sponsored it, you were the man at the microphone fighting to pass the bill.); 100:15-18 (A. I don't remember any vote 30 years ago, or 25 years ago. If I do, I'm shooting from the hip. I might tell you I think I did.); 118:23-120:18 (Q. Do you recall that the [Wallace anti-busing] bill provided parents the option of reassigning, taking their children to another school if they thought there was a safety issue with respect to the one that your child was assigned to; do you remember that? A. No, I don't, but I don't see anything wrong with that if there's a danger issue.) Manley could not remember the most important facts about passage of the bill that became Amendment 373 in 1978, even though he was its chief sponsor and manager:

Q. Do you recall that attempts were made to pass the provisions that came out as Amendment 373 in the three previous regular sessions of the legislature, the regular session of '76, '77, and '78?

A. No.

Q. You don't recall that?

A. No.

Q. Do you recall whether you were a sponsor of the bill that became 373, Amendment 373?

A. No, I cannot recall that. I may have been, but I can't recall. I think you said, what, 2,079 bills were introduced?

Q. Well, it was HB170 through 174, was the entire package. Remember there was the bill for the constitutional amendment implementing legislation, and so forth?

A. No, I don't.

Q. You don't recall any of that?

A. No, whether I signed them or whether I voted for them.

Q. Do you recall who did draft the bill?

A. No. We generally didn't know. If it was the governor's program, he

hired outside lawyers or he may get the revenue department to do them. I've seen them go both ways.

Q. Do you think that Governor Wallace had the bill that became Amendment 373 drafted?

A. I don't have any idea.

Q. You don't recall that either?

A. No.

Q. Do you recall whether Governor Wallace was for it or against it?

A. No, I can't say for sure.

Q. Do you recall whether the so-called urban representatives opposed the bill that became 373?

A. No, I don't. I don't think anybody sitting in this room, if they served back when I did, could tell you answers to those questions honestly.

Doc. 153-21 at 107:20-109:17.

One thing Rep. Manley could recall is that in 1971 Governor George Wallace had “[a] lot of clout, a lot of influence.” Doc. 153-21 at 96:13. The historical record shows, in fact, that it was Governor Wallace’s influence and power over the Legislature, including his ability to call a special session just prior to the 1978 primary elections, that enabled the Farm Bureau to overcome resistance to its Lid Bills. In *Brooks v. Miller*, the court upheld the district court’s finding of no racial intent because of Governor Sanders’ influence over the Georgia Assembly:

Plaintiffs argue that the district court placed too much emphasis on the motivations of Governor Sanders and his administration, in light of the fact that the entire Georgia legislature enacted the code which contained the majority vote provision. However, the Defendants’ evidence persuaded the district court that Sanders wielded enough

power in the legislature not only to install one of his friends and allies as Speaker of the House, but also to effectuate the passage of the 1964 election code. The Defendants proved that legitimate “good government” reasons were the primary motivating factor behind the majority vote provision’s key proponents, including Sanders, and that the Sanders administration had sufficient power over the legislature to have the 1964 election code enacted. Even if some of the legislators who eventually voted the 1964 code into law had discriminatory reasons for their support, the Plaintiffs’ constitutional claims fail under the “but for” test set out in *Hunter* and *Mt. Healthy*[*City Bd. of Education v. Doyle*, 429 U.S. 274 (1977)].

158 F.3d at 1242. Of course, in the instant case, the evidence shows that it was Governor George Corley Wallace, who had appointed Sage Lyons and Joe McCorquodale Speaker of the House, whose leadership was the “but for” cause of the Lid Bills’ passage.

Defendants submit the affidavit of former Lt. Gov. McMillan, who says he is being paid for his services “as a consultant.” Doc. 153-26 at 2 of 6. He states that he never heard “a whisper of discriminatory effect or intent as it related to the consideration of property tax issues.” Id. at 6 of 6. But Mr. McMillan admits he knew that “in the past, Alabama had had a highly inequitable system of appraising land for property-tax purposes. Many land owners, including farmers living in certain Alabama counties, for years paid property taxes based on less than the property’s appraised worth or current use.” Id. at 4-5 of 6. The *Weissinger* decision, he knew, “brought this pattern of discrimination to a halt.” Id. at 5 of 6.

What Mr. McMillan does not say, but what he must also have known, is that the “certain Alabama counties” that for generations had been devaluing their property assessments were, first and foremost, the Black Belt counties. As a candidate for Lt. Governor and Governor, it is impossible to believe that Mr. McMillan did not also know that black schools had suffered because of this “pattern of discrimination,” and that by 1978 almost all the white students had fled public schools in the Black Belt.

Because Mr. McMillan refers to his association with Senators U.W. Clemon and J. Richmond Pearson, plaintiffs have submitted the declaration of Judge Pearson, who explains why he, Senator Clemon, and other black legislators would not have discussed issues of race with their white colleagues. Judge Pearson

did not discuss these racial factors with anyone in the 1978 special session, because I was aware Sen. McMillan had endorsed the Farm Bureau’s Lid Bill. Sen. McMillan needed Farm Bureau support if he had any chance of winning his upcoming election for Lt. Governor, and I supported him in hopes of gaining his support on other issues that I was concerned with. Any candidate who was seeking a high statewide office at that time needed to have Farm Bureau support to get elected in Alabama.

PX 14 at 3.

