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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

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

Plaintiffs,

v.

THE STATE OF ALABAMA; ROBERT BENTLEY, in his official capacity as Governor of Alabama; and JULIE P. MAGEE, in her official capacity as Commissioner of Revenue,

Defendants.

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

PLAINTIFFS' RESPONSE
TO DEFENDANTS' POST-TRIAL BRIEF

Plaintiffs India Lynch et al., through undersigned counsel, pursuant to this Court's amended orders entered May 11, 2011, Doc. 256, and June 7, 2011, Doc. 277, respond as follows to defendants' post-trial brief, Doc. 275.

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I. PLAINTIFFS' RESPONSE TO DEFENDANTS' INTRODUCTION

The fundamentally flawed legal theories defendants rely on are outlined in the introduction to their post-trial brief. With due respect to able counsel for defendants, nearly every one of their major arguments is based on snippets from cases that are either taken out of context or that flatly misrepresent the principle cited.

A. Inadequate Funding Is Not Plaintiffs' Cause of Action; It Is the Injury Resulting From the Racial Discrimination Alleged in the Complaint.

Defendants at last concede that the suppression of "adequate" local revenues is at the "heart" of the complaint. Defts post-trial brief at 6-7. But, instead of using this concession to clarify the issues, defendants try to distort the issues a different way by arguing that the complaint should have been dismissed at the outset on grounds that there is no constitutional right to an adequately funded education. Defts post-trial brief at 8-9 (citing *Knight v. Alabama*, 476 F.3d 1219, 1229 (11th Cir. 2007) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973)).

Of course, the complaint does not allege a cause of action based on inadequate funding of public education. It alleges causes of action based on racial discrimination. Lack of adequate school revenues, especially at the local level, is

the injury caused by the racial discrimination. So, once again, defendants are attempting to transform this action into a *Rodriguez* case, this time literally by trying to rewrite the complaint.

B. Defendants Cannot Get Help From *Rodriguez*, No Matter How Many Ways They Try.

Defendants persist in misapplying *Rodriguez*, probing the opinion for words or phrases to take out of context. This Court rejected defendants' argument that this is a *Rodriguez* case when it denied defendants' motion for summary judgment after extensive briefing by the parties. See Docs. 157-1, 166, 193. Undeterred, defendants now reprise the argument "that federal courts should not be involved in issues relating to the tax policies of the various states," which this Court earlier rejected when it denied the motion to dismiss. Defts post-trial brief at 10; Doc. 35. Their post-trial brief repeats the admonition in *Rodriguez* they previously quoted in their summary judgment brief: "This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause...." Defts post-trial brief at 10; Doc. 157-1 at 25 (quoting 411 U.S. at 40). As plaintiffs pointed out in their brief opposing summary judgment, Doc. 166 at 45-47, *Rodriguez* refused to recognize an equal protection challenge to Texas' school funding system based on **wealth**, making it clear there would be a Fourteenth Amendment cause of action based on **racial discrimination**, as there is in the

instant action.

The worst example, however, of defendants' willingness to misread *Rodriguez* is the way they seize on the word "explicit" in the phrase "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes...." Defts post-trial brief at 11 (quoting 411 U.S. at 41) and at 185-86, 210, 217, 222, 245, 250. Defendants argue this means that a finding of purposeful racial discrimination can be made only when the state actors state their racial motives explicitly. Defts post-trial brief at 11-12. They even extend their overreach of "explicit" to govern findings of effect, injuries, causal connection, and class certification. Id.

The problem is that defendants have divorced the word explicit from the context in which the *Rodriguez* Court used it. The Court was inquiring whether the Constitution makes explicit reference to the kind of classification created by the challenged state action, not about whether the state actors had explicitly stated their motives for creating it. "We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right **explicitly** or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." 411 U.S. at 17 (bold

emphasis added). And the Court concluded that "[e]ducation, of course, is not among the rights afforded **explicit** protection under our Federal Constitution." 411 U.S. at 35 (bold emphasis added). Race, of course, is the explicit and paradigmatic suspect classification. 411 U.S. at 16 and n.40 (citations omitted); id. at 61 (Stewart, J., concurring) ("Because of the historic purpose of the Fourteenth Amendment, the prime example of such a 'suspect' classification is one that is based upon race.") (citations omitted); accord, e.g., *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("Race is the paradigm.").

Because, unlike *Rodriguez*, this action addresses specific state laws that are alleged to have been enacted for purposefully racially discriminatory reasons, this Court must employ the analytical framework set out in *Hunter v. Underwood*, 471 U.S. 222 (1985), and *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977). Defendants try to marry their misreading of "explicit" in *Rodriguez* with language from *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.24 (1979), which applied the *Arlington Heights* principles to a facially neutral statute alleged to discriminate purposefully on the basis of gender. Defts post-trial brief at 210. But, again, defendants have lifted one phrase about "objective" evidence out of *Feeney* while ignoring the rest of the Supreme Court's opinion, a careful reading of which demonstrates the fundamental flaws in

defendants' legal analyses of both intent and continuing effects.

First, *Feeney* shows that defendants have the order of addressing the evidence backwards, as they have throughout this case. The analysis of plaintiffs' claims that the facially neutral state constitutional restrictions are purposefully discriminatory does not begin, at least in this case, with their current discriminatory effects, as defendants contend. Defts post-trial brief at 11, 13. This is what the Court said in *Feeney*:

> When a statute gender-neutral on its face is challenged on the ground that its **effects** upon women are disproportionably adverse, a **twofold inquiry** is thus appropriate. The **first question** is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, **covert** of [sic: or] overt, is not based upon gender, the **second question** is whether the adverse **effect reflects** invidious gender-based discrimination. See *Arlington Heights v. Metropolitan Housing Dev. Corp., supra*. **In this second inquiry**, impact provides an "important **starting point**," 429 U.S., at 266, 97 S.Ct., at 564, but purposeful discrimination is "the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554.

Feeney, 411 U.S. at 274 (bold emphases added). The *Feeney* Court affirmed the district court's finding that the facially neutral statute "is not a pretext for gender discrimination," which it based on a careful review of the statute's history going all the way back to 1884. 411 U.S. at 275, 265-68.

It is important to note that if the answer to this first question in the twofold

inquiry had been yes, it would not have mattered how great or small was the injury suffered by the intended victim class.

> If Massachusetts by offering such a preference can be said intentionally to have incorporated into its state employment policies the historical gender-based federal military personnel practices, the **degree** of the preference would or **should make no constitutional difference**. Invidious discrimination does not become less so because the discrimination accomplished is of a **lesser magnitude**. Discriminatory intent is simply **not amenable to calibration**. It either is a factor that has influenced the legislative choice or it is not.
>
> > FN23. This is not to say that the degree of impact is irrelevant to the question of intent. But it is to say that a more modest preference, while it might well lessen impact and, as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more or less "neutral" in the constitutional sense.

411 U.S. at 277 (footnote omitted) (bold emphases added).

It is not necessary that the latter-day legislators had been aware of the historical purposeful discrimination perpetuated by their recent amendment of the statute. Awareness becomes relevant only if the statute's history is free of invidious discrimination and plaintiffs are seeking to prove purposeful discrimination through **present-day** adverse consequences of the statute. In this event, even if the present adverse effects are "severe," as they were in *Feeney*, 411 U.S. at 271, the factfinder must inquire further into the nature of the legislators' awareness.

> "Discriminatory purpose," however, implies more than intent as

> volition or intent as awareness of consequences. See *United Jewish Organizations v. Carey,* 430 U.S. 144, 179, 97 S.Ct. 996, 1016, 51 L.Ed.2d 229 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

411 U.S. at 279 (footnotes omitted). This awareness inquiry does not require the court to determine the personal motives of the legislators, that is, what was in their minds and hearts, as suggested by defense counsel's repeated question to witnesses, "Do you think so-and-so was a racist?".

> Proof of discriminatory intent must necessarily usually rely on **objective factors**, several of which were outlined in *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 266, 97 S.Ct. 555, 564,50 L.Ed.2d 397. The inquiry is **practical**. What a legislature or any official entity is "**up to**" may be plain from the **results its actions achieve**, or the **results they avoid**. Often it is made clear from what has been called, in a different context, "the give and take of the situation." *Cramer v. United States*, 325 U.S. 1, 32-33, 65 S.Ct. 918, 934, 89 L.Ed. 1441 (Jackson, J.).

411 U.S. at 279 n.24 (bold emphases added). If the "disproportionately adverse effect upon a racial minority . . . can be **traced** to a discriminatory purpose," 411 U.S. at 272 (bold emphasis added), it is subject to strict judicial scrutiny and "would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." 411 U.S. at 273. As always, in the final analysis, this Court's determination of the intent issue must be based on "the totality of legislative actions...." 411 U.S. at

280.

C. Defendants Continue To Ignore the Intended Adverse Effects of the Racially Motivated Provisions; Dr. Bell's Statewide Per-Person and Per-Pupil Weighted Averages Are Both Irrelevant and Misleading On Their Own Terms.

The *Feeney* opinion also has something to say about continuing effects: "the purposes of the statute provide the surest explanation for its impact." 411 U.S. at 275. The racially discriminatory purposes of the six provisions at issue in this action all revolve around the particular ways in which whites in the Black Belt managed to shield their property from being taxed to pay for the education of blacks. But rather than focusing on whether the millage caps and Lid Bill Amendments continue to serve those purposes, defendants stand by the weighted averages devised at the outset by defendants' counsel in their brief opposing plaintiffs' motion for summary judgment, Doc. 41 at 9-10, and repackaged by Dr. Michael Bell.

Defendants' per person and per pupil measures of how existing state and local revenues are distributed among all the counties and school systems in Alabama might have been relevant if plaintiffs had filed a pattern-and-practice equal protection action like *Rodriguez*. But plaintiffs have not asserted a pattern-and-practice claim. As defendants at last concede, the complaint alleges

continuing adverse effects in the nature of restricted **amounts** of school revenue, not **inequitable distribution** of either the existing regressive state revenues or the existing inadequate local revenues. The evidence leaves no doubt that the lowest property taxes are paid by Black Belt landowners and that the nearly all-black school systems in the Black Belt receive the lowest amounts of local school revenues as a result, as do other rural school systems. Indeed, the evidence shows that nearly all public school systems, rural and urban, receive less overall school state and local funding than the state itself deems adequate.

Even on their own terms, Dr. Bell's weighted averages erroneously presume that per-student revenues are fungible across every school system in Alabama, whether they are urban or rural, rich or poor. There are unfunded mandates and other fixed operating and capital needs that require the same amount of dollars whether a county with a population of 10,000 must pay for it or a county with 100,000 must pay for it. As Dr. Ira Harvey and Dr. Dan Sullivan explained, school dollars are not jelly beans, and Dr. Bell's simple-minded analyses fail to take account of the many complexities of public school funding.

II. PLAINTIFFS' RESPONSES TO DEFENDANTS' PROPOSED FINDINGS OF FACT

Pursuant to the Amended Order, Doc. 256, Plaintiffs respond as follows to

defendants' proposed findings of fact. Plaintiffs understand the Court's directions to require a response to "only their disputes with the opposing parties' statement of those relevant facts.."

Therefore, agreed facts are included for convenience, including references to the pretrial facts agreed upon, Doc. 242-1, filed March 12, 2011. Some of the facts offered by the defendants deemed irrelevant are noted as such. But many other facts, both disputed and agreed upon, may be irrelevant, whether so noted or not. Those facts proposed by defendants and disputed by plaintiffs are so noted with appropriate references supporting the reason for the dispute. The headings below are those used in defendants' brief and are not agreed to by plaintiffs.

A. Plaintiffs' Claims

1-10 from Agreed Facts.

B. Alabama's Property Taxes

11-26 from Agreed Facts.

27. It would be more accurate to add the following to the end of the sentence, "including constitutional amendments." 3 Tr. 149:1-9 (Brunori).

28. Dr. Harvey's statement is inconsistent with PX 563 (AASB Property Tax Chart 1988-2008), which shows that only 39% of school-related property tax referenda passed during the 21-year study period.

29 -39. Agreed.

C. Property Taxes in General

40-44. Agreed.

45. This passage in Dr. Sullivan's testimony refers only to the southeastern states. His report further states: "While about half of the other southeastern states' constitutions reference assessment ratios, they all call for assessing property at fair market value or at the full current use value. Some of the states do grant the legislature the authority to set differential assessment ratios, and the legislatures do so, but those ratios are considerably higher than the ones in the Alabama constitution. What really creates unique problems for Alabama is that it not only puts the allowable assessment ratios in the state constitution; it also has very low ratios, especially for residential, agricultural and forest property; and in the case of agricultural and forest property, it applies those low ratios to a current use valuation." PX 117 at 5.

46. This is incomplete. Dr. Sullivan's testimony was:

20 And what's important about that is, when you put
21 all of this -- it's not that there isn't another state.
22 For every provision Alabama has, you can probably find
23 another state that has an identical provision. You
24 can't find a state that has this whole combination of
25 provisions.
00177
1 And the net effect of that is to make the system

2 in Alabama very rigid; that is, it becomes very
3 difficult to make any changes in property taxes. It
4 also has had the effect of Alabama having very, very
5 low property taxes. And it -- as I said, the decision
6 making becomes very cumbersome. And the ability to
7 change it, since it becomes really difficult to change,
8 what happens is that you're sort of wherever you
9 started from is where you can end up.

7 Tr. 176-77 (Sullivan).

47-48. Agreed.

49. This is incomplete. Dr. Sullivan's testimony was:

19 Q. So every state has a current use law?
20 A. Yes.
21 Q. So every state violates neutrality in that regard?
22 A. Yes. And the issue is to what extent do they
23 violate neutrality.

8 Tr. 105 (Sullivan). See also PX 117 at 4: "About two-thirds of all states have some type of 'current use' provision, but overwhelmingly the norm is for the constitution to enable the legislature to provide for this method of valuation for certain types of property. Typically, limits are placed on this method of valuation to ensure that it supports some stated public policy (e.g., preserving family farms)."

50-57. Agreed.

58. Agreed except for last sentence. Embedding all the restrictive features in the state constitution is unique to Alabama. See response to ¶ 45 supra.

D. Alabama's Constitution is not the Cause of Plaintiffs' Alleged

Injuries

1. Alabama Voters Do Not Support Higher Property Taxes

59. This passage from Dr. Sullivan's cross-examination is incomplete. The complete passage is:

> 21 Q. And that's the problem, isn't it, is in the
> 22 referendum, it's in voter preferences, when a vote is
> 23 taken that has kept the property tax low in Alabama,
> 24 isn't that not correct?
> 25 A. That's the mechanism that what I've argued here is
> 00098
> 1 if, in fact, for example, you tabbed all of the current
> 2 use property in Sumter County valued at full fair
> 3 market value and taxed at 20 percent, the -- and the
> 4 yield per pupil per mill would then end up somewhere
> 5 close to a hundred dollars, the taxpayers might be much
> 6 more willing to incur a 1-mill increase in the property
> 7 tax than if it's only going to yield the smaller
> 8 amount. That's essentially what my testimony is.
> 9 Q. But my question related to the property taxes in
> 10 Alabama are low because property tax increases are
> 11 turned down by the voters of this state in referendum,
> 12 and that's an expression of voter preference, is it
> 13 not?
> 14 A. That is.

8 Tr. 97-98 (Sullivan). Moreover, the entirety of the testimony of Dr. Sullivan and Dr. Harvey makes this statement grievously overbroad.

60. Disputed and object: opinion testimony of lay witness. Dr. Harvey was summarizing testimony and writings of historians. Moreover, the term "citizens of the State" usually has not included African Americans in Alabama history.

61-63. Agreed.

64. Agreed that this is what Dr. Harvey wrote.

65. This is taken out of context. 9 Tr 253-55 (Frederick). In particular, it omits the following passage immediately preceding the testimony quoted by defendants:

> 8 I would also add this: I don't think anyone runs
> 9 running and skipping down the street saying, I'd love
> 10 to pay more property taxes. But I think there are some
> 11 states who have historically done a better job of
> 12 explaining the complex reasons why in the long run you
> 13 might need some.
> 14 Q. All right. So in Alabama, that might be one of
> 15 the states that has not done as sufficient job of
> 16 explaining why property taxes -- how property taxes
> 17 serve the citizens; is that correct?
> 18 A. Yeah. I mean, I think in both, certainly in 1971,
> 19 to a latter extent in 1978 there is a pretty consistent
> 20 marketing effort to engender support for, first, 325,
> 21 then 373.

9 Tr. 254 (Frederick).

2. Taxing Authorities Are Not Constrained by the Property Tax Limits in the 1901 Constitution

66. Not relevant and not understood. This statement of fact proposed by defendants and other statements like it are irrelevant for the reason given by Judge Hand in *McCarthy v. Jones*, 449 F.Supp. 480, 482 n.1 (S.D. Ala. 1978):

> The Alabama Farm Bureau Federation, the Alabama
> Cattlemen's Association, Inc., and the Alabama Association of

> Realtors have appeared in this litigation collectively as an amicus curiae. On this particular finding they take issue, arguing that while the lower assessment rates will obviously result in lower revenues than would be provided by the statewide rates, such revenues may be increased through an increase in the millage rates. The Court is convinced that this is true, but such explanation does little in the way of justifying the distinctions in assessment rates in the various counties.

67. Agreed.

68. Not relevant and not understood. See response to ¶ 66 supra.

69. Disputed. This is not an accurate characterization of Dr. Flynt's testimony, and it excludes the full context of his testimony and exchange with the Court at 2 Tr. 152-156 (Flynt).

3. Taxing Authorities Are Not Constrained by the Property Tax Limits in Amendment 373

70. Agreed.

71. Disputed - this is taken out of context. 8 Tr 66:14-67:6 (Sullivan).

72-77. Agreed.

78. Agreed but irrelevant. But see response to ¶ 66 supra.

E. Plaintiffs' Alleged Injuries Are Not Redressable.

79-81. Agreed.

82-96. Agreed that Marsh and Hubbard so testified. But their testimony is irrelevant. Moreover, both Sen. Marsh and Speaker Hubbard testified they

would not support the status quo if there were a finding by this Court that the current provisions are racially discriminatory. 13 Tr. 15 (Marsh), 24 (Hubbard).

