

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

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

Plaintiffs, \*

v. \*

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

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. \*

**PLAINTIFFS' BRIEF REPLYING TO DEFENDANTS' BRIEF  
OPPOSING SUMMARY JUDGMENT AND TO DEFENDANTS'  
MOTION TO STRIKE PLAINTIFFS' PROPOSED UNDISPUTED FACTS**

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Plaintiffs India Lynch et al., through undersigned counsel, submit the following arguments and authorities in reply to defendants' brief, Doc. 41, in response to plaintiffs' motion for summary judgment, Doc. 10, and to defendants' motion, Doc. 40, to strike or exclude "the entirety of the allegedly undisputed relevant material facts set forth by Plaintiffs in their Brief Supporting Motion For Summary Judgment [Doc. 20], along with all accompanying evidentiary submissions." Defendants' brief makes two related but separate arguments: (1) that they are not collaterally estopped to dispute any of the findings of fact made by this Court 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), and (2) that they are not required to comply with Rule 56(e), Fed.R.Civ.P., and this Court's standing order on summary judgment requirements by responding separately to each paragraph of plaintiffs' proposed undisputed facts.

In this reply, plaintiffs will show with respect to argument (1) that defendants should be bound by the *Knight* findings of historical purposeful racial discrimination behind the challenged property tax restrictions in the Alabama Constitution, based on principles of mutual – rather than non-mutual – collateral estoppel. Plaintiffs will concede, however, that collateral estoppel may not extend to the *Knight* findings of fact dealing with causation and continuing adverse racial

impact, as the Court suggested in its opinion and order denying defendants' motion to dismiss. Doc. 35 at p. 21.

With respect to argument (2), plaintiffs will show that defendants' contentions that the *Knight* findings of fact and the evidentiary record on which they are based are not admissible evidence in this action do not, as a matter of law, justify their failure to identify which of plaintiffs' alleged facts they actually are willing and able to dispute. The plain language of Rule 56, as construed by the lodestar case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), does not allow defendants to disregard the procedural and substantive obligations of nonmoving parties in summary judgment proceedings.

**I. Response To Defendants' Statement of Additional Undisputed Facts.**

As explained in the declaration of Norman J. Chachkin and the four exhibits attached to his affidavit, Exhibit A to this reply brief, plaintiffs deny the "facts" alleged in Defendants' Response Brief to Plaintiffs' Motion for Summary Judgment, at pp. 9-10 ¶¶ II.G.16, II.G.17, II.G.18 and II.G.19 (including fn.1), and deny that the "facts" alleged in ¶¶ II.G.18 and II.G.19 are "material" to the disposition of that Motion, for the following reasons:

a. The source of the figures for “per pupil expenditures” in Alabama school systems given in ¶¶ II.G.16 and II.G.17 is identified in the Second Affidavit of Mark Dixon, Doc. 41-3 ¶ 6 (“Second Dixon Affidavit”), as “based on records kept by the Alabama Department of Education.” However, the underlying data based upon which the summary table provided as Exhibit “B” to the Second Dixon Affidavit is based are neither provided nor described, nor is the methodology for determining the “source” of particular expenditures by school systems explained. In the absence of this information, plaintiffs lack a sufficient basis for admitting or denying the accuracy of the data contained in Exhibit “B” to the Second Dixon Affidavit.

b. The “facts” alleged in ¶¶ II.G.18 and II.G.19 are explained in fn.1. to be the product of calculations based on the data in Exhibits “A” and “B” to the Second Dixon Affidavit, which are described in fn.1 as constituting “spending data and average daily membership (“ADM”) data from 2006-2007 for determining the amount spent and the number of students.” Plaintiffs interpret that explanation to refer to the 2006-2007 school year. However, the Second Dixon Affidavit states in ¶ 2 that Exhibit “A” provides “**2007-2008** enrollment data” [emphasis supplied], and in ¶ 3 that Exhibit “B” provides “**2006-2007** per pupil expenditure data [emphasis supplied].” Plaintiffs therefore do not admit that the calculations

produced by the methodology explained in fn.1 of Defendants' Response Brief are actual "facts" about the relationship between enrollments and expenditures in any Alabama school system in either the 2006-07 school year or the 2007-08 school year.

c. For the reasons given above, the "facts" alleged in ¶¶ II.G.18 and II.G.19 are immaterial to the issues presented by Plaintiffs' Motion for Summary Judgment.

d. Plaintiffs submit, further, that the "facts" alleged in ¶¶ II.G.18 and II.G.19 are also immaterial to the issues presented by Plaintiffs' Motion for Summary Judgment because the calculations underlying those "facts" include federal funds received by school systems in Alabama. The issue in this case is whether the system for determining how and what state and local funds may be raised and expended for public education in Alabama is racially discriminatory. It is irrelevant and inappropriate to take account of federal categorical funding in deciding that issue. Moreover, taking federal funds into account in determining whether Alabama's K-12 funding system is nondiscriminatory, adequate or constitutional would effectively contravene the provisions of federal law that prohibit "supplanting" state funds with federal aid. *See* 20 U.S.C. § 6321(b), 7902 (Supp. V 2006) (Title I, largest program of federal aid to K-12 schools); 20 U.S.C.

§ 7709 (Supp. V 2006) (allowing only explicitly limited “supplanting” with funds received under federal Impact Aid program); 20 U.S.C. § 7861(c)(4) (Supp. V 2006) (excluding “non-supplant” provisions from Secretary of Education’s authority to waive statutory or regulatory requirements at request of states).

