No. 11-15464-BB

IN THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INDIA LYNCH, etc., et al,

Plaintiffs-Appellants,

vs.

STATE OF ALABAMA, GOVERNOR ROBERT BENTLEY, AND REVENUE COMMISSIONER JULIE P. MAGEE,

Defendants-Appellees.

BRIEF OF APPELLANTS INDIA LYNCH ET AL.

James U. Blacksher
P.O. Box 636
Birmingham AL 35201
(205) 591-7238

Larry T. Menefee
407 S. McDonough Street
Montgomery, AL 36104
205-265-6002

Edward Still
130 Wildwood Parkway
Suite 108, PMB 304
Birmingham, AL 35209
205-320-2882

India Lynch et al. v. State of Alabama et al.
No. 11-15-464-B

CERTIFICATE OF INTERESTED PERSONS

Appellants India Lynch, et al., through undersigned counsel, certify that the following persons, firms, and entities have an interest in the outcome of this case:

1. Alabama Farmers Federation, a.k.a. ALFA
2. Alabama, State of
3. Alabama State University, the Board of Trustees for
4. Anderson, Cezanne
5. Anderson, Rochester
6. Anderson, Stella
7. Bailey, Dennis
8. Baker, Locy
9. Ball, Ivy Rose
10. Ball, Miranda
11. Bass, Dr. Jonathan
12. Bell, Dr. Michael
13. Bentley, Robert, in his official capacity as Governor
14. Berryman, Cannon
15. Berryman, Slade

16. Berryman, Tyler
17. Bethay, John D., III
18. Blacksher, James U.
19. Bolling, Frederic A.
20. Brewer, Hon. Albert
21. Brooks, Michael
22. Brooks, Michael Raymond
23. Brunori, David
24. Chachkin, Norman
25. Crawley, Oscar
26. Crutcher, Buford
27. Copeland, Franco, Screws & Gill, P.A.
28. Dean, Elton
29. Edington, Robert
30. Ellis, Aubrey
31. Erdreich, Ben
32. Escalona, Elizabeth Prim Formby
33. Figures, Thomas

34. Flynt, Dr. Wayne
35. Frederick, Dr. Jeff
36. Gray, Fred
37. Gray, Jerome
38. Green, Alfreda Warner
39. Gregory, Stan
40. Hamill, Susan Pace
41. Harris, Richele T.
42. Harris, Robert
43. Harvey, Dr. Ira
44. Hodge, Taylor
45. Holliday, Shannon L.
46. Hubbard, Hon. Mike
47. Hubbard, Wiggins, McIlwain, & Brakefield, P.C.
48. Hubbert, Dr. Paul
49. Johnstone, Hon. Douglas
50. Junkins, Bobby
51. Kelly, Boyd

52. Key, Dewayne
53. King, Troy, formerly Attorney General of Alabama
54. Knight, Hon. John
55. Lemak, Lawrence
56. Little, Hon. Ted
57. Lynch, India
58. Lynch, Shawn King
59. Magee, Julie P., in her official capacity as Commissioner of Revenue
60. Manley, Richard
61. Marsh, Hon. Delbert
62. Maynard Cooper & Gale PC
63. McCormick, Gregg M.
64. McIlwain, Christopher L.
65. McKenzie, Dr. Fannie
66. McKiven, Dr. Henry
67. McMillan, Hon. George
68. Menefee, Larry T.
69. Miller, Tony G.

70. Mitchell, James L.

71. Moltz, Evan P.

72. Nabers, Drayton, Jr.

73. Neiman, John C., Jr.

74. Norrell, Dr. Robert

75. Ormond, Barbara L.

76. Ormond, Zekeiah

77. Parker, William G., Jr.

78. Pearson, Hon. Richmond

79. Perry, David A.

80. Pride, Wendell

81. Pride, Wendell, Jr.

82. Primm, Dr. Fred

83. Quick, Gary

84. Rigney, Douglas

85. Riley, Bob, formerly in his official capacity as Governor

86. Rumberger, Kirk & Caldwell, P.A., P.C.

87. Russell, Tim, formerly in his official capacity as Commissioner of Revenue

88. Sawyer, Kathy E.

89. Segall, Robert D.

90. Smith, Hon. Lynwood C.

91. Spence, E. Berton

92. Stewart, Dr. Keith

93. Stewart, Dr. William

94. Still, Edward

95. Strange, Luther, Attorney General of Alabama

96. Sullivan, Dr. Daniel J.

97. Tally, John B.

98. Thagard, Thomas W., III

99. Thomas, Kenneth L.

100. Thomas, Means, Gillis & Seay P.C.

101. Thornton, Dr. J. Mills

102. Waggoner, Hon. James Thomas, Jr.

103. White, Dr. Dewey, Jr.

104. Wiggins, Hon. Marvin

105. Williams, Christopher J.

106. Young, Herbert

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request the opportunity to present oral argument. This is a case of great public importance, involving review of over 800 pages of findings of fact and conclusions of law made by the district court following over fifteen days of trial testimony. While the issues presented on appeal are fairly straightforward, oral argument would assist this Court in focusing on the relevant facts and questions of law.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS . . . . C1 of 7

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CITATIONS iv

TABLE of RECORD REFERENCES in the BRIEF ix

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW. 3

B. STATEMENT OF FACTS 5

1. Facts Relating To Purposeful Racial Discrimination in the Enactment of the Six Constitutional Provisions. 6

a. *Antebellum Alabama*. 6

b. *Civil War and Reconstruction*. 7

c. *Redemption and the 1875 Constitution*. 9

d. *1875 to 1901*. 12

e. *The 1901 Constitution*. 14

f. *1901 to 1954*. 18

g. *School desegregation, voting rights, and Amendments*

325 and 373. 20

2. Facts Relating To the Continuing Adverse Racial Effects of the Six Constitutional Provisions. 36

C. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW 43

SUMMARY OF THE ARGUMENT 44

ARGUMENT 47

I. THE DISTRICT COURT MISAPPLIED THE CONTROLLING CASELAW TO ITS SUBSIDIARY FINDINGS OF FACT WHEN IT CONCLUDED THERE WAS NO RACIALLY DISCRIMINATORY INTENT IN THE ENACTMENT OF AMENDMENTS 325 AND 373 48

A. *When the objective* Arlington Heights *factors are applied to the district court's findings of fact, an ultimate conclusion of intentional discrimination is unavoidable.* 50

B. *The district court ignored direct evidence of racially discriminatory intent contained in its findings of fact*. 59

C. *The district court failed to consider legislators' awareness of the racially discriminatory consequences of Amendments 325 and 373*. 61

D. *The district court committed legal error when it concluded that, notwithstanding Governor Wallace's use of intentionally discriminatory tactics to ensure passage of Amendments 325 and 373, plaintiffs were required to prove that the Governor and the representatives of Black Belt landowners acted with personal racial animus*. 66

II. THE DISTRICT COURT ERRONEOUSLY APPLIED THE PATTERN-AND-PRACTICE STANDARD OF *RODRIGUEZ* TO ASSESS CONTINUING ADVERSE EFFECTS INSTEAD OF THE FOCUSED CAUSAL EFFECTS STANDARD OF *HUNTER V. UNDERWOOD*. 71

III. THE DISTRICT COURT APPLIED THE SAME ERRONEOUS LEGAL STANDARD WHEN IT CONCLUDED THAT, STANDING ALONE, SECTIONS 214, 215, 216, AND 269 HAVE NO CONTINUING ADVERSE RACIAL IMPACT. 77

IV. THE EQUAL PROTECTION STANDARDS OF *UNITED STATES V. FORDICE* APPLY FULLY TO THIS CASE, BECAUSE AMENDMENTS 325 AND 373 WERE ENACTED WITH THE PURPOSE AND HAVE THE EFFECT OF PERPETUATING *DE JURE* SCHOOL SEGREGATION IN THE BLACK BELT. 82

CONCLUSION 87

CERTIFICATE OF COMPLIANCE 89

CERTIFICATE OF SERVICE 90

TABLE OF CITATIONS

Cases:

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) . 46, 49-52, 58, 69, 73

Barber v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, 778 F.2d 750 (11th Cir.1985) 43

Brooks v. Miller, 158 F.3d 1230 (11thCir. 1998) 65

Brown v. Board of Education, 347 U.S. 483 (1954) 20, 21

Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir.1999) 82

City of Mobile v. Bolden, 446 U.S. 55 (1980) 45, 51, 52

Cooper–Houston v. Southern Ry. Co., 37 F.3d 603 (11th Cir.1994) 44

Cramer v. United States, 325 U.S. 1 (1971) 51

Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33 (1971) 27

E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) 44, 69, 75

Ferrill v. Parker Group, Inc., 168 F.3d 468 (11th Cir.1999) 69, 71

Freeman v. Pitts, 503 U.S. 467 (1992) 74

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 69

Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276 (11th Cir. 2006) . . 64, 69

Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325 (11th Cir. 2005) 43

Hunter v. Underwood, 471 U.S. 222 (1985) 46, 56, 57, 70, 73, 74, 77

In re State of Alabama, No. l0-13866-H (11th Cir., Sept. 29, 2010) 5

Johnson v. DeSoto County Bd. of Comm'rs, 204 F.3d 1335 (11th Cir. 2000) . . . 82

Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir.) (en banc), cert. denied sub nom. *Johnson v. Bush*, 546 U.S. 1015 (2005) 82

Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc) . . . 57, 58

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 44, 78, 83

Knight v. Alabama, 458 F.Supp.2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007) 3, 4, 6, 11, 23, 79, 82, 86

Lawrence v. Texas, 539 U.S. 558 (2003) 70

Lodge v. Buxton, 639 F.2d 1358 (5th Cir. Unit B 1981), aff'd sub nom. *Rogers v.*

Lodge, 458 U.S. 613 (1982) 69

Louisville and Nashville Railroad Co. v. State, Montgomery County, Ala. Circuit Court (Apr. 5, 1967) 41

Loving v. Virginia, 388 U.S. 1 (1967) 70

McCarthy v. Jones, 449 F.Supp. 480 (S.D.Ala.1978) 32

McMillan v. Escambia County, 638 F.2d 1239 (5th Cir.1981) 70

Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) 51, 61

Pullman–Standard v. Swint, 456 U.S. 273 (1982) 43

Reynolds v. Sims, 373 U.S. 533 (1964) 24

Reynolds v. Sims, 377 U.S. 533 (1964) 24

San Antonio Independent School District v. Rodriguez, 411 U.S.1 (1973) . 46, 72, 73, 75

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) . . 27, 71

United States v. Fordice, 505 U.S. 717 (1992) 2, 28, 47, 82-84, 87

United States v. Housing Authority of the City of Chickasaw, 504 F.Supp. 716 (S.D.Ala.1980) 69

United States v. Yonkers, 837 F.2d 1181 (2d Cir.1987) 64

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 75

Weissinger v. Boswell, 330 F.Supp. 615 (M.D. Ala.1971) (3-judge court) . 26, 33, 60, 65

Williams v. City of Dothan, 745 F.2d 1406 (11th Cir. 1984) 69

Constitutions and Statutes:

1891 Apportionment Act, No. 250, 1890-91 Acts of Alabama 13, 18, 78, 81

28 U.S.C. § 1291 1

Constitution of Alabama (1819) 7, 8, 65

Constitution of Alabama (1861) 7, 8

Constitution of Alabama (1865) 8

Constitution of Alabama (1868) 8

Constitution of Alabama (1875) 9-12, 14-16, 44, 48, 53, 57, 66, 76, 77

Constitution of Alabama (1901) . . 14, 17-20, 44, 45, 48, 54, 57, 66, 76, 77, 79, 85

Constitution of Alabama (1901), Amendment 325 . . . 3, 20, 23, 24, 33-36, 41, 45, 48, 49, 51, 52, 54-56, 58, 59, 61, 62, 64-69, 71, 76, 80, 82, 85, 86, 88

Constitution of Alabama (1901), Amendment 373 . . . 3, 20, 35, 36, 41, 45, 48, 49, 52, 54-56, 58, 59, 61, 65-69, 71, 76, 80, 82, 85, 86, 88

Constitution of Alabama § 182 (1901) 74, 77

Constitution of Alabama § 214 (1901) 3, 35, 77, 78, 80, 86

Constitution of Alabama § 215 (1901) 3, 35, 77, 78, 80, 86

Constitution of Alabama § 216 (1901) 3, 35, 77, 78, 80, 86

Constitution of Alabama § 217 (1901) 36, 68

Constitution of Alabama § 269 (1901) 3, 16, 35, 77, 78, 80, 86

Constitution of the United States, Amendment XIV . 1, 2, 4, 45, 47, 50, 57, 66, 67, 73, 76, 87

No. 1418, 1971 Acts of Alabama 27

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. 1, 2, 4, 45, 47, 82, 87

Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. 48, 67

Rules:

Rule 32(a)(7)(B), Fed.R.App.P. 89

Rule 52(a), Fed.R.Civ.P. 43

Other Authorities:

James Blacksher, Edward Still et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008) 79

JEFF FREDERICK, STAND UP FOR ALABAMA: GOVERNOR GEORGE WALLACE (Tuscaloosa: University of Alabama Press, 2007). 26

TABLE of RECORD REFERENCES in the BRIEF

Brief Page #		Docket #
3-4, 6	Complaint	1
4, 5, 10, 14, 19-21, 25, 29, 32, 36, 37, 40, 53-55, 87, 88	Corrected Memorandum of Opinion, Part 1	296
4	Memorandum Opinion and Order Denying Motion To Dismiss	35
4	Order Denying Plaintiffs' Motion For Partial Summary Judgment, etc.	57
5	Order Granting and Denying in Part Defendants' Motion For Judgment on the Pleadings	126
5	Order Denying Defendants' Motion For Summary Judgment	193
5, 23, 56	Trial Transcript (proceedings held 8/3/10)	252
5	Final Judgment	294
passim	Corrected Memorandum of Opinion, Part 2	296-1
5	Plaintiffs' Notice of Appeal	297
14	Trial Transcript (proceedings held 3/21/11)	257
23, 56	Trial Transcript (proceedings held 3/22/11)	258
56, 64	Trial Transcript (proceedings held 3/28/11)	261
56	Trial Transcript (proceedings held 4/4/11)	265

62	Trial Transcript (proceedings held 4/5/11)	266
63, 64, 80, 81	Trial Transcript (proceedings held 4/18/11)	270
80, 81, 86, 87	Trial Transcript (proceedings held 3/29/11)	262
81	Trial Transcript (proceedings held 3/31/11)	264
82	Trial Transcript (proceedings held 3/30/11)	263
39	What-if Analyses	PX 698
55	Department of Revenue Current Use Data Set	PX 387
56, 58	Deposition of Dr. J. Mills Thornton	PX 695
56	Declaration of Dr. J. Wayne Flynt	PX 10
56	Expert Report of Dr. Robert J. Norrell	PX 4
56	Declaration of Dr. Henry M. McKiven, Jr.	PX 16
56	Expert Report of Dr. Jeff Frederick	PX 11
81	AASB Property Tax Chart 1988-2008	PX 563

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal under 28 U.S.C. § 1291, to review the district court's October 21, 2011, final judgment in favor of defendants on all issues.

