

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 OPPOSING  
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs India Lynch et al., through undersigned counsel, submit the  
following arguments and authorities in opposition to defendants' motion for

judgment on the pleadings and supporting brief filed June 2, 2009, Docs. 79 and 79-2.

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**I. Defendants' Contentions.**

Defendants' motion for judgment on the pleadings raises new Title VI and Eleventh Amendment issues not squarely presented in defendants' motions to dismiss, which this Court denied in its memorandum opinion and order entered July 24, 2008, Doc. 35. Why defendants delayed raising these challenges to the sufficiency of the complaint is not clear. Their arguments supporting the new motion are novel in the extreme, for the most part disregarding well established case law. As we said in plaintiffs' brief opposing defendants' motions to dismiss, Doc. 31 at 2-3, defendants' arguments, if accepted, effectively would deny any black citizens of Alabama the ability to challenge the racially discriminatory state constitutional provisions and would prevent any federal court from providing judicial relief of any kind with respect to those provisions. It continues to be defendants' position that, because the challenged provisions underpin the state's ad valorem tax system, they are beyond the power of any court to interfere with. These new contentions should be rejected under binding precedents of the Supreme Court, the Eleventh Circuit, and this Court, including the predecessor of the instant action, *Knight v. Alabama*, 787 F.Supp. 1030 (N.D. Ala. 1991), *aff'd in part and rev'd in part*, 14 F.3d 1534 (11<sup>th</sup> Cir. 1994).

As best we understand them, defendants' new motion and brief make the

following arguments, set out below according to the corresponding sections of defendants' brief:

I.A. The Eleventh Amendment bars claims against the State of Alabama based on the Fourteenth Amendment.

I.B. The State of Alabama cannot be sued in its own name under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq. Indeed, defendants contend, "no cognizable claim has been or could be stated against the State of Alabama under Title VI for its allegedly discriminatory activity in the adoption of the constitutional provisions challenged in this action." Defendants' brief at 7.

II.A.1.-2.a. The allegations of law in the complaint are too conclusory, and the complaint does not allege sufficient facts to establish a "plausible" violation of Title VI.

II.A.2.b. The necessary elements of a Title VI violation cannot be established by the facts alleged. Specifically, defendants contend the following are elements necessary to plead and prove a violation of Title VI:

II.A.2.b.i. The complaint must specify the "program or activity" of the state that is receiving federal funds and that discriminates against the plaintiffs.

II.A.2.b.ii. It is not enough for the complaint to allege that defendants

are enforcing provisions enacted in the past for purposefully discriminatory reasons; plaintiffs must allege and prove that the defendants are presently engaging in intentional discrimination.

II.A.2.b.iii. The complaint must specify which state programs or activities that are receiving funds from a particular federal source are engaged in discrimination against the plaintiffs.

II.A.2.b.iv. The complaint must allege that the defendant Governor and Revenue Commissioner are purposefully discriminating against plaintiffs in some program or activity they administer that receives federal funds.

II.B. The Eleventh Amendment bars any suit by private citizens against state officers seeking an injunction against enforcement of racially motivated *restrictions* on the levy of taxes. *Ex parte Young*, 209 U.S. 123 (1908), does not apply. Defendants' brief at 29.

This brief will address in order each of these ascertained contentions of defendants.

## **II. Alabama Has Waived Its Eleventh Amendment Immunity From Claims Under Title VI.**

See Defendants' brief I.A. Defendants are correct that the Eleventh Amendment bars claims against the State of Alabama based solely on the

Fourteenth Amendment. But Congress has abrogated the State's Eleventh Amendment immunity against claims based on Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq.

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. §794], title IX of the Education Amendments of 1972 [20 U.S.C. §1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. §6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. §2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a). Actually, rather than an outright abrogation, controlling Eleventh Circuit precedent characterizes this statute as setting up a waiver of Eleventh Amendment immunity when the state accepts federal funds. *Sandoval v. Hagan*, 197 F.3d 484, 492-95 (11th Cir. 1999), *overruled on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *accord*, e.g., *Garrett v. UAB*, 344 F.3d 1288, 1290-93 (11<sup>th</sup> Cir. 2003).

### **III. Plaintiffs' Claims Against the State of Alabama in Its Own Name Are Properly Brought Under Title VI of the Civil Rights Act.**

See Defendants' brief I.B. Defendants not surprisingly do not contend that

the State has Eleventh Amendment immunity from plaintiffs' Title VI claims, but they argue that "Title VI does not authorize claims against states. It is directed solely at programs and activities of states." Defendants' brief at 5. The state itself, defendants argue, cannot be a "program or activity" within the meaning of 42 U.S.C. § 2000d-4a.

This Court rejected this very contention by the defendant State of Alabama in *Knight*:

60. While well argued, the Defendants' position is, nevertheless unavailing. Title VI prohibits racial discrimination in any program or activity receiving federal financial assistance. 42 U.S.C. Sec. 2000d. Prior to the Civil Rights Restoration Act of 1987, the term "program or activity" was not defined by the Congress. *Grove City v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), is the leading Supreme Court case on the meaning of the term. The Court in *Grove City* held that Title VI liability is established only when the plaintiff can show discrimination in a particular program or activity specifically supported by federal funds. *Id.* at 570-76, 104 S.Ct. at 1220-23. Thus, the Court ruled that only those programs which received federal funding were subject to federal regulation. For example, if a college or university restricted the use of federal funds to its financial aid program, then only the financial aid program was subject to Title VI anti-discrimination regulations. The other nonfederally funded programs within the institution remain unregulated. Therefore, *Grove City* required the plaintiff who brought a claim under Title VI to prove that a specific program receiving federal assistance was discriminatory; and moreover, any potential remediation would be limited only to the funded program and could not be implemented institution wide.