97. Agreed but irrelevant.

98. Disputed. This is an inaccurate characterization of Dr. Harvey's testimony, as follows:

11 Q. Yeah. If you look around the state, based on your
12 experience, are there certain counties where usually
13 the referendum are going to be passed and certain
14 counties where the chances are they're not going to be
15 passed, or does it -- can you even get that correlation
16 or not?
17 A. I think a fair answer to that question would be if
18 you went back to a point in time where these laws --
19 the statutory process, the constitutional amendatory
20 process, the referring -- okay, the Brookings Institute
21 report of 1932, lamenting that the one critical aspect
22 of government we made it optional that people could
23 vote no. They have to repass every 20 to 30 years,
24 local tax.
25 If you go back to a time period, say '30s, '40s,
00098
1 '50s, majority of people had kids in public schools.
2 There was a greater affinity and involvement in public
3 education.
4 We get in post-World War II area. We get into
5 massive urbanization. We get into increased probably
6 -- now, this is not an opinion, simply what I have read
7 -- discord among races, rich, poor, questioning who's
8 doing their fair share, who's not. And more and more
9 people don't have kids in school. They do not have the
10 direct connection with it. And people are given the
11 right to say no, we don't want this tax.
12 So it can become an easy target for overall

13 discontent with government and taxes.
14 Q. Would you have expected any of that in the
15 Lawrence County elections in 1992?
16 A. Yeah.
17 Q. Okay. You would have expected there to be some
18 white discontent against the black students in that
19 county?
Page 41
20 A. I didn't say that. I said --
21 Q. Was it -- I'm sorry. Go ahead.
22 A. What I would say to you, if there were an effort
23 to raise property tax for schools in Vestavia, where I
24 live, we're at 52.05 mills, I don't think it would
25 stand a chance in the world of passing.
00099
1 Yes, there may be racial motivations for some
2 votes, but, yes, there may be an unwillingness of the
3 taxpayers, also.
4 How you parse out those, that's for a polling firm
5 to take a look at.
6 Q. You seriously think there would be racial
7 motivations in Vestavia voting against --
8 A. I didn't say that.
9 Q. Okay.
10 A. I said they would be unlikely because of two
11 things: As we said, racial and dissatisfaction with
12 taxes. Taxes are too high. So it could be any
13 combination of those anywhere.

6 Tr. 97-99 (Harvey).

99. Agreed.

100-03. Agreed.

F. Alabama's Property Tax Provisions Do Not Have Any Disproportionate Effect Along Racial Lines

104. Disputed. Dr. Bell did not even attempt to analyze data that would address the specific continuing discriminatory effects of the six challenged constitutional provisions that are alleged in the complaint, in particular, ¶¶ 43, 46, and 49. 15 Tr. 149-51 (Bell). So Dr. Bell's analyses are irrelevant. Moreover, Dr. Bell's statewide measures hide the correlation of Class III property and race that is the subject of this litigation. PX 21 (Declarations of Sullivan) especially at 5-6, see also, Doc. 274, ¶¶ 478-495, especially 489.

The data in DX 891 (Bell's slide show) were presented by Dr. Bell for the first time at trial. Plaintiffs' counsel have not received any appropriate spreadsheet to check the calculations presented there and testified to at trial. Additionally, the data in Dr. Bell's final report, DX 881 (see Doc. 246 filed March 18, 2011 -three days prior to the start of trial), contained a number of "corrected" data elements from his previously filed reports, and plaintiffs never received the data in any format that would allow them to verify those calculations.

Therefore, Dr. Bell's testimony at trial based on both DX 891 and DX 881 cannot be agreed to since his data cannot be verified. Hereinafter, this response will be labeled "Disputed, not verifiable, and irrelevant Bell Study."

105. and 106. Agreed.

107. Plaintiffs agree that the 11 counties listed are majority-black

according to the 2010 Census, but Montgomery County was not a majority-black county in the 2000 Census. The Agreed Statement of Facts ¶ 338 did not mention the 2000 Census. Table GCT-PL, Race and Hispanic or Latino: 2000 - State -- County / County Equivalent Census 2000 Redistricting Data (Public Law 94-171) Summary File, available at http://factfinder2.census.gov., which shows more whites than blacks in Montgomery County.

108-13. Agreed.

114-15. Agreed, but irrelevant based on the evidence of the increased per-pupil revenue needed by school systems with higher proportions of at-risk students. 7 Tr. 6-10 (McKenzie); 7 Tr. 30-31, 40-42 (Quick); 7 Tr. 61-63, 67-68 (K. Stewart); 7 Tr. 90-91, 116-17 (Primm).

1. Property Tax Capacity.

116. The correct citation for this paragraph is "Agreed Statement of Facts at ¶336."

117. The correct citation for this paragraph is "Agreed Statement of Facts at ¶337."

118. The correct citation for this paragraph is "Agreed Statement of Facts at ¶338."

119. The correct citation for this paragraph is "Agreed Statement of

Facts at ¶339."

118. Agreed but irrelevant Bell study.

119. Agreed but irrelevant Bell study. However, the correct citation is Agreed Statement of Facts at ¶ 338.

120. Agreed but irrelevant Bell study. However, the correct citation is Agreed Statement of Facts at ¶ 339.

121. Disputed, not verifiable, and irrelevant Bell Study.

122. Disputed, not verifiable, and irrelevant Bell Study.

123. Disputed, not verifiable, and irrelevant Bell Study.

124. Disputed, not verifiable, and irrelevant Bell Study.

125. Disputed, not verifiable, and irrelevant Bell Study.

126. Disputed, not verifiable, and irrelevant Bell Study.

127. Disputed, not verifiable, and irrelevant Bell Study.

128. Disputed, not verifiable, and irrelevant Bell Study.

129. Disputed, not verifiable, and irrelevant Bell Study.

130. Disputed, not verifiable, and irrelevant Bell Study.

131. Disputed, not verifiable, and irrelevant Bell Study.

132. Agreed.

2. Yield Per Mill Per Student

133. Disputed - this is taken out of context. The question refers to the most relevant data on the chart being discussed. 8 Tr 57:24-58:7 (Sullivan)

134, Disputed, not verifiable, and irrelevant Bell Study.

135. Disputed, not verifiable, and irrelevant Bell Study.

136. Disputed, not verifiable, and irrelevant Bell Study.

137. Disputed, not verifiable, and irrelevant Bell Study.

138. Disputed, not verifiable, and irrelevant Bell Study.

139. Agreed, but irrelevant Bell Study.

140. Disputed, not verifiable, and irrelevant Bell Study.

141. Agreed.

142. Agreed, but irrelevant Bell Study.

143. Agreed.

144. Agreed, but irrelevant Bell Study.

145. Disputed, not verifiable, and irrelevant Bell Study.

146. Disputed - This is taken out of context. The discussion was about Table 2, which was developed to show the consequences of Simpson's Paradox, as its title indicates. 8 Tr 54:6-62:19 (Sullivan); PX 823.

147. Disputed - This is taken out of context. The discussion was about Table 2, which was developed to show the consequences of Simpson's Paradox, as

its title indicates. 8 Tr 54:6-62:19 (Sullivan); PX 823.

3. School Revenue Student [sic]

148. Disputed, not verifiable, and irrelevant Bell Study.

149. Disputed, not verifiable, and irrelevant Bell Study.

150. Disputed, not verifiable, and irrelevant Bell Study.

151. Disputed, not verifiable, and irrelevant Bell Study.

152. Disputed, not verifiable, and irrelevant Bell Study. The Agreed Statement of Fact ¶ 347 does not include the words "of the state's total black population" found in this paragraph of the Defendants' Brief. Including this phrase makes the statement untrue.

153. Disputed, not verifiable, and irrelevant Bell Study.

154. Disputed, not verifiable, and irrelevant Bell Study.

155. Agreed, but irrelevant Bell Study.

156. Agreed, but irrelevant Bell Study.

157. Disputed, not verifiable, and irrelevant Bell Study.

158. Disputed, not verifiable, and irrelevant Bell Study.

159. Disputed, not verifiable, and irrelevant Bell Study.

160. Disputed, not verifiable, and irrelevant Bell Study.

161. Disputed, not verifiable, and irrelevant Bell Study.

162. Disputed, not verifiable, and irrelevant Bell Study.

163. Disputed, not verifiable, and irrelevant Bell Study.

164. Disputed, not verifiable, and irrelevant Bell Study.

165. Disputed, not verifiable, and irrelevant Bell Study.

166. Disputed, not verifiable, and irrelevant Bell Study.

4. Per Student Expenditures

167. Disputed, not verifiable, and irrelevant Bell Study.

168. Disputed, not verifiable, and irrelevant Bell Study.

169. Agreed, but irrelevant Bell Study.

170. Disputed, not verifiable, and irrelevant Bell Study.

171. Agreed, but irrelevant Bell Study.

172. Disputed, not verifiable, and irrelevant Bell Study.

173. Disputed, not verifiable, and irrelevant Bell Study.

174. Disputed, not verifiable, and irrelevant Bell Study.

175. Disputed, not verifiable, and irrelevant Bell Study.

176. Disputed, not verifiable, and irrelevant Bell Study.

177. Disputed, not verifiable, and irrelevant Bell Study.

178. Disputed, not verifiable, and irrelevant Bell Study.

5. Current Use Statistics

179. Disputed, not verifiable, and irrelevant Bell Study.

180. Disputed, not verifiable, and irrelevant Bell Study.

181. Disputed, not verifiable, and irrelevant Bell Study.

182. The testimony of Dr. Harvey is ambiguous at this point. He certainly is not talking about "[r]eliance on current use [being] driven by the absence of Class II commercial property."[1] Dr. Harvey had earlier stated, "In the Black Belt, the assessed value of property is much lower than the rest of the state. This is primarily due to the significant amount of property in Class III which includes farm and timberland and is assessed at only 10% of fair market value [sic: current use value]." PX 20 (Harvey declaration) at 3.

183. Disputed, not verifiable, and irrelevant Bell Study.

184. Disputed, not verifiable, and irrelevant Bell Study.

G. There Is No Evidence of Discriminatory Intent With Respect to Alabama's Property Tax Provisions

1. Antebellum Alabama

185-86. Agreed.

187. The testimony cited by defendants does not support this statement.

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[1] "Q. Is it fair to say, then, that it is not the presence of a lot of current use in a particular county, but the absence of Class II commercial use in that county that really drives the numbers that you're talking about? A. Percentage wise, yes." 6 Tr. 110 (Harvey).

The evidence shows that white yeoman farmers were able to avoid paying taxes in antebellum Alabama, unlike yeomen in the free-soil states, because of the progressive property tax on wealth, especially the slave tax, and that planters in the Black Belt began shifting more of the tax burden to the land tax shortly before the Civil War. See Pltfs post-trial brief at ¶¶ 1-13 and associated endnotes.

188-89. Agreed.

2. The Civil War

190-92. Agreed.

3. Reconstruction and the Constitution of 1868

193-94. Agreed.

195. The news article cited for this statement shows “the diminution of assessed personal property between 1860 and 1870, by reason of the emancipation of the blacks.” DX 825. Thus the losses in personal estates fell mostly on planters, not on small farmers. According to Bond, “An assessment in 1860 of state property in the amount of $432,193,654 included the item of $152,278,000 for slaves. The white counties, prior to the War, had forced the levy of taxes upon slaves so that this form of property paid most of the taxes in 1860. In 1865 property was assessed at $128,846,475, and in 1870 at $156,770,387.” Pltfs post-trial brief at EN 34 (quoting Bond at 37).

196. Agreed. But the better citation is 2 Tr. 74:5 to 75:16 (Flynt).

197-204. Agreed.

205. Disputed. Poor whites turned to the Democratic Party because they blamed blacks for the Republican tax policies. See Doc. 274, Pltfs proposed facts ¶¶ 30-34 and associated endnotes.

206. Agreed. However, Professor Thornton's *Fiscal Policy* article also says: "[T]he reality for the white farmer was a sharp increase in taxes and a decline in services. From this perspective, it was quite natural that the notion that the large new taxes were going into the pockets of corrupt officials--bolstered as the notion was by a number of cases of genuine corruption among the Republicans--was convincing. And even if it had not been, the simple fact of high taxes and small returns, produced by dividing the tax receipts between hard-pressed whites and "nontaxpaying" blacks, would probably have been damning enough." Doc. 274, Pltfs proposed facts ¶ 27 and EN 31.

207-08. Agreed.

209. Disputed. Cannot verify quotation or its context.

210. Agreed.

211. Disputed - contrary to the Agreed Statement of fact ¶ 77.

4. The 1875 Constitution

212. Disputed. See Professor Flynt's testimony quoted in Doc. 274, Pltfs proposed facts ¶¶ 51-52. See also Professor Thornton's testimony:

20 Q. Now, why are the millage caps put
21 in the Constitution itself for the first time
22 in 1875?
23 A. Well, the new power of the whites
0067
1 in the Black Belt introduces -- it introduces
2 the racial fears of white land holders in a
3 very powerful way into the political culture
4 of the state because the Black Belt is now,
5 for the first time, very heavily represented,
6 for the first time since -- because of
7 emancipation, is very heavily represented in
8 the legislature and now because -- of because
9 of redemption, that representation of the
10 Black Belt is essentially in white hands.
11 But during Reconstruction, the
12 experience of those whites had been a county
13 government which was controlled by blacks and
14 their Republican allies and which had very
15 heavily taxed them, and taxed them for
16 purposes that they largely regarded as
17 illegitimate, such as the education of the
18 Freedmen.
19 Now that they had power back into
20 their own hands, they were intent on -- on
21 controlling that, or using that new control to
22 protect themselves from the possibility that
23 the black majority in their counties would
0068
1 ever again be able to use that political power
2 to -- to tax them in a way that would force
3 them as the property holders to cough up the
4 funds, of which would be used to the benefit
5 of the majority of the people in the Black

6 Belt who were black and essentially
7 nonproperty holding.
8 And so the dual outcome of the
9 fact that the tax was a property tax and that
10 in the Black Belt the overwhelming majority of
11 the population was nonproperty holding, meant
12 that that portion of the population in the
13 Black Belt which was property holding, which
14 is to say the white population, was fearful of
15 the -- of the -- of its experience with the --
16 with that period during which the nonproperty
17 holding majority in the Black Belt had been
18 able to use its electoral power to tax them
19 disproportionately. And so they wanted to
20 write into the Constitution permanent
21 protections.

PX 695 at 66-68.

213. Agreed.

214. Agreed. But Conservative Democrats soon gained control over their majority-black electorates in the Black Belt. See evidence cited in Doc. 274, Pltfs proposed facts ¶ 40.

215-18. Agreed.

219. Disputed. The Tuscaloosa *Times* was expressing the viewpoint of the Conservative Democratic Party, and its reliability has not been attested by an expert historian.

220-21. Agreed.

222. Disputed. Dr. Stewart is not qualified to express this opinion, nor

any of the other opinions in his "expert" report. Plaintiffs' renew their Daubert motion and brief, Docs. 146-47. Here he does not identify who "most Alabamians" are. DX 498 is not Dr. Stewart's expert report.

223. Disputed. The article makes clear that the constitution the newspaper favored was for the interests of white people:

> The ascendancy of the Democratic party in the State, and the future prosperity and happiness of the people, will depend on the constitution it will frame. If that constitution shall be objectionable to any considerable portion of the white people, it will be rejected; for we may rest assured the negroes, under instructions from their white leaders, will vote solidly against it.

DX 826 at 1.

224. Agreed that this is what the Tuscaloosa *Times* asserted. But refer to the response to ¶ 219 supra.

225. Disputed. Read in its entirety, Professor Flynt's testimony does not support this statement. E.g., omitted is this passage from the cited page, 2 Tr. 97:

> Q. Well, didn't the reconstruction period create a
> 5 high degree of distrust in the Alabama Legislature?
> 6 A. Oh, absolutely. There were blacks in the
> 7 legislature. There were scalawags in the legislature.
> 8 There were carpetbaggers in the legislature. And these
> 9 were deeply offensive to most white Alabamians.

226. Disputed. The Agreed statements cited do not address the predicate of this statement, "distrust of the legislature." See the response to ¶ 212

supra.

227. Agreed.

228. Disputed. The cited passage from Professor Flynt's cross-examination reads in full:

> 8 Q. And then suppose that farmer loses that land to a
> 9 tax foreclosure. What is his attitude toward taxes
> 10 going to be?
> 11 A. He's going to be **angry at the people who imposed**
> **12 the tax,** and the legislature.

2 Tr. 106 (Flynt) (bold emphasis added).

229. Agreed.

230. Disputed. Professor Thornton testified that the main damage to revenues caused by the panic of 1873 was the railroads' default of the bonds the state had guaranteed. "And the result of that is this new, very large demands on the state treasury and so the appropriation for the school system was not made by the legislature and the funding system began very rapidly to deteriorate during the Lewis Administration, which is from 1872 to 1874." PX 695 at 60-61.

231-34. Agreed.

235. Disputed that the 7.5 mill cap on state property taxes was part of "Alabama's" debt reduction strategy. Rather it was part of the railroad bondholders' strategy. See Doc. 274, Pltfs proposed facts ¶¶ 60-61. Thus the 7.5

mill cap placed in the 1875 constitution was a compromise between the economic interests of the "planter wing and the industrial wing" of the Conservative Democratic Party. 1 Tr. 103, 104 (Flynt).

236. Disputed that the 7.5 mill cap was a result of the concerns cited by defendants. See the responses to ¶¶ 212, 223.

237. Disputed. The discussions at the 1875 constitutional convention were deliberately not transcribed to shield them from federal review. See Doc. 274, Pltfs proposed facts ¶ 48 and EN 53. Racial motives permeated the establishment of constitutional caps on millage rates. Doc. 274, Pltfs proposed facts ¶¶ 54-59 and associated endnotes. See also response to ¶ 223 supra.

238. Disputed. DX 498 is not Dr. Stewart's report. However, referring to the report filed as Doc. 100 at p. 5, Dr. Stewart cites no authorities for this assertion, nor does the statement say the millage caps in other states were embedded in their constitutions.

