

its current African-American faculty and staff to make particularized judgments, subject to this Court's review and approval, about what broad numerical goals and positioning of black representation would achieve such a critical mass.

There was reason to think that the defendants might have welcomed this self-referential approach to resolving the problem of developing standards to guide the Court's assessment of when it may relinquish jurisdiction over the faculty and administration provisions of the Decree. However, they have united in opposition to the critical mass concept and to any attempt by this Court, with less than two years remaining before reaching the scheduled end date, to address the difficult question of what standards it will use to assess compliance. These assessment proceedings, defendants propose, should not begin before July 31, 2005. But adopting defendants' suggestion will only prolong both this Court's jurisdiction and the full realization of the Decree's remedial objectives. Alabama's system of public higher education cannot be declared unitary in the faculty and administration area or in any other area until the parties have been afforded the opportunity to present both legal arguments and evidence.

A. Defendants' Constitutional Duty Requires Both Good Faith Policies and Practices and Achievement of Desegregative Results.

Defendants renew their erroneous contention that all the Constitution requires is that they adopt policies and practices for recruiting and retaining African-American faculty and administrators. Whether or not those policies and practices produce desegregative results is irrelevant, they say. "[T]he focus is *policies*, not *numbers*." State defendants' response at 3 (emphasis in original). "[T]he proper measure of progress in a *de jure* desegregation case for universities and colleges is the good faith actions of the institutions in revising and implementing

employment ‘policies and practices’ in light of the limited pool of applicants and the number of applicants available to be hired each year.” Joint brief of defendant HWIs at 7. This crabbed position flies in the face of established desegregation case law and common sense.

The policy or practice that gives rise to this Court’s authority to enter a remedial decree is Alabama’s historical racial segregation of faculty and administrative positions in the HWIs, that is, the policy or practice not to admit or to hire any African Americans at all. This policy of racial exclusion was strictly enforced for nearly a century and a half, from 1831, when UA opened its doors, to some time after 1964. The result of this racially discriminatory policy then was zero African-American faculty. Today it is responsible in large part for both the continuing underrepresentation of African Americans in HWI faculties and administrations and for the still relatively small pool of black persons with doctoral degrees.

The faculty and administration issues in the 1990 trial were all about numbers and whether, as the Knight-Sims plaintiffs and the United States contended, those numbers reflected vestiges of *de jure* segregation that continue the racial identifiability of those institutions and negatively impact the educational opportunities of black students. *Knight v. Alabama*, 787 F.Supp. 1030, 1173-88 (N.D. Ala. 1991), *aff’d in relevant part*, 14 F.3d 1534 (11th Cir. 1994). In its conclusions, this Court did not endorse or adopt any particular policies or practices relating to the recruitment and retention of African-American faculty and administrators. To the contrary, it held that results are what count:

It is not that illegitimate barriers to black employment survive, but rather, that the minority employment procedures already in place are not implemented and followed with sufficiently sustained vigor so that they can assist in increasing the **number** of African American faculty and administrators and thereby wash the taint of the prior dual system away.

787 F.Supp. at 1187-88 (emphasis added).

Even the April 3, 2002, order that the HWIs argue should “accelerate gains in African-American faculty and administrative employment,” Joint brief of defendant HWIs at 15, did not specify any policies or practices the HWIs must adopt, nor did it approve the policies they have in place. It merely directed appropriation of small amounts of seed money and ordered the appointment of advisory committees to ensure that African Americans currently employed would be consulted in renewed efforts “for increasing and retaining black representation on . . . faculties and administrative staffs.” April 3, 2002, order at 2.

So the question remains: What results? How much increase in African-American faculty and administrators will discharge the HWIs’ constitutional duty to eradicate vestiges of segregation to the extent practicable and educationally sound? The HWIs recognize this crucial end-game issue and answer with a single figure: the percentage of full-time faculty and EEO-1 positions at all HWIs combined has increased 72.4% from 1991 to 2002, that is, from 3.2% in 1991 to 5.2% in 2002 (which, arithmetically, is an increase of 2.0%). This figure, they argue, represents “significant,” “substantial,” and “real” progress. Joint brief of HWIs at 8-10. Putting aside the institution-by-institution critiques plaintiffs presented in their objections to the annual reports and motion to modify the Decree, which defendants make no attempt to rebut, the cited HWI-wide combined faculty-EEO-1 figure does represent some progress. Left unanswered, however, is what standards or principles does this Court apply to decide whether it is **enough** progress to warrant a finding that Alabama’s system of higher education has achieved unitary status?