## **II. Reply To Defendants’ Arguments Concerning Collateral Estoppel.**

A. *Principles governing mutual offensive collateral estoppel govern this action, so they apply to the State defendants.*

The Eleventh Circuit has held that nonmutual offensive collateral estoppel may not be asserted against a state government. *Hercules Carriers Inc. v. Florida*, 768 F.2d 1558, 1579 (11<sup>th</sup> Cir. 1985) (*citing United States v. Mendoza*, 464 U.S. 154 (1984)). However, if there is mutuality between the parties plaintiff and defendant, offensive collateral estoppel can bind a state government.

Today in a companion case we hold that the government may be estopped under certain circumstances from relitigating a question when the parties to the two lawsuits are the same. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1983); see also *Montana v. United States*, *supra*; *United States v. Moser*, 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924). None of those cases, however, involve [sic] the effort of a party to estop the government in the absence of mutuality.

*Mendoza*, 464 U.S. at 163; accord, e.g., *Tugz International, L.L.C. v. Canaveral Port Authority*, 2005 WL 6046066 (M.D. Fla. 2005) (“Because Tugz was a party to

the FMC [Florida Maritime Commission] proceeding when the FMC issued its order, mutuality of parties exists. Hence, *Mendoza* and *Hercules Carriers* – addressing nonmutual collateral estoppel – do not apply.”).

Defendants’ argument that offensive collateral estoppel may not be applied against the State of Alabama, Governor Riley and Commissioner Russell in this action relies on the erroneous assertion that the relationship between plaintiffs and defendants is nonmutual. Instead, the relationship is mutual, because the Lynch African-American plaintiffs were members of the Rule 23(b)(2) class of all black citizens certified in *Knight*. 458 F.Supp.2d at 1277. Therefore, “mutuality of parties does in fact exist[, because] as [] member[s] of the plaintiff class in [*Knight v. Alabama*], [they] stood equally bound with the defendants by whatever judgment the district court reached in that case.” *Crowder v. Lash*, 687 F.2d 996, 1011 and n.13 (7<sup>th</sup> Cir. 1982).

Defendants contend that the presence of whites among the Lawrence County plaintiffs makes the use of offensive collateral estoppel in this case nonmutual. Defendants’ Brief at 21-22. They cite *Clark v. Watchie*, 513 F.2d 994, 998 (9th Cir. 1975), as support for this assertion. But *Watchie* held that there was mutuality between the parties in the first and second lawsuits, and that offensive collateral estoppel could be asserted, because the plaintiffs in both actions were members of

the same class, even though certification of the class was denied in both actions. 513 F.2d at 997, 998, 1000. Defendants may be relying on a footnote in *Watchie* that says: “It is insignificant that CMA Corporation was a plaintiff in the state suit and not in the federal suit. For collateral estoppel purposes, it is important only that all the plaintiffs in the federal suit had the opportunity to litigate the state claim.” 513 F.2d at 998 n.6. But that footnote does not address the circumstance where some, but not all, plaintiffs were the same in both suits and does not hold that the presence of nonmutual plaintiffs undermines the mutuality of the other plaintiffs.

We have found no case precedent squarely on point with the instant circumstances, where the black plaintiffs were members of the plaintiff class in *Knight*, but the white plaintiffs were not. In *Atwood-Leisman v. United States*, 72 Fed.Cl. 142 (2006), only one of the plaintiffs in the second suit seeking to apply offensive collateral estoppel against the government had been a plaintiff in the first suit. The court held that the nonmutual “plaintiffs’ attempted invocation of the doctrine is unavailing,” 72 Fed.Cl. at 151, but it did not suggest that this prevented the one plaintiff with mutuality from pursuing offensive collateral estoppel against the U.S. To the contrary, it proceeded to address this one plaintiff’s collateral estoppel claim, which it thought was problematic for a different reason (“application of the doctrine rests within a grey area of the law because, although

mutuality is present, Kimberly Associates seeks to invoke the doctrine to advance its claim rather than to defend against the government's claims"). But the court declined to decide the collateral estoppel issue because it found that the plaintiff with mutuality was entitled to summary judgment on the merits. *Id.*

Moreover, the white plaintiffs in the instant action may be able to assert mutuality with the State defendants, because their claim for relief depends entirely on the purposeful discrimination directed against the black plaintiffs. If Judge Murphy had rejected the *Knight* plaintiffs' contention that the property tax restrictions were racially motivated, we can be sure the State would be arguing that whites in a new suit are barred from seeking relief for injuries they suffer caused by that same alleged discrimination against blacks. This is so even though the Supreme Court recently rejected the theory of "virtual representation." *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008). The State likely would argue that these hypothetical white plaintiffs fell within one of the (nonexclusive) exceptions to the rule against preclusion of a nonparty set out in *Taylor v. Sturgell*, e.g., the third exception, under which "a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." 128 S.Ct. at 2172 (citation and internal quotes omitted). If the State could assert collateral estoppel defensively against the white plaintiffs with respect to

issues that depend entirely on discrimination directed against the black plaintiffs, under the doctrine of mutuality the white plaintiffs should be entitled to assert collateral estoppel offensively.

Indeed, in the days before the Supreme Court eliminated the requirement of mutuality for defensive<sup>1</sup> and offensive<sup>2</sup> collateral estoppel, there were cases that reached a similar conclusion. In *Provident Tradesmens Bank and Trust Co. v. Lumbermens Mutual Casualty Co.*, 411 F.2d 88 (3d Cir. 1969), for example, the court held that representatives of persons killed in a car accident could assert offensive collateral estoppel even though they had not been parties to the first suit against the same insurance company, in which a survivor of the same accident had defeated the company's disclaimer of coverage. The controlling factor was that the claims of the plaintiffs in both suits had to be asserted "through" the same insurance policy, just as, in the instant case, the claims of the white plaintiffs must be asserted "through" the same historical discrimination against blacks. 411 F.2d at 93-94.