STATEMENT OF THE ISSUES

1. Do the district court's findings of fact establish intentional discrimination that violates the Equal Protection Clause and Title VI of the Civil Rights Act when the controlling case law is applied correctly to those findings of fact?

a. Did the district court misapply the controlling legal standards for determining whether the 1972 and 1978 state constitutional amendments were enacted for racially invidious purposes, and do the district court's subsidiary findings of fact establish racially discriminatory intent as a matter of law?

b. In light of the district court's subsidiary findings of fact and the extensive direct, circumstantial, and expert evidence supporting those findings, are the district court's ultimate findings of fact that the 1972 and 1978 amendments were not enacted for racially discriminatory purposes clearly erroneous?

c. Did the district court apply the wrong legal standard for determining whether the specifically identified, racially motivated state constitutional provisions still have their intended racially discriminatory effects?

d. If the correct legal standard is applied to the district court's subsidiary findings of fact and the evidence supporting those facts, did the district court err when it concluded that plaintiffs have not proven a constitutionally significant adverse impact on any suspect class?

2. Did the district court err in concluding that the Fourteenth Amendment standards set out in *United States v. Fordice,* 505 U.S. 717 (1992), are not applicable to an analysis of the issues in this action?

STATEMENT OF THE CASE

This case is about six provisions in the Constitution of Alabama that perpetuate a Black Belt scheme to restrict revenues for black students that goes all the way back to 1875. After a full trial on the merits, the district court made findings of fact that four sections in the Alabama Constitution of 1901 were intended to shield white landowners in the Black Belt from being taxed to pay for black schools. But it concluded that, because constitutional amendments adopted in 1972 and 1978 were motivated by the desire of Black Belt whites to preserve their historically low property taxes, their use of racially motivated tactics to achieve this financial objective did not violate Title VI of the Civil Rights Act or the Equal Protection Clause. The court made fact findings that all six provisions still combine as intended to cripple the ability of the rural, nearly all-black public

school systems in the Black Belt to raise local revenues. But it held that this did not satisfy the requirement of showing continuing adverse effects, because most black students now attend urban schools with higher tax bases, so that, on a statewide per-capita basis, black students are harmed little more than are white students.

A. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Plaintiffs, black school children in Sumter County, a majority-black rural county in Alabama's Black Belt, and black and white school children in Lawrence County, a majority-white rural county in north Alabama, commenced this action on March 13, 2008. Doc. 1. The complaint explained that the plaintiff K-12 students were acting on the invitation of the district court and this Court in *Knight v. Alabama*, 458 F.Supp.2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir.), *cert. denied*, 127 S.Ct. 3014 (2007), which held that the same six property tax restrictions challenged in this action had racially discriminatory purposes, but that their continuing discriminatory effects were too tenuously related to higher education to afford relief in Alabama's higher education desegregation case. Doc. 1 at 1-4. Plaintiffs here alleged that §§ 214, 215, 216, and 269 in the 1901 Alabama Constitution and Amendments 325 and 373, adopted in 1972 and 1978, violate the rights of plaintiffs and other black and white students in Alabama's

public K-12 schools guaranteed by Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The complaint emphasized the narrow judicial relief plaintiffs were seeking:

> The sole purposes of the instant action are to obtain a declaratory judgment that the property tax restrictions in the Alabama Constitution this Court has already found to be purposefully discriminatory violate Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq., and the Constitution of the United States and to seek a prohibitory injunction against their future enforcement. Plaintiffs do not ask this Court to oversee reform of Alabama's property tax system, its system for raising revenue for public education, or the adequacy of its funding of the system of public education. As stated by the Alabama Supreme Court and the U.S. Court of Appeals, tax reform and the provision of adequate education funding are the responsibility of the legislative branch of government. If this Court grants the relief requested herein, the Governor and Legislature of Alabama will be able to carry out these vital legislative functions free of the purposefully racially discriminatory barriers placed in the state constitution.

Doc. 1 at 4-5 (quoted in part, Doc. 296 at 41).

The district court denied defendants' motion to dismiss, Doc. 35, and denied plaintiffs' motion for partial summary judgment that sought to bind defendants to the *Knight v. Alabama* findings of fact under principles of collateral estoppel or issue preclusion, Doc. 57. On December 22, 2009, the district court dismissed plaintiffs' Fourteenth Amendment, but not their Title VI, claims against the State of Alabama and denied defendants' motion for judgment on the pleadings with

respect to the remaining issues and defendants. Doc. 126. After discovery had been completed, the district court on July 29, 2010, denied defendants' motion for summary judgment. Doc. 193. Defendants then filed a petition for writ of mandamus in this Court seeking to dismiss this action for lack of subject-matter jurisdiction, which this Court denied. *In re State of Alabama*, No. l0-13866-H (11th Cir., Sept. 29, 2010).

The district court heard the trial testimony of Dr. Robert J. Norrell, one of plaintiffs' five expert historians, on August 3, 2010, before Dr. Norrell left for a year of teaching at a German university. Doc. 252. Thereafter, the court held fifteen days of trial between March 21, 2011, and April 19, 2011. Docs. 257-71. The district court's judgment was entered October 21, 2011, and a corrected opinion was filed *nunc pro tunc* November 7, 2011. Docs. 294, 296, and 296-1.[1] Plaintiffs filed their notice of appeal on November 18, 2011. Doc. 297.

B. Statement of Facts

Almost all of the facts summarized below are taken from the district court's findings of fact.

Alabama's state and local property taxes are the lowest of those in all fifty

---

[1] The corrected opinion was docketed in two parts, which are numbered Doc. 296 and Doc. 296-1. The citations to the opinion in this brief will use the numbers at the bottom of the page, not the docket page numbers at the top.

states. Doc 1 at 20 (citing *Knight v. Alabama*, 458 F.Supp.2d at 1297). The district court's extensive findings of fact show why this is no accident. From the end of Reconstruction to the present, white landowners in Alabama's Black Belt have succeeded in preventing their once rich cotton plantations, now mostly timber plantations, from being taxed to pay for the education of black children.

> Indeed, racism, and the resulting determination to maintain the politics of "white supremacy" at all costs, has obstructed educational progress in Alabama since the Civil War. The result has been a shamefully neglected and **grossly underfunded** public school system. However, **no specific group has historically suffered more** from Alabama's lack of an equitable and adequate public school system **than African-Americans**. . . .

Doc. 296-1 at 457 (emphasis added).

1. Facts Relating To Purposeful Racial Discrimination in the Enactment of the Six Constitutional Provisions.

The district court introduced its findings of fact with this caveat:

> The State Constitutional provisions challenged in this action cannot simply be carved out and viewed in isolation. The past foreshadows the present, and old problems are presented in new guises. Proper analysis, therefore, requires an understanding of Alabama's various approaches to educating its people, and a context-based examination of the substantive changes made. Such an examination naturally begins with the founding of the State.

Doc. 296-1 at 457-58. The findings of fact go on to explore in detail the history underlying the six challenged provisions.

a. *Antebellum Alabama*.

Before Reconstruction Alabama's Constitutions did not restrict property taxes. The 1819 Constitution "provided for a progressive 'tax system that actually made those who owned the most pay the most.'" Doc. 296-1 at 458 (footnote omitted). The Alabama Black Belt counties were the wealthiest counties in the United States, Doc. 296-1 at 463, and the slave tax paid by the Black Belt planters relieved yeoman farmers in the white counties from having to pay any taxes. Doc. 296-1 at 469-70.

The first statewide school fund was established by statute in 1854. Doc. 296-1 at 475. "It consolidated the Sixteenth Section funds for per capita distribution at the state level, and 'authorized each county to levy a one mill school tax on real and personal property *without the requirement of voter approval by referendum*.'" Doc. 296-1 at 477 (footnotes omitted) (emphasis by the district court). An 1832 statute made it a crime in Alabama to teach any black person, slave or free, to read and write. Doc. 296-1 at 477 (footnote omitted).

b. *Civil War and Reconstruction.*

Black Belt slaveowners persuaded white yeomen to support secession by pointing out that ending slavery would shift the tax burden onto their land. Doc. 296-1 at 478-79. The 1861 Secession Constitution of Alabama "like the 1819 Constitution, did not restrict the Legislature's plenary authority to regulate the

funding and operation of public education." Doc. 296-1 at 482 (footnote omitted). The Presidential Reconstruction Alabama Constitution of 1865 reapportioned the Legislature on the basis of total population, thus increasing the power of the Black Belt counties before the freedmen could vote. Doc. 296-1 at 486-87. "With regard to the issues raised in this case, the 1865 Presidential Reconstruction Constitution retained the education and taxation provisions of the 1819 and 1861 Constitutions. Doc. 296-1 at 788 (footnote omitted).

The Congressional Reconstruction Constitution of Alabama, adopted by convention in 1867 and ratified in 1868, enfranchised the freedmen and established the first centrally organized public school system in the state's history. Doc. 296-1 at 496-500. "Blacks then constituted at least forty-six percent of the population of Alabama." Doc. 296-1 at 499. "Taxes were increased 'significantly in order to fund education both for whites and newly emancipated blacks.' The 1868 Constitution required that all property be assessed on a uniform ad valorem basis." Doc. 296-1 at 501 (footnotes omitted). Even though the schools were racially segregated, the Republican-dominated State Board of Education made sure that the revenues it collected were distributed equally among white and black schools. Doc. 296-1 at 509. Whites were outraged both at the increased – and fair – property taxes and at their use to educate black children. "Tax assessors under

Republican control had 'no particular interest in protecting well-to-do white property holders, virtually none of whom were Republicans,' resulting in assessments that more closely reflected the full, fair market value of taxable property." Doc. 296-1 at 510 (footnotes omitted). "To say the least, that fact did not 'sit well' with white taxpayers, especially those who either had lost, or were on the verge of losing, their property to foreclosure or tax sale." Id. at 513-14 (footnote omitted).

> Whites also were vehemently opposed to education of the former slaves, believing that it undermined white supremacy and "implied equal status with whites." Former slaves were not deemed worthy of education. And whites deeply resented paying taxes . . . "to run *useless schools for the Freedmen*."
>
> Thus, black schools were firmly connected in the minds of whites to increased land taxes, wasteful government spending, official corruption, and "intense hostility, anger and violence from whites." As a consequence, black schools and educators became "the main object of white terrorism in the years between 1865 and 1875. Many black schools were burned, and many teachers threatened and terrorized, and a few were killed."

Doc. 296-1 at 512-15 (footnotes omitted) (emphasis by the district court).

c. *Redemption and the 1875 Constitution.*

The centralized, free, racially equal school system established by the Republican-controlled Reconstruction state government was short-lived.

> White Alabamians were able to "redeem" their state from the hated "Radical Republican" rule in the 1874 elections, regaining control of the Governor's mansion and both houses of the State

> Legislature, and most county offices to boot. The once-divided classes of Planters and small yeoman farmers united against "the two perceived villains of white Alabama history," the federal government and blacks, and formed an "all white alliance of the Democratic party" which became known as the "Conservative Democrats," consisting mostly of former Confederate officers, soldiers, sailors, and officeholders. Their common purposes coalesced around an unholy trinity: establish white supremacy; curb taxation; and abolish the Republican public education system.

Doc. 296-1 at 515-16 (footnotes omitted).

As soon as Conservative Democrats regained power, whites in the Black Belt proceeded to use control of their black voter majorities to dominate the majority-white counties in the state legislature. Doc. 296 at 79.

> With apportionment based upon total population, and whites in the populous Black Belt able to control the majority-black vote, a small number of whites were able to harness a hugely disproportionate share of power in state government. Indeed, the rise to power of the Conservative Democratic Party in the 1874 election cycle was also the rise to power of the Black Belt as a distinct political section, a position it maintained until well into the twentieth century.

Doc. 296-1 at 518-19 (footnotes omitted). The 1875 Redeemer Constitution of Alabama apportioned seats in the Legislature "based upon total population, a provision that obviously benefited the elite white classes of the populous Black Belt." Doc. 296-1 at 523 (footnote omitted). And it adopted caps on millage rates to protect Black Belt landowners.

> In order to obstruct black political officeholders from collecting substantial property taxes in the future, property tax restrictions, or

"caps," were for the first time embedded into the text of an Alabama constitution. . . .

. . . Although much of the 1875 Constitution and the historical context in which it was crafted indicates that it was an instrument dedicated to the establishment of white supremacy in the *general* sense, the property tax caps targeted blacks for a *specific* reason. **The property tax restrictions were intended to prevent the possibility that taxes could again be levied on the property of Alabama Planters in an onerous amount for the purpose of educating blacks.** "The now-dominant Conservative Democratic element, based heavily in the newly-powerful Black Belt, were unrelenting in their opposition to black education." The property tax caps reflected the intent of Black Belt Planters to keep blacks "tied to the land." . . . More broadly, however, white opposition to the education of the former slaves had many bases. It was perceived as a dangerous, "useless," and "illegitimate" use of State tax revenues: *one that whites feared might foster a sense of social equality between the races*.

. . . In other words, "the limits set on property taxes were *directly connected* to the opposition to black education." Judge Murphy had little difficulty reaching the same conclusion in his last *Knight* opinion. . . .

Doc. 296-1 at 525-28 (footnotes omitted) (citing *Knight v. Alabama*, 458 F. Supp.2d at 1283) (italicized emphases by the district court) (bold emphases added). The white counties understood that the millage caps would hurt their schools more than it would hurt white schools in the Black Belt. Doc. 296-1 at 532-33.

Nevertheless, the constitution was ratified on November 16, 1875, and the Black-Belt-led Conservative Democrats thereby secured "firm and irrevocable control of the state government." They did so by exploiting white outrage over the policies of the Radical Reconstruction government, and casting the blame for all the State had endured during the "tragic decade" of Reconstruction upon the descendents [sic] of African slaves. "[T]he memory of Reconstruction [was] powerful for . . . several generations in shaping attitudes about

> African-American political rights, about education, particularly education for black people. . . . [It was] very important . . . as a justification in the minds of conservative whites for hostility to taxation, in general."

Doc. 296-1 at 533 (footnotes omitted).

d. *1875 to 1901.*

The constitutional millage caps, however, provided only half the protection Black Belt plantation owners needed. They also needed to control the county tax assessors and "maintain very low assessments of property." Doc. 296-1 at 536 (footnote omitted). "White control of the black vote quelled fears that blacks would use their political voice to raise land taxes. The threat of the dreaded 'black tax assessor' could be eliminated." Doc. 296-1 at 535. "Land began to be assessed at much lower values than during Reconstruction, and some parcels escaped taxation altogether. 'In 1890, 57 percent of the property valued had escaped taxation. Ten years later . . . 65 percent of property went unassessed.'" Doc. 296-1 at 537 (footnotes omitted) (emphasis added). To replace state revenues lost from low property taxes, the state resorted to the brutal convict lease system, which "was in reality a reinvention of slavery, and a reinstitution of the Antebellum slave tax [that] allowed the State to continue discounting land as a significant source of revenue." Doc. 296-1 at 540-42.

The millage caps in the 1875 Constitution kept the white counties from

being able to raise sufficient local revenues for their schools. They resented the scheme that allocated state revenues on a per-capita basis disproportionately to the Black Belt counties, who were providing splendid schooling for their white children by diverting funds intended for black schools. Doc. 296-1 at 549. "Accordingly, poor whites outside the Black Belt, along with organized labor groups in Birmingham, began agitating for better educational opportunities for their children." Doc. 296-1 at 550 (footnotes omitted). But the politically powerful Black Belt whites blocked all attempts by the white counties to get around the constitutional millage caps and raise more school revenues. Doc. 296-1 at 550-54.

> [W]hite schools located in the areas with a large black population — and especially in the Black Belt, where whites might constitute as little as an eighth of the total population — were extremely well funded. Accordingly, the Black Belt counties had no incentive to seek further sources of revenue for education. "As the Black Belt politically dominated the white counties through the control of the Negro vote, the Black Belt also stood in the way of [additional] local taxation for the schools [in majority-white counties]."