61. Congress was displeased with the Supreme Court's narrow construction of the term "program or activity" and over the veto of President Reagan amended Title VI by passage of the Civil Rights

Restoration Act of 1987. 42 U.S.C. Sec. 2000d-4a (1988). The purpose of the Restoration Act is to legislatively overturn the majority's holding in *Grove City* and again bring Title VI into line with congressional intent. S.Rep. No. 64, 100th Cong., 1st Sess. 4, reprinted in 1988 U.S.Code Cong. & Admin.News, 1, 6.

62. To this end, Congress defined the term "program or activity" to make clear that when federal financial assistance is extended to part of a college or university, **or public system of higher education**, all the operations of the institution or **educational system** are covered, not just the program receiving the federal assistance.

63. As this Court has said once before, the inescapable conclusion is that Congress intended Title VI to be given the broadest possible interpretation "to assist in the struggle to eliminate discrimination from our society by ending federal subsidies for such discrimination." *Knight v. Alabama*, No. 83-M-1676-S, slip. op. at 16 (N.D.Ala. Mar. 12, 1990) quoting, S.Rep. No. 64, 100th Cong., 1st Sess. 7, reprinted in 1988 U.S.Code Cong. & Admin.News, 1, 9.

64. Without belaboring the point any further, the Court has specifically found that there is **a system of higher education** in Alabama, that the members of that system receive federal financial aid and that each of the Defendants belongs to the system. On this basis alone, there is ample authority under the Civil Rights Restoration Act to impose liability upon the Defendants, **system wide**, notwithstanding the failure of the Government or the Knight Plaintiffs to point with particularity to any one program.

787 F.Supp. at 1364-65 (bold emphasis added) (a courtesy copy of the 78-page March 12, 1990, memorandum and order will be emailed separately to the Court and to counsel). *Knight* concerned a statewide system of higher education. The complaint in the instant action alleges that the challenged state constitutional restrictions impact Alabama's entire statewide system of education, including K-12 and higher education, as well as the statewide system of property taxation.

Complaint at ¶¶ 4, 6, 19, 23, 31, 35-38, 43, 46, 50, 52.

Defendants do not explain why Congress would have abrogated the State's Eleventh Amendment immunity, 42 U.S.C. § 2000d-7, if it is impossible to state a cause of action against the State itself under Title VI. And, inexplicably, they fail to mention the holding in *Knight v. Alabama*, the *Grove City* decision, or the Civil Rights Restoration Act of 1987. They offer no reason why this Court should reach a different conclusion than it did in *Knight*. The few cases they cite are simply inapposite. *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), was decided before the Civil Rights Restoration Act of 1987, and its holding that only the specific "programs and activities" receiving federal funds are subject to federal proscriptions of discriminatory practices, like *Grove City*, was overruled by Congress.

Defendants' reference to the definition of "program or activity" in 42 U.S.C. § 2000d-4a confuses the statute's definition of a cause of action under Title VI with what constitutes "the list of eligible defendants...." Defendants' brief at 6. The Supreme Court made a related point in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), where the defendants argued that Congress had violated the constitutional separation of powers when it enacted 42 U.S.C. § 2000d-7(a)(2) *supra*. This subsection codifies the Civil Rights Remedies

Equalization Amendment of 1986, which reaffirmed the availability of all judicial remedies in “a suit against a State” for violation of the anti-discrimination statutes listed in § 2000d-7(a)(1). *Franklin*, 503 U.S. at 72. The Court explained:

In making this argument, respondents misconceive the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power. Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action.

503 U.S. at 73-74 (citation omitted). Similarly, it is necessary to distinguish the elements of a valid cause of action under Title VI, as set out in 42 U.S.C. §§ 2000d and 2000d-4, from the ability to name the state itself as a defendant for allegedly violating Title VI, as set out in 42 U.S.C. § 2000d-7. As long as plaintiffs can show that they are being subjected to invidious discrimination under a “program or activity” of the State which is receiving or distributing federal funds, §§ 2000d and 2000d-4, the State cannot invoke its Eleventh Amendment immunity, § 2000d-7(a)(1), and all judicial remedies are available “[i]n a suit against the state for a violation of [§ 2000d].” In other words, the definition of “program or activity” governs how to establish a claim upon which relief may be granted, not whether the state may be named as a defendant. If, as defendants here argue, § 2000d-4 was interpreted to “exclude the State as a whole from the list of eligible

defendants,” defendants’ brief at 6, it would nullify the explicit language to the contrary in § 2000d-7.

The case law substantiates this distinction, even if it sometimes is unclear. For example, *Schroeder v. City of Chicago*, 927 F.2d 957 (7<sup>th</sup> Cir. 1991), cited in defendants’ brief at 7, held that a plaintiff employee had failed to state a claim upon which relief could be granted under the Rehabilitation Act, notwithstanding the 1988 amendment to the Act overruling the narrow coverage standard in *Grove City*:

But the amendment was not, so far as we are able to determine — there are no cases on the question — intended to sweep in the whole state or local government, so that if two little crannies (the personnel and medical departments) of one city agency (the fire department) discriminate, the entire city government is in jeopardy of losing its federal financial assistance. We therefore need not decide whether, if Schroeder **had a claim** under the Rehabilitation Act, he could obtain damages, as he seeks to do in this suit.

927 F.2d at 962 (bold emphasis added). *Haybarger v. Lawrence County*, 551 F.3d 193 (3d Cir. 2008), questions whether this “conclusory” passage from *Schroeder* even holds up as precedent for stating a valid cause of action. 551 F.3d at 203.