239. Agreed. Note in particular this sentence: "Postwar leadership was little better, for no matter who was sent to Montgomery--Republican or Democrat--someone other than the farmer, which is what most Alabamians were, benefited from legislation passed and laws enacted." This supports the fact that the millage caps in the 1875 constitution were for the benefit of Black Belt planters.

5. The 1901 Constitution

240-41. Agreed.

242. Disputed. See Doc. 274, Pltfs proposed facts ¶¶ 75-83 and associated endnotes.

243. Disputed. Professor Flynt's law review article identifies "conservative legislators" as the persons who were fearful of loosening the constitutional millage caps. On the same page, Professor Flynt says:

> Although other concerns (such as constitutional restrictions on the state's ability to build roads or recruit business and tax restrictions that hamstrung local education) factored into the call for a constitutional convention, race figured largest. Perhaps the next most compelling issue was the desire of powerful elites to disfranchise poor and working-class whites. Having cast their lot largely with the insurgents of the 1890s and taken over many county governments, lower-class whites threatened planter and business hegemony. These elites, therefore, searched for a mechanism capable of denying lower class whites the ballot. Furthermore, disfranchisement of black voters would strip the elites of their most important line of defense, a powerless block of votes that they could manipulate however they needed. Black Belt Conservative Democrats in the Legislature had proposed bills to establish literacy and property requirements for voting throughout the 1890s that were defeated by Populists until 1901.

53 Ala. L. Rev. at 72 (footnotes omitted). See also Doc. 274, Pltfs proposed facts ¶¶ 85-86 and associated endnotes.

244. Agreed. But Dr. Harvey's book does not identify which "people"

wanted to be guarded from taxation.

245. Disputed. This reference to William C. Fitts cannot be located in DX 818. Instead, it contains a panegyric for arch-segregationist Sen. John Tyler Morgan. No authority is cited to identify who Fitts was, and there is no expert testimony about what his interests were.

246. Agreed that Governor-elect Samford is quoted in this news article, captioned "A FINE SPEECH." Defendants quote only part of a sentence, however. The whole sentence reads, "He believed in the gathering of the lowest possible tax rate and said he himself had introduced in the former constitutional convention the provision limiting the tax rate." Elsewhere in the article he is quoted as saying:

> there is a place for two great national parties in this country – a need for two, but only two. But under existing circumstances there was room in Alabama for only one unified, white man's party, made so by the live question of the two races. ... On the needs of a constitutional convention he was especially eloquent. He expressed greatest friendship for the colored man but believed it was intended that the country should be ruled by the American race. He thought lax principles in politics were somewhat due to conditions produced by the black man's suffrage and he appealed for voting by principle and that there should be no difference in the standard of a man's private and political methods.

DX 821 at 1-2.

247. Agreed that the first two planks in the Democratic Party platform for the 1901 convention dealt with disfranchising blacks and preserving the millage

caps. The preamble states that "After an experience of thirty years, affording necessary facility to qualify the negro for the exercise of the electoral franchise, it has been demonstrated that as a race he is incapable of self-government and the intelligent exercise of the power of voting." But the passage quoted by defendants is incomplete. Here are the two paragraphs in full:

> 2. That the convention shall regulate all questions of suffrage so as not to conflict with the constitution of the United States, and for the **best interest of the taxpayers and people** of the State of Alabama.
>
> 3. That there shall be inserted in such constitution a provision limiting the rate of taxation by the State, counties and municipalities, and that such rate of taxation shall not exceed the rate now fixed by the present constitution, but a lower rate shall be fixed if possible.

DX 197 at 2 (bold emphasis added). So the Democratic Party made explicit the the need to disfranchise blacks in order to protect the interests of white taxpayers.

248. Disputed. E.g., see the response to the preceding paragraph. See also Doc. 274, Pltfs proposed facts ¶¶ 87-102 and associated endnotes.

249. Disputed. E.g, see Doc. 274, Pltfs proposed facts ¶ 96 and endnotes 100-04, 106, 109, 111-16, 118, 122, 124.

250. Disputed. See Doc. 274, Pltfs proposed facts ¶¶ 84-105 and associated endnotes.

251-258. Agreed.

259. Disputed. Dr. Stewart's report does not support this assertion, and it cites no authority for the assertion that "public education interests were pleased with this provision."

260-61. Agreed.

262. Disputed. See Doc. 274, Pltfs proposed facts ¶ 95 and EN 118.

6. The Early 1900s

263-67. Agreed.

268. Disputed. Mr. Brunori's testimony at 3 Tr. 152 was about a "wave of property tax limits," but not specifically a limitation on farm and timber property.

7. Amendment 325

269-76. Agreed.

277. Agreed, except the *Weissinger* lawsuit actually commenced in 1969. See Doc. 274, Pltfs proposed facts ¶ 189 and EN 210.

278-79. Agreed.

280. Agreed; accord, *Weissinger*, 330 F.Supp. at 621.

281. Disputed, not supported by the cited agreed fact. The choice the Governor and the Alabama Legislature faced was to enact a new law that would equalize property assessments statewide or else enforce the existing state law last

enacted in 1935.

282. Disputed that enforcing the 60% ratio required by the 1935 statute would have been "unworkable." Agreed that it would have been politically very unpopular.

283-286. Agreed.

287. Disputed. The testimony of Mr. Brunori could be more accurately summarized as "The passage of Amendment 325 coincided with a wave of far-reaching limitations on property taxes in the late 1970s and early 1980s." See 3 Tr. 155:21 – 156:1 (Brunori).

288. Irrelevant. There is no evidence that Governor Wallace or legislators were influenced by the motivations in other states, or that the property tax reforms in other states were being considered in the same historical and current circumstances as existed in Alabama, or that the reforms in other states had the same legal forms and practical effects as did the constitutional amendments in Alabama.

289. Irrelevant. See response to ¶ 288 supra.

290. Irrelevant. See response to ¶ 288 supra.

291. Irrelevant. See response to ¶ 288 supra.

292. Disputed. The government of Alabama could have chosen to

enforce the uniform assessment requirement that had been in every state constitution from 1819 to 1901 and the 60% assessment ratio that had been statutorily set, first in 1911, then in 1935.

293. Agreed that the table shows the effective assessment ratios in each county placed in the *Weissinger* record.

294. Agreed.

295. Agreed.

296. Agreed that this would have been the result of enforcement of a uniform statewide assessment ratio applied to all properties.

297. Disputed, the language does not represent the agreed statements cited. Moreover, the threat of higher property taxes was posed by the constitution and statute law of Alabama, which the federal court was merely ordering to be enforced, as most governors of Alabama in the twentieth century had tried to do but had been blocked by Black Belt power in the Legislature, beginning with Governor Thomas Kilby in 1919, then Governor Frank Dixon in 1939, Doc. 274, Pltfs proposed facts at EN 161, Governor Folsom in 1945, id. at ¶ 162, and, of course, Governor Patterson and his Revenue Commissioner, Harry Haden, in 1959, id. at ¶ 141 and associated endnotes. Seen in its proper light, the defendant State's central defense in this action, perversely, relies on and seeks to uphold the flagrant

violation of its own laws.

298. Disputed, see responses to 299 through 310, *infra*.

299. Agreed that in the early 1970s Governor Wallace did not have the same power or influence over the Legislature as he possessed in his first term of office. But, as Professor Frederick testified:

> 14 Q. But I couldn't read both of them. I didn't have
> 15 time.
> 16 But you entitled that, Command and Control. I
> 17 just wonder what you did with your title, with respect
> 18 to discussing this. George Wallace was not in command
> 19 or in control of this legislature, was he?
> 20 A. No. He wasn't. The dissertation goes from 1963
> 21 to 1972.
> 22 For the bulk of that period, he really is in
> 23 pretty good command, not just of the legislature and
> 24 the power he has for most of that time. But from '63
> 25 to '72, he's really in pretty good control of Alabama
> 00144
> 1 people. He knows what they expect of him. And he
> 2 doesn't have to win these attempts at slaying the
> 3 dragon of integration. He just has to keep fighting.
> 4 And so he's in a pretty good position in there.

9 Tr. 143-44 (Frederick). Later in his cross-examination, Professor Frederick testified:

> 25 A. I think it's an expression of the sort of dynamic
> 00259
> 1 that we began to talk about with the 1971 legislature
> 2 that Wallace didn't have the same power and popularity
> 3 that he had earlier. He certainly has demonstrated in
> 4 both '70s terms that when he wanted to do something he

5 still had the power to get it done.
6 So was he actively running the state dominating
7 it, the legislature, and the people responding to
8 everything he wanted? No. But when he wanted to get
9 something done, he was still able to do that.
10 Q. He wasn't quite so able to do that, with respect
11 to the bill that became Amendment 325, was he?
12 A. How do you mean?
13 Q. Well, we just went through the difficulty of
14 getting the legislature to pass a bill?
15 A. I think he's pretty pleased with the bill that
16 comes out with 325.

9 Tr. 258-59 (Frederick). Governor Wallace's power in the 1970s was strengthened by his ability to influence the appointment of Black Belt legislators to leadership positions and by the influence of the Alabama Farm Bureau. See Doc. 274, Pltfs proposed facts ¶¶ 219, 220, 226, 260, 292 and associated endnotes.

300-03. Agreed.

304. Disputed. Sen. Harris' sole contribution to the substitute bill that became Amendment 325 was the insertion of "home rule" provisions that authorized each county to set different assessment ratios for the various classifications of property than were prescribed statewide. The classification system itself and the statewide assessment ratios came from the Farm Bureau bill and amendments to it agreed to by representatives of the Farm Bureau. See Doc. 274, Pltfs proposed facts ¶¶ 264, 271, 388-90 and associated endnotes.

305. Agreed that Black Belt power had weakened in the Legislature "to

some extent," due to its gradually diminishing representation under the series of federal court reapportionment orders from 1962 to 1983. See Doc. 274, Pltfs proposed facts ¶¶ 145, 219, 275, 320-21, 398 and associated endnotes. See also:

> Even in a reapportioned legislature the plantation owners would be a power impossible to ignore. They had many interests in common with rural landowners elsewhere in the state, forming a rural coalition new to Alabama but common in other states. Furthermore, the similarity of some interests between the Black Belt and Jefferson County that had originally cemented the alliance and then held it together for six decades had not completely disappeared.

Doc. 274, Pltfs proposed facts at EN 166 (quoting Permaloff and Grafton at 166-67). Rep. Erdreich testified that in 1971 Black Belt representatives "had significant control of the House." 10 Tr. 215:18-21 (Erdreich).

> The allocation of state government dollars fit the malapportionment of the legislature. It was universally predicted that a correctly apportioned legislature would have urban forces claiming their fair share of school, road, and other funds. Since this meant that all rural areas would lose money, it was also predictable that a new conflict pivot would define legislative politics. Formerly, it was alliance counties versus the rest. Many of "the rest" were in north Alabama and a few were in the extreme south. After reapportionment a new urban-rural division formed with medium sized counties sometimes attempting to exact tribute by siding with one group or the other. Thus Alabama shifted from its unusual system of an elite urban-rural partnership to the pattern of urban-versus-rural conflict found in most states with large cities, such as neighboring Georgia.

Doc. 274, Pltfs proposed facts EN 372 (quoting Permaloff and Grafton at 308-09).

306. Agreed, but see response to ¶ 305 supra. Characterizing the extent of political power at a point in time was described differently by various witnesses and scholars. See testimony of Senator Edington 5 Tr. at 9:3-19 describing the Black Belt legislators as being "extremely " influential.

307. Agreed this is what Sen. Harris said in his testimony. But see responses to ¶¶ 299 and 304-06 supra.

308. Disputed, see responses ¶¶ 299 and 304-06 supra.

309. Agreed this was Sen. Harris' testimony. But see contrary opinions of Lt. Gov. Beasley, Sen. Joe Fine, and Professor Flynt. Doc. 274, Pltfs proposed facts ¶¶ 219, 303 and EN 182, 250, 333, 346.

310. Agreed this was Sen. Manley's testimony. But see contrary opinions of Lt. Gov. Beasley, Sen. Joe Fine, and Professor Flynt. Doc. 274, Pltfs proposed facts ¶¶ 219, 303 and EN 182, 250, 333, 346.

311-15. Agreed.

316. Agreed. But Sen. Givhan was Vice Chair of the Finance and Taxation Committee. Doc. 219.

317. Agreed.

318. Agreed that the Legislature did not enact legislation in response to the *Weissinger* decision during the 1971 regular session. But see response to ¶ 297

supra.

319-21. Agreed.

322. Disputed. When defense counsel asked Professor Frederick about Wallace's opposition to property taxes as "a back door to increase taxes," Professor Frederick answered:

> 21 Q. Any code words here?
> 22 A. No. But I think -- I think there are some images
> 23 that he creates. The idea of a back door to increase
> 24 taxes.
> 25 I do believe that while it's fair to say most
> 00152
> 1 Alabamians did not understand the complexities of tax
> 2 issues, and that most did not understand the
> 3 complexities of property taxes, they did understand
> 4 that property taxes went for schools. They did
> 5 understand that a tremendous amount of money in
> 6 property taxes would go for schools.
> 7 So a discussion about a back door to increase
> 8 taxes, I wouldn't say that's a code word in exactly the
> 9 same way that we discussed others. But it certainly
> 10 would plant some ideas in the heads of some people
> 11 whose understanding of race and education would -- they
> 12 would hear back door to increase taxes. That would
> 13 mean more to them than it would mean to plenty of other
> 14 people.
> 15 Q. It's a metaphor, I guess. Metaphors will mean
> 16 various things to various people?
> 17 A. Somewhere between a metaphor and a code word. Is
> 18 that fair?

9 Tr. 151-52 (Frederick). And counsel did not ask Professor Frederick about the quoted section of the speech in paragraph 319 above referring to the session being

"being brought upon you by the federal courts," about which Professor Frederick had testified earlier.

> 18 THE COURT: In your judgment, was there -- is
> 19 any coded content to Governor Wallace's frequent
> 20 reference to federal judges and federal court?
> 21 THE WITNESS: Yes, sir.
> 22 THE COURT: And what would that be?
> 23 THE WITNESS: I believe it ushers in some
> 24 historic animus that many white southerners and plenty
> 25 of white Alabamians had against the federal government,
> 00110
> 1 a federal government being seen as an agent that would
> 2 come in and change their lives, co-op their lives,
> 3 force them to live in ways they weren't comfortable
> 4 with.
> 5 And the cause against federal judges seemed to
> 6 resonate with Alabamians because they suggested an evil
> 7 menacing governmental presence that could step in on
> 8 almost any matter, if the right lawsuit had been
> 9 presented to them and change something like who got to
> 10 go to certain schools, who got to serve on certain
> 11 juries, who got certain positions of prominence in
> 12 spaces and places.
> 13 THE COURT: Okay.

9 Tr. 109-10 (Frederick).

323. Agreed.

324-25. Disputed. See response to ¶ 304 supra.

326-38. Agreed.

339. Disputed. Taylor Hardin was Governor Wallace's Finance Director, and a more accurate description of what he asked of Sen. Harris is set out

in Doc. 274, Pltfs proposed facts ¶¶ 388-89 (although he said "I don't remember compromise ever being the chosen word. He asked me to see if I could come up with something that would address the ad valorem tax dilemma that we faced.") 14 Tr. 227:17-20 (Harris).

340-41. Agreed.

342-43. Disputed. Here is Sen. Harris' actual testimony:

16 Q. All right. Did you meet with Governor Wallace in
17 this process?
18 A. Judge, I could answer you I don't know. I do not
19 recall ever talking with George Wallace about it.
20 George didn't care about which way it fell. He just
21 didn't want nobody fussing with him about, you know --
22 if it was going to be anybody fussed at, he wanted it
23 to be somebody in the legislature and not him. And if
24 it's going to be any taxes raised he certainly didn't
25 want nothing to do with that, and neither did most
00193
1 legislators, I think, including me.
2 Q. Well, while we're talking about Governor Wallace,
3 what influence did Governor Wallace exercise in this
4 whole process of getting something through the
5 legislature that was to become Amendment 325 when it
6 was ratified by the people?
7 A. On me?
8 Q. No. In the process.
9 A. In the process? To my knowledge, I'm not aware of
10 any.
11 Now, I don't know who all George talked to. And,
12 eventually, when you started counting noses, whether --
13 I would be greatly surprised if he ever got into that
14 part of it. But don't ask me whether he talked with
15 somebody from some other county, but I don't know

16 whether he did or didn't.

14 Tr. 192-93 (Harris).

344. Agreed.

345. Disputed. Here is Professor Frederick's testimony on that point:

14 Q. It's 12 and 10.
15 All right. Now, down at the bottom here, the
16 governor told the legislature that he was going to
17 maintain a hands-off attitude in the deliberations.
18 That's consistent with what Professors Permaloff and
19 Grafton are telling us that --
20 A. That he said he had -- he would be hands off.
21 Q. That's right. And he's saying here, with respect
22 to what's reported in the newspaper, that he is going
23 to be hands-off?
24 A. Yeah. I mean, I think as someone who, you know
25 has studied the Wallace administration, what he says
00204
1 and what he does aren't always the same thing.
2 But, yes, he does say here that he was going to
3 maintain a hands-off attitude in the deliberations.
4 That is not an indication that he might not have got
5 involved in support of one or the other.
6 Q. But, in any event, Permaloff and Grafton state
7 that he did not take a public position in favor of
8 property tax equalization. And there's no indication
9 he had worked behind the scenes for the rural -- so
10 maybe they're reading these articles. And you are,
11 too?
12 A. Yeah. There's no evidence that he -- that he
13 did --
14 Q. Right.
15 A. -- get involved. There's no record -- I mean, the
16 records -- the way he would have gotten involved, those
17 records don't exist.

9 Tr. 203-04 (Frederick).

346. Disputed. This statement is badly misleading. In the section of cross-examination referred to, which begins at 9 Tr. 168:25 and ends at 170:19 (Frederick), counsel for the State asked Professor Frederick about a passage from Permaloff and Grafton that deals with events in the 1967 legislative session, not 1971. The full passage and its context are set out in Doc. 274, Pltfs proposed facts ¶ 173 and EN 197.