Doc. 296-1 at 549 (footnotes omitted). The 1891 Apportionment Act legalized the diversion to white schools of state revenues intended for black schools. Doc. 296-1 at 546-49. The district court quoted Dr. Wayne Flynt's description of the white counties' plight:

> People who live in the hill country and wire grass [are] looking at

> stuff like this and say[ing], how come we own 20 acres of cotton land and we're paying our taxes, and people in Black Belt counties are not being assessed anything? Well, it happens to be the color of the tax assessor is white down in the Black Belt, and sympathetic to the planters and elected by the planters and protecting planter property. And that's fine and well and good, because white kids will go to school, anyway, using funds that are being paid from taxes in the hill country and the wire grass. Looks like a terribly flawed system.

Doc. 296-1 at 564 n.1185 (quoting Flynt, Doc. 257 at 167).

e. *The 1901 Constitution*.

"Having exhausted all avenues of either circumventing or amending the property tax restrictions embedded in the 1875 Constitution, 'supporters of public schools [became] convinced that a constitutional convention was necessary to establish in Alabama a broad program of public education.'" Doc. 296-1 at 553-54 (footnote omitted). After the Black Belt whites used their captive black vote to "count out" gubernatorial candidates supported by white and black populists in 1892 and 1894, Doc. 296 at 13, Doc. 296-1 at 559-65, the white counties realized that the only way to get out of their constitutional straightjacket was to disfranchise all the blacks. Doc. 296-1 at 570-71. But that could undercut the Black Belt's ability to control state government, so a compromise was worked out in the enabling act that would preserve continued Black Belt control of the Legislature and keep its property taxes low. "[R]epresentation in the State Legislature would continue to be based upon total population, even after the disfranchisement of

blacks; and, the millage rate restrictions placed upon ad valorem property taxes in the 1875 Constitution could not be removed, only lowered if possible. The last two of those conditions ensured continued Black Belt control of the Legislature, and, low property taxes." Doc. 296-1 at 576-77 (footnotes omitted). "Even after suppressing black civil and political rights by whatever means necessary for more than a quarter of a century, whites in the Black Belt retained the mindset that they must guard against black voting majorities — that they must not allow blacks to regain access to the ballot box and, thereby, to inflict upon whites the double blows of Radical Reconstruction: i.e., onerous property taxes imposed for the purpose of providing adequate funding for black public schools." Doc. 296-1 at 599-600 (footnote omitted).

The district court's findings of fact devote twelve pages reviewing the racism that permeated the 1901 constitutional convention before they conclude:

> Based upon a study of the entire text of the official proceedings of the 1901 Constitutional Convention, every secondary source to touch upon the subject, the testimony of every expert addressing the matter in this case, and the sound judgment of modern Alabama historians, there can be no doubt that the context within which the present constitution was framed was one saturated in white supremacy and the plenary hatred of a dispirited and downtrodden race of people. That historical truth must remain at the forefront in the mind of any reader passing upon the content of the 1901 Constitution. As Dr. Flynt testified, "you can't break it into chunks and say it's mainly about race, but [one particular piece] is not about race."

Doc. 296-1 at 591 (footnote omitted). The district court found that the "subjects [of taxation and education] were inextricably intertwined . . . ." Doc. 296-1 at 592 (footnote omitted). "Delegates to the 1901 Constitutional Convention, like the delegates to the 1875 Convention, were opposed to the education of black children, and firmly against the funding of black schools with white tax dollars." Doc. 296-1 at 585-86 (footnote omitted). The millage caps were retained at the same levels as those in the 1875 Constitution, except that the state millage cap was reduced from 7.5 to 6.5 mills. That one mill was moved to section 269 as an optional tax that could be levied by each county for school purposes. "It also should be noticed that this optional tax required, for the first time in Alabama history, a voter referendum, thus ensuring that only those who could vote (i.e., whites) had authority to raise taxes for education in their counties." Doc. 296-1 at 598 (footnote omitted). The district court then set out its ultimate finding of fact with respect to the 1901 millage caps:

> As in the Constitution of 1875, the state and local property tax restrictions were adopted for the purpose of protecting white taxpayers from the threats of "black rule" and increased taxation for the purpose of funding equitable and adequate educational opportunities and other social services important to blacks. Further, the property tax restrictions were incorporated with an assumption (a correct assumption, as it turned out) that per capita expenditures were nothing more than a guise, and that most of the funding for the education of black children would be diverted by local officials to white schools. **The optional county tax for education was no less**

> **discriminatory**. It was adopted only because blacks, disfranchised by every means conceivable under the 1901 Constitution, would be barred from the ballot boxes, and unable to vote in favor of taxes that might fund schools for their own children.

Doc. 296-1 at 601-02 (footnotes omitted) (emphasis added).

Black Belt leaders had to employ control of their black vote one last time to get the 1901 Constitution ratified. "Predictably, the campaign for ratification of the 1901 Constitution focused upon race, *and nothing but race*. The rallying cry for public confirmation of the delegates' dirty deeds was 'White supremacy, honest elections, a new constitution, one and inseparable.'" Doc. 296-1 at 616 (footnotes omitted) (emphasis by the district court). "[T]he margin of victory was 27,000 votes; and that margin was fraudulently provided by twelve counties in the Black Belt, 'where the overwhelming black majority [was] being asked to disfranchise themselves,' but nevertheless and incomprehensibly voted approximately 36,000 to 5,000 'in favor of their own disfranchisement.'" Doc. 296-1 at 616-17 (footnote omitted).

The Black Belt was able to tailor the 1901 Constitution to ensure its continued domination of the Alabama Legislature and its under-assessment of land for property taxes. First and foremost was

> the provision specifying that apportionment in the Legislature would continue to be based upon total population, even though overwhelming numbers of voters in the black majority counties would

> be disfranchised under the Constitution's complex suffrage provisions. As a consequence, a mere handful of elite whites in the majority-black counties would have grossly disproportionate representation in the State Legislature and, thereby, possess the power to protect and advance their sectional interests in state government. Further, and despite the fact that the 1901 Constitution required reapportionment of the Legislature following each decennial census, Black Belt legislators successfully blocked all attempts to enforce that mandate for more than sixty years.

Doc. 296-1 at 612 (footnotes omitted). By maintaining the 1875 millage caps on both state and local property taxes, "the property of the Black Belt Planter class continued to be shielded from meaningful taxation to provide revenue for needed social services to either blacks or poor whites — the most important service being, of course, public education." Doc. 296-1 at 613-14 (footnote omitted). And, by embedding the 1891 Apportionment Act in section 256 of the 1901 Constitution, the Black Belt delegates made sure that school revenues collected by the state and redistributed on a per-capita basis would continue to divert from their black schools much more funding for their white schools than was available to the majority-white counties. The district court found that "[t]he incorporation of the 1891 Apportionment Act into the organic law of the State was perhaps a harder blow to the education of African Americans than any other provision in the 1901 Constitution." Doc. 296-1 at 602.

f. *1901 to 1954*.

"Predictably, the State became more supportive of public education after blacks were disfranchised by the 1901 Constitution, and local government officials were constitutionally permitted to divert education funding for black schoolchildren to white schools." Doc. 296-1 at 620-21 (footnote omitted). But Alabama's "Educational Awakening," *id*., proved devastating to blacks. Doc. 296-1 at 624 (footnotes omitted). "Initially, advancements in public school funding came by way of higher local property taxes." Doc. 296-1 at 622 (footnote omitted). The Legislature established a statutory 60% assessment ratio in 1911, which was re-enacted in 1935 and widely ignored thereafter. Doc. 296 at 262, Doc 296-1 at 622. The Black Belt controlled the Legislature, and "[t]he governor, unwilling to challenge Black Belt planters and the powerful Farm Bureau, ignored the [Russell Sage Foundation] recommendation [to reform property taxes] and proposed gas and income taxes instead." *Id*. State revenues for schools were segregated from the general budget, an income tax was adopted in 1933, and a state sales tax was enacted in 1935. Doc. 296-1 at 623-24. A Minimum Program Fund was created, *id*., to redistribute growing state revenues that were collected mostly outside the Black Belt to local school systems based on the number of students (both black and white) and their assessed property tax bases. Doc. 296 at 153-55.

Black Belt legislators repeatedly blocked the efforts of other legislators and

Alabama governors to force property assessments in the Black Belt counties to the level of assessments in the rest of the state. Doc. 296 at 144-45, Doc. 296-1 at 623 n.1370, 627. The public utilities and railway companies, whose property was assessed by the State Revenue Department at levels closer to the statutory 60 percent assessment ratio, won state court judgments declaring their assessments unfair under the 1901 Constitution. Doc. 296 at 266-70.

g. *School desegregation, voting rights, and Amendments 325 and 373.*

Brown v. Board of Education, 347 U.S. 483 (1954), ushered in the Civil Rights Movement and provoked Alabama's official campaign of massive resistance to school desegregation, which was centered in the majority-black Black Belt counties. Doc. 296-1 at 625-30. Governor John Patterson, who was elected in 1958 on an anti-school desegregation platform and who was supported by Black Belt political leaders on that account, ran into a brick wall when his Revenue Commissioner, Harry Haden, attempted administratively to enforce property assessment equalization. Doc. 296 at 271-81. Haden "issued a Regulation directing county taxing authorities to assess all property subject to taxation at thirty percent of its fair and reasonable market value." Doc. 296 at 274. But the powerful Black Belt legislators "had apoplexy," id. at 276. "Anti-property tax legislators launched a filibuster that stopped the general appropriation bill.

Filibuster participants included the Black Belt leader J. Roland Cooper; Walter Givhan, a veteran Farm Bureau, Citizens Council, and Black Belt power-wielder; and Bob Kendall, a frequent Black Belt supporter." Doc. 296 at 278 (citation omitted). "According to Patterson, the leader who most effectively represented anti-equalization interests was Dallas County's Walter Givhan." *Id*. at 279 (citation omitted). Governor Patterson was forced to back down, and Haden's regulation was withdrawn. Doc. 296 at 279-80 (citation omitted).

After *Brown v. Board of Education,* 347 U.S. 483 (1954), "Alabamians continued to support funding for public schools, but only so long as they remained segregated." Doc. 296-1 at 626. The two policies the state came to rely on most to block federally mandated school desegregation were freedom of choice and support for private schools. Doc. 296-1 at 628-29, 647-49. Federal court school desegregation and voting rights decrees reminded white Alabamians of "the first Reconstruction, [when] Alabama defeated 'the two perceived villains of white Alabama history[:] the federal government and blacks.'" Doc. 296-1 at 631 (footnote omitted).

"George Wallace used whites' fear of a second reconstruction to his advantage in gaining office and advancing the interests of **his core constituency**; e.g., leaders in the Black Belt; the White Citizens' Council; the Alabama Farm

Bureau ("Farm Bureau") and **all true '[b]elievers in white supremacy**.'" Doc. 296-1 at 632-33 (footnote omitted) (emphases added). Wallace was elected to his first term as Governor in 1962 after being defeated by John Patterson and the Ku Klux Klan in 1958. "Wallace learned this lesson well, and, indeed, he would not be 'out-niggered' again." Doc. 296-1 at 634. "Federal judges were 'a frequent whipping boy of the governor. . . ." Doc. 296-1 at 639-40 (footnote omitted).

Wallace "was perhaps the State's most active participant in the promotion of private schools, encouraging 'white flight' from the public school system." Doc. 296-1 at 638 (footnote omitted). "In the fall of 1963 . . . Wallace solicited support for the building of private schools before the State Farm Bureau annual meeting. And it is [this] event that suggests how he found support for his political efforts, his emerging political movement among the Farm Bureau interests who [were] composed heavily of the large landed interest in the Black Belt." Doc. 296-1 at 639 (footnote omitted).

> Governor Wallace maintained "a very close" and reciprocal relationship with the Alabama Farm Bureau (the precursor of "ALFA"), a powerful lobbying organization that was **the political arm of Planters in the Black Belt** and other very large farming operations in other parts of the State. The Farm Bureau promoted Governor Wallace in his various campaigns, both inside and outside the state, and supported his legislative agenda, and Wallace returned the favors by using his political muscle to support the Farm Bureau's interests. Indeed, **the Farm Bureau enjoyed some of its most powerful influence during the Wallace years**. Farm Bureau

> President J.D. Hays of Madison County considered George Wallace a "hopeless" candidate for President of the United States, "but that wasn't the point," Hays noted in explaining his support of Wallace's presidential run. "I was sharpening my plow in Alabama. It was well taken because he served many years as governor." Dr. Flynt interpreted this statement to mean essentially: "I aligned myself with the racially-discriminatory governor with the **racially-discriminatory policies so that I could accomplish my agenda** in Alabama because of his great popularity."

Doc. 296-1 at 642-43 (footnotes omitted) (emphases added). Both the Farm Bureau and Wallace "were fiercely opposed to tax increases," Doc. 296-1 at 643, and they would use the explosive issues of race to safeguard their historical avoidance of property taxes. "Throughout the 1960s and '70s, [Wallace's] hallmark opposition to school desegregation, his rural county constituent base, and the growth of private school options for 'white flight' all contributed **the political capital that proved helpful in achieving his supporters' economic goals**." Doc. 296-1 at 643-44 (footnote omitted) (emphasis added).

The district court's review of the historical background of the events leading to adoption of Amendment 325 is captioned "**History repeating itself** — *Black Belt rule again threatened by the "Second Reconstruction*." Doc. 296-1 at 644 (all emphases by the district court). The district court first refers to the same confluence of events that Judge Murphy and the expert historians had labeled a "perfect storm," *Knight v. Alabama*, 458 F.Supp.2d at 1294; Flynt, Doc. 258 at 62;

Norrell, Doc. 252 at 80-81:

> The Supreme Court's decision in *Reynolds v. Sims*, [373 U.S. 533 (1964),] subsequent legislative reapportionment, the Civil Rights Acts of 1964 and 1965, the rise of the black vote, and fear of increased property taxes all combined to cause Black Belt Planters and legislators to fear that their section would again be subjected to "black rule," as it had been during Congressional Reconstruction.

Doc. 296-1 at 644 (footnote omitted). Macon County's Sam Engelhardt, who served in the Legislature until the late 1960s, had "[m]ixed motives of race and economics [that] guided his actions: specifically, his fear of the "nigger tax assessor.'" Doc. 296-1 at 646 (footnote omitted).

> Engelhardt's fear of an African-American tax assessor was not unique to him; virtually all white Alabamians who owned large tracts of agricultural or timberlands shared it. The apprehension was directly traceable to the experiences of those Black Belt Planter elites who had "redeemed" the state from "Radical" Reconstruction rule in 1874, and the increased property taxes that funded African-American schools during that period. Faced with the growing threat of a second Reconstruction, during which blacks would again gain political power, Black Belt whites were prepared to fortify their defenses against increased taxation.

Doc. 296-1 at 646-47 (footnote omitted).

The findings of fact then proceed to relate the "racial context of events leading up to enactment of Amendment 325." Doc. 296-1 at 647. Lurleen Wallace was elected Governor in 1966 as a "placeholder" for her husband, who at that time was constitutionally barred from serving a second consecutive term. Doc.

296-1 at 648.

> The legislature that met in 1967 was the first in the state's history to be fully reapportioned on a one-person-one-vote basis. Reapportionment brought many changes, not all of them for the better. Urban-rural division became the major base of conflict. The outnumbered Black Belt delegation found new allies in other rural legislators, sometimes joining them in fights against old alliance partners from Jefferson County who now worked with other urban interests. The Governors Wallace sided with the Black Belt-rural counties.

Doc. 296-1 at 657 n.1510 (citation omitted).