Unlike *Schroeder*, Haybarger did not sue the entire Commonwealth for her termination. Instead, she identified the entity receiving federal funds — the Fifty-Third Judicial District — and limited her suit accordingly. In sum, because Haybarger fashioned her suit in a materially different manner than the plaintiff in *Schroeder*, we find that decision inapposite.

*Id.* The issue in *Haybarger* was whether the state defendants had Eleventh Amendment immunity. As in other cases, the Third Circuit concluded they did not have immunity, because the plaintiff, suing for employment discrimination, had stated a cause of action, in this case under the Americans with Disabilities Act and the Rehabilitation Act. The ability to state a claim under a statute listed in 42 U.S.C. § 2000d-7(a)(1) governs the waiver of Eleventh Amendment immunity, just as it governs whether relief is available under § 2000d-7(a)(2). It does not control whether the state itself may be named as a defendant.

So, in *Koslow v. Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), where the Commonwealth of Pennsylvania was named as a defendant along with plaintiff's employer, the Department of Corrections, the court held that the state's acceptance of federal funds it directed to the Department of Corrections allowed plaintiff to state a cause of action and thus to defeat the state's defense of Eleventh Amendment immunity. "[I]f a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency — but only against that department or agency." 302 F.3d at 171 (citation omitted). The state, however, was not dismissed as a defendant, because "program or activity" defines the scope of the cause of action, not the permissible defendants.

Further illustrating this distinction is *Konar v. Illinois*, \_\_\_ F.3d \_\_\_, 2009 WL 1344806 (7<sup>th</sup> Cir., May 14, 2009) (not for publication), in which the state was named as the sole defendant by a plaintiff who complained that his divorce proceedings had violated his rights under Title IX of the Education Amendments of 1972. Slip op. at 2. The district court dismissed Konar’s complaint on the ground that Illinois had not waived its Eleventh Amendment immunity. The Seventh Circuit affirmed the dismissal, but modified the judgment “to reflect a dismissal for failure to state a claim....” *Id.* (“to the extent that Konar claims a violation of Title IX in connection with a court-ordered parenting class, he does not allege that an educational institution excluded him from participation, denied him benefits, or subjected him to sex discrimination within the context of the program itself, as would be necessary to state a claim under Title IX”).

Similarly, in *Benning v. Georgia*, 391 F.3d 1299 (11<sup>th</sup> Cir. 2004), a prisoner sued both the State of Georgia and its Department of Corrections under the Religious Land Use and Institutionalized Persons Act, which prohibits a state from burdening the exercise of religion in a “program or activity” receiving federal funds. 42 U.S.C. § 2000cc-1. The Eleventh Circuit affirmed the district court’s denial of defendants’ motion to dismiss on grounds, *inter alia*, that Georgia had waived its Eleventh Amendment immunity.

Congress unambiguously required states to waive their sovereign immunity from suits filed by prisoners to enforce RLUIPA. Section 2000cc-2(a) provides that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The statutory definition of government specifically includes states and state agencies. 42 U.S.C. § 2000cc-5(4)(A). Georgia was on clear notice that by accepting federal funds for its prisons, Georgia waived its immunity from suit under RLUIPA.

391 F.3d at 1305-06 (*citing Garrett v. UAB*, 344 F.3d at 1293).

*Schroeder, Haybarger, Konar, and Benning* all dealt with the discrimination claims of individuals against one department of a state or local government. In the instant case, the property tax restrictions in the Alabama constitution adversely affect the putative plaintiff class(es) in statewide systems of education and taxation, involving hundreds of state and local public school systems, as well as countless state agencies, local governments, and other entities that provide public services, most of which are recipients of federal funds. To name them all would take many pages of the complaint, but that is not necessary to establish a cause of action under Title VI. We will demonstrate below that both of the other named defendants, the Governor and Revenue Commissioner, are distributors and/or recipients of federal funds. However, as the defendants argue elsewhere in their brief, this is a suit against the State itself, which is ultimately responsible for its own constitution and for its statewide system of public education, and thus is

properly named as a defendant.

**IV. The Complaint On Its Face Satisfies the “Plausibility Standard” of Rule 8(a), Fed.R.Civ.P.**

See defendants’ brief II.A.1.-2a. Defendants’ brief supporting their motion for judgment on the pleadings relies on *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007), to argue that the complaint in this action does not meet the new “plausibility” standard governing motions to dismiss.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

*Iqbal*, 129 S.Ct. at 1949 (*quoting Twombly*) (citations omitted). The Court goes on to enunciate “[t]wo working principles,” first, that the assumption of truth does not extend to alleged legal conclusions, and, second, that the complaint must allege a plausible claim for relief.

Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and

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

*Iqbal*, 129 S.Ct. at 1950 (citation omitted).

Defendants contend that the allegations in the complaint referring to Title VI are too conclusory to state a plausible claim for relief. But, instead of arguing that too few facts are alleged to support “misconduct” that violates federal law, *id.*, which was the problem in *Twombly* and *Ashcroft*, defendants argue that “the lengthy averments” of fact in the complaint “are entirely outside the purview of Title VI, which exists solely to prevent the use of federal dollars in a racially discriminatory manner. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 (1979).” Defendants’ brief at 12. The citation to *Weber* is puzzling for several reasons. First, *Weber* dealt with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., not Title VI. Second, the jump cite in defendants’ brief appears to be in error, because the only mention of Title VI in *Weber* is at 443 U.S. at 206 n.6, which merely distinguishes it from Title VII by saying that Title VI was enacted “to assure federal funds would not be used in an improper manner.” Third, to the extent that this casual reference to Title VI may provide any support for defendants’ contention that Title VI’s anti-discrimination provisions reach only the use of federal funds, it has been overruled by Congress in

the Civil Rights Restoration Act of 1987, as we pointed out above.