The State defendants contend there is **no** principled way to evaluate the results of the

African-American faculty and administrator provisions of the Decree. State defendants’ response at 5 (citing an inapposite Voting Rights Act case, *Holder v. Hall*, 512 U.S. 874 (1994)). Nevertheless, the State defendants cite statistics purporting to show that UA and AU have passed the University of Michigan, Ohio State University, the University of Illinois, Penn State University and UCLA in the percentage of African Americans on their full-time faculties.¹ State defendants’ response at 5-6. From these percentages, they conclude: “Were one to look at these numbers and, **considering nothing else**, try to determine whether a vestige of segregation was present, it would appear UCLA is guilty.” *Id.* at 6 (emphasis added). Exactly. Considering nothing else – like nearby African-American populations and the constitutional duty to eradicate vestiges of *de jure* segregation. According to the 2000 federal decennial census, black or African-American persons comprised 26.0% of Alabama’s population, compared with 14.2% in Michigan, 11.5% in Ohio, 15.1% in Illinois, 10.0% in Pennsylvania, 6.7% in California and 12.3% in the whole United States. And Alabama’s black population is growing. Published reports estimate that 75,000 more blacks moved into Alabama during the 1990s than moved out. Jeff Hansen, *Blacks returning to Alabama*, The Birmingham News, May 5, 2001 (online

¹ We are unable to validate these 2001 figures for the out-of-state universities with available resources. However, Appendix F to the 2003 annual report of UAS does provide 2001 data for EEO-1 and faculty combined, which show the following black percentages:

University of Illinois Chicago	7.50%
Penn State Harrisburg	6.94%
University of Michigan	4.50%
University of Alabama	4.36%
University of Illinois Urbana-Champaign	4.16%
Ohio State University	4.13%
Auburn University	3.97%
UCLA	3.28%
Penn State Main Campus	2.90%

edition). Scholarly research cited in plaintiffs' objections to the 2003 annual reports shows that African-American academics favor areas with large black populations. Demographic factors like this raise questions about why all of Alabama's HWIs should not be expected at least to show African-American percentages of faculty and EEO-1 positions as high as those at TSUM (15.69%), Wayne State University (9.73%), Middle Tennessee State University (9.12%), Old Dominion University (8.75%), Georgia State University (8.66%) and Georgia Tech (8.63%). Appendix F to the 2003 annual report of UAS.

These are all matters that should be explored in depth in an evidentiary hearing. But such a hearing should be guided by the critical mass principles enunciated in *Grutter*.

B. *Grutter v. Bollinger* Is Controlling Precedent For This Desegregation Action.

Defendants are correct that thus far this Court has declined to adopt the critical mass concept plaintiffs long have been advocating as the relevant standard for adjudging the HWIs' compliance with the constitutional duty to desegregate their faculties and administrations. Joint brief of HWIs at 5. However, this Court is bound to consider the impact on the instant action of the important constitutional issues resolved in *Grutter v. Bollinger*. Defendants contend that *Grutter v. Bollinger* applies only to voluntary diversity policies in higher education, not to constitutional desegregation obligations. *Id.* at 6-7, 12-14. But defendants don't explain why this should be so. They don't attempt to distinguish the principles underlying critical mass that the Supreme Court held were compelling state interests in Michigan from the principles that should inform a remedy for *de jure* segregation: promoting cross-racial understanding, breaking down stereotypes, enabling students better to understand persons of different races and cultures, making sure that the diffusion of knowledge and opportunity through public institutions of

higher education is accessible and the path to leadership is visibly open to all individuals regardless of race or ethnicity, encouraging underrepresented African-American students to participate in the classroom and not to feel isolated, helping them not to feel like spokespersons for their race, and informing white students about the variety of viewpoints among African Americans. *Grutter*, 123 S.Ct. at 2331-34 (summarized in plaintiffs’ objections to annual reports and motion to modify the Decree at 7-9).

Under the standard of *United States v. Fordice*, 505 U.S. 717 (1992), the *Grutter* critical mass principles define what policies are educationally sound – indeed, compelling, leaving for this Court only the question of the extent to which their realization at Alabama’s HWIs is practicable.² In this regard, defendants’ complete dismissal of the *Grutter* precedent underscores

² Defendants reiterate their contention that the sole measure of faculty and administration desegregation is “the extent it impacts student choice.” Joint brief of HWIs at 10. This blinkered view of what desegregation law requires was rejected in the 1991 opinion:

928. Undoubtedly, black as well as white students are strongly influenced and encouraged by college professors. The Knight Plaintiffs’ evidence has thoroughly convinced the Court that black students at majority white colleges and universities benefit on many levels from the presence of black faculty and administrators. Be that as it may, the Knight Plaintiffs never established by a preponderance of the evidence that black students themselves were being deprived of a full and fair education simply because they did not have the opportunity to form a mentor/mentee relationship with a black professor.