In early 1967 the L&N Railroad obtained a state court injunction ordering the State Department of Revenue to comply with the requirement that all property be assessed at the same ratio of fair market value. Doc. 296 at 281-82. In response, the Legislature's Joint Committee on Ad Valorem Taxation "recommended the establishment of a statewide reassessment program, lowering the unenforced [statutory] sixty percent maximum assessment rate to thirty percent. Thus began the legislative process that would culminate in Amendment 325." Doc. 296-1 at 659. A Farm Bureau proposal to adopt a classification system was defeated. Doc. 296-1 at 660. Instead, the 1967 statute "[c]app[ed] all property tax assessments at thirty percent of fair market value, and grant[ed] state and local tax officials wide discretion in the setting of ad valorem assessment rates. . . ." Doc. 296-1 at 660-61 (footnotes omitted). Federal court lawsuits that would lead to

Weissinger v. Boswell, 330 F.Supp. 615 (M.D. Ala.1971) (3-judge court), were commenced in 1967. Doc. 296 at 282-99.

Albert Brewer became Governor when Lurleen Wallace died in 1968, and in 1969 Brewer was able to get the Legislature to pass an education package that increased state revenues without addressing property taxes. Doc. 296-1 at 648-49. In the May 1970 Democratic primary runoff, George Wallace defeated Albert Brewer by "resort[ing] to some of the meanest and most explicit racial campaign tactics ever seen in Alabama." Doc. 296-1 at 649 (footnote omitted).

> It was "the nadir, in terms of racism and political campaigns in the state." Wallace attacked Brewer's increased education funding legislation, thereby "tapping into the . . . [white voters'] resentment . . . over what was happening to the public schools in the state."
>
> Wallace frequently linked his anti-taxation policy to the actions of the federal government, calling for votes "against further taxes for . . . federal schools." Indeed, 1970 campaign literature frequently linked "high taxes" with "the crisis in [the] public schools." In 1970, Wallace "became the anti-tax . . . candidate . . . ." Dr. Frederick testified that after the 1970 election, Wallace put aside explicit references to race and resorted to "code words" that had clear racial connotations for white Alabamians thereby tailoring his rhetoric toward a national constituency, as he prepared for another run at the office of President of the United States.

Doc. 296-1 at 650-51 (footnotes omitted).[2] Voters defeated Governor Brewer's

---

[2] Dr. Jeff Frederick is the author of the definitive study of George Wallace's career in Alabama politics, as opposed to national politics. JEFF FREDERICK, STAND UP FOR ALABAMA: GOVERNOR GEORGE WALLACE (Tuscaloosa: University of Alabama Press, 2007).

proposed income tax amendment for schools in the same November 1970 general election that returned George Wallace to the Governor's office. Doc. 296-1 at 655.

The Black Belt was the primary focus of U.S. Justice Department efforts to desegregate the public schools, and "Alabama relied upon various 'freedom of choice' plans to feign compliance with court desegregation orders." Doc. 296-1 at 647 (footnotes omitted). But in 1970, federal courts began to strike down freedom-of-choice plans.

> Led by Governor Wallace, whites, desperate and outraged by the reality of integrated schools, renewed their determination to defy *Brown*. By September 1971, approximately 25,000 white students, including most white students in the Black Belt, were attending private schools. With the threat of integrated schools lingering, **tax increases to benefit public education were unpopular, to say the least**.

Doc. 296-1 at 648 (footnotes omitted) (emphasis added).

> White hostility toward court-ordered busing was at a peak in 1971, the year of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). Beginning his second term in office in 1971, Governor Wallace responded to those decisions by **continuing to serve as the voice of the white supremacists** of the state, and crusading against integrated public schools. Wallace opposed busing in rhetoric and action, passed a pupil transfer bill known as "Act No. 1418," and made efforts to reopen segregated schools that had been closed by federal court orders as "private schools." "Essentially all of these evasive schemes — Teacher Choice, health and safety, Freedom of Choice, as it pivots towards whites, tuition grants for private schools — one by one the legislature of Alabama passe[d] them, and one by one the federal

> courts invalidate[d] them."

Doc. 296-1 at 651-52 (footnotes omitted) (emphasis added). The district court's findings of fact then proceed to describe how Governor Wallace explicitly linked federal court-ordered school desegregation with federal court-ordered property assessment equalization:

> In the midst of this tense racial environment, the three-judge federal court sitting in the Middle District of Alabama handed down its decision in the case of *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala.[, June 29,] 1971), . . . which required equalization of property assessments statewide. The Legislature was in regular session when the decision was announced, and urban representatives reacted immediately to the *Weissinger* decree by advancing bills to equalize assessments. Governor Wallace, however, yet again seized the opportunity to attack the federal courts. The day after the *Weissinger* decision was released, Wallace linked federal-court-ordered property-tax equalization with white opposition to school desegregation. . . .
>
> Two weeks after the *Weissinger* decision, Governor Wallace told private school patrons in Bibb County: "I think it's a horrible thing that you people have to pay taxes to support public schools. Then you have to dig in again to pay for quality education for your children in a private school." Wallace continued to link opposition to federal court school desegregation orders with resistance to increased school taxes. He repeatedly vowed to "veto any direct taxes" for schools, including any bill that would raise property taxes. . . .
>
> In a March 18, 1971 speech to the Alabama Education Association, Governor Wallace even more explicitly linked his opposition to increasing school revenues with his opposition to federally-mandated school desegregation. . . . He blamed public opposition to desegregation for the defeat of Governor Brewer's public school income tax amendment, **and for the defeat of local property tax proposals** called for by Brewer's local effort school legislation.

Doc. 296-1 at 652-56 (footnotes omitted) (emphasis added).

Two African Americans from Macon County in the Black Belt were elected to the House in 1970, and a federal court was poised to order further reapportionment of the Legislature, which legislators knew would both increase black representation and diminish the power of Black Belt whites in the Legislature. Doc. 296-1 at 656-57.

> As a result of federal court-ordered reapportionment, legislative power was already passing to urban areas, where there was much stronger support for property taxes, and where the millage rates already were higher than millage rates in rural areas. Blacks residing in the cities were becoming better organized politically, and more capable of making their influence felt in the Legislature. As successive legislative reapportionment plans increased the number of legislators from urban areas and decreased their counterparts from rural areas, **Black Belt whites relied more and more on Governor Wallace to defend their historical interests**.
>
> In short, when the Legislature was forced by the *Weissinger* decision to address property tax equalization, **more than just taxation was at issue**. Faced with the reality of integration, whites were fleeing the public school system, and **they were opposed to funding not only integrated schools, but schools that their children were not even attending**. Racial tensions were high, and the political powers that had "redeemed" the state a century before were once again threatened by the specter of "black rule."

Doc. 296-1 at 656-57 (footnotes omitted) (emphases added).

Governor Wallace immediately let legislators know he supported a property classification plan and would oppose an across-the-board assessment ratio as "a back door way of raising new revenue." Doc. 296-1 at 662 (footnote omitted). In

the1971 regular session, the Farm Bureau reintroduced its classification bill, while urban legislators proposed an across-the-board twenty-five percent assessment ratio, Doc. 296-1 at 663, which was the average assessment level in the state. Doc. 296 at 271. Wallace used "strongly worded . . . Populist rhetoric, attempt[ing] to bully the Legislature into passing the Farm Bureau's property tax classification bill. . . ." Doc. 296-1 at 664.

> I am calling for the Legislature to present to the voters of this state a proposed amendment to the Constitution which would bring about a classified system of property assessment. I feel that this should be offered to the voters to take the place of any across-the-board percentage figures that might be passed. *It is simply impossible under current law to provide a percentage factor which would retain the current level of revenue from the special interest groups and at the same time refrain from increasing property taxes for homeowners*.

Doc. 296-1 at 664 (footnote omitted) (emphasis by the district court).

The Legislature deadlocked, and the regular session ended in September 1971 "without passing either the general fund or education budgets, and leaving redistricting and property tax issues unresolved. Therefore, a special session was necessary. But at a news conference, Wallace said he would not call a special session until the legislative leaders reached agreement with his administration on property taxes." Doc. 296-1 at 664 (footnotes omitted).

Governor Wallace put the Legislature in a straightjacket. In a televised speech to the joint houses at the start of the November 15, 1971, special session, he

vowed to veto any bill that would result in increased property taxes, saying "that he wanted to keep basically the **same tax structure already in existence**, 'but somehow, equalize it.'" Doc. 296-1 at 667 (footnote omitted) (emphasis added). After the first November special session of the Legislature had finally adopted education and general fund budgets, Wallace called the second special session on November 30. *Id*. The Farm Bureau classification package passed the House but was blocked in the Senate by an urban filibuster, with Senator George Lewis Bailes of Jefferson County accusing the Farm Bureau of "just trying to write into law (de jure) what has been the practice (de facto) in Alabama **since reconstruction**." Doc. 296-1 at 668 (footnote omitted) (emphasis added). With the Senate deadlocked, "[i]t was apparent that the Wallace administration would need to be involved in any compromise solution to the ad valorem taxation question." Doc. 296-1 at 668 (footnote omitted). "Wallace angrily denounced" the filibustering senators, Doc. 296-1 at 669, in language containing familiar code words recalling his racist campaign the previous year:

> [A] **minority** group in the senate has filibustered and obstructed the [orderly] processes of the senate, and this group is composed of those who really **seek to continue to fight the governor's race in 1970**, rather than work for the good of the people of Alabama in 1971. They thought Wallace was defeated, but the people of Alabama were stronger than **national democrats**.

Doc. 296-1 at 669 (footnote omitted) (emphases added).

The Wallace administration asked Senator Bob Harris to draft a compromise bill. Doc. 296-1 at 669. Harris represented Morgan and Limestone Counties, whose large Tennessee Valley landowners had joined the Black Belt in resisting efforts to equalize property assessments. Doc. 296-1 at 658 n.1511. Harris' compromise would give each county tax assessor flexibility to establish different assessment ratios than those that applied statewide. Doc. 296-1 at 670. (This was the feature that later would be struck down as a rationally unjustifiable equal protection violation in *McCarthy v. Jones,* 449 F.Supp. 480, 484 (S.D.Ala.1978). Doc. 296 at 295-301.) Nevertheless, when the special session reconvened on January 5, 1972, the Farm Bureau demanded amendments to the Harris compromise bill, and "the Alabama Farm Bureau's forces in the Alabama Senate rammed through the bureau's classification-of-property plan on ad valorem taxation late Saturday night after shutting off debate with a cloture motion." Doc. 296-1 at 672 (footnote omitted). The House quickly concurred in the Senate bill during an unusual Sunday morning session. "As a result, not many members knew just what the bills they passed Sunday morning did, in detail." Doc. 296-1 at 673 (footnote omitted). A backup bill also passed that would set a statutory, uniform, thirty percent assessment ratio for all property statewide if the constitutional amendment was not ratified. Id. "All of the fact witnesses who appeared at trial

testified that they did not recall any discussion of race in the debate on Amendment 325." Doc. 296-1 at 677.

"[T]he Alabama Farm Bureau organized and orchestrated a statewide campaign that oversimplified and misled voters about the effects of the proposed amendment." Doc. 296-1 at 673-74. The Farm Bureau bill had strategically lumped homes in the same 15% assessment ratio classification with farm and timber land, so convincing voters to ratify the amendment and avoid the 30% assessment ratio fall-back was easy. Governor Wallace appeared in so many Farm Bureau commercials a little girl who saw the Governor on television said "look, mommy, it's the Farm Bureau man." Doc. 296-1 at 676 (footnote omitted). Amendment 325 was ratified by the voters on May 30, 1972. Id.

The *Weissinger* court gave the state several extensions of time to comply with its decree, because of difficulties local tax assessors encountered obtaining professional reappraisals of all property. As October 1, 1978, the final deadline for compliance, approached, "it became apparent that, even with Amendment 325 in place, assessment values of (and, therefore, the taxes due on) residential, farm, timberland, and commercial property would be far higher than they had been prior to the court's decision in *Weissinger*." Doc. 296-1 at 679 (footnote omitted). So, "the Farm Bureau and rural legislators launched another campaign to amend the

property tax provisions of the State Constitution yet again. To accomplish that objective, the Alabama Farm Bureau turned to one of the most reliable and pliable protectors of its interests in the State Legislature: Rick Manley, a Representative from a district including parts of Marengo and Hale counties, both among the traditional Black Belt counties." Doc. 296-1 at 680 (footnote omitted). On behalf of the Alabama Farm Bureau, Rep. Manley had failed in four previous regular sessions, including the 1978 regular session, to get the Legislature to amend Amendment 325 to lower the assessment ratio for farm and timber land and to have them appraised at their current use value, rather than at their fair market value. Manley was known as the "Father of the Lid Bill." Doc. 296-1 at 680.

Given this impasse, Governor Wallace took personal charge of the bills that would become Amendment 373 and its implementing statute. Wallace hired his own lawyers, met with Rep. Manley, and instructed them to meet with representatives of the Farm Bureau. Doc. 296-1 at 680-81. Stan Gregory, one of the lawyers hired by Wallace, testified that "the Governor himself was the 'ultimate decider' of what went into the bill." Doc. 296-1 at 681 (footnote omitted). Wallace waited until just five weeks before the 1978 state primary elections to call a special session to take up the Lid Bill, and he threatened to campaign against legislators who opposed him. Doc. 296-1 at 682 and n.1617.

The Lid Bill passed in the minimum time needed and was ratified by the voters as Amendment 373. Doc. 296-1 at 682-83.

Even though Governor Wallace was "almost solely responsible" for passage of Amendment 373, Doc. 296-1 at 683, the district court concluded that "Wallace's involvement was no longer necessarily a proxy for racism. By 1978, Wallace had begun to court, and to receive, support from black voters." Id. (footnotes omitted). The court further found that "[t]o the extent the amendment [373] was an extension of prior Alabama policy, it was born of Amendment 325, and not a child of Alabama's race-driven past. The legislators involved in the process of enacting Amendment 373 stressed in their testimony that the debate was one between urban and rural interests, not the politics of blacks versus whites." Doc. 296-1 at 684 (footnote omitted).

The district court summarized its findings of fact with respect to Sections 214, 215, 216, and 269 of the 1901 Alabama Constitution:

> As in the Constitution of 1875, the state and local property tax restrictions were adopted for the purpose of protecting white taxpayers from the threats of "black rule" and increased taxation for the purpose of funding equitable and adequate educational opportunities and other social services important to blacks. Further, the property tax restrictions were incorporated with an assumption (a correct assumption, as it turned out) that per capita expenditures were nothing more than a guise, and that most of the funding for the education of black children would be diverted by local officials to white schools. The optional county tax for education was no less

> discriminatory. It was adopted only because blacks, disfranchised by every means conceivable under the 1901 Constitution, would be barred from the ballot boxes, and unable to vote in favor of taxes that might fund schools for their own children.

Doc. 296-1 at 601-02 (footnotes omitted). "But," the district court wrote in its conclusions of law, "[plaintiffs] have not sustained their burden to show that the amendments adopted in the 1970s, and which reformed Section 217, were enacted because of a racial **animus**. Therefore, the court finds that there was no racially discriminatory intent in the enactment of Amendments 325 and 373, or in the current use statutes passed in 1982." Doc. 296-1 at 776 (emphasis added).

2. Facts Relating To the Continuing Adverse Racial Effects of the Six Constitutional Provisions.

The six constitutional provisions challenged in this action have their biggest impact on local school revenues, which are needed to pay for the facilities, materials, and services that state funds don't cover. "The unfunded mandates local school boards face include, but are not limited to, the costs of purchasing textbooks, maintenance of school facilities, acquiring technology equipment, and the expenses of meeting the special needs of 'at-risk' children. Doc. 296-1 at 690, 693 (footnotes omitted).