In any case, on its face the complaint clearly satisfies the new Rule 8 “plausibility” standard. It alleges that the State of Alabama, the Governor, and the Revenue Commissioner are enforcing property tax restrictions in the Alabama constitution that were found to have been enacted for purposefully discriminatory reasons 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). It alleges, as did the complaint found sufficient in *Knight*, that the many programs and activities of the statewide systems of public education and property taxes receive federal funds, a fact that is not just plausible but beyond dispute.

**V. The Summary Judgment Standard, Not the Plausibility Standard, Governs Defendants’ Motion For Judgment On the Pleadings.**

The holdings of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* addressed the question whether the complaints in those actions could “survive a motion to dismiss.” *Twombly*, 550 U.S. at 548; *Iqbal*, 129 S.Ct. at 1950 (quoted in *Sinaltrainal v. Coca-Cola Co.*, \_\_\_ F.3d \_\_\_ (11<sup>th</sup> Cir., Aug. 11, 2009), slip op. at 10). This Court has already denied defendants’ motion to dismiss. Before the Court now is defendants’ motion for judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P. Rule 12(d) provides:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the

pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Extensive discovery has already proceeded in this action since entry of the uniform initial order entered December 3, 2008, Doc. 51 at 5. Defendants suggest no principled basis for this Court to exclude matters outside the complaint, and none exists, as a careful reading of *Twombly* and *Iqbal* reveals.

*Twombly* was brought as a massive, nationwide class action alleging antitrust violations by the phone company, and *Iqbal* was a tort action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), against the Attorney General of the United States and the Director of the FBI. The plausibility standard was enunciated by the Court to prevent groundless or implausible actions from proceeding to costly and invasive discovery.

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 528, n. 17 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F. 2d 1101, 1106 (CA7 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from

the events related in the complaint”). . . .

*Twombly*, 550 U.S. at 558; accord, *Iqbal*, 129 S.Ct. at 1950 (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”). The doors of discovery were unlocked in the instant action nine months ago. The deadline for completing discovery has been extended twice by agreement and is now less than three months away. If there had been a problem of plausibility in the complaint, it should have been “exposed at the point of minimum expenditure of time and money by the parties and the court.” *Twombly*, 550 U.S. at 558 (citations omitted). It would be an abuse of discretion for this Court to suspend further discovery pending its ruling on the motion for judgment on the pleadings absent a motion for protective order satisfying the demanding requirements of Rule 26(c), Fed.R.Civ.P. *Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1559 (11<sup>th</sup> Cir. 1985).

Thus the standard for assessing defendants’ motion for judgment on the pleadings is the same as the summary judgment standard.

Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party.

*Scott v. Taylor*, 405 F.3d 1251, 1253 (11<sup>th</sup> Cir. 2005) (citing *Cannon v. City of*

*West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)).

**VI. It Is Undisputed That the State, the Governor, and the Revenue Commissioner All Are Receiving and/or Distributing Federal Funds.**

See defendants' brief II.A.1.-2.a., b.i., and b.iii. The complaint alleges that the continuing racially discriminatory impact of the challenged property tax restrictions in the Alabama constitution results from their suppression of local school revenues and the consequent over-reliance on funding from the State to pay for public education. See in particular ¶ 43:

43. 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 (citations omitted).

The complaint alleges, as noted above, that this discriminatory impact operates statewide and that federal financial assistance is received by "departments,

agencies and political subdivisions” of the State -- too many to be listed.

This Court can take judicial notice of official publications of the U.S. Bureau of Census. Fed.R.Evid. 201(b); e.g., *United States v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002). They show that in FY 2008 the State of Alabama received a total of \$7,241,745,000 in federal grants, <http://www.census.gov/prod/2009pubs/cffr-08.pdf>, Table 4, and \$10,253,408,000 in procurement contracts, Table 5. According to the most recently available census report, Federal Aid To States For Fiscal Year 2006, <http://www.census.gov/prod/2008pubs/fas-06.pdf>, in FY 2006 state and local governments in Alabama received a total of \$6,565,179,000 in federal grants. This included \$633,563,000 from the Department of Education, *id.* Table 1, of which \$368,167,000 went to K-12 programs, and \$39,727,000 went to postsecondary programs. *Id.*

In addition, as of August 6, 2009, the State of Alabama has been notified it will receive \$3,299,419,789 in federal stimulus funds, including \$596,355,871 in education fiscal stabilization grants, \$181,864,783 under the Individuals with Disabilities Education Act, \$164,518,337 in Title I grants to local education agencies, \$49,254,237 in school improvement grants, \$10,489,941 in educational technology state grants, \$9,961,000 for early head start, and \$9,790,731 in

vocational rehabilitation grants, to name just a few of the stimulus grants to public education. See

<http://www.recovery.gov/?q=content/allocation-programs&state=AL>.

Much of the federal stimulus funds will be received by and/or distributed by the defendant Governor. According to the summary of the American Recovery and Reinvestment Act of 2009 published on the web site of the Alabama Legislative Fiscal Office,

[http://www.lfo.state.al.us/pdfs/ARRA%20Docs/ARRA%20Master%20Copy\\_JSI\\_04.01.09%20at%206.33.pdf](http://www.lfo.state.al.us/pdfs/ARRA%20Docs/ARRA%20Master%20Copy_JSI_04.01.09%20at%206.33.pdf), the Alabama Department of Economic and

Community Affairs (ADECA), whose director is appointed by and reports directly to the Governor, will receive and distribute at least \$212,467,288 in federal stimulus funds, and the Governor himself will receive and distribute at least \$1,458,083,000 in federal stimulus funds, including \$596,356,000 to be distributed to local education agencies.

