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

JOHN F. KNIGHT, JR., and **ALEASE S. SIMS**, et al., individually and on behalf of others similarly situated,	*	
Plaintiffs and Plaintiffs-Intervenors,	*	
UNITED STATES OF AMERICA,	*	
Plaintiff-Intervenor,	*	
	*	Civil Action No.
v.	*	CV83-M-1676-S
THE STATE OF ALABAMA, et al.,	*	
Defendants.	*	

KNIGHT-SIMS PLAINTIFFS' REPLY TO RESPONSES OF THE STATE DEFENDANTS AND THE UAS BOARD TO PLAINTIFFS' MOTION FOR ADDITIONAL RELIEF WITH RESPECT TO STATE FUNDING OF PUBLIC HIGHER EDUCATION

Plaintiffs John F. Knight, Jr., and Alease S. Sims et al., through undersigned counsel, reply as follows to the responses and oppositions of the "State Defendants" and the Board of Trustees of the University of Alabama (hereafter "UAS"), dated September 30, 2003, to plaintiffs' motion for additional relief with respect to state funding of public higher education, filed July 28, 2003.

A. **The Additional Relief Plaintiffs' Seek Is Not Barred by Law of the Case**.

The State Defendants and UAS (collectively hereafter "defendants") mischaracterize the

Remedial Decrees entered by this Court in 1991 and 1995 as final judgments, the findings and conclusions of which may not be revisited at this time. This action is a school desegregation case, and, as such, it is governed by the unique principles the Supreme Court has over the decades prescribed regarding the duty of the State and federal courts with respect to the modification and termination of desegregation decrees. In a tacit admission of futility, neither the State Defendants nor UAS respond to plaintiffs' recitation of those principles in their objections to 2003 annual reports and motion to modify or amend the Remedial Decree to specify compliance with provisions requiring desegregation of HWI faculties and administrations, filed August 22, 2003, at 4-6, which we repeat below for the Court's convenience:

> **The Constitutional Duty of the State**
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> 8. The constitutional obligation of the State of Alabama is capsulized in *United States v. Fordice*, 505 U.S. 717, 729 (1992): "If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." *Fordice* cites *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.").
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> 9. Contrary to the repeated assertions of some defendants that the limits of their desegregation responsibilities are defined by the particularized remedies specified by the Remedial Decrees, this Court is bound to retain jurisdiction over those areas in which the State has failed to meet the desegregation obligations imposed by the Constitution itself. In higher education as in K-12 desegregation cases, the State must "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Freeman v. Pitts*, *supra*, 503 U.S. at 486 (*quoting Green v. School Bd. of New Kent County,* 391 U.S. 430, 437-438 (1968)).
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> 10. Before this Court may relinquish jurisdiction over its decrees in this action, it must determine that the State of Alabama has achieved unitary status with respect to each aspect of its system of public higher education. "The **concept of unitariness** has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system **must be examined in all of its facets**, **both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn**." *Freeman v. Pitts*, *supra*, 503 U.S. at 486 (emphasis added).
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> 11. This Court's Remedial Decrees and orders have many components,

covering several areas of public higher education, in the HWIs, in the HBIs, in state funding and elsewhere. Before dissolving the Decrees, this Court must reassess each of these areas for compliance with the Fourteenth Amendment. It may decide to terminate its jurisdiction in some areas and retain it in others. "We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree." *Freeman v. Pitts*, *supra*, 503 U.S. at 490-91.

12. For example, in the DeKalb County K-12 case, the Supreme Court upheld the district court's exercise of equitable discretion to allow state school authorities "to regain control over student assignment, transportation, physical facilities, and extracurricular activities, while **retaining court supervision over the areas of faculty and administrative assignments** and the quality of education, where full compliance had not been demonstrated." *Freeman v. Pitts*, *supra*, 503 U.S. at 492 (emphasis added).

13. In addition to examining the areas of higher education it has already targeted for remedial action, this Court should "inquire whether other elements ought to be identified, and to determine whether minority students [are] being disadvantaged in ways that require[] the formulation of new and further remedies to ensure full compliance with the court's decree." *Freeman v. Pitts*, *supra*, 503 U.S. at 492.