The twelve traditional Black Belt counties[3] plaintiffs used to measure continuing effects of purposeful discrimination, the counties in which the vast majority of African Americans once lived, now contain only 11% of all black residents of Alabama. Doc. 296-1 at 692. More than half (50.62%) of all black students in the state's 131 public school systems now attend the ten urban school systems with the largest enrollments. Doc. 296 at 139 n.287, Doc. 296-1 at 695.

There are fifteen majority-black school systems in the Black Belt. Doc. 296-1 at 692-93.

> A total of 33,534 black students were enrolled in the fifteen majority-black, Black Belt school systems during the 2009-10 academic year. Those students constituted 21.5% of the black students enrolled in the State's 36 majority-black school systems, and 12.9% of the total number of black students enrolled in all of the State's 131 school systems."

Doc. 296-1 at 694 (footnotes omitted). The district court found that those 33,534 Black Belt students were hit the hardest by the six challenged provisions in the Alabama Constitution. To begin with, "[t]he Black Belt is particularly hard-hit by poverty." Doc. 296-1 at 696. Statewide, African Americans have significantly lower incomes, higher poverty rates, and less valuable homes than do whites, Doc.

[3] "Those counties are Barbour, Bullock, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Perry, Pickens, Sumter, and Wilcox; and their respective locations within the State are depicted in the map on the facing page [44]." Doc. 296 at 45.

296 at 49, and "Alabama's black school children suffer from poverty at a much higher rate than Alabama's white students." Doc. 296-1 at 695-96. All eight of the school systems where over 90% of students were receiving reduced or free lunches are in the Black Belt. Doc. 296-1 at 697. By the factor of poverty alone, Alabama's underfunding of its public schools has a disparate impact on blacks.

> Due to the general socioeconomic conditions of Alabama's black citizens relative to the State's white citizens, and the undeniable linkage between poverty and literacy, any disparity in educational funding will likely have an adverse impact on black students, both in terms of their daily educational experience and in terms of their life outcomes.

Doc. 296-1 at 697 (footnote omitted).

But the constitutional millage caps and assessment restrictions were designed primarily to shield white landowners in the Black Belt from taxation and to restrict revenues for black students in the Black Belt. E.g., Doc. 296-1 at 656-57. So, as expected, those provisions have the greatest adverse impact on Black Belt counties.

> Alabama's majority-black counties have a significantly higher percentage of their land area subject to appraisal by "current use" methodologies than the State's non-majority-black counties. A mean of 74% of the land area of majority-black counties consisted of "current use" acreage in 2009, whereas the mean for non-majority-black counties was 57% of the land area.
>
> Based on this 2009 data, statewide, there is a direct and positive, statistically significant relationship between a county's racial makeup and the percentage of its land area subject to "current use"

appraisal methodologies. . . .

Doc. 296-1 at 699-700. But, the district court noted, "when the statistics are viewed statewide, the State's total black population does not tend to live in counties with a high proportion of 'current use' property." Doc. 296-1 at 700.

In light of the history behind the six constitutional provisions, it is not surprising that the extremely low under-valuation of farm and timber land overwhelmingly benefits whites. "The share of [current use] property owned by whites is significantly higher than the white percentage of the State's population. . . ." Doc. 296-1 at 701.

> While blacks accounted for 26.35% of the State's total population in 2009, they owned only about 3% of Alabama's agricultural acreage and 2% of its timber acreage. Whites owned almost 96% of the State's agricultural acreage and 89% of its timber acreage, while constituting about 71% of the total State population.
>
> The same disparity appears when comparing the number of farm owners or timber owners by race. Whites own 93% of the State's farms and 84% of its timber operations, while constituting 71% of Alabama's population. Blacks own 6% of the State's farms and 3% of its timber operations, while constituting 26.35% of Alabama's population. Persons of other races own the remainder of the farms and timber operations in Alabama.

Doc. 296-1 at 701-02 and n.1703 (footnotes and citations omitted). "The unequal distribution of 'current use' property by race is especially pronounced in the Black Belt." Doc. 296-1 at 702.

To demonstrate the continuing adverse effects of the six constitutional

provisions, plaintiffs' witness, Dr. Ira Harvey, prepared several "what-if" analyses, which, as the district court noted, "attempt[] to answer the question: "*What if the challenged provisions did not exist*?" Doc. 296-1 at 739 (emphasis by the district court). The most relevant of these what-if analyses are summarized in PX 698.[4] Here is a portion of the table that shows increased assessment values if the current use provision alone were eliminated, even if the different assessment ratios for the four property classifications set out in Amendment 373 were retained:

Rank	Name	Group	All Classes Total Assessed Value with "Current Use" Land @ Fair Market Value	Increase in Total Assessed Value Due to Current Use extinction	Percent Increase in total assessed value
1	Geneva	O	$339,362,681	$129,003,682	61.33%
2	Bullock	B	$127,012,186	$32,770,866	34.77%
3	Wilcox	B	$203,996,046	$49,982,546	32.45%
65	Madison	U	$4,571,986,566	$61,830,946	1.37%
66	Etowah	U	$1,023,338,466	$12,878,746	1.27%
67	Mobile	U	$5,221,584,928	$43,655,108	0.84%

An additional $32M of assessed property value makes a significant difference in thinly populated Bullock county. And here is a portion of the table that shows

[4] In PX 698, B = Black Belt county, O = other rural county, and U = urban county.

increases in assessment values if both the current use and separate classifications were eliminated and all property across the board were assessed at 30% of its fair market value (the statutory backup if Amendment 325 had not been ratified by the voters, Doc. 296-1 at 677, the ratio set in the 1959 Haden regulation, Doc. 296 at 274, and the ratio set in *Louisville and Nashville Railroad Co. v. State,* Montgomery County, Ala. Circuit Court (Apr. 5, 1967), id. at 282):

Rank	Name	Group	All Classes Total Value	Change in Assessed Value @ 30% of Fair Market Value for All Property	Percent Increase in Total Assessed Value
1	Geneva	O	$859,081,404	$648,722,405	308.39%
2	Bullock	B	$294,989,499	$200,748,179	213.02%
3	Wilcox	B	$474,348,298	$320,334,798	207.99%
65	Talladega	O	$2,367,541,498	$1,133,460,958	91.85%
66	Houston	U	$2,813,065,802	$1,336,907,362	90.57%
67	Montgomery	U	$6,539,751,297	$3,007,054,572	85.12%

Thus, without question, the **amount** of assessed values subject to property taxes has been drastically depressed by Amendments 325 and 373. Dr. Harvey's what-if analyses ranked the 67 counties by the percentage of assessed valuations they are losing as a result of those two amendments. These rankings demonstrate the particularly rural and Black Belt effects of Amendments 325 and 373.

But the district court thought these "what-if" analyses were "flawed." Doc. 296-1 at 740-41. Instead, the district court adopted defendants' position that, to show the requisite continuing adverse racial effects of the six constitutional provisions, Black Belt students and black students statewide must be lumped together and compared with all other counties and with white students statewide, taking into account all factors that may affect property taxes, including "the differing land areas, distribution of property types, and population sizes of each county, or the relative needs of each county to provide [public] services to its citizens." Id.

Thus the district court went on to make findings of fact, not about the **amount** schools are underfunded, but about the racial **distribution** of that underfunding across the state; not about the lost **amount** of local school revenues **caused by** the six challenged provisions, but about the "**existing inequality"** among counties and among blacks and whites **caused by** the many geographic and economic factors that are **not being challenged in this action**. Doc. 296-1 at 740-41. Not surprisingly, when all students in all Alabama school systems were lumped together in one pot, with most blacks now attending urban schools, black-white per-student differences tended to dissipate. Doc. 296-1 at 715, 718, 723-24, 732. The district court even did its own (irrelevant) distribution analysis of Dr.

Harvey's what-if figures and found, again not surprisingly, that eliminating the current use and different classification assessment ratios would improve the condition of Black Belt counties and black students, but would not eliminate their inequality measured against other counties. Doc. 296-1 at 742-43, 747, 750-51.

C. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

> Rule 52(a)[, Fed.R.Civ.P.,] broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.
>
> The Rule does not apply to conclusions of law. . . . [I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.

Pullman–Standard v. Swint, 456 U.S. 273, 287 (1982); accord, e.g., *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005) ("this Court can reverse a district court's finding of intentional discrimination *only* if the finding is clearly erroneous, is based on clearly erroneous subsidiary findings of fact, or is based on an erroneous view of the law") (quoting *Barber v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers*, 778 F.2d 750, 754 (11th Cir.1985)).

Where there is a fundamental inconsistency between the district court's ultimate findings of no intentional discrimination and several of its subsidiary

findings of fact, and/or those ultimate findings have been based on an erroneous view of controlling case law, the general rule of law is that "a remand is the proper course unless the record permits only one resolution of the factual issue." *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283-86 (11th Cir. 2000) (quoting *Cooper–Houston v. Southern Ry. Co.*, 37 F.3d 603, 604 (11th Cir.1994) (quoting *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331–32 (1974)).

SUMMARY OF THE ARGUMENT

The district court entered over 300 pages of findings of fact that described how caps on millage rates in the Alabama Constitution were enacted in 1875 and 1901 for the racially discriminatory purposes of preventing black majorities in the Black Belt counties from being able to raise local property tax revenues for their public schools and preventing black-white coalitions in the Legislature from raising state property taxes. From the 1870s to the 1970s, politically powerful white cotton and timber plantation owners in the Black Belt were able to maintain control of their county tax assessors and the malapportioned Alabama Legislature to keep their land from being assessed at more than a very small fraction of its fair market value.

When federal courts ordered re-enfranchisement of African Americans in the Black Belt, reapportionment of the Legislature, school desegregation, and

statewide equalization of property assessments, the ability of Black Belt whites to shield their land from being taxed to pay for schools attended by black children was threatened. During this time whites were fleeing the Black Belt public schools. Their representatives enlisted the segregationist political tactics of Governor George C. Wallace and the Alabama Farm Bureau to enact constitutional amendments in 1972 and 1978 that thwarted increasing efforts to enforce the uniform assessment requirement that had been in all of Alabama's constitutions since 1819. These amendments embedded the extremely low assessments of Black Belt farm and timber lands in the Alabama Constitution. They also preserved the complicated procedures for raising millage rates. As a result, the nearly all-black school systems in the Alabama Black Belt are today unable to raise the amounts of local school revenues needed to maintain and to operate their public schools.

The district court concluded that the millage caps in the 1901 Constitution were racially motivated. But it erroneously concluded that controlling case law of the Supreme Court and this Court prevented it from finding the invidious purpose behind the 1972 and 1978 amendments needed to prove violations of the Equal Protection Clause and Title VI of the Civil Rights Act. Specifically, the district court:

(a) misread a reference to "original sin" in *City of Mobile v. Bolden*,

446 U.S. 55, 74 (1980), as undermining the importance of the objective factors in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), which clearly reveal the discriminatory intent behind the challenged amendments;

(b) overlooked the direct evidence of invidious racial intent contained in its subsidiary findings of fact;

(c) failed to consider lawmakers' awareness of the current racially discriminatory consequences of the two amendments; and

(d) required proof of personal racial animus on the part of Governor Wallace and Black Belt representatives for employing intentionally discriminatory tactics when they pursued the economic objective of preventing their property taxes from increasing.

The district court then erroneously concluded that the severe loss of local school revenues in the Black Belt was not enough to prove continuing adverse racial effects of the challenged state constitutional provisions, even those provisions enacted in 1901 that were found to be racially motivated. It mistakenly thought it must apply the statewide, per-student analysis of *San Antonio Independent School District v. Rodriguez*, 411 U.S.1 (1973), instead of the causal relationship analysis of *Hunter v. Underwood*, 471 U.S. 222 (1985), which focuses on the injuries suffered by the targets of purposefully discriminatory state laws.

Because most black Alabamians have migrated out of the Black Belt and now reside in urban areas, the misapplied statewide weighted averages made it appear that white and black students were almost equally disadvantaged by Alabama's nationally lowest property taxes and overall underfunding of its public schools.

Finally, the district court misread this Court's precedents as foreclosing an issue that has never been addressed: Do the Fourteenth Amendment principles of *United States v. Fordice,* 505 U.S. 717 (1992), apply to K-12 public schools as well as to public higher education? *Fordice* held that, because higher education is not compulsory and is subject to student choice, state policies that can be traced to the *de jure* dual system, and that continue to foster racial segregation of schools by encouraging white students not to attend racially integrated schools, violate the Equal Protection Clause and Title VI unless they can be justified by sound educational practice. Those principles clearly apply to K-12 policies, such as the property tax restrictions challenged in this case, that lay at the heart of Alabama's long history of *de jure* school segregation, because they were enacted to encourage whites to choose private schools, and they continue to be powerful and educationally unsound disincentives for whites to return to underfunded public schools in the Black Belt and elsewhere in Alabama.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE CONTROLLING CASELAW TO ITS SUBSIDIARY FINDINGS OF FACT WHEN IT CONCLUDED THERE WAS NO RACIALLY DISCRIMINATORY INTENT IN THE ENACTMENT OF AMENDMENTS 325 AND 373 .

The district court found that in 1972 and 1978 white landowners in Alabama's Black Belt made use of Governor George C. Wallace's campaign of massive resistance to federally mandated school desegregation to entrench in the state constitution the scheme going all the way back to Reconstruction that shielded their property from taxes that would be used to pay for the education of black children. Doc. 296-1 at 775-76. Since 1875 they had used constitutional caps on millage rates and electoral control of the Legislature and county tax assessors illegally to assess their property far below its fair market value and to guard against potential re-enfranchisement of their majority-black populations. The district court found that the millage caps placed in the 1901 Constitution had the purpose of ensuring the ability of Black Belt whites to maintain these racially discriminatory practices. Doc. 296-1 at 773-76.

In the 1960s and 1970s, this complex Black Belt scheme was under severe attack. Federal courts ordered desegregation of their white and black schools, re-enfranchisement of blacks under the Voting Rights Act, reapportionment of the Black Belt-dominated Legislature, and an end to illegally low property assessments. Doc. 296-1 at 644. Just as whites in the Black Belt were fleeing their

public schools and a few African Americans were being elected to state legislative and local offices, the white landowners in the Black Belt, represented by the Alabama Farm Bureau, used Governor Wallace and his demagogic campaign against federally enforced equal rights for blacks to embed their ridiculously low property assessments in the Alabama Constitution. Doc. 296-1 at 775-76.

Notwithstanding these damning findings of fact, the district court reached the ultimate conclusion that the 1972 and 1978 constitutional amendments were not racially motivated. Doc. 296-1 at 776. It did so by misapplying the controlling Supreme Court case law in the following ways:

(1) The district court did not apply to its findings of fact the objective *Arlington Heights* factors, dismissing as "original sin" the long historical background and sequence of events that led to enactment of Amendments 325 and 373, and thus it did not give evidentiary weight to the unanimous expert opinions of five Alabama historians.

(2) The district court either overlooked or disregarded its findings of fact containing direct evidence of Governor Wallace's racially motivated linkage of property taxes with white opposition to federally ordered school desegregation.

(3) The district court failed to consider lawmakers' awareness of whites' opposition to taxes for racially integrated schools and the racially

discriminatory present consequences of these constitutional amendments, namely, the continued denial of local school revenues to Black Belt schools that were now nearly all black.

(4) Finally, the district court erroneously concluded that where the objective of white landowners was to preserve their racially motivated, historically low assessments of farm and timber land, their use of purposefully discriminatory tactics to achieve this financial objective did not violate the Equal Protection Clause absent proof that Governor Wallace and Farm Bureau officials acted with personal racial animus toward African Americans.