929. The lack of black faculty role models is not, standing alone, a basis for Title VI or Fourteenth Amendment liability. It is certainly not inconceivable that a black student on a majority white campus could find the same mentoring and guidance from a white professor that he or she believes might be available from a black professor. This observation does not, however, indicate that the Defendants have satisfied their obligation to comport employment practices in a manner that assures compliance with the requirements of Title VI.

787 F.Supp. at 1187. *Grutter* clearly reinforces the point that getting African-American students bodily on campus does not end the desegregation task and that a critical mass of black faculty and administrators is necessary to provide a diverse educational environment for students of all ethnic backgrounds. Plaintiffs intend to present further testimony from students about this relationship. In any event, the black student numbers displayed on page 11 of the HWIs’ joint

the need for this Court to modify and make more specific the faculty and administration provisions of the Remedial Decree. Nothing dramatizes this need more than defendants' disturbing assertion that *Grutter's* endorsement of critical mass establishes the "ceiling" of action the HWIs could take if they voluntarily chose to do so, not a "floor" for their constitutional duty to desegregate. Joint brief of HWIs at 12-13. In other words, defendants contend, there are limits on what the Constitution can require Alabama to do that fall below the steps Michigan may take voluntarily to promote racial diversity. They do not explain how this position can be squared with the Supreme Court's command that the State must "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated **root and branch.**" *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) (quoting *Green v. School Bd. of New Kent County*, 391 U.S. 430, 437-438 (1968)) (emphasis added). Defendants' unabashed inversion of constitutional principles amounts to an explicit admission that, notwithstanding this Court's repeated exhortations that they act aggressively to increase black representation, the HWIs feel bound only to comply with the strict letter of the Decree and the April 3, 2002, order.

When this Court provides an evidentiary hearing, plaintiffs expect to present testimony from class members that no fundamental changes have occurred in the institutional practices affecting the hiring and retention of African Americans on the HWIs' faculties and administrations. Certainly, as the discovery responses of every HWI reveal, no defendant

brief do not by themselves establish any causal relationship between student choice and black representation on faculties and administrations. To the contrary, they suggest that white student numbers have been declining, adding powerful financial incentives for the HWIs to recruit African-American students, who are forced to choose one the HWIs for the full range of educational programs at both the undergraduate and graduate levels.

institution has adopted the principles underlying critical mass, and none has consulted even the few African Americans serving on the newly formed advisory committees about whether they should adopt critical mass goals for its hiring, promotion, tenure and retention procedures.

Particularly damaging to effective desegregation is the persistent refusal of the HWIs to incorporate in their faculty search and selection practices the critical mass principle that job descriptions and qualification criteria should “focus on academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’” *Grutter*, 123 S.Ct. at 2331 (citation omitted). Plaintiffs’ discussions with class members have revealed that, still, over a decade after entry of the Remedial Decree, no job descriptions or search committee instructions at the HWIs explicitly refer to the Decree’s desegregation mandate as one of the selection criteria.³ To the contrary, to plaintiffs’ knowledge, all the HWIs continue to enforce an express policy that the candidates’ race or ethnicity **not** be taken into account at all when it comes to comparing their relative qualifications.⁴ Under this colorblind regime, diversity or desegregation is considered, if at all, only after the candidates’ traditional credentials have been weighed and finalists have been selected. That is, the cultural backgrounds and experiences of African-American candidates are not counted among their “qualifications.” Educational criteria are skewed toward awarding candidates thought to have acquired what white academicians consider to be the most “merit badges,” to use a Scouting metaphor, instead of comparing them in light of who would

³ E.g., see the University of Alabama’s web site: <http://www.eop.ua.edu/policies.html>.

⁴ E.g., see Auburn’s web site:
<http://www.auburn.edu/administration/aaeeo/policies/policy01.html>.

contribute most to the institution's educational environment.

If *Grutter* does nothing else, it removes all the doubts that have shadowed implementation of this Court's Remedial Decree about the constitutionality of taking race into account openly and explicitly in the hiring and retention of faculty and administrators. Of course, African-American candidates should not be shielded from individual competition with other candidates, *Grutter*, 123 S.Ct. at 2332, 2343. "In some cases . . . an applicant's race may play no role, while in others it may be a 'determinative' factor." *Id.* at 2334 (citation omitted) (internal quotes omitted). The factor of race should be "extremely strong" without being the "predominant" factor in the total selection process. *Id.* But defendants' refusal to acknowledge *Grutter's* distinction between constitutionally permissible, flexible goals and "rigid numeric, race-based formula[s]" or "hard numeric goals and timetables," compare joint brief of HWIs at 14 with plaintiffs' objections to annual reports and motion to modify Decree at 9-10, makes it abundantly clear that the HWIs will continue their race-blind practices unless this Court directs them to do otherwise.