347. Agreed that Governor Wallace was always campaigning and was not "typically" concerned about the administration of state government or policy. But Professor Frederick was making the point that Wallace did get interested in state policy when the policy issue was important to his core constituency, whose support he needed to keep getting elected. E.g., Professor Frederick said:

> 25 So one of the net results of the politics of
> 00047
> 1 perpetual campaigning is that while you reward your
> 2 constituents, and while you are constantly in -- in
> 3 communication with them, not a lot of good stuff gets
> 4 happened in the state.

9 Tr. 46-47 (Frederick). See Doc. 274, Pltfs proposed facts ¶¶ 163, 237-38, 332 and associated endnotes. See also Professor Frederick's explanation for Wallace's ardent support of Amendment 373 in 1978. Doc. 274, Pltfs proposed facts ¶ 332 (citing 9 Tr. 116-17 (Frederick)).

348. Agreed. But see the response to ¶ 347.

349. Disputed. As shown above in the response to ¶ 304 supra, Sen. Harris did not "draft[] House Bill 56."

350. Disputed. As shown above in the response to ¶ 304 supra, Sen. Harris did not "draft[] House Bill 56." In addition, on cross-examination Sen. Harris admitted that he "talked with John Dorrill. I'm sure I talked with some folks from -- that had Farm Bureau connections. And I'm sure that somewhere along the line we swapped ideas, but I was never there looking for what does Farm Bureau want." And he testified:

> 2 Q. Did you disagree with the way [reporter Don Wasson] characterized the
> 3 influence of Farm Bureau on this classification bill?
> 4 MR. NABERS: Your Honor, there's a headline
> 5 and there's a sentence in the article, and I don't know
> 6 whether the question refers to the headline or the
> 7 sentence in the article.
> 8 THE COURT: I believe the question refers to
> 9 the headline.
> 10 THE WITNESS: This, Judge?
> 11 THE COURT: Yeah.
> 12 THE WITNESS: The trouble with tax problem is
> 13 nobody understands it. But you have questioned whether
> 14 John Dorrill and Milton Parsons and Jim Hayes [sic: Hays] had some
> 15 influence in the legislature, right?
> 16 BY MR. BLACKSHER.
> 17 Q. Yes, sir. Actually, there were two articles. One
> 18 that you just read, the caption is, "Trouble With Tax
> 19 Problem is Nobody Understands It."
> 20 A. Probably true.

21 Q. And there's a funny cartoon. Doesn't have you in
22 it, though, I don't think.
23 A. I hope not. Now, you did bring this to me?
24 Q. But the other article is on the second page and
25 says, "Third House Seems to Be Running Things."
00227
1 A. Right. That would be Don's take on that. And he
2 -- if you were looking around for somebody who was
3 interested in tax matters, Farm Bureau was interested.
4 And John Dorrill was sitting somewhere out there on the
5 bypass, Jimmy Hays was sometimes. And so they were
6 interested in it. But were they running things? No,
7 sir. They weren't.
8 And Don was -- what you said while ago sounded to
9 me like Don was sort of sarcastic in something he said.
10 What did he say?
11 Anyway, I would agree that John Dorrill and Milton
12 were active lobbyists for Farm Bureau in every way they
13 saw that they could make a difference.

14 Tr. 225-27 (Harris).

351-71. Agreed. However, as Sen. Harris conceded in the response above to ¶ 350, very few legislators understood what was in all these bills, substitutes, and amendments. See Doc. 274, Pltfs proposed facts ¶ 292 and EN 328.

372. Agreed that the fact witnesses testified that race was not openly discussed. But Sen. Edington testified that "everyone understood that race was the underlying issue," and Sen. Harris conceded he would not have expected Sen. Roland Cooper of Wilcox County openly to raise the race issue. See Doc. 274,

Pltfs proposed facts ¶¶ 281-83, 307, 387. All of plaintiffs' expert historians testified about Governor Wallace's use of coded messages referring to the race issue. E.g. Doc. 274, Pltfs proposed facts ¶¶ 151-53, 206, 260, 326 and associated endnotes.

373-74. Agreed that this was Sen. Harris' testimony. But see the response to ¶ 372 supra.

375-76. Agreed that Fred Gray and Thomas Reed voted for Amendment 325. But Fred Gray had no recollection of the bill or what it was about and testified in his deposition that "in those days they were hiding a lot of things like they do now, not just on racial issues, but on any other issues." CX 16 (Fred Gray deposition) at 24 and Doc. 274, Pltfs proposed facts ¶¶ 285-86. Mr. Gray's lack of understanding of the real purposes and effects of Amendment 325 is exactly what the Farm Bureau and Governor Wallace intended in the way they marketed the amendment both to legislators and to voters. See Doc. 274, Pltfs proposed facts ¶¶ 294-98.

377. Disputed. See Doc. 274, Pltfs proposed facts ¶ 282.

378. Agreed. But see response to ¶ 376 supra.

379-81. Agreed. But see Doc. 274, Pltfs proposed facts ¶ 384.

382. Disputed. See Doc. 274, Pltfs proposed facts ¶¶ 381-82.

383. Agreed that Sen. Waggoner so testified in his deposition. However, his memory of the events was too vague to provide reliable evidence. CX 12 at 9:15-22. Sen. Waggoner testified that he could not recall what circumstances caused the property tax issues to come up, id. at 12:8-11, or a federal lawsuit called Weissinger v. Boswell, id. at 12:13-17, or a special session in 1971, id. at 27:6-11 ("No, I don't. I've been through lots of special sessions, Jim. I don't remember one specific one. After so many years, they all run together; okay?"), or whether Governor Wallace supported the Lid Bill, id. at 27:12-15, or any negotiations with his colleagues in the Legislature over the 1971 Lid Bill, id. at 7-10.

384. Agreed.

385-87. Agreed. But Sen. Edington testified that "everyone understood that race was the underlying issue." Doc. 274, Pltfs proposed facts ¶¶ 281-83.

388. Agreed that Professor Frederick's testimony is consistent with the testimony of legislators who could not recall discussing race as an issue in regard to Amendments 325 and 373. But Professor Frederick's complete answer explains why the legislators' testimony does not undermine the historians' conclusion that the amendments had a racially discriminatory purpose:

8 Q. Do you know of any legislator during the time
9 Amendments 325 and 373 were being considered in the

10 legislature who suggested or said in any way that the
11 bills that became Amendments 325 or 373 might
12 discriminate against African-Americans along racial
13 lines?
14 A. I do not. But I do -- would not necessarily
15 expect to see that either.
16 As a historian who's gone through boxes and boxes
17 of material, I mean, I can say to you that people don't
18 leave margin notes about motivations or beliefs.
19 That's not the kind of records that politicians usually
20 leave. So if we're looking for a single piece of
21 smoking gun evidence, politicians don't usually leave
22 those kinds of records. The Nixon administration being
23 an exception. Generally speaking, politicians are
24 pretty careful with the kinds of things they leave
25 behind.

10 Tr. 30 (Frederick).

389. Agreed. But see the response to ¶ 388 supra.

390-91. Agreed that Professor Norrell, based on the evidence he had studied, was unwilling to assign personal racial motives to any particular individual legislator. But he assigned racially discriminatory motives to Governor Wallace and his Black Belt constituents on whose behalf he was acting and whose influence was the determining factor in the passage of Amendments 325 and 373. See Doc. 274, Pltfs proposed facts ¶ 331.

392. Disputed that no expert historians were unable to identify contemporaneous documents, such as news articles, indicating racial discrimination behind Amendment 325. E.g., see Doc. 274, Pltfs proposed facts ¶¶

169, 192-95, 197, 199, 201, 205-08, 213 (see 2 Tr. 60:8 to 61:18 (Flynt)), 220, 225-26, 236-37, 243, 254, 267, 270, and 297. This does not include the scores of contemporaneous news articles and other documents admitted in evidence that indicate racial discrimination behind the passage of Amendment 325.

393. Disputed. Professor Frederick was asked " do you know of any newspaper article or editorial that existed when either Amendment 325 was passed in the legislature, or 373, that **said** that either of those provisions discriminated against African-Americans along racial lines?" "Said," not "suggested." See response to ¶ 392 supra.

394. Again, the question asked if the journalists etc. had "written," not had "suggested" racial discrimination. See response to ¶ 393 supra.

395. Agreed. But Professor Frederick added: "But I don't know that the issue of property tax throughout Alabama history has been the source of a significant number of monographs or historical research." 10 Tr. 29:5-8.

396-98. Agreed.

399. Agreed that Sen. Harris so testified. But disputed that he had no information that Amendment 325 would have a racially discriminatory effect. See Doc. 274, Pltfs proposed facts ¶¶ 385-86.

400. Agreed that the sponsors and supporters of Amendment 325

avoided explicit references to race and framed it as a conflict between urban and rural interests. Indeed, the historical scheme of Black Belt landowners to shield their property from taxation that would have benefitted black students eventually would have been ended by the growing legislative strength of urban legislators and governors, whose economic interests historically had suffered from the Black Belt scheme, had it not been for the effective intervention of Governor Wallace, still powerful Black Belt legislators, and the powerful Farm Bureau lobby.

401-02. Agreed. See response to ¶ 400 supra.

403. Agreed.

404-07. Agreed. However, these statements say nothing about registration or turnout of black or white voters, nor does it contain any other information, such as precinct analysis, that might lead one to conclude how the vote was cast by racial groups. More importantly, the facts stated here are irrelevant, because plaintiffs' rights under Title VI and the Fourteenth Amendment can be violated only by the State and state officials; they "cannot be denied even by a vote of a majority of a State's electorate...." *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 (1964); accord, e.g., *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624, 683 (1943) ("One's right to life, liberty, and property ... and other fundamental rights may not be submitted to vote; they depend

on the outcome of no elections.”). The motives of voters are irrelevant.

8. Amendment 373

408-11. Agreed.

412-14. Agreed, but irrelevant. Neither Dr. Brunori nor any other witnesses testified that Alabama had real estate inflation like other parts of the country nor that the national real estate inflation was one cause for adopting Amendment 373.

415. Disputed. The complete answer by Mr. Gregory shows that the demand for a constitutional amendment came from his client, Governor Wallace, not from “Alabama”:

> 21 Q. In that meeting, did Governor Wallace or anybody
> 22 in his staff say what it was they wanted you to do?
> 23 A. They generally described to us what they wanted to
> 24 see, in terms of the property tax proposal. One, of
> 25 course, they felt that one was necessary.
> 00062
> 1 Q. Okay. Explain or did they explain why they felt
> 2 it was necessary to do this?
> 3 A. Yes, they did. And this was especially Governor
> 4 Wallace's point, that the reappraisal programs that had
> 5 been instituted pursuant to the Weissinger litigation
> 6 were beginning to come, I guess, to fruition, you would
> 7 say. In other words, take several years to do a
> 8 massive reappraisal program.
> 9 Q. You were seeing what the results --
> 10 A. Right. And the results were actually beginning to
> 11 come in. And the results were in, in many places, very
> 12 significant increases in assessed values.

13 This didn't come as a giant shock or surprise,
14 because it was quite obvious many places did not
15 actively reappraise their property in accordance with
16 the then-applicable requirements of Alabama law, which
17 had been applicable for, you know, since at least '01.
18 And you could see a lot of -- too much variation. And
19 that's what the court order had been all about.
20 So try to straighten that out, to try to get
21 property valued on an equalized basis across the state,
22 those appraisal programs had been instituted. The
23 result was that you wound up with a lot of places
24 having significant increases. And this was a concern
25 that Governor Wallace had.

14 Tr. at 61-62 (Gregory).

416-18. Agreed.

419. The agreed statement ¶ 259 is different:

In 1972 a three-judge panel ordered the State to reapportion its legislative districts in a plan that created 105 House districts "nested" into 35 Senate districts. *Sims v. Wallace*, 336 F. Supp. 924 (M.D. Ala. 1972). The redistricting plan ordered by the *Sims* Court was in place during the 1974 elections. The legislature that passed Amendment 373 was elected under districting arrangement, ordered by the *Sims* court.

420-26. Agreed.

427. Disputed. The drafting process for the bill that became Amendment 373 began when Rep. Rick Manley tried unsuccessfully in four previous regular sessions to get the Legislature to pass the Farm Bureau bill package that became Amendment 373. Stan Gregory and Bob Thorington got involved after Governor Wallace took personal charge of getting the new Lid Bill

amendment passed. See Doc. 274, Pltfs proposed facts ¶¶ 319-26, 348 and associated endnotes.

428. Agreed that the impending *Weissinger* deadline was one reason Governor Wallace wanted the Lid Bill package to pass quickly, but, Mr. Gregory testified, so was the deadline for getting a constitutional amendment on the November general election ballot. 14 Tr. 106:22 to 107:8 (Gregory). In addition, Governor Wallace had purposefully delayed calling the special session until five weeks before the September 5, 1978, primary elections in order to put pressure on the legislators, whom Wallace threatened to campaign against if they raised any taxes. Doc. 274, Pltfs proposed facts ¶ 325, 329. Moreover, Wallace would be leaving office after the November 1978 election, and this was the Farm Bureau's last chance to use his leadership to get its property tax agenda through the Legislature. Doc. 274, Pltfs proposed facts ¶ 332.

429-32. Disputed. These are incomplete statements of the instructions given Mr. Gregory by Governor Wallace and his administration. Doc. 274, Pltfs proposed facts ¶¶ 348-51, 356-58 and associated endnotes.

433. Disputed. Mr. Gregory makes it very clear that he did not look at all states nor even all of the states with current use provisions. 14 Tr 90:14. Moreover, the current use provisions he did find in other states were unlike those

Alabama ultimately adopted:

> 4 Q. You could have done just like a farmstead
> 5 exemption?
> 6 A. Many variations on it. Some states, for instance,
> 7 limit the amount of acreage for current use. Some
> 8 states require you to live on the farm. Some states
> 9 make timber eligible for something different from which
> 10 farm property is eligible. It just -- they're just all
> 11 over --
> 12 Q. You looked at all those possibilities from other
> 13 states; is that correct?
> 14 A. I can't say we looked at every one.
> 15 Q. You made an effort?
> 16 A. That's right. And we found lots of different
> 17 approaches. We found that virtually any state we did
> 18 look at had some sort of differential assessment for
> 19 farm and rural property.

14 Tr. 90 (Gregory).

434. Disputed. This is incomplete. Mr. Gregory also said that it is politically easier to place a general provision in the proposed amendment and then let the executive branch determine "exactly what it does."

> Also, I think probably speculating, but, as a political matter, it's probably easier to pass something generally conceptually than it is to pass something in specific, where it's easier to figure out exactly what it does.

14 Tr. 89:24 to 90:3.

435. Agreed that is what Mr. Gregory recalled.

436. Agreed that is what Mr. Gregory recalled. But see the special

access afforded Farm Bureau officials. Doc. 274, Pltfs proposed facts ¶¶ 357, 359.

437. Disputed. Here is the complete answer:

6 Q. By the way, when was the first time that you met
7 with Rick Manley?
8 A. I don't know. I would say I may not have met Rick
9 Manley until the second special session in 1978. I
10 could be wrong about that. But that's what I first
11 recall.
12 Q. He was the sponsor of the bill that --
13 A. He sponsored the Governor's package, yes.

14 Tr. 109 (Gregory). Dr. Paul Hubbert testified that when Amendment 373 was before the Legislature Stan Gregory was frequently in the company of Farm Bureau representatives John Dorrill and Milton Parsons "just about all the time when he was on the hill." CX 14 at 54:8-11, 55:5-10 (Hubbert).

438. Agreed that several Senators from Birmingham supported the inventory exclusion.

439. Disputed. The factors that perpetuated and aggravated the racial discrimination complained of in this action were the central considerations of the actors who sought to perpetuate these historically discriminatory practices and who gave Stan Gregory his instructions. See Doc. 274, Pltfs proposed facts ¶¶ 348-59 and associated endnotes.

440. Agreed this was Mr. Gregory's testimony. Whether or not his responses are credible, Mr. Gregory did not determine the substantive policies to

drafted in Amendment 373. He took his instructions from Governor Wallace, who was "the ultimate decider." Doc. 274, Pltfs proposed facts ¶ 358.

441. This statement is not supported by the cited testimony of Mr. Gregory. 14 Tr. 62 (Gregory). See response to ¶ 428 supra.

442-51. Agreed. But the official journals of the Legislature merely reflect that Amendment 373 passed without any deliberation or debate. Sen. Joe Fine was quoted saying, "Wallace could have saved money if he had put all of that in an executive order and let the presiding officers of both houses sign the thing." Doc. 274, Pltfs proposed facts ¶ 329 and endnotes.

452. Disputed. Rep. Reed voted for HB 170, as did four other African-American House members. See Doc. 274, Pltfs proposed facts ¶ 333. But this is not evidence that Rep. Reed or the other black House members "supported" the bill. See Doc. 274, Pltfs proposed facts ¶ 328 and endnotes.

453. Agreed. But see response to ¶ 452 supra.

454. Agreed the fact witnesses testified that race was not openly discussed. But the expert historians expressed the opinion that Governor Wallace once again used coded rhetoric that invoked the race issue. Doc. 274, Pltfs proposed facts ¶¶ 326-27, 330-31 and endnotes. And the white legislators testified they were aware of the circumstances that demonstrate the racially discriminatory

purposes of Amendment 373. Doc. 274, Pltfs proposed facts ¶¶ 381-87. Sen. Pearson explained why black legislators opposing Amendment 373 would not have discussed its racial aspects with their white colleagues. Doc. 274, Pltfs proposed facts ¶ 392.

455-58. Agreed that Sen. McMillan so testified. But the candor of his testimony about being unaware of the racial discrimination underlying Amendment 373 must be seriously questioned. See Doc. 274, Pltfs proposed facts ¶¶ 391-96.

459. Agreed that McMillan's political affiliations and friendships with the Alabama Farm Bureau in 1978, when he was running for Lieutenant Governor, and again in 1982, when he was running for Governor, are particularly relevant to his motives for supporting Amendment 373 and the current use statute. See response to ¶ 455-58 supra.

460-65. Agreed.

466-72. Agreed that George McMillan so testified. The substance of his testimony is disputed for the reasons discussed at length in plaintiffs' responses to defendants' conclusions of law regarding the testimony of white legislators, infra at pp. 105-13.

473-76. Agreed that Judge Johnstone so testified. But he simply had no recollection of what Amendment 373 was about or even how he voted.