A. *When the objective* Arlington Heights *factors are applied to the district court's findings of fact, an ultimate conclusion of intentional discrimination is unavoidable.*

In the section of its opinion discussing the controlling principles of law, the district court correctly identified the *Arlington Heights* factors that must govern judicial inquiry about invidious intent behind the six challenged provisions in the Alabama Constitution: (1) the racial impact of those provisions, (2) the historical background of the enactments, "particularly if it reveals a series of official actions taken for invidious purposes," (3) the sequence or chain of events leading up to their enactment, (4) procedural or substantive departures from the norm, (5) contemporary statements by members of the decisionmaking body, and (6) "[i]n

some extraordinary instances" the trial testimony of lawmakers. Doc. 296-1 at 421-23 (quoting *Arlington Heights*, 429 U.S. at 266-68). The first five *Arlington Heights* factors rely on objective evidence, which is usually the most probative.

> 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 [(1977)]. 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 (1971) (Jackson, J.).

Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 n.24 (1979) (emphasis added). See also *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.").

The district court made detailed subsidiary findings of fact about the "Historical Context," Doc. 296-1 at 630, and the "racial context of events leading up to the enactment of Amendment 325." Id. at 647. It found that "[t]he determination of whites to prevent a second 'Reconstruction' and preserve the 'southern way of life' is significant in analyzing the 'flow of events' that led to the amendments challenged in this action." Id. at 632. But, apparently because of a reference to "original sin" in *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980),

Doc. 296-1 at 442, 795, the district court concluded that all its extensive fact findings based on the objective *Arlington Heights* factors should not be considered in reaching its ultimate conclusion about the racial motives for enacting Amendments 325 and 373. It concluded that, although "old sins cast long shadows," id. at 776, all of its findings of fact from 1819 to 1972 showed only "the general existence of racism [and were] not sufficient, alone, to show that particular constitutional provisions were enacted with a discriminatory intent." Id. With one stroke of the pen and a fixation on "original sin," the district court effectively held that the first five *Arlington Heights* evidentiary factors would not apply to its analysis, and that its exhaustive, "context-based examination" of Alabama's property tax history had no probative value. Doc. 296-1 at 457-58. Those objective findings of fact are not even discussed in its conclusions of law about Amendments 325 and 373. The district court explained why:

> Stated differently, the precedent that controls this court's decision in a case of this nature creates a secular theology devoid of the doctrine of original sin. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.") (Stewart, J., plurality opinion) (superseded by statute in non-relevant part).

Doc. 296-1 at 760 (footnote omitted).

This was clear legal error where the historical background, sequence of

events, substantive and procedural departures, contemporaneous statements, and racial impact set out in the district court's findings of fact show not merely "the general existence of racism," Doc. 296-1 at 776, but the racist design of the particular state constitutional amendments at issue in this case.

The historical background. The millage caps were first placed in the 1875 Redeemer Constitution, at the same time that whites in the Black Belt were gaining electoral control of their huge black majorities. Doc. 296-1 at 525-28. Property taxes collected by the state and redistributed to the counties on a per-capita basis were diverted from black schools to white schools in the Black Belt. Id. at 549-50. When fraudulent manipulation of the black vote was threatened in the 1890s by white populists, Black Belt whites agreed to disfranchise blacks on condition that the 1875 millage caps, discretionary apportionment of state school funds, and racially segregated schools would be entrenched in the 1901 Constitution. House and Senate districts would remain malapportioned to allow Black Belt politicians to control the Legislature. Doc. 296-1 at 576-77. For well over half the twentieth century Black Belt whites preserved the several components of their scheme for avoiding property taxes and were able to use their legislative dominance to keep their white schools well funded and their black schools deprived. Urban counties increasingly resented state school revenues collected by

the state being redistributed unfairly based on the Black Belt's refusal to equalize their property assessments, as required by the 1901 Constitution. Doc. 296 at 80-82, Doc. 296-1 at 620-30.

The sequence or chain of events leading to enactment of Amendments 325 and 373. Finally, federal courts began ordering desegregation of Black Belt schools, an end to Black Belt dominance of a malapportioned Legislature, the re-enfranchisement of black voter majorities in the Black Belt counties, and equalization of property assessments. Id. at 630-57. The impending end of their historical scheme renewed white Black Belt landowners' fear of the "dreaded black tax assessor." Id. at 535. Black Belt legislators and the Alabama Farm Bureau, representing their Black Belt constituencies, were able to thwart urban legislators' nearly successful efforts to equalize property assessments. They did so by taking advantage of Governor George Wallace and his popular campaign of massive resistance to school desegregation. Id. at 657-76. They embedded their historically low property assessments in the Alabama Constitution at the same time that nearly all whites in the Black Belt were fleeing the public schools, leaving behind underfunded public school systems that were almost entirely black. Id. at 656-57.

Procedural or substantive departures from the norm.

Substantively, since Alabama's founding in 1819, uniform fair market valuation of all taxable property had been the constitutional and statutory norm. Doc. 296-1 at 461, 488, Doc. 296 at 21-22, 259-66. Across-the-board, statewide assessment ratios of 60% were statutorily adopted in 1911 and 1935, were reduced to 30% (briefly) by Revenue Department regulations in 1959, Doc. 296 at 271-81, and by statute in 1967. Doc. 296 at 262-63, Doc. 296-1 at 660. Amendment 325 broke with over 150 years of Alabama law. Procedurally, Governor Wallace had to call two special sessions, both carefully timed for maximum pressure on legislators, to ensure enactment of Amendments 325 and 373. Doc. 296-1 at 664-73, 680-83.

Contemporary statements by members of the decisionmaking body. The district court's extensive review of contemporaneous statements by Governor Wallace, legislators, and Farm Bureau officials are summarized in the statement of facts, supra at pp. 21-32, and in Section I.B. of this brief, infra, addressing direct evidence of racially discriminatory motives.

The racial impact of Amendments 325 and 373. As a result, to this day, even when they are able to overcome the constitutional millage caps, African Americans in the Black Belt are left with little property value to which the millage rates can be applied, because farm and timber land is assessed at such low values. Using the district court's example, Doc. 296 at 196-97, the yield per mill of "good"

farm land and "average" timber land is only about $0.05 per mill per acre. If farm and timber land were assessed at 20% of its fair market value, as are other commercial properties in Alabama, based on a statewide average ratio of fair market value to current use value of 3.6, the farm and timber land in the district court's example would yield $0.36 per mill per acre. PX 387.

These findings of fact make a conclusion of intentional racial discrimination underlying the enactments of Amendments 325 and 373 inescapable. They reveal an unbroken and continuing official policy to shield white landowners in the Black Belt from having to pay for their black schools. No less than five history professors, all of them experts on the history of Alabama, expressed their unanimous opinion that this was the racially discriminatory official state policy that motivated the enactments of Amendments 325 and 373. Thornton, PX 695 at 211-12; Flynt, PX 10 at 22-23, Doc. 258 at 61-65; Norrell, PX 4 at 8, Doc. 252 at 80-83; McKiven, PX 16 at 16-17, Doc. 261 at 143-46; Frederick, PX 11 at 10-11, Doc. 265 at 65-118. The district court's findings of fact refer frequently to the testimony of these historians, but its conclusions of law do not mention them, even though the district court had acknowledged in its discussion of the controlling case law that " *Hunter v. Underwood* added the **often critical** evidentiary factor of expert historical testimony and opinions, which may shed considerable light upon

what the contemporaneous record divulges about the motivations behind challenged enactments. *Hunter v. Underwood*, 471 U.S. 222[, 228-29 (1985)]." Doc. 296-1 at 424 (emphasis added).

Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc), relied on by the district court, Doc. 296-1 at 760, actually contravenes its conclusion that past history and the sequence of events leading up to enactment of Amendments 325 and 373 ought not be considered. In *Johnson*, this Court took into account Florida's "long history [of criminal disenfranchisement], tracing back well before the Civil War." 405 F.3d at 1218-20. "Because the plaintiffs' Equal Protection claim hinges on the 1868 criminal disenfranchisement provision, we must examine the historical context in which that provision was adopted." Id. at 1218. Where in *Johnson* this Court found little or no evidence of intentional racial discrimination behind Florida's 1868 felon disfranchisement provision, id., the district court's findings here of racial motives for the enactment of millage caps in Alabama's 1875 and 1901 Constitutions and the under-assessment of Black Belt property are supported by overwhelming evidence. The *Johnson* plaintiffs conceded that the felon disfranchisement provision placed in the 1968 Florida Constitution "was not enacted with discriminatory intent," 405 F.3d at 1223 (footnote omitted), in stark contrast with the Lynch plaintiffs' contention, the great

weight of evidence, and the district court's subsidiary findings of fact that purposeful racial discrimination was employed to ram Amendments 325 and 373 through the Alabama Legislature. These amendments did not eliminate the taint of their "odious origins." 405 F.3d at 1223-25. Rather, Amendments 325 and 373 were tailored precisely to maintain the previously illegal under-assessment of farm and timber land, and they did not ameliorate the historically low local revenues for schools in the Black Belt. They were passed not just "shortly after the end of *de jure* segregation in education," 405 F.3d at 1226, but at exactly the same time that federal courts were ordering an end of freedom of choice in Alabama. And "the legislators who refused to desegregate the [Alabama] schools without a court order in the `1960s [and 1970s], most likely overlapped significantly with[, indeed, were the same as,] the legislators who passed the facially neutral education [property tax] system in the 1970s." Id.; Doc. 296-1 at 647-52.

The district court's mistaken belief that its peculiar concept of secular original sin prevented it from weighing the objective *Arlington Heights* factors is particularly perverse in this case, where the status quo Amendments 325 and 373 were designed to maintain is a racially motivated policy that has survived without interruption for over a century. This is the "direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the

amendments up to 1978," that Judge Murphy found in *Knight*, 458 F.Supp.2d at 1296, citing Professor Mills Thornton, PX 695 at 175-81. Implicit in the district court's reasoning here is the notion that an official policy to discriminate against African Americans will be more difficult to strike down the longer it lasts. Surely that cannot be. Rather, it is more imperative than ever that the burden of property tax penury be lifted from the black majorities in Alabama's Black Belt.

B. *The district court ignored direct evidence of racially discriminatory intent contained in its findings of fact.*

The district court concluded "there is no direct evidence in the record that *either* Amendment 325 or Amendment 373 was racially motivated." Doc. 296-1 at 761 (footnote omitted) (emphasis by the district court). This squarely conflicts with its finding that Governor Wallace made "overtly-racist appeals as a justification for Amendment 325," Doc. 296-1 at 742, some of which are set out in the district court's findings of fact.

> Wallace frequently linked his anti-taxation policy to the actions of the federal government, calling for votes "against further taxes for . . . federal schools." Indeed, 1970 campaign literature frequently linked "high taxes" with "the crisis in [the] public schools."

Doc. 296-1 at 650 (footnote omitted). In a March 18, 1971, speech to the Alabama Education Association Wallace said:

> [T]he public, as things now stand, "is simply turned off" on education and on educators [handwritten interlineation: as far as more taxes are

> concerned because HEW-Courts.] This is no guess or surmise, it is an actual documented fact – you recall quite vividly last year in November when the people of Alabama turned down overwhelmingly an income tax that would apply only to a few taxpayers in the State and that every county that has voted upon taxes for local schools has defeated them and even one county having voted to take off a tax that had been routinely accepted for a great number of years.

Doc. 296-1 at 655 n.1505. The *Weissinger v. Boswell* decision was entered on June 29, 1971. The district court found: "[t]he day after the *Weissinger* decision was released, Wallace linked federal-court-ordered property-tax equalization with white opposition to school desegregation." Doc. 296-1 at 653.

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

Doc. 296-1 at 653 (footnotes omitted) (emphases by the district court). The district court's conclusions of law define direct evidence as evidence that requires no inference or presumption to prove the existence of a fact. Doc. 296-1 at 761 n.1865 (citations omitted). The court did not explain why these statements by Governor Wallace do not satisfy that definition. Standing alone they are enough to make clearly erroneous the district court's conclusion that "the amendments ratified in 1972 and 1978 were not measures adopted for the purpose of depriving

black public school students of adequate funding for education." Doc. 296-1 at 771.

C. *The district court failed to consider legislators' awareness of the racially discriminatory consequences of Amendments 325 and 373.*

The district court made a finding of fact that "[f]aced with the reality of integration, whites were fleeing the public school system, and they were opposed to funding not only integrated schools, but schools that their children were not even attending." Doc. 296-1 at 657. Legislators had to be aware that "[w]ith the threat of integrated schools lingering, tax increases to benefit public education were unpopular, to say the least." Doc. 296-1 at 648. Legislators had to be aware of Governor Wallace's explicitly stated anti-school desegregation reasons for demanding passage of Amendment 325.

But the district court did not consider the lawmakers' awareness of the discriminatory consequences Amendment 325 would have on funding for the all-black schools in the Black Belt and integrated schools elsewhere in Alabama. Instead of focusing on the legislators' awareness of the Amendment's "*present impact*," Doc. 296-1 at 436 (emphasis by the district court), as required by *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 275 (1979), the district court mistakenly looked for evidence of legislators' awareness "of the

history," Doc. 296-1 at 440-41, or "the odious **origins**," id. at 443, of the property tax provisions they were modifying. (Bold emphases added.)

The district court referred to the testimony of white legislators that race was not discussed in the debates over Amendment 325, Doc. 296-1 at 676-78, 762-63 (footnotes omitted) (citing testimony of Rep. Ben Erdreich and Sen. Bob Harris), but it did not refer to their testimony about the present adverse racial consequences they were aware of. Rep. Erdreich admitted he was aware:

a. that Black Belt representatives still "had significant control of the House," Erdreich, Doc. 266 at 215,

b. that the Black Belt would lose more seats in future legislative reapportionments, id. at 216,

c. that more African Americans soon would be elected to local offices in the Black Belt, id.,

d. that Governor Wallace was urging resistance to desegregation decrees, id. at 217-18,

e. that Wallace was supported by whites in the Black Belt, id. at 218,

f. that some whites had left the public schools in the Black Belt and had "gone to academies," id.,

g. that most whites in Alabama "were against added revenues for

schools," id. at 219, and

h. that the Farm Bureau's classification bill would preserve low property assessments in the Black Belt, id.

Nor did the district court refer to Sen. Bob Harris' testimony that he was aware that large numbers of white children had left the public schools in the Black Belt, that Governor Wallace was supporting private schools for these white students, and that Wallace was not in favor of raising public school revenues. Harris, Doc. 270 at 215-16. Sen. Harris described what he called the "Black Belt mentality":

> That's -- the status quo, keep it like it is. Rural more than urban. And were there -- were there areas in which the, quote, black mentality, Black Belt mentality had racial insinuation? Probably. I don't doubt that. I mean, I'm sure some of the folks -- I'm sure if you went down there today, there's some folks from the Black Belt that have black orientation.

Id. at 237. Thus legislators were aware of both the adverse consequences for black school children in the Black Belt and the discriminatory intent of whites who wished to avoid being taxed to pay for racially integrated schools. "[P]laintiff[s] may demonstrate intentional discrimination if 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)).