On August 5, 2009, defendants filed objections refusing to respond to plaintiffs' third discovery request, which asked the defendants to verify the foregoing figures published on the internet, which sought more detailed information about the federal funds distributed by the state to local public school systems, and which sought details about the federal funds received and/or

distributed by the defendant Governor and Revenue Commissioner. The bases of defendants' objections are the arguments in their motion for judgment on the pleadings that the allegations of the complaint require dismissal of this action without proceeding to discovery or to matters outside the complaint. Concurrently with service of this brief, plaintiffs' counsel will confer with defendants' counsel to ascertain whether this requested discovery can be obtained without the necessity of filing a Rule 37 motion.<sup>1</sup>

But defendants' objections to discovery about federal funds underscores the baselessness of their motion for judgment on the pleadings. They are invoking the Rule 8 "plausibility" standard set out in *Iqbal* and *Twombly* not to challenge plaintiffs' ability to plead and to prove facts supporting their claims that defendants are enforcing racially discriminatory provisions of the state constitution, but to contend that publicly available, uncontroversial facts about federal funding received by these defendants had to be pleaded more specifically. These are facts

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<sup>1</sup> Defendants did provide four of the documents plaintiffs requested, the budget management reports and comparative summaries of revenues for fiscal years 2006 and 2007, which reveal federal funds received by the Governor and Revenue Commissioner in those years. For example, attached to this brief as Exhibit A are highlighted excerpts from one of these voluminous reports which identify some of the federal funds defendants received in FY 2007:

Department of Revenue:	\$1,750,391.96
ADECA:	\$174,114,475.11

that rise far “above the speculative level,” *Twombly*, 550 U.S. at 555 (quoted in *Sinaltrainal*, slip op. at 10), arguably to the level of facts subject to judicial notice. By challenging the sufficiency of allegations of the complaint regarding federal funding, particularly at this advanced stage of the litigation, defendants are attempting to resurrect “the hyper-technical, code-pleading regime of a prior era” that Rule 8 was intended to end. *Iqbal*, 129 S.Ct. at 1950. This attempt to distort the Federal Rules should be squarely rejected.

**VII. It Is Not Necessary That Plaintiffs Plead or Prove That the Governor and Revenue Commissioner Are Guilty of Present-day Intentional Discrimination.**

See defendants’ brief II.A.2.b.ii. and iv. The complaint in this action alleges a cause of action based on the equal protection standards of *Hunter v. Underwood*, 471 U.S. 222 (1985), which held that enforcement of racially motivated provisions of the Alabama constitution that continue to have their discriminatory effects must be enjoined. Defendants’ brief, however, erroneously argues that this Court should employ the standards of *Burton v. City of Belle Glade*, 178 F.3d 1175 (11<sup>th</sup> Cir. 1999), which required plaintiffs to prove that the city’s present-day refusal to annex a previously segregated black housing project was intentionally discriminatory. The two cases are analytically distinct. *Hunter* held:

Without deciding whether § 182 [of the 1901 Alabama constitution] 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. It was not necessary for the plaintiff in *Hunter* to prove that the defendant voter registrars had racially discriminatory motives for continuing to enforce § 182. By contrast, in *Burton* the issue was not whether a purposefully discriminatory law was still in force and effect. Ordinances that required Belle Glades' housing projects to be racially segregated had been repealed in 1963, and the issue was whether the city's decision in 1995 refusing to annex the formerly all-black housing project was racially motivated. 178 F.3d at 1184-85. The court held that the city's economic reasons for refusing to annex were "reasonable," *id.* at 1193, and that its 1995 decision was not "traceable to or rooted in past *de jure* segregation." *Id.* at 1190 (quoting *Knight v. Alabama*, 14 F.3d 1534, 1540-41 (11<sup>th</sup> Cir. 1994) (internal quotation marks omitted) (citing *United States v. Fordice*, 505 U.S. 717, 727-32 (1992))). The issue in the instant action is whether, as in *Hunter*, the defendant State, Governor, and Revenue Commissioner should be enjoined from enforcing provisions in the Alabama constitution enacted with discriminatory intent between 1875 and 1978 and that remain in full force and effect, not whether the defendants have taken some recent action that was purposefully discriminatory,

as was the case in *Burton*.

If defendants are suggesting, *sub silentio*, that the *Hunter v. Underwood* standards do not apply to plaintiffs' Title VI claim, they are simply wrong.

We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732, n. 7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

*Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003).

**VIII. Title VI Protects Plaintiffs Against All Racial Discrimination in a Program or Activity That Receives Federal Funding, Not Just Discrimination in the Use of Those Federal Funds.**

See defendants' brief II.A.2.b.iii. Defendants argue that it is not possible for plaintiffs either to plead or to prove a Title VI violation in this action, because there is no relationship between federal funding and the challenged property tax provisions in the Alabama constitution.

What is missing in this regard from the plaintiffs' Complaint and what could never be alleged within the factual context they have otherwise averred is – in the words of a sister court within the 11th Circuit – a “logical nexus” between: (1) a (nonexistent) federally-funded program associated with the limits on property tax and (2) the “discrimination” these plaintiffs claim they are today suffering.