14. There is no bright-line test for unitariness.

> That the term "unitary" does not have fixed meaning or content is not inconsistent with the principles that control the exercise of equitable power. The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. In this respect, as we observed in *Swann [v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15-16 (1971)], "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." The requirement of a unitary school system must be implemented according to this prescription.

Freeman v. Pitts, *supra*, 503 U.S. at 487.

The Eleventh Circuit has, of course, acknowledged that compliance with the desegregation decree is only half of the district court's inquiry when it is considering

relinquishing jurisdiction. *E.g., Lockett v. Board of Education of Muscogee County School Dist*., 111 F.3d 839, 842 (11th Cir. 1997) ("a district court must determine (1) whether the local authorities have eliminated the vestiges of past discrimination to the extent practicable and (2) whether the local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan.") (*citing Lee v. Etowah County Bd. of Education*, 963 1416, 1425 (11th Cir. 1992)). This Court's explicit reservation of authority to modify the Remedial Decrees merely acknowledges a duty to revise a desegregation plan and to provide additional remedies as needed to eliminate all vestiges of de jure discrimination that long has been embedded in the case law. In *United States v. Lawrence County School Dist*., 799 F.2d 1031 (5th Cir. 1986), the Government's argument that the court "may not grant broader and entirely different 'relief than contemplated in an extant decree previously determined by this court to be constitutionally adequate'" was rejected. 799 F.2d at 1042.

> While judicial remedies for unconstitutional action must be targeted to elimination of the unconstitutional chancre, the remedial power of a federal court that adopts a desegregation plan is not thereafter limited to enforcement of the details of the original plan. Because, as this court has previously said, a school system is not "automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated," the adoption of the plan does not exhaust the power of the court to direct elimination of vestiges of segregation that remain or become apparent only after the plan has been put into place.
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> . . . If correcting violations will suffice to wipe out the marks of past segregation, the court should not order more. If, however, it becomes evident that an integrated school system cannot be achieved simply by directing adherence to the original plan, the court may consider remedial measures that are designed to restore the victims of segregation to the position they would have occupied absent both the original discriminatory conduct and the aggravation of it by school authorities' failure to comply with corrective orders.

Id. at 1043 (footnotes and citations omitted); *accord, Hereford v. Huntsville Bd. of Education*, 504 F.2d 857, 858 (5th Cir. 1974) ("We view this case as presenting no more than a motion in the

district court for further relief in a typical school desegregation case where modification is indicated because of lack of success. *Cf. Ellis v. Board of Public Instruction of Orange County, Florida*, 5 Cir., 1974, 465 F.2d 878, where we required a new plan as to three schools in a system, which schools had not been desegregated.”).

In short, the failure of the parties earlier to present and of this Court to address vestiges of segregation in Alabama’s property tax system do not bar the relief plaintiffs now request in this ongoing school desegregation case.

A. The *Pullman* Deferral Doctrine Deterred Earlier Inquiry Into Vestiges of Segregation in the Property Tax System.

Neither do defendants attempt to refute plaintiffs’ argument that the pendency of the so-called Equity Funding Cases in state court prevented inquiry by this Court into the property tax system in 1991 and 1995. Indeed, UAS’ opposition attaches its May 20, 2002, objections to plaintiffs’ first mention of the property tax vestiges, in which it then argued that this Court should not accept plaintiffs’ invitation “to litigate what is clearly a political state law issue already before the Alabama Supreme Court.” UAS opposition, Exhibit A at 22. This is a clear reference to the principle of *Pullman* deferral: “We have required deferral, causing a federal court to ‘sta[y] its hands,’ when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case.” *Growe v. Emison*, 507 U.S. 25, 32 (1993) (*quoting Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941)). Eleven days after UAS filed this objection, the Alabama Supreme Court brought an abrupt end to the Equity Funding Cases. *Ex parte James*, 836 So.2d 813 (Ala. 2002). Whether or not the *Pullman* doctrine strictly would have barred this Court from inquiring earlier into all the

desegregation aspects of the property tax system, plaintiffs cannot be faulted for waiting in expectation that the Legislature and/or the state courts eventually would enforce the pending state court injunction requiring the State of Alabama to provide adequate and equitable funding for its public school system.

B. Depressed Local Property Taxes Decrease the Share of Education Trust Fund Dollars Available to Public Higher Education.