The district court's conclusion that Governor Wallace's "overtly-racist appeals as a justification for Amendment 325 . . . fail[] to explain the silence of contemporary *legislators* on that issue," Doc. 296-1 at 742 (emphasis by the district court), is inconsistent with its findings of fact that the federal courts were policing legislators' efforts to circumvent school desegregation orders. Doc. 296-1 at 651-52. Supporters would have known that announcing that a purpose of Amendment 325 was to deny local revenues to the all-black schools left in the Black Belt would have invited the scrutiny of the federal courts who were supervising school desegregation decrees in every Black Belt school system and who had struck down "all of these evasive schemes — Teacher Choice, health and safety, Freedom of Choice, as it pivots towards whites, tuition grants for private schools. . . ." Doc. 296-1 at 652. Sen. Harris acknowledged that he would not have expected Black Belt legislators like Sen. Roland Cooper of Wilcox County to come forward and say his white constituents did not want to pay property taxes for the public schools they were fleeing. Harris, Doc. 270 at 213-14. Sen. Robert Edington of Mobile testified that after the first two African Americans since Reconstruction were elected in 1970 to the House, white legislators avoided

discussing race openly. Doc. 261 at 8. So in the proceedings leading to enactment of Amendment 325 race "wasn't debated on the floor, no." Id. at 24.

In any event, the evidence need not show that all legislators, or even a majority of legislators, had racially discriminatory motives in enacting a particular constitutional provision. Rather, the relevant inquiry is whether the bills' drafters, sponsors, and supporters, particularly Governor Wallace, "had sufficient power over the legislature to have the [provisions] enacted." *Brooks v. Miller*, 158 F.3d 1230, 1242 (11thCir. 1998). The district court made findings of fact that Governor Wallace did have sufficient power to have Amendments 325 and 373 enacted and was the but-for cause of their passage. It found that

> large landowners in rural areas, who traditionally had benefitted from the lowest property assessment ratios in the State and pliant county tax assessors who systematically ignored state law in order to illegally bestow financial favors on some of the State's wealthiest citizens . . . **had one of the strongest voices in Alabama politics to champion their cause**. The Farm Bureau, with assistance from an **extraordinarily-popular Governor**, was **able to ensure** the enactment of legislation that protected the interests of the large, rural landholders, guaranteeing that some of Alabama's wealthiest citizens paid some of its lowest taxes.

Doc. 296-1 at 775-76 (emphases added). But for Governor Wallace's intervention, the Legislature's response to the *Weissinger* decree likely would have been a statute that finally enforced the uniform assessment requirement that had been in the Alabama Constitution since 1819, rather than a constitutional amendment that

allowed owners of farm and timber land to continue the illegally low assessments in the Black Belt that other counties had been protesting since the 1870s. Under a uniform assessment ratio, large landowners in the Black Belt would have been forced to bear – at long last – their fair share of the local school revenue burden.

D. *The district court committed legal error when it concluded that, notwithstanding Governor Wallace's use of intentionally discriminatory tactics to ensure passage of Amendments 325 and 373, plaintiffs were required to prove that the Governor and the representatives of Black Belt landowners acted with personal racial animus.*

In its conclusions of law, the district court acknowledged that the enactment of Amendments 325 and 373 was intended to perpetuate the historical Black Belt scheme of shielding whites' property from being taxed for black schools.

> It bears reiteration that, in 1861, Alabama's Black Belt Planter elite used race to convince poor-white, yeoman farmers in the hill counties and Wiregrass to march off and fight a rich man's war. A generation later, the State's aristocratic elite again used racism to entrench their interests in the State Constitutions of 1875 and 1901, at the expense of poor whites. In that tradition, **the Farm Bureau, representing the scions of those Planter elites**, used its connections with a sitting **governor who was popular because of his racist rhetoric** to effect a classification plan that would promote their political and financial interests over those of all other citizens of the State.

Doc. 296-1 at 769 (footnotes omitted) (emphases added). Nevertheless, the district court concluded that these racist tactics would not violate the Fourteenth Amendment unless plaintiffs proved that the Governor, legislators, Farm Bureau

officials and their Black Belt constituents acted with personal malice toward African Americans.

> It is worth noting that Wallace's public racism was likely motivated as much by a thirst for power as it was by genuine personal hatred. See Part III(A)(11)(a)(i)(A), supra. Such a motive is no less base than full-fledged racism, but it militates against plaintiffs' assertion that association with Wallace is a proxy for racism, instead, it is very likely a proxy for **powerlust and greed**. While taking advantage of such political influence may demonstrate greed or powerlust, **it is not necessarily tantamount to a racially discriminatory intent** on the part of the [Farm Bureau] organization itself, or its officers, lobbyists, and lawyers.

Doc. 296-1 at 769 and n.1891 (emphases added). "The Farm Bureau's motivation for supporting Wallace in his various campaigns, therefore, cannot be colored in black and white, but in 'green': i.e., the alliance was the most direct path to political and financial gain." Doc. 296-1 at 768.

In the district court's view, the pursuit of political and financial gain could not violate plaintiffs' constitutional rights to equal protection even if it perpetuated intentional racial discrimination.

> The challenged provisions of the Alabama Constitution, and particularly the "current use" and "Lid Bill" aspects added to the State's organic law by Amendments 325 and 373, arguably are a continuation in practical, but not in legal, terms of the *de facto* classification system that existed prior to the *Weissinger* decision. That system flowed from the period following the ratification of the 1901 Constitution, when county tax assessors consistently undervalued property, particularly in rural areas, and **primarily to prevent adequate funding for black schools**. But the amendments

> ratified in 1972 and 1978 were not measures adopted for the purpose of depriving black public school students of adequate funding for education. Rather, the weight of the evidence indicates they were a reaction to the increases in property appraisals and assessments mandated by the *Weissinger* decision, and the accompanying threat of a tremendous increase in the property taxes paid by large landowners.

Doc. 296-1 at 771 (footnote omitted) (emphasis added). Consequently, the district court held, "[plaintiffs] have not sustained their burden to show that the amendments adopted in the 1970s, and which reformed Section 217, were enacted **because of a racial animus**. **Therefore, the court finds** that there was no racially discriminatory intent in the enactment of Amendments 325 and 373, or in the current use statutes passed in 1982." Doc. 296-1 at 776 (emphases added).

The district court's demand of proof of racial animus is squarely contrary to law. Even if the defendants' primary motive is to make or save money, they may not employ purposefully discriminatory policies or strategies to achieve those economic objectives. For example, a restauranteur may not intentionally refuse to hire women in order to preserve his profitable trademark of male-only waiters, and a union may not intentionally decline to pursue claims of racial discrimination for the purpose of gaining financial benefits for its members through collective bargaining.

> To prove the discriminatory intent necessary for a disparate treatment or pattern or practice claim, **a plaintiff need not prove that a defendant harbored some special "animus" or "malice" towards**

> **the protected group to which she belongs**. In the race discrimination context, we recently have explained that "**ill will, enmity, or hostility are not prerequisites of intentional discrimination**." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 n. 7 (11th Cir.1999).

E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1283-84 (11th Cir. 2000) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987)) (emphases added).

Compounding this legal error, the district court appeared to have demanded that plaintiffs produce "smoking gun" evidence of racial animus on the part of the supporters of Amendments 325 and 373. Doc. 296-1 at 766-67. This view of the law is squarely contradicted by *Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); accord, e.g., *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d at 1283 ("Because explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent.") (quoting *United States v. Housing Authority of the City of Chickasaw*, 504 F.Supp. 716, 727 (S.D. Ala.1980)); *Williams v. City of Dothan*, 745 F.2d 1406, 1414-15 (11th Cir. 1984) (citing *Lodge v. Buxton*, 639 F.2d 1358, 1363 n. 8 (5th Cir. Unit B 1981) (noting that courts cannot expect to find a "smoking gun" in discrimination cases), aff'd sub nom. *Rogers v. Lodge*, 458 U.S. 613 (1982);

McMillan v. Escambia County, 638 F.2d 1239, 1246 n. 15 (5th Cir.1981)).

Even if some proof of racial animus was necessary, the district court did not explain why this criterion is not met by its finding of fact that "George Wallace[;] . . . leaders in the Black Belt; the White Citizens' Council; [and] the Alabama Farm Bureau ('Farm Bureau') [were] all **true '[b]elievers in white supremacy**," Doc. 296-1 at 632-33 (emphasis added). Or by its finding that "[b]eginning his second term in office in 1971, Governor Wallace responded to those [federal court] decisions by **continuing to serve as the voice of the white supremacists** of the state, and crusading against integrated public schools." Doc. 296-1 at 651-52 (emphasis added). Perhaps one might argue that even the Founding Fathers and Abraham Lincoln were white supremacists, and that would be true. But a century after the Fourteenth Amendment was ratified in 1868, the Supreme Court made it clear that a purpose to maintain white supremacy "is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race." *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (citing *Washington v. Davis*, 426 U.S. 229, 241–242 (1976); *Loving v. Virginia*, 388 U.S. 1, 8 (1967)). See also *Hunter v. Underwood*, 471 U.S. at 229 (affirming this Court's reversal of the finding "that the crimes provision in § 182 was not enacted out of **racial animus**," where "neither the District Court nor appellants seriously dispute the claim that this

zeal for **white supremacy** ran rampant at the [1901] convention.") (emphases added) (quoted in part, Doc. 296-1 at 581-82).

In short, the findings of fact that Governor Wallace and the Alabama Farm Bureau successfully employed purposefully discriminatory tactics to push through the Legislature constitutional amendments tailored to entrench extremely low property assessments for large landowners in the Black Belt are sufficient to prove that enactment of Amendments 325 and 373 violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. The district court's ultimate findings and conclusions of no intentional racial discrimination are based entirely on its erroneous view of the controlling case law and are clearly erroneous.

II. THE DISTRICT COURT ERRONEOUSLY APPLIED THE PATTERN-AND-PRACTICE STANDARD OF *RODRIGUEZ* TO ASSESS CONTINUING ADVERSE EFFECTS INSTEAD OF THE FOCUSED CAUSAL EFFECTS STANDARD OF *HUNTER V. UNDERWOOD*.

On its face, the district court's conclusion of law with respect to the continuing adverse racial effects of the six provisions in the Alabama Constitution makes no sense. The court essentially held that, even though these particular provisions combine drastically to depress the property tax base and ability to raise local school revenues for the nearly all-black public schools in the Black Belt, because too many black students have migrated to the cities, the 33,534 black students left behind in the Black Belt are entitled to no relief.

The reason it makes no sense is that the district court applied the wrong legal standard to these facts. It held that because "[t]he State Constitutional provisions challenged by plaintiffs apply to the State as a whole[,] the analysis must be of their statewide effect. See *San Antonio Independent School District v. Rodriguez*, 411 U.S.1, 26-27 (1973)." Doc. 296-1 at 777. The district court simply misread the holding of *Rodriguez*. The *Rodriguez* plaintiffs challenged the entire "Texas system of financing public education." 411 U.S. at 4. There was no claim in *Rodriguez* that Texas had enacted a particular law for the invidious purpose of discriminating against Mexican Americans. "The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class." 411 U.S. at 55. Rather, "[plaintiffs] brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base." 411 U.S. at 5.

Absent any claim that a specific statute or policy had been designed or enacted for the purpose of discriminating against particular counties or a particular group of Mexican Americans, the issue in *Rodriguez* was whether, taking into account all the geographic, demographic and economic factors that determine how those revenues are **distributed** among local school systems, did the **entire system**

of financing public education violate the Equal Protection Clause? "Because of differences in expenditure levels occasioned by **disparities** in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination." 411 U.S. at 47 (emphasis added). The Supreme Court held "that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 411 U.S. at 24. But, even if poor students were a suspect class, the Court held, such a "**comparative**-discrimination theory" on behalf of "a class of this size and diversity" would have to compare all school districts in the state, not just a selected 10% of the wealthiest and poorest districts. 411 U.S. at 26-27 (footnotes omitted) (emphasis added).

The source of error in the district court's conclusion of law here is that it failed to understand that the instant action is not a pattern-and-practice case challenging inequitable **distribution** of revenues in Alabama's entire system of school funding or in the **entire system** of property taxation. This is a *Hunter v. Underwood/Arlington Heights* case challenging specifically identified racially discriminatory sections in the state constitution designed to restrict the **amount** of property taxes that can be collected in the Black Belt counties. The court's discussion of the controlling case law correctly cited the principles governing

continuing adverse effects in a case such as this: "The Supreme Court has also clarified that there must exist a strong, direct, **causal relationship** between the racially-discriminatory **intent motivating** a facially neutral statute, and, its disproportionate effects upon the **targeted** population." Doc. 296-1 at 425 (citing *Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (emphases added). The district court's findings of fact demonstrated that the racial motivation behind the challenged provisions **targeted** the African-American population in the Black Belt, so the continuing effects inquiry must focus on the adverse racial effects those particular provisions still **cause** in the Black Belt.

The district court erred when it included in its causation analysis of continuing adverse effects not just the impact of the six challenged state constitutional provisions but all the economic, demographic and geographic factors that determine the amount of property taxes collected. Doc. 296-1 at 740-41. In *Hunter v. Underwood* the Supreme Court looked only at the persons disfranchised because of misdemeanor convictions, that is, persons whose injuries were caused by § 182 of the 1901 Alabama Constitution, not at all persons black and white disfranchised by the entire system of voter qualifications, including residency requirements, literacy tests, poll taxes, and felony convictions. Likewise, here the district court should have limited its continuing effects inquiry to the reduction in

property taxes caused by the six challenged provisions and should not have looked for racial disparities in the entire system of property taxation and school funding.

The district court's error here is analogous to the "bottom-line" fallacy the Supreme Court has rejected in employment discrimination cases.

> Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where **particular** hiring practices may operate to deprive minorities of employment opportunities), a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial imbalance in the work force.

E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1276 (11th Cir. 2000) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989)) (bold emphasis added).

The district court erroneously demanded that plaintiffs show that eliminating the six constitutional provisions would cure "the existing inequality among counties," Doc. 296-1 at 741, even though plaintiffs have never based any of their claims on the distribution of property values or revenues among the counties. It is not reasonable to expect that, even if the racially motivated provisions are struck down, the rural Black Belt systems will ever have access to the same more valuable tax base enjoyed by urban and suburban school systems. That was the holding of *Rodriguez*, which plaintiffs are not questioning in this action. But eliminating the constitutional millage caps, assessment ratios, and current use standards would

vastly increase the local school revenues available to Black Belt students and thus correct the specific harm caused by the particular constitutional provisions at issue in this case.

The findings of fact show, not surprisingly, that the targeted Black Belt counties and school systems are the hardest hit with respect to the percentage of their property tax base that has been lost and their ability to collect local school revenues **caused by** the combination of constitutional assessment ratios, current use provisions, and millage caps, just as the drafters of the six provisions intended. Even if there are some rural counties outside the Black Belt, like Geneva County, that fare even worse than Black Belt counties in the what-if analyses of devaluation caused by the assessment ratios and current use provisions, the harm inflicted on the targeted victims is still actionable under the Equal Protection Clause.

Just as the millage caps in the 1875 and 1901 Alabama Constitutions injured many more white school systems than black school systems, Amendments 325 and 373 necessarily apply statewide, as the district court says, and the amounts of local property tax revenues other local school systems can raise are also depressed. So is the overall amount of state and local school funding in Alabama.

The underfunding of public schools throughout the state, the district court found, has a disparate impact on mostly black, poor school systems and students,

whether they are urban or rural. But even those students who are not the targeted victims of the racially motivated enactments are entitled to relief. The plaintiff class in *Hunter v. Underwood* included all "persons who have been purged from the voting rolls or barred from registering to vote in Alabama solely because of a misdemeanor conviction," not just the African Americans who were the targeted victims of § 182 of the 1901 Alabama Constitution. 471 U.S. at 224. The drafters' intent to discriminate against poor whites as well as blacks did not obviate an equal protection violation where purposeful discrimination against blacks was the "but-for" motivation. Id. at 231-32.

III. THE DISTRICT COURT APPLIED THE SAME ERRONEOUS LEGAL STANDARD WHEN IT CONCLUDED THAT, STANDING ALONE, SECTIONS 214, 215, 216, AND 269 HAVE NO CONTINUING ADVERSE RACIAL IMPACT.