Defendants' brief at 18 (footnotes omitted). The “sister court” decision relied upon by defendants is *Stroud v. Seminole Tribe of Florida*, 574 F.Supp. 1043, 1046

(S.D. Fla. 1983), and once again defendants cite *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981). Defendants' brief at 16. These are case precedents that antedate the Civil Rights Restoration Act of 1987, and their program-specific holdings have been overruled. *NCAA v. Smith*, 525 U.S. 459, 466 n.4 (1999) ("Congress enacted the CRRA in response to Part III of our decision in *Grove City College v. Bell*, 465 U.S. 555, 570-574 (1984), which concluded that Title IX, as originally enacted, covered only the specific program receiving federal funding.") (citing *Franklin v. Gwinnett County Public Schools*, *supra*, 503 U.S. at 73); accord, e.g., *Sheely v. MRI Radiology*, 505 F.3d 1173, 1187 n.14 (11th Cir. 2007). Once again, instead of citing an outdated "sister court" decision, defendants should have addressed the contrary holding of *this* Court against these same defendants. *Knight v. Alabama*, *supra*, 787 F.Supp. at 1364-65.

The other cases cited in defendants' brief present doubtful authority and, in any case, can be distinguished from the instant action. *Lightbourn v. City of El Paso*, 118 F.3d 421 (5th Cir. 1997), continues to rely on *Brown v. Sibley*, *supra*, without considering the Civil Rights Restoration Act of 1987 and subsequent Supreme Court precedents. 118 F.3d at 427. Moreover, the holding in *Lightbourn* is based on the uncontested fact that the defendant Secretary of State received no financial aid whatsoever. *Id.* ("Here, the plaintiffs have not even argued that the

Secretary receives federal financial assistance — let alone presented any evidence on this point. Therefore, the plaintiffs have failed to state a claim under Section(s) 504 against the Secretary.”). In the instant action, both the Governor and the Revenue Commissioner receive and/or distribute substantial amounts of federal funds.

The district court cases defendants cite all inexplicably rely on the *Grove City* program-specificity standard that Congress overruled with the CRRA of 1987. *Florida A.C.G. Council, Inc. v. Florida*, 303 F. Supp. 2d 1307, 1311 n.3 (N.D. Fla. 2004), cites *Commodari v. Long Island University*, 89 F.Supp.2d 353, 378 (E.D. N.Y. 2000), for the proposition that “plaintiff must allege a ‘logical nexus’ between a federally funded program or activity and the employment discrimination he allegedly suffered.” *Commodari*, in turn, quotes a pre-CRRA case, *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir. 1981). All of the other cases cited in *Commodari* either antedate 1987 or else continue to rely on the overruled standard of *Grove City College v. Bell*,<sup>2</sup> which is the final citation in *Commodari* itself. 89 F.Supp.2d at 378 n.11. *Assoko v. City of New York*, 539 F.Supp.2d 728 (S.D.N.Y. 2008), may be distinguished on

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<sup>2</sup> E.g., *David K. v. Lane*, 839 F.2d 1265, 1275-76 (7th Cir. 1988), which fails to address the recently enacted CRRA of 1987, and is cited in footnote 11 of *Commodari*.

the ground that the federal housing subsidies plaintiffs received through Citibank could not be attributed to the City of New York. 539 F.Supp.2d at 740. Moreover, the *Assoko* plaintiffs did “not allege in what manner the City or the Partnership intentionally subjected them to discrimination or denied them benefits because of their membership in a protected category.” *Id.*

So defendants are fundamentally wrong when they argue that “[t]he facts [plaintiffs] have averred can never be forced into a Title VI mold because the discriminatory animus they allege was on the part of the State of Alabama itself in the adoption of the constitutional provisions, not on the part of some federally funded program or activity of the State.” Defendants’ brief at 18-19. The plain language of Title VI protects plaintiffs not only from being “excluded from participation in [or] be[ing] denied the benefits of ... any program or activity receiving Federal financial assistance,” it protects them from being “subjected to discrimination under” any such program or activity. 42 U.S.C. § 2000d. The complaint alleges, and it is undisputed, that the defendant Governor and Revenue Commissioner are the state executive authorities responsible for enforcing and promulgating regulations under the challenged state constitutional provisions. Complaint at ¶¶ 11 and 12. The offices and departments they control are thus “programs and activities” under which plaintiffs are being subjected to invidious

racial discrimination. That discrimination will be remedied if this Court grants the relief requested in the complaint and enjoins the defendants from enforcing these state constitutional provisions in the future.

**IX. This Action Presents the Classic Application of *Ex Parte Young* To Enjoin State Actors From Enforcing Racially Discriminatory Laws That Violate the Fourteenth Amendment.**

See defendants' brief II.B. This final section of defendants' brief argues that plaintiffs are barred by the Eleventh Amendment from asserting their claims for declaratory and prospective injunctive relief against the Governor and Revenue Commissioner in their official capacities. Specifically, defendants contend that plaintiffs' Fourteenth Amendment claims against the property tax restrictions in the Alabama constitution are not allowable under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908). From the difficult-to-follow discussion in this long section of defendants' brief we have discerned the following three bases of this contention:<sup>3</sup>

(1) *Ex parte Young* does not apply because the Governor and Revenue Commissioner are not threatening to initiate any civil or criminal action against the plaintiffs. Defendants' brief at 24.

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<sup>3</sup> Plaintiffs respectfully reserve the right to respond to any additional bases of argument we have overlooked.

(2) *Ex parte Young* only authorizes suits against state officers to protect plaintiffs' property and liberty from unconstitutional state laws.

Defendants' brief at 24-27.

(3) *Ex parte Young* does not allow suits challenging state officials' enforcement of state laws that limit and do not seek to collect taxes. Defendants' brief at 29.