The State Defendants try to dismiss the significance of *Ex parte James* by arguing that it only concerned the funding of K-12 schools. State Opposition at 12. They go on to protest that several of the state constitutional provisions challenged by plaintiffs' motion for additional relief cap local property taxes not state taxes. *Id*. at 9-15. These arguments are at best disingenuous in light of this Court's 1991 findings that "[t]he amount available for appropriation to public senior institutions of higher education in Alabama in a given year depends on the projected size of the ASETF."[1] *Knight v. Alabama*, 787 F.Supp. 1030, 1208 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994). Defendants' contention is worse than disingenuous in light of the contrary position state universities successfully pursued in *Siegelman v. Alabama Assn. of School Boards*, 819 So.2d 568 (Ala. 2001), that higher education cannot be penalized for K-12 teacher salary obligations of local school systems when the ETF is prorated. There can be no dispute that elimination of the racially motivated caps and assessment ratios imposed on county and municipal property taxes would free up more of the ETF for higher education.

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1 The Alabama Special Education Trust Fund is now officially called simply the Education Trust Fund. Ala. Code § 16-13-16 (Supp. 2002).

C. Reduced Funding Negatively Impacts All Aspects of the Remedial Decrees and Creates New Barriers To Black Students' Access To Higher Education.

Defendants do not deny that the current public education funding crisis has seriously diminished educational opportunities throughout the entire system of higher education, as plaintiffs allege. They only challenge plaintiffs' figures (gleaned from published sources) calculating the degree of damage done thus far. They do not dispute, for example, plaintiffs' reliance on the fact that almost all the specific remedies prescribed by this Court were based on models assuming specific levels of growth in overall funding for higher education. For example, supplemental funding for ASU and AAMU was intended only to jumpstart them until formula funding could take over and make their new and existing programs self-sustaining. Only two years away from the elimination of court-ordered funding, this Court must assess the negative impact of the current funding crisis on the HBIs in the long term.

Nor do defendants dispute plaintiffs' assertion that the funding crisis will cripple further the limited resources the HWIs have always claimed are responsible for the problems they have recruiting and retaining African Americans for their faculties and administrations. Nearly all the responses to plaintiffs' recent discovery request refer explicitly to lack of funds to explain the minimal levels of progress (or retreat) in the HWIs' compliance with the provisions of the 1991 Remedial Decree. Even the special supplemental funds that were to be provided the HWIs under this Court's April 3, 2002, order have not been fully paid for the first year, because of the financial crisis.

But perhaps the greatest damage caused by the funding crisis will be the additional financial barriers to higher education access in general for African-American students in

Alabama, whether it is at the HBIs, at the HWIs (where, as UAS correctly points out, most black students go), or at private colleges (where state funding for scholarships and financial aid has been cut in half). The State Defendants may quibble about how much tuition has gone up at all the state universities, but they cannot deny that the increases are substantial by any measure or that, given the bleak prospects for the fiscal years to come, we have seen the last of them. Nor do defendants mention the near total elimination of the state funded scholarships and financial aid that were already so small that Alabama ranked near the bottom of the nation. Low income students, who are disproportionately black, now must hurdle both higher tuition and costs at state institutions and the absence of any state assistance dealing with those costs.

The state constitutional provisions plaintiffs challenge are traceable to a century-old policy of shielding white property owners from having to pay for the education of black students. That these restrictive revenue provisions are still having their intended effect is impossible to deny.

D. The Constitutional Amendments Adopted After 1901 Perpetuate and Intentionally Exacerbate Their Original Racially Discriminatory Design.

The State Defendants contend that plaintiffs cannot successfully challenge the constitutionality of the two Lid Bill amendments to the 1901 Alabama Constitution, Amendments 323 and 373, (1) because they were enacted "after the end of the period of *de jure* segregation," and (2) because they were upheld in two prior federal court actions. State Defendants' response at 15-16. Defendants' arguments are wrong on both counts.