Even though the district court did make ultimate findings of fact that the four millage cap sections were placed in the 1901 Constitution for the same racially discriminatory purpose for which they were enacted in 1875, namely, to shield Black Belt land from being taxed to pay for services provided to blacks, education in particular, Doc. 296-1 at 596-602, 772-74, it concluded that these racially motivated provisions have no current adverse racial impact. Doc. 296-1 at 784-86. It reached this conclusion by applying the same erroneous legal theory discussed above, that plaintiffs must show comparative, per-capita adverse racial impact

statewide.

> As none of the measures of impact show that blacks are disadvantaged by the constitutional provisions challenged by plaintiffs in a way whites are not, or that blacks are disproportionately affected when compared to whites, this court can only conclude that the provisions do not have a racially-discriminatory adverse impact.

Doc. 296-1 at 785-86. This legal standard makes no reference to the specific injury the racially motivated millage caps were intended to **cause**. The district court reaffirmed Judge Murphy's finding that "[i]n 1875, whites from the Black Belt, concerned that a black majority might regain political power and raise taxes, placed in the constitution millage caps for both state and local property taxes." Doc. 296-1 at 528 (quoting *Knight v. Alabama*, 458 F.Supp.2d at 1283). The same fear of a future re-enfranchised black electorate was the reason the millage caps were preserved in the 1901 Constitution. Doc. 296-1 at 598-602.

> [W]hites in the Black Belt retained the mindset that they must guard against black voting majorities — that they must not allow blacks to regain access to the ballot box and, thereby, to inflict upon whites the double blows of Radical Reconstruction: i.e., onerous property taxes imposed for the purpose of providing adequate funding for black public schools.

Id. at 600 (footnote omitted).

Because it was using the wrong legal standard, the district court never considered any of the unrebutted evidence that the millage caps in Sections 214, 215, 216, and 269 today have precisely the adverse racial impact that the drafters

intended. By 1993, historical fears of whites in the Black Belt were fully realized when the number of African Americans in the Alabama Legislature had achieved rough proportionality, increasing to 27 out of 105 House seats and 8 of 35 Senate seats.[5] Representatives of now fully enfranchised African Americans have been able to form the effective coalitions with both Democrats and Republicans, urban and rural white legislators, just as the 1901 convention delegates feared. Knight, Doc. 262 at 128-31.

Until 2010, the Legislative Black Caucus was part of the ruling Democratic majority in both houses of the Legislature, and for nearly two decades African Americans held leadership positions in the House and Senate. For example, Rep. John F. Knight, Jr., lead plaintiff in *Knight v. Alabama*, served as Chair of the House Government Finance and Appropriations Committee. Id. at 132-34. Chairman Knight was able to work with Republican Governor Bob Riley to enact income tax reform. Id. at 134. And in 2003 black legislators joined a coalition with Governor Riley that overcame opposition from some Republican legislators and enacted proposed "Amendment One" to the Alabama Constitution. Gray, Doc. 262 at 160-62. Amendment One would have increased the assessment ratio to

---

[5] See James Blacksher, Edward Still et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249, 274 (2008) (footnote omitted).

100% for property taxes collected only by the state, not by local governments, while reducing the state millage rate from 6.5 to 3.5 mills and modifying the current use provisions to produce an additional $400 million in state revenues. Perry, Doc. 270 at 15-20. Even with Amendments 325 and 373 barring statutory changes in assessment ratios, if not for Section 214, some or all of the new revenue could have been obtained statutorily by increasing the state millage rate and modifying the statute implementing the current use provision in Amendment 373. Instead, just as Black Belt delegates to the 1901 convention had intended, white voters were rallied by the Alabama Farm Bureau and Forestry Association to defeat Amendment One, Doc. 296-1 at 675-76; Perry, Doc. 270 at 17, even though it passed in every Black Belt county, where black majorities now were fully enfranchised. Gray, Doc. 262 at 162.

Sections 215, 216, and 269, which cap the millage rates that counties, municipalities, and local school systems can levy, also continue to empower whites to prevent blacks from raising their local property taxes. The district court's conclusion that "[t]here is no evidence that any county or municipality would impose a higher tax rate if it was not limited by Section 215 or 216," Doc. 296-1 at 785, is clearly erroneous. Records kept by the Alabama Association of School Boards over the period 1998 to 2008, show that, of the 66 millage rate referenda

held in counties and municipalities for their schools, 40 were defeated, including 7 of the 26 proposals to renew an existing millage rate. PX 563; Sullivan, Doc. 264 at 49-50.

Some Black Belt school boards, like the one in Macon, have succeeded in getting their majority-black electorates to increase millage rates. PX 563. But in Sumter County, a school board proposal to raise an additional 15 mills was defeated after white business leaders financed the opposition campaign and told residents they would move their businesses and jobs out of the county if the referendum passed. Primm, Doc. 263 at 126-43. The Sumter County Superintendent testified that

> the issue was mainly the fact that the school district was predominantly African-American. And so, as a result, most of the large landowners and most of the businesses are basically owned by whites. So like in most cases, . . . eventually it gets back down to the fact that there's a predominantly African-American school district that has no support from the local business community because there's really no -- they don't have any students in the -- in the school system.

Id. at 142-43. Whites who had fled the Barbour County schools were able to defeat the renewal of a 3 mill levy for the nearly all-black county schools. See pp. 86-87 infra. So, the district court's conclusion that the racially motivated millage caps placed in the 1901 Constitution have no continuing adverse racial effects is based on an erroneous view of the law and is clearly erroneous.

IV. THE EQUAL PROTECTION STANDARDS OF *UNITED STATES V. FORDICE* APPLY FULLY TO THIS CASE, BECAUSE AMENDMENTS 325 AND 373 WERE ENACTED WITH THE PURPOSE AND HAVE THE EFFECT OF PERPETUATING *DE JURE* SCHOOL SEGREGATION IN THE BLACK BELT.

The district court concluded that "Eleventh Circuit precedent may not be avoided," and *United States v. Fordice,* 505 U.S. 717 (1992), "does not apply to the analysis of plaintiffs' Equal Protection claims in this case." This was a misreading of this Court's precedents and is inconsistent with the school desegregation principles set out in *Fordice*.

This Court has never been confronted with and has never decided the question whether the *Fordice* standards apply in the context of K-12 education. The district court correctly noted, Doc. 296-1 at 447, that in *Burton v. City of Belle Glade*, 178 F.3d 1175, 1190 (11th Cir.1999), *Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1344 (11th Cir. 2000), and *Johnson v. Governor of Florida*, 405 F.3d 1214, 1225 (11th Cir.) (en banc), cert. denied sub nom. *Johnson v. Bush*, 546 U.S. 1015 (2005), this Court declined to apply the *Fordice* standards "outside the education setting." *Johnson v. DeSoto County*, 204 F.3d at 1344 n.18. In *Knight v. Alabama*, 476 F.3d 1219 (11th Cir. 2007), this Court held that the same state constitutional property tax restrictions at issue in the instant action could not be challenged under *Fordice* in Alabama's **higher** education

desegregation case. Doc. 296-1 at 448-50 (citing *Knight v. Alabama*, 476 F.3d at 1226-30). This appeal is from the district court's conclusion that *Fordice* does not apply in a **K-12** education case. A review of the Supreme Court's reasoning in *Fordice* shows that the school desegregation principles enunciated there squarely apply to the facts in this case.

The Supreme Court designed the *Fordice* principles to address circumstances where students in a state that had maintained *de jure* racial segregation in its system of public education could exercise **choice** with respect to which school to attend.

> Like the United States, we do not disagree with the Court of Appeals' observation that a state university system is quite different in very relevant respects from primary and secondary schools. Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice. The State historically has not assigned university students to a particular institution. . . . Thus, as the Court of Appeals stated, "[i]t hardly needs mention that remedies common to public school desegregation, such as pupil assignments, busing, attendance quotas, and zoning, are unavailable when persons may freely choose whether to pursue an advanced education and, when the choice is made, which of several universities to attend."

505 U.S. at 728-29 (citation omitted). Mississippi contended that, where familiar desegregation remedies could not compel students to attend identifiably white or black colleges, their race-neutral freedom-of-choice policies satisfied the Fourteenth Amendment. The Supreme Court disagreed.

> That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. **In a system based on choice**, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be **attributed to state policies**, many can be. Thus, even after a State dismantles its segregative admissions policy, there may still be state action that is **traceable** to the State's prior de jure segregation and that **continues to foster segregation**.

505 U.S. at 729 (emphases added). The *Fordice* Court then issued this important caveat:

> It is important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi's prior *de jure* system. In highlighting, as we do below, certain remnants of the prior system that are readily apparent from the findings of fact made by the District Court and affirmed by the Court of Appeals, we by no means suggest that the Court of Appeals need not examine, in light of the proper standard, each of the other policies now governing the State's university system that have been challenged or that are challenged on remand in light of the standard that we articulate today.

Id. (footnote omitted). Just as students have a choice of which university to attend in Alabama's system of public higher education, so also in Alabama's system of public elementary and secondary education parents have the choice of sending their children to the schools to which they are assigned or to move to another public school system **or to attend private schools**. The six property tax provisions at issue here may have been too tenuously related to higher education for the *Knight* plaintiffs to obtain relief, but they are directly related to the choices

parents face when sending their children to K-12 schools.

The district court in the instant action made findings of fact that Governor George Wallace used every state policy at his disposal to encourage whites in the Black Belt to **choose** to flee the public schools and to attend private schools if the federal courts ordered desegregation of their student bodies. Doc. 296-1 at 638-44, 651-53, 798-803. At Governor Wallace's behest, the Legislature enacted laws seeking to divert public school revenues to tuition grants for whites attending private schools. And Governor Wallace procured enactment of Amendments 325 and 373 for the purpose of preventing white landowners in the Black Belt and elsewhere from having to pay increased taxes for the public schools they were fleeing. The evidence is uncontroverted, and the district court found, that the public K-12 schools in the Black Belt, with one exception, remain almost all-black today. Doc. 296-1 at 694.

The millage caps embedded in the 1901 Constitution and perpetuated in Amendments 325 and 373 also encourage white landowners in the Black Belt to work to defeat millage referendums for the public schools. The Superintendent of Schools for Barbour County, George Wallace's home county, which today is still operating under a federal court school desegregation decree, testified about why the renewal of a 3 mill district tax for the nearly all-black county schools was

defeated in 2010, even though the countywide 3 mills, 75% of which goes to the majority-white Eufaula public schools, passed. Doc. 262 at 44-47. The Barbour County Superintendent explained that, because only 70 of the 1000 white students living in the county attend public school, white school parents opposed renewing the 3 mills:

> Those parents pay ad valorem tax already. But for their children's education by executing their **freedom of choice** for education for their children, then they're being taxed ad valorem tax for educational services within the county, but then they're paying **by choice** for the education of their children. So it makes sense that it would be difficult to pass additional ad valorem taxation within the Barbour County proper.

Doc. 262 at 45 (emphases added).

In other words, Sections 214, 215, 216, and 269 of the 1901 Constitution and Amendments 325 and 373 are among those state policies that are traceable to Alabama's dual K-12 school system, Doc. 296 at 19 n.28 (quoting *Knight v. Alabama*, F. Supp. 2d at 1311-12), and they continue to foster segregation, both by denying black public school students equal educational opportunities and by encouraging whites in the Black Belt to make the **choice** of attending private schools (or public schools outside the Black Belt). They were enacted for the purpose of restricting the amount of revenues that fund mostly black schools in the Black Belt and racially integrated schools elsewhere, and they continue to

discourage the return of white students to their underfunded public schools. Thus, under *Fordice*, "[t]o the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VI. . . ." 505 U.S. at 743.

CONCLUSION

The district court found that "Alabama continues to be plagued by an inadequately-funded public school system — one that hinders the upward mobility of her citizens, black and white alike, especially in rural counties." Doc. 296-1 at 797-98. Even though it found that Governor George Wallace and his core Black Belt constituents employed intentionally racist tactics to overcome urban resistance to the enactment of Amendments 325 and 373, taking advantage of whites' opposition to being taxed to pay for racially integrated schools, the court thought the motive of greed trumped the motive of race.

> State powerbrokers perceive little benefit from investing in a quality *statewide* public school system, because the children of their most influential constituents are generally enrolled in exclusive suburban school systems, with large *local* tax bases, or in private schools. Many of those private schools sprouted following court-mandated integration. As demonstrated in this opinion, however, "white flight" to the suburbs or private schools has not disproportionately harmed blacks. Instead, it also punishes many white students who remain in the public school systems. The children of the rural poor, whether black or white, are left to struggle as best as they can in underfunded, dilapidated schools. Their resulting lack of an adequate education not only deprives those students of a fair opportunity to prepare

> themselves to compete in a global economy, but also deprives the State of fully-participating, well-educated adult citizens.

Doc. 296-1 at 798 (emphases by the district court). Of course, the motives of greed, protecting wealth, and avoiding higher taxes motivated all the official policies of white supremacy in Alabama history, including slavery, Doc. 296 at 72-77, secession, Doc. 296-1 at 478-80, the millage caps in the 1875 and 1901 Constitutions, Doc. 296-1 at 528-29, 596-602, the racial segregation of schools and the diversion of funding for black schools to white schools, Doc. 296-1 at 602-06, 624-25, and the disfranchisement of blacks, Doc. 296-1 at 564-74. Just as they did in the anti-school desegregation atmosphere of the 1970s, powerful state actors in previous eras played the race card to support the financial objectives of their wealthy constituents.

The district court misplaced the blame for this sad state of affairs on the Supreme Court. Had the district court interpreted controlling Supreme Court principles correctly, it would have been compelled – based on its subsidiary findings of fact – to grant the relief plaintiffs have requested. Plaintiffs submit that the district court's ultimate findings of no intentional discrimination with respect to Amendments 325 and 373 and its ultimate finding that none of the six challenged provisions has continuing adverse racial effects are based on an erroneous view of the law, and that the record permits only one resolution of the factual issues when

the correct legal standards are applied to the subsidiary findings of fact. Those ultimate findings of fact are clearly erroneous.

The district court's judgment erroneously allows to stand the most lasting and arguably the most damaging vestiges of segregation and white supremacy in Alabama history. The judgment should be reversed and remanded with instructions to enter judgment for plaintiffs.

Alternatively, the judgment should be vacated and remanded with instructions for the district court to re-examine its ultimate findings of fact and conclusions of law in light of the correct legal standards.

Respectfully submitted,

s/James U. Blacksher
P.O. Box 636
Birmingham AL 35201
205-591-7238
Fax: 866-845-4395
E-mail: jblacksher@ns.sympatico.ca

Larry T. Menefee
407 S. McDonough Street
Montgomery, AL 36104
205-265-6002
fax 205-832-9476
E-mail: lmenefee@knology.net

Edward Still
130 Wildwood Parkway
Suite 108, PMB 304
Birmingham, AL 35209
205-320-2882
E-mail: still@votelaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in this

Court's order of December 20, 2011. This brief contains 21,427 words.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading was served electronically upon the following counsel of record on December 23, 2011.

William G. Parker, Jr.
Elizabeth Prim Formby Escalona
Alabama Attorney General's Office
501 Washington Avenue
Montgomery, AL 361030
wparker@ago.state.al.us
pescalona@ago.state.al.us

Kenneth L. Thomas
Frederic A. Bolling
THOMAS, MEANS, GILLIS & SEAY P.C.
3121 Zelda Court
P.O. Box 5058
Montgomery, Alabama 36103-505
klthomas@tmgslaw.com
fabolling@tmgslaw.com

s/James U. Blacksher
Attorney for plaintiffs-appellants India Lynch et al.