To advance these arguments defendants invite this Court to go back a century and do a close reading of *Ex parte Young* and the nineteenth century precedents it relied on. But this Court is bound to apply *Ex parte Young* as it has been construed by more recent appellate decisions.

The controlling authority on *Ex parte Young* is *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the most recent decision that examines *Ex parte Young* in depth. Defendants' argument (1) appears to pursue one of the factors cited in "the case-by-case approach to the *Young* doctrine" advanced in the opinion of Justice Kennedy, joined by Chief Justice Rehnquist, 521 U.S. at 280, which was flatly rejected by the other seven members of the Court.

In concluding that the Tribe's suit cannot proceed, the principal opinion [of Justice Kennedy] reasons that federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns, including whether a state forum is available to hear the dispute, what particular federal right the suit implicates, and whether "special

factors counsel[ly] hesitation” in the exercise of jurisdiction. Ante, at 274, 275, 278-280 (internal quotation marks omitted). This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence. The parties have not briefed whether such a shift in the *Young* doctrine is warranted. In my view, it is not.

521 U.S. at 291 (O’Connor, J., concurring, joined by Scalia, J., and Thomas, J.); accord, *id.* at 298 (Souter, J., dissenting, joined by Stevens, J., Ginsburg, J., and Breyer, J.) (“Justice O’Connor’s view is the controlling one”). Justice O’Connor’s opinion clearly enunciates the standard set out in “our modern *Young* cases”:

While it is true that the Court has decided a series of cases on the scope of the *Young* doctrine, these cases do not reflect the principal opinion’s approach. Rather, they establish only that a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than retrospective.

521 U.S. at 294 (comparing *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977), with *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 68 (1984), and *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)) (emphasis supplied by Justice O’Connor); accord, e.g., *Board of Trustees, University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *MCI Telecomms. v. BellSouth Telecomms.*, 298 F.3d 1269, 1272 (11th Cir. 2002); *Sandoval v. Hagan*, 197 F.3d 484, 500-01 (11<sup>th</sup> Cir. 1999), overruled on other grounds, sub nom. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Summit Medical Assoc. v. Pryor*, 180 F.3d 1326, 1336-38 (11th Cir. 1999).

Under these well established *Ex parte Young* principles, there is no requirement that the state defendants be threatening civil or legal proceedings against the plaintiffs.<sup>4</sup> This was one factor of “significance” in Justice Kennedy’s proposed narrow, case-specific approach to *Young*, 521 U.S. at 273 (citations omitted), that was rejected by the Court’s majority. In any event, defendants misread *Ex parte Young* as imposing such a requirement. They cite the discussion in *Young of Fitts v. McGhee*, 172 U.S. 516 (1899). Defendants’ brief at 25-26. But *Fitts* held that a suit against the Attorney General of Alabama to challenge a bridge toll violated the Eleventh Amendment because “neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. . . .” *Ex parte Young*, 209 U.S. at 157 (quoting *Fitts*, 172 U.S. at 530). Thus, the Court said in *Young*:

In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the

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<sup>4</sup> If, at pages 22-23 of their brief, defendants are contending that the Eleventh Amendment bars suits against state officers in their official capacities, they are obviously wrong. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (“implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. See *Ex Parte Young*.”) (quoted in *Scott v. Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005)).

enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

209 U.S. at 157. As alleged in the complaint in the instant action, the Revenue Commissioner is charged by law to enforce “the provisions of the Alabama Constitution complained of herein and their enabling statutes and [to] promulgate[] rules and regulations governing the valuation of property subject to ad valorem taxes pursuant to its enforcement authority.” Complaint ¶ 12 (citing Ala. Code § 42-2-40). He has the duty to “exercise general and complete supervision and control of the valuation, equalization, and assessment of property [and] the collection of all property [taxes.]” Ala. Code § 40-2-11(1). Moreover, he is charged with instituting civil and criminal proceedings against both taxpayers and state and local officials for failure to comply with the laws implementing the challenged state constitutional provisions. Ala. Code §§ 40-2-11(4), (5), and (9). The Revenue Commissioner is appointed by and holds office at the pleasure of the Governor, to whom the Revenue Commissioner must report and serve as an advisor on tax policies. Ala. Code §§ 40-2-11(9), (11), (12), and 40-2-41. There can be no question that these defendants are the proper state officials to be named as defendants in this *Ex parte Young* action.

Defendants nevertheless argue that, “as the *Young* Court said of the *Fitts*

case, the State Superintendent of Schools might as well have been made a party to the instant action for all that it has to do with any official duties of the Revenue Commissioner or the Governor.” Defendants’ brief at 27. They do not explain how this statement can be squared with the statutory duties of the Revenue Commissioner and Governor, which place them in the same position vis-a-vis enforcement of the challenged state constitutional provisions in this action as were the public service commissioners vis-a-vis their order in *Verizon Maryland, Inc. v. Public Serv. Comm’n of Maryland*, 535 U.S. 635 (2002), which defendants also rely on. Defendants’ brief at 28.

Defendants’ argument (2) asserts that *Ex parte Young* is aimed only “at preventing an unconstitutional (or otherwise federally prohibited) taking of property or liberty (such as enforcing an unconstitutional tax or criminally prosecuting a citizen under an unconstitutional law).” Defendants’ brief at 24. If defendants are contending that plaintiffs’ allegations of racial discrimination in this action are not covered by *Young*’s exception to Eleventh Amendment immunity they are patently wrong. Even Justice Kennedy’s narrow reading of *Young* in *Coeur d’Alene* says that “official acts of racial discrimination” in violation of the Fourteenth Amendment “offer a powerful reason to provide a federal forum.” 521 U.S. at 279. Justice O’Connor agreed. 521 U.S. at 295 (plaintiffs claims of racial

segregation in *Milliken v. Bradley* “were particularly strong”).