Alternatively, if this Court concludes that the presence of white plaintiffs in this action prevents any consideration of whether the State defendants are bound

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<sup>1</sup> *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

<sup>2</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

by any of Judge Murphy's findings of fact, we will seek voluntary dismissal of those plaintiffs, leaving only a putative plaintiff class of African Americans. Of course, if the black plaintiffs ultimately obtain the declaratory and injunctive relief they seek, the dismissed white plaintiffs and the subclass they seek to represent will benefit just as much as if they had remained in the case. They are here, after all, only for relief purposes, as this Court recognized when it read the complaint to allege that whites had been injured "perhaps unexpectedly" by the alleged discrimination against blacks. Doc. 35 at 22.

*B. The fact findings of racial motives underlying the challenged property tax restrictions were necessary to the judgment in Knight and were fully litigated.*

To reiterate the standard for collateral estoppel:

A court may give preclusive effect to a matter in dispute only when (1) that issue is identical to an issue decided in an earlier proceeding; (2) the issue was actually litigated on the merits; (3) the issue was decided in the earlier proceeding, meaning "the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision"; and (4) the burden of proof in the earlier proceeding is at least as stringent as the burden of proof in the current proceeding. *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir.1995). Moreover, the party against whom issue preclusion is being sought must have had a "full and fair opportunity" to litigate the issue in the prior proceeding. *Wingard v. Emerald Venture Florida LLC*, 438 F.3d 1288, 1293 (11th Cir.2006).

*Bates v. Harvey*, 518 F.3d 1233, 1240-41 (11<sup>th</sup> Cir. 2008). Defendants do not

dispute that, at least with respect to Judge Murphy's fact findings regarding the racially discriminatory motives for the adoption of the challenged provisions in the Alabama Constitution, plaintiffs in this action can satisfy elements (1)<sup>3</sup> and (4) of this standard. They dispute only element (3), arguing that "the property tax issue" was not "critical and necessary" to the judgment in *Knight*, Defendants' Brief at 15, and then argue that "the property tax issue" was not "fully" litigated, *id.* at 18, which presumably combines element (2) with the full-and-fair-opportunity-to-litigate consideration. Defendants make no attempt to apply these arguments to Judge Murphy's findings of fact separately, apparently contending that they all must fall solely because judgment was entered for the State in the *Knight* property tax proceedings, based on the court's conclusion, affirmed by the Court of Appeals, that there was an insufficient causal connection between the racially motivated tax provisions and the desegregation of higher education. By taking this

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<sup>3</sup> Defendants apparently recognize that the difference in equal protection legal theories in *Knight*, which was based on *United States v. Fordice*, 505 U.S. 717 (1992), and in this action, which is based principally on *Hunter v. Underwood*, 471 U.S. 222 (1985), does not prevent plaintiffs from asserting offensive collateral estoppel with respect to the found facts that are common to both theories. See *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 220 (4<sup>th</sup> Cir. 2006) ("a party is not entitled to rely on the doctrine of collateral estoppel to establish a legal conclusion when the underlying substantive law has materially changed; it does not, however, authorize a party to revisit a question of fact that has been previously determined").

position, defendants provide little assistance to this Court in determining which of the *Knight* issues of **fact** are precluded by collateral estoppel.

Plaintiffs concede that the fact findings regarding causation and the continuing adverse effects of historical discrimination on K-12 students may not have been fully litigated, because the focus in *Knight* was on higher education. This is a close question, because the State's successful defense breaking the chain of causation between the property tax system and higher education depended on showing that K-12 funding suffered first. Nevertheless, even finding of fact 87, "[t]he effect of low property tax revenues has had a crippling effect on poor, majority black school districts," may not be binding on the State, if it chooses to contest it. But findings of fact 11 through 78 clearly were fully litigated and decided adversely to the State. They were necessary and critical to the judgment ultimately rendered in favor of the State, because, as this Court has noted, the *Knight* plaintiffs had to satisfy their burden of tracing the challenged state constitutional provisions to racially discriminatory motives before the burden was shifted to the State to prove there were no continuing segregative effects on higher education. Doc. 35 at 6 n.10 (*quoting Knight VI*, 458 F. Supp. 2d at 1312).<sup>4</sup> The

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<sup>4</sup> See *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 575-77 (1<sup>st</sup> Cir. 2003) (instructing district court to consider applying offensive collateral estoppel with respect to the first prong of First Amendment claims, even if second prong had to be tried if new plaintiffs were to establish entitlement to relief in second lawsuit).

Court of Appeals acknowledged “[t]he district court has so held” that “these constitutionally enshrined tax policies were adopted for segregative purposes and with discriminatory intent.” 476 F.3d at 1226. It did not question those findings; rather, it held they did not “advance” the Knight plaintiffs’ higher education claims, and it affirmed the district court’s finding that their causal connection with higher education was too attenuated. *Id.*

Defendants argue that, because the State chose to focus on the “irrelevance” of the property tax issue to higher education, it had no “incentive to litigate the issues relating to the alleged vestiges of discrimination in the property tax system over a period of more than a century, and the State in fact did not fully litigate them.” Defendants’ Brief at 19-20. Earlier in their brief, defendants go way beyond the contention that these issues were not “fully” litigated and say: “The State of Alabama, represented by a different counsel team, **largely conceded** the historical issues relating to the allegedly discriminatory intent behind the adoption of the challenged tax provisions.” *Id.* at 11 (emphasis added).<sup>5</sup> The record in