8 Q. Right. Do you remember how you
9 voted for amendment -- voted with respect to
10 Amendment 373?
11 A. The only reason I remember is that
12 when you called me to ask whether I wanted
13 to be deposed, I specifically put you on the
14 spot and said, well, Drayton, how did I
15 vote? Because I did not recall.
16 Q. Right.
17 A. And, as I recall, your answer was
18 you told me that I voted against the Lid
19 Bill. I think that's correct. And I
20 surmised that -- that the chief opposition
21 to the Lid Bill, without being crystal clear
22 on it, was that the AEA did not want it
23 because they thought higher property taxes
19
1 would be better for the school system.
2 Q. And, Judge, my notes indicate that
3 you voted in favor of it. I may have told
4 you you voted against it, but --
5 A. Well, that's -- well, I mean --
6 well, I mean -- well, that shows how
7 confused and how bad my recollection of the
8 thing is.

CX 13 at 18-19. Judge Johnstone elaborated about his lack of memory on cross-examination:

4 Q. Let's see. You were in the
5 legislature for one term?
6 A. That's right.
7 Q. And you didn't have any particular
8 recall of the circumstances surrounding the
9 Lid Bill when Mr. Nabers called you?
10 A. No, I did not. I did not recall,
11 and still don't recall, exactly why the

12 proponents of the bill were saying it was
13 good legislation and why the opponents of it
14 were saying it was bad.
15 Q. Do you remember who the proponents
16 were?
17 A. I don't really. I don't have an
18 independent recollection of that.
19 Q. You don't know who drafted --
20 A. No.
21 Q. -- the bill that became --
22 A. No.
23 Q. -- Amendment 373?
23
1 A. No.
2 Q. Do you recall who the sponsor was?
3 A. No.
4 Q. Do you recall whether a particular
5 -- particular lobby group was backing it?
6 A. No, I don't. I -- if someone told
7 me, then some things might fall into place,
8 but as you can tell from my -- my trying to
9 recount how I voted or what I thought I had
10 voted, I really don't have a good
11 recollection of that bill.

CX 13 at 22-23. See also the response to ¶¶ 466-72 supra.

477-79. But Rick Manley was always representing the interests of the Alabama Farm Bureau, sponsored and managed all their property tax bills from 1971 through 1982, and was very aware of the racially discriminatory consequences of those bills. See Doc. 274, Pltfs proposed facts ¶¶ 164, 192, 196, 198, 203, 214, 305, 319-24, 329, 371-79, 381-82 and associated endnotes.

480. Agreed.

481-82. Agreed that Sen. Little so testified. But see the response to ¶¶ 466-72 supra.

483. Agreed.

484-87. Agreed Sen. Waggoner so testified. But see the response to ¶¶ 466-72 supra.

488. Agreed.

489. Dr. White testified:

22 Q. Did race ever enter into the
23 discussion of Amendment 373?
1 A. Not that I know of. Not that I
2 recall.

CX 11 at 13-14. But see the response to ¶¶ 466-72 supra.

490-91. Agreed. But Dr. Hubbert also testified that Amendment 373 treats white people differently than black people "In the sense that there is more white people that own property, yes, I would say there is fewer black people probably on the property tax rolls. Everybody pays certain taxes, but only those who own property pay property tax. So I would say in that sense there is disproportionately fewer blacks paying property tax." CX 14 at 26:2-9 (Hubbert).

492. Duplicate. See response to ¶ 388 supra.

493. Duplicate. See response to ¶ 394 supra.

494. Duplicate. See response to ¶ 393 supra.

495. Duplicate. See response to ¶ 395 supra.

496. Duplicate. See response to ¶ 396 supra.

497-98. Agreed. Read in its entirety, Dr. Harvey's "500 page text on the history of education finance in Alabama" supports plaintiffs' claims in this action. E.g., see Doc. 274, Pltfs proposed facts endnotes 141, 144, 148, 150, 152, 154-55, 157-58, 252, 260.

499. Duplicate. See response to ¶ 390 supra.

500. Duplicate. See response to ¶ 391 supra.

501. Agreed.

502. Agreed. But see response to ¶¶ 404-07 supra.

503. Agreed that misleading the voters was the campaign strategy employed by Governor Wallace and the Alabama Farm Bureau in the referendums ratifying both Amendments 325 and 373. See Doc. 274, Pltfs proposed facts ¶¶ 294-98, 340 and associated endnotes.

504. Disputed. This statement both misrepresents Professor Frederick's testimony and misleadingly suggests that local constitutional amendment procedures were not previously available to voters – although, as Professor Frederick noted, black voter majorities were a recent phenomenon. Here is his testimony:

17 Q. Isn't it true that the bill that will become
18 Amendment 373 is going to empower black voting
19 majorities in every majority black county in the state
20 of Alabama? Isn't it going to empower those voting
21 majorities to raise property taxes?
22 A. It's certainly going to provide a mechanism by
23 which they could do that, yes.
24 Q. And that is something entirely new, with respect
25 to the property tax system of the state of Alabama, is
00252
1 it not?
2 A. I believe there were some considerations in the
3 past where a local government could ask for a tax
4 increase, it could go through the state legislature,
5 and then could be voted on. But it's, generally
6 speaking, what you're saying is true. I think
7 primarily because of the increased presence of black
8 voters.

9 Tr. 251-52 (Frederick).

9. The 1982 Current Use Legislation

505. Agreed.

506. The complete and accurate language of this section of Act No. 135, H.J.R. 172, captioned HOUSE JOINT RESOLUTION, AN ACT, is as follows:

> **Section 4. Current use value**. For ad valorem tax years beginning on and after October 1, 1978, with respect to taxable property defined in Seetion 40-8-1, Code of Alabama 1975, as amended, as Class III property and upon request by the owner of such property as hereinafter provided, the assessor shall base his appraisal of the value of such property on its current use on October 1 in any taxable year and not on its fair and reasonable market value. As used in this Act, "current use value" shall be deemed to be the value of eligible

> taxable property based on the use being made of that property on October 1 of any taxable year; provided, that no consideration shall be taken of the prospective value such property might have if it were put to some other possible use. In determining the current use value of eligible, taxable property, the assessor shall presume that there is no possibility of the property being used for any other purpose; as if there were a legal prohibition against its use for any other purpose. In determining the current use value for real property classified as agricultural or forest property, the tax assessor shall consider farm income, soil productivity or fertility, topography, susceptibility to flooding, rental value, replaceability as agricultural property for the production of food and fiber, and other factors which may serve to determine value for agricultural or timber production purposes, including any such factors that the department of revenue shall by regulation specify. The department of revenue shall, prior to May 1, 1979, prescribe all needful rules and regulations for the enforcement and implementation of this Section by the department and by the several county tax assessors and all other persons listed in Section 40·2-11(1), Code of Alabama 1975, as being charged with any duty in the enforcement of tax laws.

(Quoted in *Eagerton v. Williams*, 433 So.2d 436, 439-40 (Ala. 1982)).

507. Agreed that George McMillan so testified and that DX 888 is a copy of "Act No. 79-163, H.J.R. 153-Manley, [Rep.] McMillan, HOUSE JOINT RESOLUTION RECOMMENDING THAT THE STATE DEPARTMENT OF REVENUE ADOPT CERTAIN REGULATIONS PERTAINING TO CURRENT USE VALUATION OF AGRICULTURAL AND FOREST PROPERTY IN THE STATE." The current use formulas in Act No. 79-163, H.J.R. 153, appear to be

identical in relevant respects to the formula Stan Gregory testified he was instructed by his Alabama Farm Bureau client to draft in the 1982 current use statute. See Doc. 274, Pltfs proposed facts ¶ 372. See also *Eagerton v. Williams*, 433 So.2d at 444 ("The Court finds this House Joint Resolution of particular relevance inasmuch as its sponsors were some of the same legislators who sponsored Act No. 135 and because of the relatively brief period of time between the passage of Act No. 135 and the resolution.").

508. Agreed. See *Eagerton v. Williams*, 433 So.2d at 440.

509. Disputed to the extent this statement is inconsistent with the judicial findings in *Eagerton v. Williams*, 433 So.2d at 442-43.

510. Disputed to the extent this statement is inconsistent with the judicial findings in *Eagerton v. Williams*, 433 So.2d at 442-43.

511. Agreed.

512. Disputed. The holding in *Eagerton v. Williams* speaks for itself.

513. Agreed.

514. Disputed that the Alabama Department of Revenue was unwilling to implement the current use provisions of Amendment 373 and its implementing statute. The Legislature passed the 1982 current use statute at the instance of the Alabama Farm Bureau and the landowner clients represented by Stan Gregory.

See Doc. 274, Pltfs proposed facts ¶ 372. The cited testimony of George McMillan refers to the 1979 session. Nowhere is the 1982 session mentioned.

515-33. Agreed.

534. Agreed that no witness called by plaintiffs or defendants testified about any discussion of race in the Legislature with respect to the passage of the 1982 current use statute. But the no votes of every black member of the House and Senate says something about the perceptions of black legislators, the contemporaneous passage of a statute exempting private "church" schools from regulation by the State Department of Education treated whites differently than blacks, and the Alabama Farm Bureau's veiled references to continued white resistance to racially integrated schools treated blacks differently than whites. See Doc. 274, Pltfs proposed facts ¶¶ 274, 375, 380 and associated endnotes.

535. Agreed that Sen. White so testified.

536. Agreed. But see response to ¶¶ 477-79 supra.

537. Agreed that Sen. Little so testified.

538. Agreed that Sen. Waggoner so testified.

539. Agreed that Dr. Hubbert so testified.

10. No Constitutional Reform Commission Or Other Review Process Has Found that the Provisions and Amendments at Issue were Intended to Discriminate

540-42. Plaintiffs have not disputed these facts proposed by defendants because, since they are totally irrelevant, we have not studied the documents.

543. Agreed that Gov. Brewer testified as follows:

18 Q. Yes. But do you find anything in that Amendment
19 373 that discriminates along the lines of race?
20 A. No. I just think it's an unfair thing. I don't
21 think it has anything to do with race, and never
22 considered it having anything to do with race until I
23 began talking with you lawyers about this case.

10 Tr. 213 (Brewer). However, this is inconsistent with Gov. Brewer's testimony elsewhere. See Doc. 274, Pltfs proposed facts EN 151 and ¶ 200.

544-50. Plaintiffs have not disputed these facts proposed by defendants because, since they are totally irrelevant, we have not studied the documents.

11. Additional Evidence in Support of Defendants

551. Agreed. Correct citation is Agreed Statement of Facts ¶ 326.

552. Agreed. Correct citation is Agreed Statement of Facts ¶ 327.

553. Agreed. Correct citation is Agreed Statement of Facts ¶ 328.

554. Agreed. This is only a minor portion of the Agreed Statement.

555. Agreed. Correct citation is Agreed Statement of Facts ¶ 329.

556. Agreed. Correct citation is Agreed Statement of Facts ¶ 330.

557. Agreed.

558. Agreed. Correct citation is Agreed Statement of Facts ¶ 331.

559. Agreed. Correct citation is Agreed Statement of Facts ¶ 332.

560. Agreed. Correct citation is Agreed Statement of Facts ¶ 333.

561. Disputed. Here is Dr. Harvey's testimony:

19 Q. My question, Mr. Harvey, is simply when you start
20 out the report, you immediately go to the Black Belt
21 and talk about the assessed value of that property and
22 what that's caused by. I'm merely asking if you --
23 that's something that you were asked to do, or did you
24 just start in that particular area?
25 A. I can't say that I was asked to do that. My best
00034
1 recollection is, well, here's the situation. We know
2 from the current funding crisis in public schools that
3 traditional Black Belt counties are the ones whose
4 school systems are hurting the most, who have no
5 monetary reserves, so in many cases have had to borrow.
6 Therefore, it was logical to begin with that situation
7 and conclusion, that they are among the most severely
8 challenged by the current situation.
9 Q. And that view was something that you brought to
10 this project?
11 A. I brought that to this project, and it's replete
12 in all of my writings to this point.
13 Q. Are they -- the problems experienced by the Black
14 Belt more severe than the white, rural, poor counties?
15 A. You've made a distinction that Black Belt are
16 black, and white are white. That's not the distinction
17 that's being developed by the term "Black Belt."
18 I believe historians will tell you it relates
19 particularly to the type of soil that is found there.
20 Black Belt counties tend to be in the middle belt of
21 the state. They tend to be historically rural,
22 agrarian, underfunded, low tax rates, low assessed
23 valuations. So that is why I was immediately drawn to
24 their plight.

25 THE COURT: But isn't the majority of the
00035
1 population of those counties black as opposed to white,
2 in terms of just the demographic division of the people
3 who reside within those areas?
4 THE WITNESS: That is correct.

6 Tr. 33-35 (Harvey).

562-65. Agreed.

566. Agreed that Gov. Brewer said it was "a little misleading." But he went on to testify:

1 Q. Could you put -- I am going to have your
2 deposition put up. Okay. It's not the page I'm at.
3 And I am not going to take the Court's -- 45. Could
4 you go up a page, please, Ed oh, okay. 44.
5 If you look at the bottom of Page 43, I asked you
6 a question, I believe, Governor. This is me. But did
7 you ever hear any Black Belt legislator speak opening
8 -- I think that means openly -- about this when you
9 were in the legislature? And could you read your
10 answer at the top of Page 44?
11 A. I can't read all the question. It's not all
12 showing on here. It cuts off.
13 Q. Are you look at 44, sir?
14 A. No. I am on 42. I'm sorry.
15 Q. My question starts at the bottom of Page 43.
16 A. Oh, I see now. Thank you.
17 Q. Can you read the answer that begins at the top of
18 Page 44 that begins, not in relation?
19 A. Yes. Not in relation to ad valorem tax, but I
20 heard them speak openly about their attitude towards
21 taxation generally, in that they would favor sales
22 taxes, transaction taxes over property or income taxes.
23 Q. And I asked because?
24 A. Well, the theory was, and I had one I remember

25 specifically say to me that it's the only tax that
00188
1 blacks pay.
2 Q. He didn't use the term blacks.
Page 78
3 A. That's correct.

10 Tr. 187-88 (Brewer).

567. Agreed.

III. PLAINTIFFS' RESPONSE TO DEFENDANTS' ARGUMENT AND PROPOSED CONCLUSIONS OF LAW

A. Response to Defendants' Contention That Plaintiffs Lack Article III Standing

This Court rejected defendants' challenge to plaintiffs' standing in their motion to dismiss and motion for summary judgment. Doc. 35 at 10-23; Doc. 193 at 3. Standing has been the subject of extensive briefing by the parties. Doc. 27 at 10-20; Doc. 31 at 8-20; Doc. 151 at 14-20; Doc. 166 at 43-45. Plaintiffs rely on their previous briefs asserting Article III standing. But, at the risk of being repetitive, we respond as follows to the standing contentions renewed in defendants' post-trial brief.

1. Plaintiffs have proved legally cognizable injury.

Plaintiffs' injury in this action is caused by racial discrimination, not by

"underfunding that deprives" them an "adequate education," as defendants argue. Defts post-trial brief at 159. See plaintiffs' response to the introduction in defendants' post-trial brief, supra. There is no more legally cognizable right under Title VI of the Civil Rights Act and the Equal Protection Clause than to be free of state laws that were enacted for racially discriminatory purposes and that still have their intended adverse effects.

> Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on Negroes by our society.

Rose v. Mitchell, 443 U.S. 545, 554-555 (1979); accord, e.g., *Shelley v. Kraemer* 334 U.S. 1, 23 (U.S. 1948) ("The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."). As this Court said in denying defendants' motion to dismiss, the complaint contains "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.

So the first injury suffered by plaintiffs is being subject to state constitutional provisions that were designed to discriminate against African Americans. But, in addition to this continuing official insult, these six provisions continue, as they were intended, to benefit white landowners and to make it more difficult to raise local school revenues for black students, particularly for those black students in the targeted Black Belt school systems.

Defendants argue that plaintiffs' injuries are not "concrete or particularized" because they are not "different from those faced by all other public school children in Alabama...." Defts post-trial brief at 155. But the fact that the legal devices chosen by the drafters of the purposefully discriminatory provisions necessarily injure all public school students to some extent has nothing to do with whether those injuries are concrete and particularized. "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 n.1 (1992). The diminution of local school revenues and the educational resources they might buy certainly affect the plaintiff students in a personal and individual way.

Together, the terms "concrete and particularized" have been used by the

Supreme Court to distinguish actionable injuries from generalized grievances that a plaintiff "suffers in some indefinite way in common with people generally...." *Lujan*, 504 U.S., at 560. The student plaintiffs in this action are not people or citizens or the public in general. They are members of a particularized class of persons who are harmed by the state constitutional restrictions on local school revenues. The fact that the number of students is relatively large does not make their injury any less concrete and particularized. Justice Scalia, who wrote the opinion of the Court in *Lujan*, has elsewhere explained:

> If the effect is "undifferentiated and common to all members of the public," [*U.S. v.] Richardson*, [418 U.S. 166] 177 [(1974)] (internal quotation marks and citations omitted), the plaintiff has a "generalized grievance" that must be pursued by political, rather than judicial, means. These terms explain why it is a gross oversimplification to reduce the concept of a generalized grievance to nothing more than "the fact that [the grievance] is widely shared," ante, at [24], thereby enabling the concept to be dismissed as a standing principle by such examples as "large numbers of individuals suffer[ing] the same common-law injury (say, a widespread mass tort), or ... large numbers of voters suffer[ing] interference with voting rights conferred by law," ibid. The exemplified injuries are widely shared, to be sure, but each individual suffers a particularized and differentiated harm. One tort victim suffers a burnt leg, another a burnt arm--or even if both suffer burnt arms they are different arms. One voter suffers the deprivation of his franchise, another the deprivation of hers. With the generalized grievance, on the other hand, the injury or deprivation is not only widely shared but it is undifferentiated.

Federal Election Com'n v. Akins, 524 U.S. 11, 35-36 (1998) (Scalia, J., dissenting).