First, it is not true that the period of *de jure* segregation had finally ended in 1971 and 1978, when Amendments 323 and 373 were adopted. Defendants do not attempt to rebut the

detailed allegations in plaintiffs' supporting brief about Alabama's campaign of massive resistance to federally mandated K-12 desegregation during the 1970s under Governor Wallace's leadership, nor the fact that powerful landowner interests capitalized on public hostility to public education generated by the campaign of massive resistance to win approval of state constitutional protection against property taxes. Moreover, federal court litigation seeking eradication of vestiges of *de jure* segregation in the system of public higher education had not even begun in 1978. In short, it is undisputed that the assessment ratios, current use formula and lids placed on state and local property taxes by Amendments 323 and 373 were only the latest chapter in the same historical official policy of shielding white property owners from new exposures to taxation for public education brought about by changing circumstances.

Second, plaintiffs' racial discrimination claims in this action against Amendments 323 and 373 are not barred by principles of either claim or issue preclusion. Defendants understandably do not try to distinguish their preclusion arguments in this instance from the much closer questions regarding the preclusive effects of *ASTA v. Alabama Public School and College Authority*, 393 U.S. 400 (1969), this Court rejected in its 1991 decision. 787 F.Supp. at 1365-68. After all, *ASTA* specifically addressed issues of desegregation in higher education, and there was overlap in both the identity of parties and of the causes of action. By contrast, neither *Weissinger v. Boswell*, 330 F.Supp. 615 (M.D. Ala. 1971) (3-judge court), *McCarthy v. Jones*, 449 F.Supp. 480 (S.D. Ala. 1978), nor *Weissinger v. White*, 733 F.2d 802 (11th Cir. 1984), addressed claims of racial discrimination. They involved exclusively equal protection claims based not on suspect classifications but on arbitrary and irrational discrimination in the property assessment practices among the several counties in Alabama. None of the plaintiffs was an African American, none of the Knight-Sims plaintiffs was a party or in privity with the

Weissinger and McCarthy parties, and there is serious doubt that the earlier plaintiffs would have had standing to assert racial discrimination claims of any sort, much less the desegregation claims advanced in this action. Certainly there was no adjudication of any of the claims the Knight-Sims plaintiffs now are advancing, and defendants have not identified any earlier decided issues of fact or law that would impact this action.

Section 40-8-1, Code of Alabama (1975), merely codifies the restrictions on property taxes mandated by the Lid Bill. If this Court granted the relief plaintiffs seek and held that Amendments 323 and 373 are unconstitutional, the Legislature would be free to repeal or amend those statutory provisions.

Section 269 of the 1901 Alabama Constitution, plaintiffs have alleged, placed a cap on local property taxes for schools and imposed for the first time a requirement of voter approval to impose even that limited millage. Defendants are correct, of course, that Section 269 has been amended several times, including Amendments 111 (adopted to resist desegregation, as this Court found), 202 and 382. But all the amendments carried forward the caps and the requirement of voter approval, the provisions that are traceable to an intent to shield white property owners from taxes used to pay for the schooling of African Americans. Indeed, there have been many county- and muncipality-specific constitutional amendments over the past century that increased local property taxes. See plaintiffs' supporting brief at 55-56. Because they had to amend the 1901 Constitution, each of these local millage increases had to survive voter referendums, one of the primary barriers that were embedded in the constitution for racially discriminatory reasons. For purposes of the instant action, the issue is not whether each amendment to Section 269 – or the other challenged provisions of the 1901 Constitution – was itself racially motivated and thus a violation of the Fourteenth Amendment; rather, the issue is whether their millage caps and

referendum requirements are traceable to that original discriminatory purpose. Defendants cannot deny that they are.

The defeat on September 9, 2003, of the voter referendum to approve the tax reform package proposed by the Governor and passed by the Legislature is only the most recent – and the most dramatic – example of how the original design of the 1901 Constitution continues today to have its racially discriminatory effects. Had the so-called Amendment 1 reform package been subject to enactment in the ordinary legislative process there would have been no need for voter approval of its terms. Very few laws levying taxes would ever be enacted if they all had to survive popular referendums. That is an old fact of political life which applies everywhere, as the voter initiative-plagued citizens of California know all too well. And that well known fact is precisely why the conservatives in the 1901 Convention entrenched the referendum hurdle in Alabama's Constitution as a further shield for white property owners. Even black voters are frequently convinced to vote against property tax increases, notwithstanding the fact that they usually are voting against their own interests. However, preliminary analysis of the county returns from the September 9, 2003, referendum shows that African Americans generally supported Amendment 1, as did most African-American legislators, while whites voted overwhelmingly against it. See the scatter plots in Attachment A to this reply.