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<sup>5</sup> In the *Knight* proceedings Governor Riley and the State were represented by one of the lawyers who represent defendants in this action. Defendants cite no case authority for the proposition that a change in counsel, no matter how complete, affects the issue of collateral estoppel. This is not a situation where the party against whom collateral estoppel is sought had no lawyer at all in the first lawsuit. See *Richardson v. Miller*, 101 F.3d 665, 669 (11<sup>th</sup> Cir. 1996) (plaintiff was not precluded from litigating liability issues where he appeared at the first trial

*Knight* shows that the State defendants did not concede the historical fact issues at any stage of the litigation. See, e.g., pages 1-9 of State defendants' post-trial proposed findings of fact, CA No. 83-1676 (N.D. Ala.), Doc. 3277 (copy attached to this brief as Exhibit D). They cross-examined the Knight plaintiffs' historians, J. Mills Thornton<sup>6</sup> and Robert J. Norrell, and they called Dr. William Stewart to rebut the plaintiffs' historical evidence. Exh. B to plaintiffs' motion for summary judgment, Doc. 10-4 at 247-62, 616-99. The amount of effort and evidence the State invested in its defense of these historical facts does not control the question whether those fact issues were "actually" or "fully" litigated.

Collateral estoppel applies only to those issues which were "actually" or "fully" litigated in the prior action. However, this rule does not refer to the quality or quantity of argument or evidence addressed to an issue. It requires only two things: first, that the issue has been effectively raised in the prior action, either in the pleadings or through development of the evidence and argument at trial or on motion; and second, that the losing party have had "a fair opportunity procedurally, substantively and evidentially" to contest the issue.

*In re Bush v. Balfour Beatty Bahamas, Ltd.*, 62 F.3d 1319, 1323 (11<sup>th</sup> Cir. 1995).

In deciding whether the historical findings of fact in *Knight* were critical and

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with no lawyer).

<sup>6</sup> Dr. Thornton's deposition, which was admitted in evidence as Doc. 12, Knight Exh. 66, Exh. F to plaintiffs' motion for summary judgment in this action, was attended by John Tally and Henry Walker as counsel for the State, both of whom cross-examined Dr. Thornton. A lawyer from the Alabama Attorney General's office also attended the deposition.

necessary to the judgment in that case and whether Governor Riley and the State had a full and fair opportunity to litigate them, this Court should exercise its “broad discretion” by applying to the particular circumstances of this case the guiding principles set out by the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *accord*, *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1172-73 (5th Cir. 1981) (“this discretion is not unbounded and must be channeled through the considerations of fairness listed in *Parklane*, along with any other considerations of fairness which the trial judge deems appropriate.”) (footnote omitted). There are no strict rules to apply. District courts must “question[] the fairness of applying the doctrine in the context of particular fact situations.” *Hicks*, *supra*, 662 F.2d at 1171. The ultimate question is whether, for whatever reason, “the application of offensive estoppel would be unfair to a defendant. . . .” *Parklane Hosiery*, 439 U.S. at 331; *accord*, *e.g.*, *Hicks*, 662 F.2d at 1170 (“considerations of fairness are of great importance in determining when use of offensive collateral estoppel should be permitted”).<sup>7</sup>

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<sup>7</sup> Thus, for example, in *Appling v. State Farm Automobile Mutual Ins. Co.*, 340 F.3d 769 (9<sup>th</sup> Cir. 2003), *cert. denied*, 543 U.S. 871 (2004), the predicate holding that a provision in the employment contract provided for termination for cause rather than at will was necessary to the prior judgment, even though the defendant prevailed in the previous suit by proving good cause.

Thus, the district court erred by finding the termination-for-cause decision in *Sandberg* was not necessary to the holding. Contrary to the

Applying collateral estoppel to the historical fact findings in *Knight* would not be unfair to the State defendants. The stakes in *Knight* were not “small and nominal,”<sup>8</sup> and future suits based on adjudicated findings of historical discrimination were more than “foreseeable,” so the State had every “incentive to defend vigorously.” *Parklane Hosiery*, 439 U.S. at 330; accord, *Johnson v. United*

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district court’s conclusion, the prerequisite for applying collateral estoppel was met.

But we affirm the district court’s decision because, notwithstanding its erroneous conclusion on the “necessarily decided” question, it proceeded to balance the various fairness factors and held that the “stark landscape of inconsistent prior interpretations of the termination clause weighs heavily in favor of granting Sandberg no preclusive effect.” The district court did not abuse its discretion by giving nearly conclusive weight to this factor. *See Parklane Hosiery*, 439 U.S. at 330-31, 99 S.Ct. 645 (holding that district courts have discretion to refuse to apply offensive non-mutual collateral estoppel against a defendant if such an application of the doctrine would be unfair).

340 F.3d at 776 (other citation omitted).

<sup>8</sup> This distinguishes the instant action from the cases cited by defendants, in which collateral estoppel was not applied to what were “minor” issues in earlier suits, that is, issues that were “incidental, collateral, or immaterial” to the prior judgment. *A.J. Taft Coal Co. v. Connors*, 829 F.2d 1577, 1579 (11<sup>th</sup> Cir. 1987) (plaintiffs in first suit “did not appeal the portion of the decision which failed to disallow the \$6,983.93 moisture deduction”); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1171 (5<sup>th</sup> Cir. 1981) (“The Workman litigation subjected Quaker to a liability of approximately \$35,000 while the present plaintiffs relying on that judgment stand to collect over \$400,000. Moreover, other possible plaintiffs who were employees of Quaker at the time of the Hilgenfeld Memorandum may be able to subject Quaker to considerably more liability in the future if this estoppel is used subsequently.”).