In its July 24, 2008, opinion denying defendants motions to dismiss this Court characterized the complaint as containing “troubling allegations of deep-rooted, invidious discrimination, not entirely unlike those that gave rise to the Supreme Court’s watershed decision in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954).” Doc. 35 at 22-23. *Brown*, of course, reminded us that African Americans are the persons “for whose protection the amendment was primarily designed.” 347 U.S. at 490-91 n.5 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880)).<sup>5</sup>

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<sup>5</sup> It is ironic that defendants’ only reference to a race case, defendants’ brief at 23, is *Governor of Georgia v. Madrazo*, 26 U.S. 110 (1828), in which captured Africans were treated as property rather than as persons. It appears that Georgia had seized these Africans, and the slave trader and slave owner were trying to regain possession of them. The point here is that when *Ex parte Young* was decided, only a few years after Alabama’s 1901 constitution was ratified, enforcing the equality rights of African Americans guaranteed by the Reconstruction Amendments was not yet a high priority for the Supreme Court. As we said in our brief opposing defendants’ motions to dismiss, Doc. 31 at 37 n.16:

Justice Campbell’s biographer in 1920 “point[ed] out that of the more than six hundred cases in which its protection has been invoked, only twenty-eight involved racial rights of the colored man, and quotes from a North Carolina lawyer, as a not inapt statement of its effect, that it was made ‘for the protection of the negro, but has become the asylum of the multi-millionaire’” Simeon E. Baldwin, *Review of HENRY G. CONNOR, JOHN ARCHIBALD CAMPBELL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 1853-1861*, 19 YALE L.J. 946, 947 (1920) (citations omitted).

Today, even defenders of the “new federalism” jurisprudence acknowledge the

Defendants' argument (3), at bottom, is what their motion for judgment on the pleadings seems to be all about:

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

Defendants' brief at 29. This assertion, which attempts to repackage arguments advanced unsuccessfully in defendants' motion to dismiss, is flatly wrong.

Perhaps the most explicit rejection of this assertion is in *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964), which held there was "no doubt" about the district court's power to enjoin the defendant county officials

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core anti-discrimination limits placed on state sovereignty by the Fourteenth Amendment.

The Rehnquist Court cannot fairly be characterized as a champion of the John C. Calhoun or George C. Wallace perspective of States' Rights. In case after case, the Rehnquist Court has not hesitated to remedy violations of fundamental civil rights by state governments. These decisions involve, for example, matters of religion, speech, association, and voting.

William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1175-76 (2002). One of those decisions, of course, is *Hunter v. Underwood*, 471 U.S. 222 (1985), in which Justice Rehnquist, writing for the Court, struck down §182 of the 1901 Alabama constitution, in spite of the fact that power to prescribe voter qualifications is reserved to the states, because §182 was motivated, at least in part, by racial discrimination.

from failing to levy taxes for public schools and from granting tax credits and exemptions to parents sending their children to racially segregated private schools. 377 U.S. at 232-33 (cited with approval in *Missouri v. Jenkins*, 495 U.S. 33, 38, 57 (1990)). The defendants in *Griffin*, who were “the Board of Supervisors, School Board, Treasurer, and Division Superintendent of Schools of Prince Edward County, and the State Board of Education and the State Superintendent of Education,” 377 U.S. at 232, made the same Eleventh Amendment argument advanced by defendants here, and Justice Black, writing for the Court, flatly rejected it:

It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex parte Young*, 209 U.S. 123 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment.

377 U.S. at 228.

*Griffin* was cited in support of the holding in *Hibbs v. Winn*, 542 U.S. 88, 93, 112 (2004), which, as a suit against a state official under 42 U.S.C. § 1983, also necessarily relied on *Ex parte Young* to avoid a conflict with the Eleventh Amendment. *Id.* at 93-94. This Court relied on *Hibbs* to reject defendants’ challenge to the complaint based on the Tax Injunction Act. Doc. 35 at 29 (the

TIA does “not . . . stop third parties from pursuing constitutional challenges to tax benefits in a federal forum”) (quoting *Hibbs*, 542 U.S. at 108). *Hibbs* cites many earlier federal court decisions striking down tax exemptions and other tax benefits under the Establishment Clause of the First Amendment, all of which named as defendants the state officials who enforced the challenged tax laws, thus implicitly invoking the *Ex parte Young* exception to Eleventh Amendment immunity. 542 U.S. at 110-12 (citations omitted).

Perhaps defendants intend to distinguish a “limitation” on taxes from a tax credit, exemption, or other “benefit.” But that is not possible. The millage caps, assessment ratios, current use provisions, and lids embedded in Alabama’s constitution are no different from the tax credits in *Griffin* or *Hibbs* in respect to being tax restrictions that are neutral on their face, and thus applying to everyone, but that in their application discriminatorily limit the taxes paid by the privileged few who are their intended beneficiaries. As in *Hibbs*, plaintiffs in this action “seek prospective relief only,” 542 U.S. at 99, which prevents the defendant state officials from invoking either the TIA or the Eleventh Amendment to bar plaintiffs’ claims against “an ongoing violation of federal law. . . .” *Coeur d’Alene*, 521 U.S. at 294.

### Conclusion

Defendants' motion for judgment on the pleadings should be denied.

Respectfully submitted this 11<sup>th</sup> day of August, 2009.

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### CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2009, 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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