The complaint does not allege merely a "generalized grievance" that the State of Alabama is not complying with federal law. *Lance v. Coffman*, 127 S.Ct. 1194, 1198 (2007). Rather it alleges "the sorts of injuries alleged by plaintiffs in voting rights cases" and other cases where the victims of racial or other invidious discrimination were found to have standing. *Lance* at 1198 (citing *Baker v. Carr*, 369 U.S. 186, 207-208 (1962); accord, *Dillard v. Chilton County Comm'n*, 495 F.3d 1324 (11th Cir. 2007)).

This is not a case like *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), on which defendants rely to argue that plaintiffs cannot establish personal, concrete, and particularized injury they suffer because of the challenged state laws. Plaintiffs in *Cuno* sought to challenge in federal court the Ohio Legislature's decision to establish a program offering state and (where locally authorized) local "tax breaks" to companies that establish new facilities in the State or relevant municipality. The complaint was that this reduced the amount of state or local funds available to be expended on projects which the plaintiffs there favored. In other words, plaintiffs in *Cuno* attacked a legislative decision to enact a program that they didn't like on the ground that the appropriation of monies for that program would make it harder for them to convince the legislature to pass programs that they preferred. There was no supervening, limiting constitutional

provision at the heart of the case, merely the operation of a democratically elected representative body. That could not be more unlike the present suit, which seeks to remove a set of Alabama constitutional provisions rooted in historic racially discriminatory policies and practices that directly creates multiple barriers to the ability of black citizens to obtain school revenues through ad valorem taxes.

Defendants' assertion that "[n]o 'injury' to a public school student could be more hypothetical or intangible than an impediment to the student's elected representatives' ability to raise state and local revenues," Defts post-trial brief at 155, is more properly considered in relation to the standing factors of causation and redressability, addressed below.

2. The state constitutional restrictions on raising millage rates and assessing property cause plaintiffs' injuries.

Defendants reprise arguments that previously were rejected by this Court. First, they argue that this is a case like *Allen v. Wright*, 468 U.S. 737 (1984), and that the causal linkage between the property tax restrictions in the Alabama constitution and plaintiffs' injury amounts to "pure speculation." Defts post-trial brief at 160. Once again, defendants mischaracterize plaintiffs' injury as "some generalized lack of educational resources more or less shared by all students in the State," which cannot be traced to the challenged provisions. Id. at 161.

The present case could hardly be more different from *Allen v. Wright*, 468 U.S. 737 (1984), on which defendants principally rely. That case involved an attack upon the adequacy of the Internal Revenue Service's implementation and enforcement of procedures for identifying private schools with discriminatory policies which, the plaintiffs claimed, interfered with or diminished their children's opportunity to attend desegregated public schools. The plaintiffs in *Allen* were found to lack Article III standing "because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful." 468 U.S. at 757. The government "conduct" challenged was "IRS regulations and practices" that failed to deny tax exempt status to every racially segregated private school. 468 U.S. at 788 n.23. There was no allegation that the IRS was guilty of racial discrimination, nor that the number of discriminatory private schools with tax-exempt status in the areas where plaintiffs resided was sufficient to have an impact on the racial composition of local public schools. The alleged injury plaintiffs suffered, the Court held, was not sufficiently "concrete," and the "line of causation" was "attenuated" at best. 468 U.S. at 752. "From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party not before the court.'" Id. at 757 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). This lack of

concreteness and causation created a problem of redressability, because whether court-ordered, stronger, more aggressively enforced IRS regulations would have forced whites to remove their kids from private schools was "highly speculative." 488 U.S. at 758 and 759 n.24 (citation omitted).

In *Allen*, the plaintiffs claimed two injuries, neither of which the Supreme Court viewed as sufficiently concrete to give them standing, and neither of which is anything like the injuries claimed by plaintiffs here. First, the *Allen* plaintiffs claimed they were injured by the federal government's allegedly inadequate activities to enforce the federal policy that denied tax exemption to racially discriminatory private schools. 468 U.S. at 752-53. This alleged injury, the Court said, was nothing more than a generalized grievance based on the interest every citizen has in having the Executive Branch enforce the laws, which the Court had often found inadequate to confer Article III standing. 468 U.S. at 754-55. Second, the *Allen* plaintiffs said that the IRS' lax enforcement made it easier for discriminatory private schools to operate and impaired the plaintiffs' ability and opportunity to receive a desegregated public education. This claim of injury, the Supreme Court found, was fatally undermined by the absence of allegations and/or proof that the plaintiffs' children did not in fact attend desegregated public schools in their localities, or that denial of tax-exempt status to additional private schools

in those communities would result in the private schools' closure and consequent return of their students to public education systems, a chain of causation the Court found unavoidably speculative. 468 U.S. at 756-58. The *Allen* plaintiffs were challenging "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." 468 U.S. at 759-60.

By contrast, plaintiffs in the instant action are attacking specific, concrete state laws, namely, §§ 214, 215, 216 and 269 and amendments 325 and 373 of the Alabama Constitution, which Judge Murphy found to have been enacted for the racially discriminatory purpose of shielding whites' property from taxation that would be used to pay for the education of blacks. If the court enjoined future enforcement of these constitutional restrictions, as we show below, there is nothing speculative about the relief plaintiffs would receive. This Court will not be called upon to be a "continuing monitor[]" of executive action. *Allen*, 468 U.S. at 760. The Alabama Legislature will retain its "power of the purse," id., and it can choose to act or not to act to restructure the tax system. Taxation, as defendants' cases say, is a fundamental legislative responsibility. But the State is forbidden to enact tax laws that have the purpose and the effect of discriminating against members of

a racial minority.

Next, defendants argue that plaintiffs' injury is caused by the people or voters of Alabama, not by the Constitution. Defts post-trial brief at 162-65. This argument is wrong as law and as fact. As a matter of law, plaintiffs' rights are violated by official state action, not by the voters. See response to defendants' proposed facts ¶¶ 404-07 supra (citing *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 (1964); accord, e.g., *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624, 683 (1943)). In addition, as Judge Hand found in *McCarthy*, see plaintiffs' response to defendants proposed fact ¶ 66 supra, the voters' (restricted and occasional) ability to raise millage rates does not provide a relevant defense to discriminatory limits on property valuations.

As a matter of fact, the evidence shows that a majority of white voters refused to ratify the 1901 constitution, which was proclaimed ratified nonetheless when black voters in the Black Belt were "counted in." See Doc. 274, Pltfs post-trial brief at ¶ 105 and endnotes. Had the 1901 constitution failed ratification, Alabama would have continued to be governed by the 1875 constitution, which at least authorized county and municipal governments to increase millage rates up to the level of the constitutional caps without having to seek voter approval.

The evidence further shows that during the first half of the twentieth

century, when black citizens were disfranchised, whites voted to increase property tax revenues for white schools, both when Amendment 3 was ratified and in local referenda to raise millage rates. See Doc. 274, Pltfs post-trial brief at ¶¶ 109-15 and endnotes. In 1933 voters ratified the income tax amendment, and in 1947 they ratified the amendment that earmarked the income tax for teacher salaries. Doc. 274, Pltfs post-trial brief at ¶¶ 115, 118 and endnotes. Voters in counties that were becoming more urban were particularly supportive of higher school taxes, and it was during this period that Black Belt domination of the Legislature evolved into an urban-rural conflict. Doc. 274, Pltfs post-trial brief at ¶ 113 and endnote.

White voters of the Black Belt generally evidenced their desire for good education for their white children throughout this period. In the earliest times they paid for private tutors. When public schools were established, they apportioned very disproportionate shares of school revenues to their own children, leaving negligible amounts for black children. They sought and obtained substantial state funds to support their white schools. It is generally agreed that they created some of the best schools in the state for their white children. However, by 1970 when it was clear that freedom of choice would not satisfy federal desegregation mandates and that they would have to share both school facilities and school revenues with black children, whites in the Black Belt – and elsewhere in Alabama – balked.

This was one reason Governor Brewer's proposed constitutional amendment to increase income taxes for schools was defeated in the November 1970 election that brought George Wallace back into office. See Doc. 274, Pltfs post-trial brief at ¶¶ 122-206 and endnotes.

Resistance to school desegregation, actively encouraged by Governor Wallace, and deceptive marketing campaigns by the Alabama Farm Bureau and Wallace account, at least to some degree, for voters' ratification of Amendments 325 and 373. See Doc. 274, Pltfs post-trial brief at §§ 207-340 and endnotes. Most voters were also faced with a Hobson's choice: accept the post-*Weissinger* higher assessments or vote to lower their taxes (even at the cost of lowering the taxes of farm and timber owners even more). 3 Tr. 132-33 (Flynt). The classification ratios and current use valuations provided by Amendments 325 and 373 place unfair burdens on lower income voters and makes them less likely to approve millage increases. See Doc. 274, Pltfs post-trial brief at endnotes 414-15.

In short, the millage caps, voter referendum requirements, classification ratios, current use provisions, and complicated override procedures in Alabama's constitution are the direct and immediate causes of the injury plaintiffs suffer.

3. The declaratory judgment and prohibitory injunction plaintiffs seek would redress the injury they complain of.

Defendants' arguments that plaintiffs have not proven that they are suffering some concrete, particularized injury that is causally linked to the challenged state constitutional provisions, and that can be redressed by the relief they request, all are based on the same misrepresentation of the complaint's allegations, namely, that the relief plaintiffs seek depends on "potential subsequent action by state authorities." Doc. 275 at 165. To the contrary, the immediate result of enjoining future enforcement of the six state constitutional provisions and their enabling legislation, as defendants recognize, would be (absent valid legislative action to the contrary) an "increase [in] most property taxes across the board by some 500% to 1,000%." Defts post-trial brief at 166. That is because existing state and local millage rates would have to be applied to the full market value of assessed property once the assessment ratios in the Lid Bill amendments are struck down. See PX 698 (What-if 2008 Abstract Summary) at 4-5 (showing a 109% increase in assessed value if all property were assessed at 30% of fair market value); see also PX 826, "Ass Val What If by County" tab, column AF (showing an increase of 318% if the assessment ratio were 60%) and column AN (showing an increase of 597% if the assessment ratio were 100%). This would increase school revenues immediately to levels roughly six times the amounts which now can be collected under Amendment 373.

In short, the benefit plaintiffs and the class they seek to represent would get from the straightforward injunction they are requesting would not be uncertain and perhaps too little, as defendants suggest; rather it would be all too certain and too much, as defendants exclaim in horror. The complaint requests that the injunction be stayed for a reasonable period, not because school revenues would not increase until future action by the Governor and Legislature, but because state authorities should have the opportunity to use their plenary legislative powers to moderate the impact on taxpayers. Of course it is true that the results of future legislative action are unpredictable, but the results of future legislative inaction are not. That was exactly the case with the remedy prescribed by the court in *Weissinger v. Boswell*, 330 F. Supp. 615, 625 (M.D. Ala. 1971) (3-judge court) (cited in *Knight*, supra, 458 F.Supp.2d at 1292). In fact, it is the case with every judicial order that declares a state law unconstitutional and unenforceable, even if the benefits of future legislative inaction are not as certain as they are here.

This action presents classic equal protection claims, in which members of a racially defined group who have been purposefully targeted by state legislative action, and who continue to be disadvantaged in exactly the way the laws' drafters intended, invoke longstanding federal anti-discrimination protections to enjoin future enforcement of those laws. Plaintiffs in the instant action are just like the

plaintiffs in *Hunter v. Underwood*, 471 U.S. 222 (1985), who were "blocked from the voter rolls" by § 182 of the Alabama Constitution, and who sought "a declaration invalidating § 182 as applied to persons convicted of crimes not punishable by imprisonment in the state penitentiary (misdemeanors) and an injunction against its future application to such persons." 471 U.S. at 224. This prospective relief was granted notwithstanding the fact that it did not guarantee that the *Hunter* plaintiffs would thereafter seek to register to vote and would meet all the other qualifications Alabama has established to be eligible to vote. Nor did the injunction issued in *Hunter* preclude the possibility that the Alabama Legislature would re-enact the race-neutral misdemeanor disqualification, this time for nondiscriminatory reasons.

Similarly, the four black school children who through their parents challenged the facially race-neutral School Placement Law the Alabama Legislature enacted to replace the provision in the Alabama Constitution explicitly requiring racially separate schools were found to have standing, *Shuttlesworth v. Birmingham Bd. of Education*, 162 F.Supp. 372, 376 (N.D. Ala. 1958) (3-judge court), aff'd per curiam, 356 U.S. 101 (1958) ("That federal jurisdiction exists in some district court under [28 U.S.C.A. §§ 1331, 1343 and 42 U.S.C.A. § 1983] requires no discussion.").

Defendants' reliance on the Eleventh Circuit opinion in *Knight v. Alabama,* 476 F.3d 1219 (11th Cir. 2007), is misplaced. The *Knight* court was not addressing a standing issue. Rather, it affirmed Judge Murphy's holding that the linkage between property taxes and funding for **higher** education was too tenuous to be the basis for further relief in that case. Moreover, the *Knight* plaintiffs were seeking relief much broader than the prohibitory injunction requested in this action. "Plaintiffs' requested relief was that the district court enter an injunction requiring the State to revise its tax policies and tax rates to adequately fund K-12 education." 476 F.3d at 1224. It was this court-supervised relief that the Eleventh Circuit opined, in dictum, would be speculative.

The white plaintiffs in this action likewise have standing to sue because they are injured by the discriminatory actions of the State, even though the intended victims of the discriminatory actions are black. As the Eleventh Circuit held in *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1040-41 (11th Cir. 2008):

> Other courts have similarly found that a non-minority plaintiff has standing to allege that it was injured by defendants' discriminatory animus toward third parties. The non-minority plaintiff's own injury is sufficient to confer standing, separate from the question of whether the non-minority plaintiff also has standing to vindicate the rights of third parties. See *Scott v. Greenville County*, 716 F.2d 1409, 1415 (4th Cir.1983) (concluding that non-minority

housing developer had standing to make an equal protection claim under § 1983, because "if defendants singled out [plaintiff] for disadvantageous treatment because of his willingness to house minority tenants, then [plaintiff] in his own stead suffered injury to his right to be free from official discrimination"); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 17 (1st Cir.1979), vacated on other grounds, 454 U.S. 807, 102 S.Ct. 81, 70 L.Ed.2d 76 (1981) (finding that real estate corporation has standing under § 1983 to allege that state municipal corporation discriminated against it for its willingness to sell housing to low-income and minority families); *Pagliuco v. City of Bridgeport*, No. 3:01-CV-836, 2005 WL 3627409, 2005 U.S. Dist. LEXIS 33738, at *16-17 (D.Conn. Dec. 13, 2005) (finding that club owners have standing to bring equal protection claims under § 1983 alleging they were singled out for enforcement because of their African-American clientele; explaining that prudential bar against third-party standing is not relevant because "[p]laintiffs are not attempting to vindicate the rights of their clientele. They are asserting their own right to be free from unequal enforcement of the laws based on discriminatory criteria--namely the race of their patrons."); *Hallmark Developers, Inc. v. Fulton County,* No. 1:02-cv-01862-ODE, 2004 WL 5492706, 2004 U.S. Dist. LEXIS 30616, at *51 (N.D.Ga. Sept. 27, 2004) (finding that plaintiff housing developers "have Article III standing to vindicate, at a minimum, their own rights" under § 1983 based on allegations that discriminatory zoning decisions prevented development of housing for low-income and minority residents); *Pisello v. Town of Brookhaven*, 933 F.Supp. 202, 212 (E.D.N.Y.1996) (finding that management company had standing to maintain equal protection claims under § 1983 where plaintiff alleged it was singled out for enforcement actions due to its efforts to place minority tenants in local rental housing); *Puglisi v. Underhill Park Taxpayer Assoc.*, 947 F.Supp. 673, 689 (S.D.N.Y.1996) (finding that non-minority landlord had standing to vindicate his own rights under § 1983 based on allegations that he was targeted for enforcement in effort to drive out his

African-American tenants).

. . .

. . . Because Young Apartments alleges that it was directly injured by Jupiter's enactment and enforcement of the Overcrowding Ordinance, it has standing--on its own behalf--to challenge the allegedly discriminatory nature of Jupiter's actions.

In this matter, plaintiffs have both alleged and proven their claims of legally cognizable injury, causation, and redressability. Accordingly, they have amply established their standing to prosecute this action.

B. There Is No Basis For Reconsidering This Court's Ruling That Plaintiffs' Claims Against the Governor and Revenue Commissioner Are Not Barred By the Eleventh Amendment.

This Eleventh Amendment defense was exhaustively briefed by the parties, Docs, 79-2, 93, 99, 102, and was rejected by this Court when it denied defendants' motion for judgment on the pleadings. Doc. 126. Plaintiffs cannot discern any new arguments in defendants' post-trial brief, Doc. 275 at 172-77. We will not burden the Court by repeating our earlier arguments and authorities. The defendants' implied motion to reconsider the Court's ruling should be denied.

C. There Is No Basis For Reconsidering This Court's Ruling That Plaintiffs' Claims Are Not Barred Either By the Tax Injunction Act or By Principles of Comity.

These defenses were exhaustively briefed by the parties, Docs. 27, 29, 33, 34, and were rejected by this Court's opinion and order denying defendants'

motion to dismiss the complaint. Doc. 35 at 23-36. The only new argument in defendants' post-trial brief, Doc 275 at 178-83, is based on *Levin v. Commerce Energy Co.,*130 S.Ct. 2323 (2010), to which plaintiffs respond as follows.

The defendants' use of *Levin v. Commerce Energy Co.*, 130 S.Ct. 2323 (2010), in support of their argument is flawed for two reasons. First, the defendants noted that *Levin* discussed *Hibbs v. Winn*, 542 U.S. 88 (2004), but changed one word in a quote from *Levin* so as to reverse the meaning of *Levin*'s analysis. The *Levin* Court noted that "only one remedy would redress the [*Hibbs*] plaintiffs' grievance: invalidation of the credit, which inevitably would increase the State's tax receipts." The defendants quoted that passage, but replaced "increase" with the word "decrease." Doc. 275 at 181.

Second, the defendants description of *Levin*'s holding would lead one to believe that it had limited *Hibbs* and its interpretation of the TIA. Doc. 275 at 180. In fact, the holding in *Levin* was:

> The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court. In so ruling, we distinguish *Hibbs v. Winn*, 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004), in which the Court held that neither the TIA nor the comity doctrine barred a federal district court from adjudicating an Establishment Clause challenge to a state tax credit that allegedly funneled public funds to parochial schools.