*States*, 576 F.2d 606, 615 (5<sup>th</sup> Cir. 1978) (“One of the most important considerations is whether, at the time of the earlier action, the party could foresee that facts subject to estoppel could be important in future litigation.”) (*citing Moser Steel Co. v. N. L. R. B.*, 568 F.2d 436, 440 (5<sup>th</sup> Cir. 1978)). Indeed, by arguing that the property tax provisions primarily restrict local K-12 funding, not higher education funding, the State was effectively **inviting** another lawsuit by class members on behalf of K-12 students. This is not like the situation in *Hicks*, where the defendant “could not be sure that some other plaintiff would not emerge later to use the results of the litigation against him.” 662 F.2d at 1170.

Nor does the current action afford the State defendants “procedural opportunities unavailable in the first action that could readily cause a different result.” *Parklane Hosiery*, 439 U.S. at 330-31 (footnote omitted); *accord*, *Williams v. Bennett*, 689 F.2d 1370, 1382 (11<sup>th</sup> Cir. 1982) (state defendants had same procedural opportunities in prior class action and were bound by prior court’s findings that prison conditions at Holman Prison violated Eighth Amendment’s prohibition of cruel and unusual punishment). The opportunity to cross-examine plaintiffs’ historians again in this action and to produce rebuttal witnesses and

evidence is no different in the instant action than it was in *Knight*.<sup>9</sup> And the State simply passed up the opportunity to contest the historical fact findings on appeal. As the Eleventh Circuit said in *Knight*, “[t]he State did not appeal the denial of its motion to disallow plaintiffs’ new claim,” 476 F.3d at 1223 n.7, and it did not challenge Judge Murphy’s ruling in favor of plaintiffs on the first prong of *United States v. Fordice*, 505 U.S. 717 (1992), as an alternative ground for affirmance. The State now is arguing that it made a litigation strategy decision to postpone an aggressive defense of its historical discrimination that this Court and the plaintiff class must defer to. That would defeat collateral estoppel’s “dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” *Parklane Hosiery*, 439 U.S. at 326 (citing *Blonder-Tongue Laboratories, supra*, 402 U.S. at 328-329).

### **III. Defendants Should Not Be Allowed To Evade Their Procedural Obligations Under Rule 56(e) and This Court’s Standing Order.**

Defendants contend that they are not required to comply with Rule 56(e)(2), which provides:

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<sup>9</sup> *Knight* was not litigated in “an inconvenient forum [where the State] was unable to engage in full scale discovery or call witnesses. . . .” *Parklane Hosiery*, 439 U.S. at 331 n.15.

*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

They base this contention on the absence of affidavits and admissible and relevant evidence supporting plaintiffs' Rule 56 motion. The problem with defendants' argument is that it erroneously conflates its procedural obligation to respond to plaintiffs' alleged undisputed facts with substantive questions about whether summary judgment may be granted based on the existing record.

Rule 56(a) states that "[a] party claiming relief may move, *with or without supporting affidavits*, for summary judgment on all or part of the claim."

(Emphasis added.) Rule 56(c) provides: "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The bellwether authority construing Rule 56 is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which holds that the moving party may support her motion for summary judgment on her pleadings "with or without supporting affidavits," requiring "the nonmoving party to go beyond the pleadings and by its own affidavits, or by the 'depositions, answers to

interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” 477 U.S. at 323-24 (*quoting* Rule 56(e)).<sup>10</sup>

Defendants cite *Howard v. BP Oil Co.*, 32 F.3d 520 (11<sup>th</sup> Cir. 1994), which cites *Celotex* and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), for the proposition that the nonmoving party must make a showing of genuine disputed facts only “[a]fter the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.” 32 F.3d at 524. But *Celotex* expressly repudiates this proposition:

But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by “showing” – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings.

477 U.S. at 325. Now that plaintiffs, by reference to the pleadings, have “point[ed] out” to this Court that there is an absence of evidence contrary to the facts found in *Knight*, it is defendants, the nonmoving parties, who must “by affidavits or as

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<sup>10</sup> The wording of Rule 56(e) as amended since *Celotex*, see *supra*, makes no material change with respect to this requirement.

otherwise provided in this rule – set out specific facts showing a genuine issue for trial.” Rule 56(e)(2). We are not told which of the separately numbered *Knight* findings of fact defendants dispute and what evidence they will rely on to dispute them. But, since Governor Riley and the State are contending they are entitled to a complete retrial of every fact that this Court found in *Knight*, it is particularly appropriate and fair to require them to identify the evidence they will rely on, whether it was introduced in *Knight* or not. In these circumstances, the Rule 56 policy emphasized in *Celotex* has particular force:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.” Fed.Rule Civ.Proc. 1. . . .

477 U.S. at 327 (citations omitted).

Because defendants have failed or refused to respond “in *separately numbered paragraphs* that coincide with those of the moving party’s claimed undisputed facts,” in compliance with Appendix II in this Court standing order regarding summary judgment proceedings (emphasis in original), those facts should be treated as undisputed.

The proper course in applying Local Rule 56.1 at the summary judgment stage is for a district court to disregard or ignore evidence relied on by the respondent – but not cited in its response to the movant’s statement of undisputed facts – that yields facts contrary to those listed in the movant’s statement. That is, because the

non-moving party has failed to comply with Local Rule 56.1 – the only permissible way for it to establish a genuine issue of material fact at that stage – the court has before it the functional analog of an unopposed motion for summary judgment.

*Reese v. Herbert*, 527 F.3d 1253, 1268 (11<sup>th</sup> Cir. 2008). This procedural requirement in the local rule “is not in conflict with Rule 56.” *Id.* at 1269 (footnote omitted).