The purpose of representative democracy is allow persons elected by the people to decide how best to balance the services government should provide with taxpayers' understandable reluctance to pay higher taxes. A fair and efficient balance can be struck only through those elected representatives, who have the benefit of all the relevant information, who can engage in the dialogue, negotiation and compromises that the legislative process provides, and who ultimately will be held accountable by their constituents on election day.

E. Plaintiffs Do Not Ask This Court To Devise a Tax Reform Plan or To Exceed Its Constitutional Remedial Authority.

The State Defendants misunderstand the remedy for the racially discriminatory property tax system plaintiffs are proposing. This Court is not being asked to take control of state government and impose its own tax reform plan. What plaintiffs are asking this Court to do is to enjoin enforcement of those state constitutional provisions that prevent the Governor and the Legislature from enacting property tax reform through the ordinary legislative process, without necessarily having to submit the reform legislation for voter approval. The specifics of reform would be left to elected state and local authorities. The federal constitutional violation alleged here is broad; it goes to the foundation of the entire public education system, which includes higher education, and adversely impacts the educational opportunities of African Americans (and all other citizens) in literally every aspect of public education policy and practice. State government must reconcile the many facets of tax policy that any effective reform plan would implicate. This Court's role would be limited to ensuring that the State's plan adequately addresses and eliminates the vestiges of segregation in the tax system. Deference to legislative proposals for eliminating the vestiges of racial discrimination from the tax system is particularly appropriate now that, as the State Defendants point out, African Americans are fairly represented in the Legislature. Where the ballots of their ancestors were voted to disfranchise themselves in 1901, members of the plaintiff class should now be provided an unfettered opportunity to participate in the political process of tax reform.

The model for the remedial approach this Court should take is found in *Missouri v. Jenkins*, 495 U.S. 33 (1990), where similar taxation issues were addressed, although the tax

system itself was not unconstitutional, as it is here, and where the question was the extent of federal court authority to command additional revenues to support remedies for desegregation in other aspects of the school system.

> The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative, the very one outlined by the Court of Appeals: it could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power. The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.
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> As *Brown v. Board of Education,* 349 U.S. 294, 299 (1955), observed, local authorities have the "primary responsibility for elucidating, assessing, and solving" the problems of desegregation. This is true as well of the problems of financing desegregation, for no matter has been more consistently placed upon the shoulders of local government than that of financing public schools. As was said in another context, "[t]he very complexity of the problems of financing and managing a ... public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that ... 'the legislature's efforts to tackle the problems' should be entitled to respect." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney,* 406 U.S. 535, 546-547 (1972)). By no means should a district court grant local government *carte blanche,* but local officials should at least have the opportunity to devise their own solutions to these problems.

495 U.S. at 51-52 (some citations omitted). What *Jenkins* says about the power of the district court to enjoin statutory limits on local authorities' ability to increase property taxes applies as well to this Court's power and duty to enjoin limits imposed on the Legislature by racially discriminatory provisions in Alabama's Constitution:

> It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation. . . . Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take

> account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. However wide the discretion of local authorities in fashioning desegregation remedies may be, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

495 U.S. at 57 (*quoting* *North Carolina Bd. of Education v. Swann,* 402 U.S. 43, 45 (1971)).

Plaintiffs' proposal that the Court enjoin state and local governments from failing to tax all property at 60% of its fair market value would come into play only if the Governor and Legislature failed to enact an adequate remedy in timely fashion. That is precisely what the Middle District court threatened to do in *Weissinger v. Boswell*, 330 F.Supp. 615, 625 (M.D. Ala. 1971) (3-judge court). The assessment ratio of 60% was selected because it was the last constitutional formula enacted by the Legislature in 1935. *Id*. If, as plaintiffs allege, the assessment ratios in Amendments 323 and 373 violate the federal Constitution, this same remedial logic would apply.

F. Defendants Do Not Contest the Merits of Plaintiffs' Claims.

Both the State Defendants nor UAS appear to concede the merits of plaintiffs' allegations that the property tax system is rooted in purposeful racial discrimination. State Defendants' response at 2; UAS opposition at 3-4. Accordingly, plaintiffs are filing contemporaneously with this reply a motion for partial summary judgment.