Levin, 130 S.Ct. at 2328. While the Court mentioned *Hibbs*' TIA holding, it

distinguished only *Hibbs*' treatment of the comity doctrine, 130 S.Ct. at 2332-33, 2335-36.

With respect to comity, *Levin* distinguishes *Hibbs* and this action from the case before it in two important respects. First, the *Levin* plaintiffs were commercial businesses who were complaining "about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden." 130 S.Ct. at 2332. The Court noted that these circumstances involved a state's legislative choices about how to accomplish equality by unequally distributing benefits and burdens. 130 S.Ct. at 2333. And "the most obvious way to achieve parity would be to reduce respondents' tax liability. Respondents did not seek such relief, for the TIA stands in the way of any decree that would 'enjoin ... collection of [a] tax under State law.' 28 U.S.C. § 1341." 130 S.Ct. at 2335 (footnote omitted). The *Hibbs* plaintiffs were in no sense seeking to reduce their own taxes, and neither are the plaintiffs in the instant action.

Second, and even more importantly, the tax statute in *Levin* did "not employ classifications subject to heightened scrutiny or [that] impinge[d] on fundamental rights...." 130 S.Ct. at 2333 (citing *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Zwickler v. Koota*, 389 U.S. 241, 245-248, 88

S.Ct. 391, 19 L.Ed.2d 444 (1967); *McNeese v. Board of Ed. for Community Unit School Dist*. 187, 373 U.S. 668, 672-674, and n. 6, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963)). The *Levin* Court then goes on to distinguish *Hibbs* in the same manner this Court did in its opinion and order denying defendants' motion to dismiss.

> *Hibbs* was hardly a run-of-the-mine tax case. It was essentially an attack on the allocation of state resources for allegedly unconstitutional purposes. In *Hibbs*, the charge was state aid in alleged violation of the Establishment Clause; in other cases of the same genre, the attack was on state allocations to maintain racially segregated schools. See *Hibbs*, 542 U.S., at 93-94, 110-112, 124 S.Ct. 2276. The plaintiffs in *Hibbs* were outsiders to the tax expenditure, "third parties" whose own tax liability was not a relevant factor. In this case, by contrast, the very premise of respondents' suit is that they are taxed differently from LDCs. Unlike the *Hibbs* plaintiffs, respondents do object to their own tax situation, measured by the allegedly more favorable treatment accorded LDCs.
>
> *Hibbs* held that the TIA did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision. In context, we clarify, the *Hibbs* footnote comment on comity is most sensibly read to affirm that, just as the case was a poor fit under the TIA, so it was a poor fit for comity.

130 S.Ct. at 2335. For the same reasons, this action is also a poor fit, and there is no basis for reconsidering this Court's earlier ruling denying the State's TIA and comity defenses.

D. The Overwhelming Preponderance of Evidence, Viewed in Light of the Correct Legal Standards, Proves the Fourteenth Amendment Violations Alleged in the

Complaint.

Defendants' inability to counter plaintiffs' detailed and lengthy evidence with evidence of their own has led them, once again, either to distort or to evade the controlling Supreme Court standards for proving violations of Title VI and the Equal Protection Clause. We have outlined in our response supra to the introduction in defendants' post-trial brief some of the fundamental errors in defendants' legal theories. But the one of the most egregious legal errors advanced by defendants is their contention that the first step this Court must take in determining whether the six challenged property tax provisions were enacted for racially discriminatory purposes and continue to have their intended discriminatory effects, in violation of Title VI and the Fourteenth Amendment, is to examine current-day property tax and school funding statistics for any racially disparate distribution of revenues or expenditures.

A moment's reflection reveals, first of all, that defendants' theory makes no sense. The only way to determine whether the effects of a particular state statute or constitutional provision tell us anything about its drafters' purpose is to look at the statute's effects **at the time it was enacted**. The members of the 1901 constitutional convention had no way of knowing exactly what results their millage caps and voter referendum requirements would produce over a hundred years later.

Neither could Governor Wallace and members of the Alabama Legislature have based their decisions to enact Amendments 325 and 373 on knowledge of what Dr. Bell's weighted averages would show about data gathered over thirty years later. In other words, Dr. Bell's figures tell us nothing relevant to the issue of original intent.

So, if defendants' legal theory depends at all on Dr. Bell's numbers, it can only be an attempt to demonstrate that the property tax restrictions plaintiffs contend were enacted in the past for racially discriminatory purposes today have no continuing racially discriminatory effects. But that requires finding out exactly what racially adverse effects the drafters intended. This is an inquiry defendants urge the Court not to pursue and that they criticize plaintiffs for focusing on. For example, to defendants, it is irrelevant that 47% of all Black Alabamians resided in the Black Belt in 1901, PX 364 (Table County Populations 1860-2000), or that nearly all white students fled the public schools in the Black Belt in 1971, leaving behind a black population that had been reduced to 25% of all Black Alabamians, PX 364 (Table County Populations 1860-2000), if today black students in the Black Belt constitute less than 12% of all black students in the state. PX 424 (Enrollment Black and White 2008-09). But these are some of the data that are relevant both for determining what the drafters' purposes were and for determining

what conditions would constitute continuing adverse effects today.

Attention to the time period during which adverse effects are relevant helps us understand the "twofold inquiry" called for by *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979), when a court examines evidence of invidious purpose and effects in a state law. The first question in *Feeney* inquired about the circumstances surrounding the nineteenth century origins of the Massachusetts veterans preference statute and whether it revealed overt or covert discrimination against women. The second question asked what disparate impact numbers in the present said about possible invidious intent behind the latest amendment of the statute, not what they said about continuing adverse effects of purposeful discrimination in 1874 (no past discriminatory purpose was found).

Defendants help answer the question of what constitutes continuing adverse effects of past purposeful discrimination when they say the issue in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir.), cert. denied, sub nom. *Johnson v. Bush*, 546 U.S. 1015 (2005), was whether a provision in Florida's 1968 constitution had "removed the odious taint of the original law." Defts post-trial brief at 222. Here's what the en banc *Johnson* opinion says:

> In *Hunter*, the Supreme Court **left open** the precise question we confront here: whether a subsequent legislative

> re-enactment can eliminate the **taint** from a law that was **originally** enacted with discriminatory intent. *Hunter*, 471 U.S. at 233, 105 S.Ct. 1916. In *Cotton v. Fordice*, 157 F.3d 388 (5th Cir.1988), the Fifth Circuit recognized that this issue was left open by *Hunter* and held that the facially neutral disenfranchisement provision in that case overcame its "odious origin" through legislative amendments. 157 F.3d at 391. The Fifth Circuit pointed out that the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, but was amended by the legislature in 1950 to remove burglary as a disenfranchising crime, and was amended in 1968 to add murder and rape as disenfranchising crimes, two crimes which were historically excluded because they were not considered "black" crimes. Id.

405 F.3d at 1223-24 (footnote omitted)(bold emphasis added). Use of the term "taint" implies both a focus on exactly what mechanisms the drafters of the original law selected to effect their purpose and the need to make sure the latter-day amendments did not leave behind even small traces of those specific original discriminatory effects. As the Supreme Court said in *Feeney*, "Invidious discrimination does not become less so because the discrimination accomplished is of a **lesser magnitude**." 411 U.S. at 277 (footnote omitted) (bold emphases added).

Examining the important difference between the factual circumstances in *Arlington Heights*, on one hand, and the facts in *Hunter v. Underwood* and *Johnson v. Governor,* on the other hand, helps clarify the proper application of the Supreme Court's equal protection legal standards. In *Arlington Heights* the official

state action claimed to be racially motivated was the recent denial of a re-zoning petition. So the same current-day evidence of racial effects informed both the Court's inquiry about whether the re-zoning denial had a racially discriminatory purpose and its inquiry about whether it still had discriminatory effects.

By contrast, in *Hunter v. Underwood* the evidence of adverse racial effects both in 1901, when the misdemeanor disqualifications were enacted, and in the 1980s, when current-day plaintiffs brought their federal lawsuit, informed the Supreme Court's inquiry about the invidious purpose of the drafters in 1901. The fact that many whites had been disfranchised by the misdemeanor disqualification, so that the disparate impact had diminished substantially from 10 times to 1.7 times as many blacks as whites disqualified "ma[d]e no constitutional difference," as *Feeney* says, 442 U.S. at 277, when it came to ascertaining whether the statistics, in combination with the historical background, were sufficient to prove original invidious intent. *Hunter v. Underwood*, 471 U.S. at 227.

Defendants argue that the 1.7 times difference in current-day adverse effects was relied on by the *Hunter* Court to establish the element of continuing adverse effects of the 1901 enactment. Defts post-trial brief at 186-87 (citing *U.S. v. Armstrong*, 517 U.S. 456, 467 (1996)). Plaintiffs have disputed this reading of *Hunter*, arguing that the reference to 1.7 times black/white disqualification was

made in the context of proving original intent, not current effects. Doc. 166, plaintiffs brief opposing defendants' motion for summary judgment, at 40-42 (citing *United States v. Alabama*, 252 F.Supp. 95 (M.D. Ala. 1966) (3-judge court)). But this Court need not resolve this ambiguity in the *Hunter* opinion. Even if, as defendants assert, the 1.7 times ratio related to proof of continuing adverse effects of the 1901 provision, it is instructive to note (1) that it measured the disqualification rates in only two counties, and (2) that it included only those persons disqualified by the misdemeanor provision challenged by plaintiffs, not every Alabamian who was disfranchised for any reason.

This undermines defendants' contention that the investigation of continuing adverse effects in this action must look solely at the statewide bottom line, taking into account all factors that determine racial differences on a per-person basis, not just the differences caused by the six provisions in the Alabama constitution plaintiffs challenge. Plaintiffs have demonstrated that Dr. Bell's statewide weighted averages improperly mask the adverse racial impact one would expect to find in an undifferentiated statewide analysis. But the main point is that Dr. Bell did not even attempt to analyze the adverse effects intended by the particular state constitutional restrictions at issue here.

Johnson v. Governor makes even clearer the fundamental error in

defendants' contention that the Fourteenth Amendment analysis must begin with an examination of the current-day disparate impact of the entire property tax and school funding systems. *Johnson* states explicitly that the intent inquiry must focus on the discriminatory effects produced at the time the law was enacted.

> Proof of intentional discrimination is required under the Equal Protection Clause. **One factor relevant to the intent inquiry** is whether the law being challenged has an **impact** that bears more heavily on one race than another. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Here, Florida's felon disenfranchisement provision **did not create a significant disparate impact along racial lines in 1968**. Accepting the plaintiffs' estimates for 1968 as true, the felon disenfranchisement provision denied voting rights to **far more whites than African-Americans** and decreased the percentage of African-American voters state-wide by less than one quarter of one percent. The plaintiffs' best estimates show that 44,562 white voters and 16,150 black voters were disenfranchised in 1968 due to a felony conviction. Although proportionately more African-American voters were affected, the percentage of eligible African-American voters in the voting age public dropped only from 12.57% in 1967 to 12.32% in 1968. The plaintiffs focus on the *present* racially disparate impact of the felon disenfranchisement provision, but this amount of **disparate impact was not present in 1968 when the provision was enacted**. Although disturbing, the *present* racially disparate impact of the felon disenfranchisement law **does not guide our analysis**.

Johnson v. Governor, 405 F.3d at 1222 n.17 (italicized emphasis in original) (bold

emphases added).[2] In the instant action, instead of reducing the adverse impact, like Florida's new constitution did in 1968, the 1972 and 1978 amendments to Alabama's constitution were carefully designed to preserve the illegal, artificially

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[2] Defendants also cite *Coleman v. Miller*, 117 F.3d 527, 530-31 [sic: 529] (11th Cir. 1997), cert. denied, 523 U.S. 1011 (1998), which arguably adopted a contrary approach to the order of proof:

> [Plaintiff challenging Georgia state flag, which incorporates the Confederate battle flag] must first demonstrate that the flying of the Georgia flag produces disproportionate effects along racial lines, and then must prove that racial discrimination was a substantial or motivating factor behind the enactment of the flag legislation. See *Hunter v. Underwood*, 471 U.S. 222, 225-26....

The Eleventh Circuit panel went on to say:

> Having concluded that appellant has failed to demonstrate that the Georgia flag presently imposes a discriminatory racial effect, we need not decide whether discrimination against African-Americans was a motivating factor in the flag bill's passage. See *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971) (race-motivated legislation violates Constitution only when it "affect[s] blacks differently from whites").

But there are several ways to distinguish *Coleman v. Miller*. First and foremost, Confederate flag litigation has a judicial history that fairly can be characterized as *sui generis*. E.g., see *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir.1990) (cited in *Coleman v. Miller*, 117 F.3d at 530). Second, the court's finding of no present discriminatory effects would have applied as well at the time the 1956 statute was enacted. In other words, plaintiffs' claim against the Georgia state flag was never actionable, in the past or in the present. In any case, to the extent *Coleman v. Miller* is inconsistent with *Johnson v. Governor*, the later decision, rendered by the en banc Eleventh Circuit, is controlling on this Court.

low property valuations in the Black Belt going all the way back to 1875. This purposefully perpetuated the past discrimination, and the resulting diminution of the property tax base had its most damaging effects on black students in the Black Belt, since nearly all whites had fled those public schools. The fact that more white students than black students were similarly impacted, especially those attending rural schools, does not mitigate the violation of the federally protected rights of African-American students in the Black Belt.

Many of defendants' proposed conclusions of law suffer from the application of defendants' erroneous theories of law, which have been pointed out above. Those proposed conclusions that do address relevant legal standards are fact-intensive and have been fully addressed either in plaintiffs' proposed findings of fact and conclusions of law, Doc. 274, or in plaintiffs' responses above to defendants' proposed findings of fact supra. We will not burden the Court with a repetition of those arguments. What follows are brief responses to particular arguments in defendants' proposed conclusions of law. Plaintiffs respectfully request that they be given an additional opportunity to respond to any questions or issues the Court believes need further development.

1. The Testimony of White Legislators

The testimony of George McMillan may provide the best opportunity for

examining, in light of the governing legal standards established by the U.S. Supreme Court, the relevance or irrelevance of the testimony of white legislators that race was never considered in the passage of Amendments 325 and 373. The defendants contend that no racially discriminatory purpose can be found behind the passage of the bills that became Amendments 325 and 373, because the legislator witnesses were unaware of any historical racial purposes and were not made aware of any present racial consequences by their black colleagues.

First, legislator awareness of the racial consequences of the two amendments is not relevant to the intent inquiry unless invidious purpose cannot be detected when addressing the "first question" of the "twofold inquiry" set out in *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979), namely, whether the classifications established by these amendments are based on historical racial discrimination, either overtly or covertly. Id. Common sense dictates this first inquiry, because the State of Alabama, legally and practically, is the chief defendant in this action, and it cannot disclaim awareness of its own history.

This first question requires examining the historical legislative antecedents of Amendments 325 and 373, as the Court did in *Feeney*. 411 U.S. at 265-68. Those historical antecedents are 153 years (1819 to 1972) of state constitutional provisions requiring uniform assessment of all property at the same

rate or ratio, and state statutes setting the uniform assessment ratio at 60% in 1911 and 1935, then at 30% in 1967. From 1875 to 1972 these state constitutional and statutory requirements were systematically and intentionally violated by Black Belt landowners, who resenting paying for the education of blacks, and whose under-assessment practices later were followed by rural landowners in other counties. Amendments 325 and 373 were carefully tailored by the Alabama Farm Bureau and Governor Wallace to ratify these irrational (as found in *Weissinger*) violations of Alabama law by maintaining the status quo with respect to property assessments. The perpetuation of the under-valuation of Black Belt property was overt. The historical, racially discriminatory reasons for the artificially low valuations were (mostly) covert.

In this action the State defends the amendments' overt perpetuation of its official lawlessness by arguing that its latter-day legislators were born too late to have known about the racially discriminatory origins of that lawlessness – or that none of them would have read Malcolm McMillan and other Alabama historians to have informed themselves of these racist origins. But, as *Feeney* teaches, it is not necessary to show that modern-day legislators were aware of the history of

discrimination that covertly underlies the legislation they are considering.[3]

Unawareness of the particulars of this property tax history is believable for most of us who lived through the 1970s in Alabama, even if, "the memory of

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[3] The Supreme Court's recent decision in *Nevada Comm'n on Ethics v. Carrigan*, 2011 WL 2297793 (June 13, 2011), which upheld a state's legislative recusal provision, is not directly on point. But the Court's discussion of how a legislator's reasons for his or her vote must be viewed for constitutional purposes is instructive:

> But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is **not personal** to the legislator but **belongs to the people**; the legislator has no personal right to it. As we said in *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), when denying Article III standing to legislators who claimed that their voting power had been diluted by a statute providing for a line-item veto, the legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." In this respect, voting by a legislator is different from voting by a citizen. While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies ... pertain to legislators not as individuals but as political representatives executing the legislative process." *Coleman v. Miller*, 307 U.S. 433, 469–470, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (opinion of Frankfurter, J.).

2011 WL 2297793 at *6 (bold emphases added). Saying that a legislator's vote is not personal but belongs to the people does not mean that his or her motives are not relevant for discerning invidious purposes that violate the Equal Protection Clause. But it does suggest that a legislator's unawareness of the racial motives of past state actors whose invidious purposes will be perpetuated by the current-day legislator's vote cannot absolve the state itself from its continuing obligation under the U.S. Constitution to eliminate all vestiges of that past official discrimination.

reconstruction is powerful for subsequent generations, for several generations, in shaping attitudes about African-American political rights, about education, particularly education for black people." Doc. 253 Tr. 26-27 (Norrell). But it is less believable in the case of George McMillan, who is Malcolm McMillan's nephew, who knows his uncle's book "is recognized as sort of the definitive treatise on the 1901 Constitution," 11 Tr. 111:20-21 (McMillan), and who got an A in the class that used his uncle's fourth grade history of Alabama. 11 Tr. 111:25 to 112:6 (McMillan). (Although we are doubtful that Professor McMillan's fourth grade history, which is not in evidence, discussed property taxes. The point is that George McMillan is likely to have studied all of his uncle's works.)