Defendants’ counsel represent that they have not had enough time to develop evidence to support their “disagreement” with the allegations in the complaint, which are based on the *Knight* findings. See Defendants’ Brief at 32 and answer of State defendants, Doc. 37 at 4 *et seq.* But, if defendants can show they are unfairly disadvantaged by time constraints, their relief is provided by Rule 56(f), “which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.” *Celotex*, 477 U.S. at 326. There would appear to be no evidence defendants could obtain from plaintiffs through discovery that would be relevant to the allegedly undisputed facts, and it is not clear what evidence not already available to defendants they would seek out, or how much time they need to do so. It would be unfair to deny plaintiffs’ motion for summary judgment and force them to undertake the expense of retaining experts and marshaling other evidence to reintroduce in this action before defendants have come forward with some showing

of contrary evidence that they could not or would not present in the *Knight* proceedings. If defendants are not collaterally estopped to dispute the *Knight* findings of fact, and if they can convince the Court that additional time is warranted to procure such evidence, these Rule 56 proceedings should be continued for a reasonable period of time to allow them to do so.

#### **IV. The Knight Trial Transcript and Trial Exhibits Can Support Summary Judgment.**

Rule 56(e)(2) says that if defendants fail to respond as required to plaintiffs' alleged undisputed facts, summary judgment should be entered against them "if appropriate." Defendants' failure to comply with Appendix II "does not, however, automatically entitle the movant to summary judgment." *Reese v. Herbert*, 527 F.3d 1268. Plaintiffs still bear the burden of demonstrating that the undisputed facts and the evidentiary materials on which plaintiffs rely support the entry of summary judgment. *Id.* (citing *Celotex*, 477 U.S. at 323).

In one way or another, all of defendants' contentions that plaintiffs' evidentiary materials cannot be used to support summary judgment are based on whether they would be admissible at trial. The governing rule, however, is not whether the moving parties' materials are admissible in evidence, but whether they "could be 'reduced to admissible evidence at trial' or 'reduced to admissible

form.”” *Macuba v. DeBoer*, 193 F.3d 1316, 1323 (11<sup>th</sup> Cir. 1999) (citing *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir.1999); *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1135 (11th Cir.1996)[, *amended on other grnds*, 102 F.3d 1118, *cert. denied*, 520 U.S. 1274 (1997)]; *McMillian v. Johnson*, 88 F.3d 1573, 1584-85 (11th Cir.1996)[, *aff’d* 520 U.S. 781 (1997)]; *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1246 (3d Cir.1993)[, *cert. denied*, 510 U.S. 994 (1993)]; *Raby v. Baptist Med. Ctr.*, 21 F.Supp.2d 1341, 1353-54 n.9 (M.D. Ala.1998); *Coker v. Tampa Port Auth.*, 962 F.Supp. 1462, 1466-67 (M.D. Fla. 1997)). Plaintiffs do not contend that this Court’s findings of fact in *Knight* will be admissible in evidence; rather, they are referenced in the pleadings as stating the facts plaintiffs contend are undisputed. Those facts are supported by the evidence admitted at trial in *Knight*, which, for reasons that follow, can be reduced to admissible evidence at trial in this action.

A. *The trial transcript and exhibits from the Knight trial may be used to support summary judgment.*

Defendants’ brief, at page 25, cites no case authority for its argument that the entire record in *Knight* is hearsay and may not be considered in these summary judgment proceedings. That is because “It is well-settled that a certified transcript of a judicial proceeding may be considered on a motion for summary judgment.”

*Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1415 n.12 (5<sup>th</sup> Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994).

If a party, for summary judgment purposes, may rely on affidavits which “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein,” [Rule 56(e)], and if depositions and answers to interrogatories may be considered, *see id.*, there is no sensible rationale which would preclude reliance on sworn testimony faithfully recorded during the conduct of a judicially-supervised adversarial proceeding. All of the hallmarks of reliability attend upon such trial transcripts.

*Advance Financial Corp. v. Isla Rica Sales, Inc.* 747 F.2d 21, 27 (1<sup>st</sup> Cir. 1984) (citations omitted). Without even questioning this rule, many Eleventh Circuit decisions have approved of the use of prior trial transcripts to support summary judgment. *E.g.*, *Jackson v. State of Alabama Tenure Comm’n*, 405 F.3d 1276, 1285 (11<sup>th</sup> Cir. 2005); *Roland v. U.S. Postal Service*, 200 Fed. Appx. 868, 870 (11<sup>th</sup> Cir. 2006) (11<sup>th</sup> Cir. Rule 36-2). *See also*, *Adams v. St. Lucie County Sheriff’s Dept.*, 998 F.2d 923, 924 (11<sup>th</sup> Cir. 1993) (Hill, J., dissenting).

Obviously the exhibits admitted in evidence at the *Knight* trial can be reduced to evidence admissible in the instant action also. Defendants’ sole objection to the exhibits appears to be that they “have not been authenticated by affidavit or otherwise verified.” Defendants’ Brief at 25. They make this same authenticity objection to the trial transcript as well. Plaintiffs are uncertain

whether defendants are suggesting these exhibits really aren't authentic or whether they are insisting on the formality of official certification. The case they cite to support this argument, *Rogers v. Ford Motor Co.* 952 F.Supp. 606, 610-11 (N.D. Ind. 1997), involved striking summary judgment exhibits offered by the nonmoving party that were unauthenticated letters, not court documents. If defendants insist, plaintiffs will ask the clerk of this Court to certify under seal, as provided by Rule 44(a)(1), Fed.R.Civ.P., the *Knight* trial transcript and exhibits. However, undersigned counsel has ascertained that the original exhibits are still in the possession of Judge Murphy's courtroom deputy in Rome, Georgia, and Judge Murphy's court reporter would have to be contacted to obtain the original transcript. We will await this Court's instructions before asking them to be sent back to the clerk's office in Birmingham to be certified.