Defendants also took the deposition of Fred Gray, who, with Thomas Reed (now deceased), was elected to the House from Macon County in 1970. Gray and Reed were the first two African Americans to serve in the Alabama Legislature

since the nineteenth century. Defendants place great emphasis on the fact that Reps. Gray and Reed voted in favor of the passage of the bill that became Amendment 325, pointing to Mr. Gray's testimony that he would have voted no had he been aware that it was racially discriminatory. Doc. 157-1 at 44-45. But defendants understandably omit Mr. Gray's explanation that he was a first-time legislator and, "[a]s you know, the process in the Legislature is not designed for beginners knowing what goes on anyway or anybody other than those who control the Legislature." Doc. 153-14 at 22:9-15. "If it were patent on its face, I would have voted against it and everybody I would think would have expected me to have voted against it. But in those days they were hiding a lot of things like they do now, not just on racial issues, but on any other issues." Id. at 24:5-13. Mr. Gray, like other African American leaders and newly enfranchised voters in Alabama who had been excluded from the political process at all levels of local, state, and national government, had no way to know about the discriminatory property assessments that whites in the Black Belt had manipulated since 1874.<sup>32</sup> So far as

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<sup>32</sup> Ben Erdreich speculated that in 1971-72 Reps. Gray and Reed simply assumed they were supposed to line up with rural interests. Doc. 153-12 at 24:22-25:8. Indeed, this is the way Amendment 325 was framed by its (white) sponsors and opponents.

When the 1971 Lid Bill amendment finally passed in January 1972 a few blacks had been elected to county commissions only in Greene and Bullock counties, and there were no black tax assessors anywhere in Alabama. Jerome Gray, PX 16 at 13:7-13. Bullock and Greene were the only counties with black tax

they knew, the enactment and ratification of Amendment 325 was “like voting for motherhood,” as Governor Brewer says.<sup>33</sup> Fred Gray learned the historical facts and their adverse effects on black schools as counsel for Alabama State University in the *Knight* case. Doc. 153-14 at 25:1-13.<sup>34</sup>

The dual lopsidedness – of white ownership of current-use property and of black student bodies in the Black Belt – is similar to the extreme disparities found

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assessors when the 1978 Lid Bill passed. *Id.* at 13:19-22. In 1978 the attention of the predominately black Alabama Democratic Conference “was on voter registration issues, getting blacks appointed to Boards of Registrars even though it was a slow go.” *Id.* at 17:13-16. Blacks were not successful getting elected to county commissions in substantial numbers, even in the Black Belt, until after ADC in 1985 instituted its statewide *Dillard* lawsuit challenging the at-large election of county commissioners. *Id.* at 17:5-20:21, 45:14-19. In 1972 and 1978 ADC didn’t have knowledge enough about property taxes “to go out and explain it” to black voters. *Id.* at 29:20-21:2. But by the time Governor Riley proposed his Amendment One property tax reforms in 2003, ADC and the Legislative Black Caucus were “strong advocates for his position.” *Id.* at 22:8-10. By 2003 a majority of elected officials in the Black Belt were African Americans, and as a result the 10 majority-black Black Belt counties were among the sixteen that voted in favor of Amendment One. *Id.* at 28:3-15. Even today, because whites still own most of the wealth in the Black Belt, black voters are subject to economic intimidation when referendums are held on increasing millage rates. *Id.* at 37:13-40:10.

<sup>33</sup> Brewer, Doc. 153-10 at 25:21.

<sup>34</sup> Similarly, Rep. John Knight testified that property tax became an issue in the *Knight* case “[b]ecause one factor in the lawsuit was the [vestiges] of racial discrimination in this state and the impact on education. Through the historians, through the testimony, it became apparent to some of us that property tax issues certainly should be addressed in this state. It had an adverse impact on blacks when it comes to education.” Doc. 153-18 at 17:20-18:5.

sufficient to prove discriminatory official intent in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Yick Wo*, the Court found that all Chinese laundry operators (310 in number) had been denied permission to operate in wooden buildings by the San Francisco Supervisors, while 79 of the 80 white operators of such laundries had received such permission. The Court held, “The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong....” 118 U.S. at 374.

*Gomillion* arose out of a redrawing of the city limits of Tuskegee (by Sam Engelhardt, one of the Farm Bureau advocates of the Lid Bills) “to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident.” 364 U.S. at 341. The Court remanded the case for trial, holding that if the facts alleged were proven, “the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.” *Id.*

Appendix A to this brief lays out in great detail the evidence satisfying the *Arlington Heights* factors showing purposeful discrimination in the enactment of

the challenged state constitutional property tax provisions and supporting Judge Murphy's findings of fact in *Knight*. Whether or not it is true, as defendants contend that most legislators were unaware of these historical factors and sequence of events, there is no doubt that the Alabama Farm Bureau, Governor Wallace, and the Black Belt legislators who rammed Amendments 325 and 373 through the Legislature were aware of their racially discriminatory purposes.

**D. Defendants Offer No New Evidence or Arguments To Warrant Reconsideration of This Court's December 22, 2009, Order Denying Dismissal of Plaintiffs' Title VI Claims.**

Accordingly, plaintiffs rely on their brief opposing defendants' motion for judgment on the pleadings, Doc. 93, and the undisputed fact that all defendants are recipients and/or distributors of federal funds.

**CONCLUSION**

Defendants' motion for summary judgment should be denied.

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I hereby certify that on March 30, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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