The historical evidence shows that the answer to the first *Feeney* question is yes, that the measures of property assessment created by Amendments 325 and 373 are covertly based on race. But the answer to the second question, whether the amendments' present-day adverse effects reflect invidious racial discrimination, 411 U.S. at 277, is also yes. "What [the Alabama] legislature [was] "**up to**" [is] plain from the **results its actions achieve[d]**, [and] the **results they avoid[ed]**." 411 U.S. at 279 n.24 (bold emphases added). The result Amendments 325 and 373 achieved was the preservation of the property assessment status quo. Conversely, the results they avoided were any substantial increase in property

assessments, particularly for farm and timber land, and the corresponding restriction of local revenues for the nearly all-black public schools in the Black Belt.

All of the legislators who testified at trial were aware of most of these adverse consequences, but none could have been more aware of them than was George McMillan. Presumably, in 1978 Sen. McMillan was aware of the consequences Lt. Gov. McMillan described in his March 1982 letter to Auburn history professor, 11Tr. 143:20-24, Allen Jones:

> Alabama has in the past had a highly inequitable system of appraising land for property tax purposes. There is no question but that many land owners, including farmers, living in certain Alabama counties for years paid property taxes based on a gross under-evaluation of the property's appraised worth or current use. At the same time, those living in other parts of the State were paying property taxes based on more accurate appraisals of their land's worth or current use.
>
> A Federal Court Order in the '70's brought this pattern of discrimination to a halt. The Order required all property in Alabama to be appraised on a uniform basis. However, in the re-appraisal process which was employed to implement the Court's mandate certain past inequities were perpetuated. As a.consequence, another re-appraisal of all property in the State has been occuring [sic] over the last several months to ensure the uniformity which the Court Order required and to bring in additional revenues from an up-to-date appraisal. This reappraisal which will be concluded this year will result in all Alabama property owners with certain isolated exceptions having to pay higher property taxes.

DX 546 at 1-2.

George McMillan is "very familiar" with the Black Belt, 11 Tr. 171:10-12 (McMillan), and knows of its history. 11 Tr. 178:16 to 184:5 (McMillan). Like the other white legislators, he was aware that, with the exception of the City of Demopolis schools, whites had fled public schools in the Black Belt. 11 Tr. 192:14-25 (McMillan). He was aware that farm and timber land are "disproportionately owned by those of the white race, as opposed to those who are African-American." 11 Tr. 194:6-17 (McMillan). "I would think anybody that lives in Alabama would have that awareness." 11 Tr. 201:17-18 (McMillan). So, whether or not George McMillan ever heard "a whisper of discriminatory effect or intent, as it related to consideration of property tax issues," 11 Tr. 146:22-24 (McMillan), he could not disclaim awareness of Amendment 373's racially discriminatory consequences.

Since the adverse effects on African-American students in the Black Belt "can be traced to a discriminatory purpose," Amendments 325 and 373 are subject to strict judicial scrutiny, *Feeney*, 411 U.S. at 272, and "require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause...." Id. at 280. Maintaining the status quo with respect to property assessments is not a persuasive justification where its effects are to preserve the historical discrimination against black schools in the Black Belt.

George McMillan attempted to articulate the "public policy" justification for his support of Amendment 373, which was to protect farmers so they could make a profit. DX 546 at 2; 11 Tr. 187:22 to 188:5 (McMillan). But Sen. McMillan only supported "the **concept** of current use." 11 Tr. 144:7-8 (McMillan) (bold emphasis added). He did not inform himself about whether the specific current use provisions he voted for would actually serve that concept – or whether it would serve it too well. McMillan "was not one of the people who was writing or being allowed input into that legislation." 11 Tr. 198:7-8 (McMillan). He did not investigate how other states implemented their current use provisions. "I did not, because I have nothing to -- if I had been the person who was providing -- who was drafting this, I think those would have been steps that I would have taken, because I think that you can learn from how other states -- you know, address problems." 11 Tr. 201:4-8 (McMillan). Later, in 1982, Lt. Gov. McMillan did not even know that the statute implementing Amendment 373 was being amended to keep the property tax yield of farm and timber land at about 5 cents per mill per acre. 11 Tr. 202:16-24 (McMillan).

On the other hand, there is plenty of evidence that Sen. McMillan's real reason for supporting Amendment 373 was to gain Farm Bureau support in his upcoming run for Lieutenant Governor. Even had he "done my homework" about

the particulars of property tax history, Lt. Gov. McMillan testified he was not certain he would have voted against the Farm Bureau bills. 11 Tr. 138:12, 150:11 to 151:6 (McMillan). As Sen. Pearson testified:

> 4 Q.... Do you think that George McMillan would
> 5 have voted for a bill that he knew was racially
> 6 discriminatory?
> 7 A. I think in politics when you have got a greater
> 8 aim, a goal, in order to get there to do better things,
> 9 yes. So I think he would have.

11 Tr. 36 (Pearson).

In George McMillan's case, the "better things" he was pursuing were higher offices, Lieutenant Governor in 1978 and Governor in 1982. Alabama Farm Bureau President Jimmy Hays may not have supported McMillan's candidacy for Lieutenant Governor after McMillan spurned Hays' demand to choose Senate committee chairs in return (Hays' demand itself reveals the level of influence the Farm Bureau expected to exercise over the Legislature). But McMillan still sought and got the support of Farm Bureau members. 11 Tr. 138:14 to 139:17 (McMillan).

George McMillan's relationship with the Farm Bureau goes all the way back to his childhood, when he was raised in an Alabama Extension Service household and visited his father's office in the Auburn building named after Luther Duncan, who as head of the racially segregated Extension Service helped found the

racially segregated Alabama Farm Bureau. 11 Tr. 110:18 to 111:11, 114:5-9, 152:9-22, 160:11 to 161:3, 162:18-24 (McMillan). When he was running for Lieutenant Governor, George McMillan spoke at one of the two or three Farm Bureau conventions he has attended and campaigned alongside Goodwin Myrick, who defeated Hays and was elected Farm Bureau President. 11 Tr. 159:4-13, 161:4 to 162:1 (McMillan). McMillan is an ALFA (auto and home) policyholder, regularly receives its publications, and knows people on the Alabama Farm Bureau's board of directors. 11 Tr. 162:6-17 (McMillan). Under these circumstances, one can easily understand why George McMillan could not "join[] Senator Pearson and Senator Clemon and others who fought this legislation [that became Amendment 373]." 11 Tr. 150:19-21 (McMillan).

2. The Relevance of Simpson's Paradox

Because defendants totally ignored the nature of the discriminatory effects intended by the drafters of the 1901 constitution and amendments 325 and 373, their weighted averages calculations look for racial disparities in the statewide, per-person **distribution** of revenues and expenditures, not at whether the **amount** of property assessments and yield per mill they produce are still suppressed. After all, in 1901 the Black Belt still had some of the wealthiest counties in Alabama, and their representatives, who dominated the constitutional

convention and the Legislature, did not design the millage caps to deny their counties a fair distribution of school revenues collected elsewhere in the state. To the contrary, they maintained the 1875 caps to suppress the amount of school revenues in their own counties, among other reasons, to ensure that property taxes collected in other counties would be **favorably** redistributed to the Black Belt. White landowners in the Black Belt intended to use the provisions of the 1891 Apportionment Act that were incorporated in the 1901 constitution to deny black students a fair distribution of school revenues **within** their counties. An analysis by Dr. Bell of per-resident and per-pupil distribution of school revenues and expenditures across the state in 1901 probably would show a large disparate impact in favor of blacks that masked the diversion to white schools of funds intended for black schools. Such an analysis would make no more sense for determining the intended discriminatory effects of the 1901 millage caps than it does today.

But, considering Dr. Bell's distributive calculations on their own terms, Dr. Sullivan's Table 2 in PX 823 demonstrates the Simpson's Paradox problem with Dr. Bell's data. See Table 2 below. Defendants try to brush off Simpson's Paradox in a footnote. Defts post-trial brief at 202 n.31. But, as Dr. Sullivan explained, "reliance on statewide weighted averages can be very misleading if you aren't taking into account the other factors that make school districts different from

one another." 8 Tr. 43:25 to 44:3 (Sullivan). Broken down into more nearly relevant categories in terms of school finances, the per pupil expenditures (PPE) and dollars per mill per pupil (PMPP) turn out to be lower for black students than for white students in every category except one, white-county school systems, which enroll less than 12% of all black students in Alabama. There is "a substantial difference in large urban districts." 8 Tr. 42:21-22 (Sullivan).

These differences likely can be accounted for by the lower income status of African Americans in Alabama, which can be expected to correlate with lower property tax bases in their school systems. These are not issues in this action. Plaintiffs have not challenged the method for redistributing state revenues produced by the Minimum Foundation Program.

What is relevant in Dr. Sullivan's Simpson's Paradox table is its clear display of the dramatically lower dollars per mill per pupil in the 33 majority-black school systems. The differences are $4 per pupil compared with white-county systems and $2 per pupil compared with white city systems. But the difference is $22 between majority-black systems and large urban systems.

Table 2
Demonstration of the Consequences of Simpson's Paradox

(1)	(2)			(3)			(4)		(5)		(6)	
Group*	Enrollment - Number			Enrollment-Percent			Local PPE		PMPP		Pct Free	
	Total (2a)	White (2b)	Black (2c)	Total (3a)	White (3b)	Black (3c)	White (4a)	Black (4b)	White (5a)	Black (5b)	White (6a)	Black (6b)
Large	311,925	154,130	139,893	40.8%	33.8%	52.6%	2223	1,852	70.78	69.73	34%	52%
White-cities	127,842	90,188	26,646	17.3%	20.7%	10.2%	2,230	2,113	53.51	49.20	30%	37%
White-county	210,742	170,043	28,805	29.9%	40.8%	11.9%	1,126	1,146	48.83	51.72	40%	44%
Black-majority	84,665	19,602	65,063	12.0%	4.7%	25.3%	1,257	1,153	47.43	47.39	61%	72%

* Large = 12 systems; Other White majority: cities = 45 systems, counties=41 systems; Other Black-majority = 33 systems

[Note: the "large systems" are large cities and metro counties with enrollments of 10,000 students or more. They include the following: Birmingham, Dothan, Hoover, Huntsville and Tuscaloosa cities, and Baldwin, Jefferson, Madison, Mobile, Montgomery Shelby and Tuscaloosa counties.]

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This big difference in yield per mill correlates with the heavy dependence of Black Belt county school systems on current use property, as displayed below in Table 1 from PX 823.

From PX 21 p. 9 of 23 - Declarations of Dan Sullivan Doc 166-21 filed 3/30/10 p. 8 of 16

ATTACHMENT A

Table 1
Counties Most Affected by the Existing Current-Use Provisions

(1) County	(2) Percent of Tax Base that is Class III – Current Use	(3) Percent Increase in Tax Base if Provisions Removed	(4) Black Belt County	(5) Percent of Public School Students who are Black
Perry	19.7%	138%	Yes	99.1%
Sumter	19.1%	134%	Yes	100%
Bullock	18.9%	132%	No	99.6%
Geneva	18.2%	127%	Yes	19.6%
Conecuh	17.2%	120%	Yes	79.5%
Wilcox	15.7%	110%	Yes	99.7%
Greene	13.2%	92%	Yes	99.8%
Pickens	12.2%	85%	Yes	66.3%
Marengo	11.6%	81%	Yes	85.4%
Monroe	11.0%	77%	Yes	58.2%
Hale	11.0%	77%	Yes	74.3%
Lowndes	11.0%	77%	Yes	99.6%
Choctaw	10.5%	74%	Yes	74.6%
Macon	9.9%	69%	Yes	97.4%
Clarke	9.9%	69%	Yes	65.7%
Henry	9.6%	67%	No	48.6%
Crenshaw	9.3%	65%	Yes	34.0%
Butler	8.7%	61%	Yes	60.9%
Washington	8.7%	61%	No	41.6%
Lamar	8.7%	61%	No	19.3%

While one would expect to find lower tax bases in rural systems than in urban school systems, the fact that majority-black systems, some of which are in the Black Belt, have property tax bases even smaller than the less current-use-dependent white rural systems supports plaintiffs' other evidence that demonstrates how the Black Belt drafters' instruments for suppressing local property taxes continue to hit their targets.[4] E.g., see Doc. 274, Pltfs post-trial brief at ¶¶ 431-32, 439-41, 446-60, 462-63, 467-76 and associated endnotes and citations to exhibits.

3. Shielding White Landowners

Defendants assert that shielding whites' property in the Black Belt "does not state a violation of the U.S. Constitution." Defts post-trial brief at 189-90. No

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[4] Defendants contend that "[i]n 1875, Alabama Republicans had no interest in targeting Black Belt children in order to protect white land owners." Defts post-trial brief at 240. This ignores the fact that Republicans had little or no say in the 1875 constitutional convention, as Professor McMillan states:

> Eighty Democrats, twelve Republicans, and seven "Independents" were elected. Most of the Republican and "Independent" delegates were from the Black Belt; four of them were Negroes. As the "Independents" had been elected with the votes of former Republicans, they would probably vote with the Republicans. However, Sam Rice, leader of the Republican opposition, could count on the consistent support of only the twelve Republican members. Obviously, the Democrats had overwhelming control of the convention.

Doc. 274, Pltfs proposed facts ¶ 47, EN 51 (quoting McMillan at 188).

authority is cited, probably because defendants know they are distorting plaintiffs' claims in this action, which contend that a statutory **purpose** to shield white property from being taxed to pay for the education of blacks constitutes invidious discrimination that violates the Equal Protection Clause. That proposition is impossible to dispute, even if plaintiffs can cite no other cases that have addressed this precise form of purposeful discrimination. The absence of a precedent squarely on point is not surprising, since no other state has Alabama's unique history. Defendants' assertion that whites control most of the landed wealth everywhere in the United States may be correct. It invites us to recall how whites acquired all that land, but that historical aside is not relevant to the facts of this case, the Yazoo Land Fraud notwithstanding.

4. Gordon v. Lance Is Inapposite.

Defendants' reliance on *Gordon v. Lance*, 403 U.S. 1 (1971) is misplaced. That case did not involve invidious racial discrimination.

> Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no 'discrete and insular minority' for special treatment. The three-fifths requirement applied equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement.

403 U.S. at 5. Plaintiffs' evidence proves that the six provisions they challenge in

the Alabama constitution purposefully single out African Americans for special discriminatory treatment.

Defendants' reference, Defts post-trial brief at 13, to Judge Murphy's opinion in *Knight*, 458 F.Supp.2d at 1314, is inapposite for a similar reason. Judge Murphy limited his quoted statement to the Knight plaintiffs' unsuccessful effor to invoke *Hunter v. Erickson,* 393 U.S. 385 (1969). His complete statement is as follows:

> The Court is unpersuaded that the instant case falls under *Hunter*[*v. Erickson*] and its progeny. Specifically, unlike the challenged legislation in *Hunter* and *Washington*[*v. Seattle School District No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982)], Alabama's property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure.

In the instant action, plaintiffs have not alleged a cause of action based on the Fourteenth Amendment standards of *Hunter v. Erickson*. Instead, plaintiffs have alleged that the six state constitutional provisions violate the Fourteenth Amendment and Title VI under the standards of *Hunter v. Underwood*.

5. The Farm Bureau's Racially Discriminatory Motives

Defendants' conclusions of law blow hot and cold in trying to deal with the role of the Alabama Farm Bureau in the passage of Amendments 325 and 373.

On one hand they seem to acknowledge that the Farm Bureau's involvement is a problem and try to distance its lobbyists from influence in the legislative process. They contend that "the Farm Bureau did not have any influence on Harris's drafting of House Bill 56." Defts post-trial brief at 227. And, conceding that Farm Bureau official and Senator Walter Givhan had "racist proclivities," they argue that he did not influence passage of Amendment 325 in the Legislature. Id. at 243-44. On the other hand, defendants defend Farm Bureau President J.D. "Jimmy" Hays with the astounding assertion that Professor Flynt could not identify anything in Hays' oral history "which indicated that J.D. Hays had any racial motivation at all." Id. at 244. This latter assertion abuses any fair reading of the transcript of Professor Flynt's cross-examination. For example, counsel for the State read Professor Flynt a passage from the oral history in which Hays talked about George Wallace, then asked:

> 22 Q. But he was a bell weather [sic: bellwether] representing, I guess, a
> 23 minority group of people in this country at a time of
> 24 great change, and perhaps helped solidify the decision
> 25 that puts us where we are today.
> 00061
> 1 That's correct, isn't it?
> 2 A. Yeah. And I think an historian might say, but he
> 3 was a bell weather; that is, a warning signal in the
> 4 night representing a minority group of people, white
> 5 segregationists in this country at a time of great
> 6 change, and perhaps helped solidify the decision that
> 7 puts us where we are today.

> 8 That's certainly the way I would read it in light
> 9 of his reaction in the various speeches, particularly
> 10 the '63 speech Wallace made to the farm -- Farm
> 11 Federation, which is the predecessor to this period
> 12 he's talking about.
> 13 Q. This doesn't indicate that Mr. Hays is a racist in
> 14 any way, does it?
> 15 A. No. But he does say that what he likes about
> 16 Wallace is Wallace is a bell weather [sic] representing a
> 17 minority group of people. That's people who believe in
> 18 segregation. I don't know what else he could have in
> 19 mind here.

3 Tr. 60-61 (Flynt).

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

E. There Is No Basis For Reconsidering This Court's Ruling Rejecting Defendants' Arguments That Plaintiffs' Title VI Claims Against All Defendants Should Be Dismissed.

Defendants' several arguments, repeated here, that the federal funds received by the State of Alabama, the Governor, and the Revenue Commissioner do not subject them to plaintiffs' claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., were exhaustively briefed by the parties, Docs, 79-2, 93, 99, 102, and were rejected by this Court when it denied defendants' motion for judgment on the pleadings. Doc. 126. Plaintiffs cannot discern any new arguments in defendants' post-trial brief, Doc. 275 at 250-54. We will not burden the Court by repeating our earlier arguments and authorities. The defendants' implied motion to reconsider the Court's ruling should be denied.

CONCLUSION

The great preponderance of evidence proves all of plaintiffs' claims, and they are entitled to the relief they have requested.

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