*B. Expert opinion testimony may be used to support summary judgment.*

Defendants' next argument, that the expert opinion evidence received in *Knight* is not allowed under Rule 56(e), is close to being frivolous. The cases cited in their brief stand for the opposite proposition. *Rogers v. Ford Motor Co.*, *supra*, 952 F.Supp. at 611 ("the court's decision to strike the exhibits to the plaintiffs' response in no way renders inadmissible expert testimony based upon the information contained in those documents"); *Elliott v. Massachusetts Mutual Life*

*Ins. Co.*, 388 F.2d 362, 366 (5<sup>th</sup> Cir. 1968) (“if a [nonmoving] party offers opinion evidence on the hearing of a motion for summary judgment, the court must determine in advance whether that evidence would be admissible if the trial were on the merits, and, if so, it must deny the motion for summary judgment”). The opinion evidence was excluded in *Elliott* because it was **not** expert opinion.

The cases relying on expert opinion evidence in summary judgment proceedings are legion. Most seem to grant summary judgment because the nonmoving party failed to present expert opinion evidence. *E.g.*, *Johnson v. McNeil*, 2008 WL 747610 (11<sup>th</sup> Cir., Mar. 21, 2008) at \*5 (Rule 36-2); *Mack v. Metropolitan Life Ins. Co.*, 246 Fed. Appx. 594, 598 (11<sup>th</sup> Cir. 2007) (Rule 36-2); *Jones v. Wike*, 654 F.2d 1129, 1130 (5<sup>th</sup> Cir. 1981). Some hold that conflicting expert evidence defeats a summary judgment motion. *E.g.*, *Parker v. Wellman*, 230 Fed. Appx. 878, 883-84 (11<sup>th</sup> Cir. 2007). A district court’s decision to exclude expert evidence in summary judgment proceedings is reviewed for abuse of discretion, not for error of law. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1250 (11<sup>th</sup> Cir. 2007).

*C. Rule 36 admissions.*

Plaintiffs agree that Rule 36(b), Fed.R.Civ.P., does not allow the State’s admissions in *Knight*, Pltfs. Exh. 177, Exh. J supporting plaintiffs’ motion for

summary judgment in this action, Doc. 16, to be used against the State in this action. But the mere fact that the state filed these admissions shows that its counsel must have consulted appropriate history authorities in 2004 and that they have had over four years to consult them further. This reinforces the State's obligation to identify with specificity which *Knight* findings of fact it can, in good faith and with supporting evidence, dispute in this action. The advisory committee notes to Rule 36(b) say:

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. **Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.**

(Emphasis added) (citations omitted). In light of the mutuality of parties in *Knight* and the instant action, unjustly imposing on plaintiffs the expense of preparing to prove again the same matters previously admitted should be avoided by enforcing the procedural obligations of the State under Rule 56.

*D. Relevance.*

The separately numbered facts which defendants contend are irrelevant include all the historical discrimination antedating the 1901 Alabama Constitution

and most of the facts regarding the impact of the property tax provisions on higher education. Defendants' Brief at 4, ¶ E. This Court in *Knight* determined that all those facts were relevant to plaintiffs' equal protection claims, and defendants' arguments opposing collateral estoppel and the admissibility in evidence of the *Knight* transcript and exhibits have no bearing on relevance and materiality.

This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus defendants' arguments about relevance provide them no excuse to bypass the procedural requirement of responding to the separately numbered alleged undisputed facts.

**V. The Undisputed Facts Establish the Harm and Causation To Support Summary Judgment.**

Defendants renew the arguments about harm and causation they advanced unsuccessfully to support their motions to dismiss, now contending they defeat summary judgment, even if defendants are bound by – or have been unable to dispute – the *Knight* findings of fact. Specifically, they say again that plaintiffs

cannot be harmed by the state constitutional property tax restrictions so long as it is still possible for the citizens of Lawrence and Sumter Counties to raise their millage rates, and they contend the second Dixon affidavit shows that public school students in those counties and black students across the state already receive more funding than do other students.

Plaintiffs addressed the first of these arguments at pages 3-4 of their brief opposing the motions to dismiss, Doc. 31, showing that the voter referendum requirement is only one of “the racially motivated barriers that operate to prevent the lid from ever being reached, namely, provisions that restrict the base against which millage rates may be applied to small fractions of the property’s fair market value, that burden homeowners in relation to farm and timber land, which are taxed only at low ‘current use’ values, [and] that require proposals to raise millage rates to jump multiple political hurdles at the local and state levels.” The voter referendum requirement itself, this Court found in *Knight*, “was crafted to ensure, with disfranchisement, that only whites could give their consent to higher local property taxes” Doc. 20 at ¶ 36. Defendants have not disputed the evidence in the affidavit of DeWayne Key, Doc. 31-7, that the most recent Lawrence County referendum was defeated notwithstanding the support of black voters. Nor have they disputed the evidence in the affidavit of Senator Bobby Singleton, Doc. 31-6,

that in majority-black Sumter County, after the voters approved millage increases in 1988, 1990, and 1998, they defeated another millage increase in 2006 after economic threats were published by business and wealthy land owners, most of whom are white. The referendum requirement continues to do precisely the work its racially motivated drafters intended it to do: helping to shield whites' property from being taxed to pay for blacks' education.

Plaintiffs pointed out in the first section of this brief why the data in the second Dixon affidavit fail to show that plaintiffs' county school systems are not harmed. The Dixon data use total expenditures, including federal grants, which is misleading and irrelevant. Plaintiffs submit with this brief exhibits which demonstrate the difference when federal funds are excluded.<sup>11</sup> Sumter is No. 20 in total per-pupil expenditures. However, if local per pupil expenditure and state per pupil expenditure from the table are combined into a single figure, Sumter drops to No. 69, or below the halfway point. Lawrence County drops to No. 60, not in the top 40% but barely in the top 50%. Chachkin declaration Exhs. 2, 3.

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<sup>11</sup>As explained in the declaration of Norman Chachkin submitted herewith, the figures in the exhibits are for the 2004-05 school year (the latest school year for which enrollment and expenditure data by each school system are publicly available), and for 130 districts (there are 132, but Trussville, for which no per-pupil figures are provided, and the Alabama School of Fine Arts, which is not a school district, are excluded).

Equally important are Lawrence County's ranking at no. 74 and Sumter County's ranking at no. 100 in local school funding. Chachkin declaration Exh. 4. This Court found in *Knight* that "Alabama's over-reliance on sales taxes supports the conclusion that inadequate property taxes cause Alabama's inadequate revenues. Specifically, because most rural and low-income counties have small commercial sales bases, sales taxes will never raise adequate revenues to meet minimum needs, including educational needs." Doc. 20 at ¶ 82. See also ¶¶ 87 and 88. The harm intended by – and all too well accomplished by – the challenged property tax provisions is to restrict the ability of **local** school systems to raise revenue for their students. The lack of local resources hurts students, because "schools that have good local funding would be able to offer advanced placement courses, foreign language courses, higher level math, and in many cases the classes would be smaller and offered on a regular basis." Doc. 20 at ¶ 96 (quoting former State Superintendent Ed Richardson).

Of special relevance is the low ranking in local funding of the ten majority-black county school systems<sup>12</sup>, all of which are located in the Black Belt. The

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<sup>12</sup> This Court can take judicial notice of official census data, which show that the ten counties with majority-black total populations in 2000 are Bullock, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Perry, Sumter, and Wilcox, all of which are located in the Black Belt. See Exhibit B to this reply brief. *United States v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002) (citing Fed.R.Evid. 201(b)).

undisputed facts are that these Black Belt counties were the main target of the racially motivated tax restrictions in the state constitution, e.g., Doc. 20, ¶¶ 33, 76-78, and, as noted above, “[t]he effect of low property tax revenues has had a crippling effect on poor, majority black school districts.” *Id.*, ¶ 87. Exhibit 4 to the Chachkin declaration shows that in 2004-05 all these majority-black counties had per-pupil local expenditures under \$1,000. Lawrence County local funding was also under \$1,000 per pupil. By comparison, local per-pupil expenditures in the two school systems with the highest local funding, Homewood and Mountain Brook, were about \$5,000 and \$4,500 respectively. Most school systems in Alabama had local per-pupil expenditures between \$1,000 and \$2,000.

The harm and causation resulting from low property taxes extend beyond the Black Belt to all rural school systems in particular, and “even areas boasting valuable commercial and residential property have difficulty in raising adequate revenue because of the Lid Bill’s low assessment ratios for all property classifications.” Doc. 20, ¶ 89. Inadequate property taxes are “the primary force driving” the injustices in Alabama’s revenue system, which “unfairly burden poor and lower-income Alabamians,” who are predominately black<sup>13</sup>, while denying

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<sup>13</sup> See Doc. 16, Exhibits 150 and 151. The most recent federal census figures comparing white and black poverty in Alabama are from 2006. They are attached to this reply brief as Exhibit C.

them the educational “opportunities to improve their condition.” *Id.*, ¶ 80. “[T]he lack of financial resources results in lower academic achievement in K-12 and less likelihood of success in higher education<sup>14</sup>. . . .” *Id.*, ¶ 96. “In 2003, Alabama spent \$5,908 per K-12 student, compared with a national average of \$7,376 per student.” *Id.*, ¶ 97. Thus, in addition to disadvantaging poor and majority-black school districts within the state, Alabama’s overall inadequate funding of K-12 education has a disparate impact on black students statewide.

Finally, defendants’ renewed argument that the harms caused by the property tax restrictions cannot be redressed by the declaratory and injunctive relief plaintiffs seek has no merit, for the reasons given at pages 8-19 of plaintiffs’ brief opposing the motions to dismiss, Doc. 31, and at pages 9, 31 and n.23 in this Court’s memorandum opinion and order denying those motions, Doc. 35.

## **VI. Conclusion.**

Defendants’ motion to strike plaintiffs’ evidentiary materials should be

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<sup>14</sup> Contrary to defendants’ contentions, the *Knight* findings of fact about how low property taxes contribute to the underfunding of public higher education and adversely affect black students’ opportunities to enter and to complete college are relevant to plaintiffs’ claims in this action. Even if they were too attenuated to satisfy the second prong of *Fordice*, those facts are still relevant to the Lynch plaintiffs’ equal protection claims, which encompass the entire public school system.

denied, and plaintiffs' motion for summary judgment should be granted. Plaintiffs are mindful, however, of this Court's preliminary impression that additional evidence may be required on the issue of causation, which would be preceded by a period of discovery. Doc. 35 at 21. If, after a more thorough review of the legal and factual issues presented, this Court does not grant plaintiffs' motion for summary judgment in full, plaintiffs respectfully submit that further steps ought to be taken to narrow the factual issues that legitimately are in dispute before opening unlimited discovery and forcing plaintiffs to undertake the expense of preparing additional evidence.

These are among the matters the Court could take up at the hearing required by Rule 56(c), Fed.R.Civ.P. At that hearing, plaintiffs could also offer evidence to support the allegations in their complaint, denied by defendants, that plaintiffs are who they say they are and that they are adequate representatives of a class of Alabama citizens who are also injured by the challenged property tax provisions in the Alabama Constitution. Of course, even without class certification, if the Court grants plaintiffs the relief they seek, all those putative class members will enjoy the same benefits anyway.

Respectfully submitted this 3rd day of September, 2008,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2008, 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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