C. Plaintiffs Request the Opportunity To Present Evidence Challenging the HWIs' Compliance Reports To This Court.

The Knight-Sims plaintiffs and their counsel continue to encounter deep-seated doubts among members of the class about the genuineness and true depth of the statements of commitment to desegregation that pepper the defendants' written reports to this Court. At the appropriate time, before this Court declares the system unitary and relinquishes jurisdiction, an evidentiary hearing should be held to receive some of this testimony. Defendants want to postpone this hearing to July 31, 2005. But at that point, if plaintiffs demonstrate less than full

compliance with the orders of this Court, the only choice will be to extend the term of the Remedial Decree. Candidly, plaintiffs believe such an extension will already be necessary to accomplish the *Fordice* mandate in the area of HWI faculty and administration desegregation. But identifying and attempting to fix these compliance problems sooner rather than later will mitigate the irreparable harm class members continue to experience and ultimately should shorten the period of this Court's retained jurisdiction.

On the other hand, the issues addressed at an evidentiary hearing would be more focused if this Court first granted plaintiffs' motion to modify the Decree and ordered the HWIs to conduct critical mass reviews of their institutional practices in consultation with their current African-American faculty and administrators. If done properly, the results of those reviews would inform the Court about both the campus-particular goals of desegregation practices and which strategies are most likely to achieve them.

Most importantly, such critical mass reviews would, for the first time, give African-American faculty and administrators input in the official positions taken by the HWIs in this action. Plaintiffs have yet to discover a single African American who was consulted and participated in drafting the official positions taken by the HWIs regarding compliance with the Decree. Even if a few were consulted, certainly there has been no collegial input from African-American faculty and administrators with respect to their institutions' positions. This action is litigation in the broad public interest that requires minimizing the strict adversarial conventions that characterize private litigation. Indeed, even the appearance that fundamental decisions about institutional remedial change at the HWIs are the exclusive province of their white leadership perpetuates vestiges of *de jure* segregation. The mechanisms approved in *Grutter*

provide clear models for this Court and the parties to employ in attempting to realize the constitutional objectives of the Remedial Decree.

The reluctant attitudes with respect to aggressive implementation of desegregation remedies exhibited in the defendants' opposition to plaintiffs' motion to modify the Decree also characterize the public faces of the HWIs. Perhaps the best evidence of this is their official web sites, the first place prospective African-American candidates are likely to look for encouragement.⁵ One can search these sites in vain for any reference to this action or for evidence of the efforts to recruit and to retain African-American faculty and administrators that fill pages and pages of the HWIs' compliance reports to this Court. So far as plaintiffs can tell, public access to this body of written information is limited to the Clerk's office.

By way of contrast, consider UCLA's web site. See <http://faculty.diversity.ucla.edu/>. Contrast the Associate Vice Chancellor position assigned exclusively to the administrative duties of promoting diversity, the amount of financial resources devoted to her programs, the scope of those programs and the amount of sheer demographic data that is on public display at UCLA with the web sites of Alabama's HWIs. To use (abuse?) a football metaphor, it is ironic that Alabama would adopt a UCLA defense when it has refused to employ the West Coast Offense. To be sure, plaintiffs recognize the important differences of size, prestige, financial resources, location, demographics, etc. between the University of California and Alabama's HWIs. And web sites are only one indication of institutional commitment to diversity. But this is strong

⁵ Here are the links to the HWIs' web sites: AU, <http://www.auburn.edu/>; AUM, <http://www.aum.edu/home/>; JSU, <http://www.jsu.edu/>; TSU, <http://www.troyst.edu/>; UA, <http://www.ua.edu/>; UAB, <http://main.uab.edu/>; UAH, <http://www.uah.edu/>; UM, <http://www.montevallo.edu/>; UNA, <http://www.una.edu/>; USA, <http://www.usouthal.edu/>; UWA, <http://www.westal.edu/>.

evidence that Alabama's efforts to acknowledge and carry out its constitutional duty to eradicate vestiges of segregation fall far short of voluntary efforts to promote diversity elsewhere.

In addition, the data this Court ordered the HWIs to provide in response to plaintiffs' discovery request cast serious doubt on defendants' annual protestations about the lack of "qualified" African-American candidates for faculty and administration vacancies. For example, the following table is undersigned counsel's best effort so summarize the (incomplete) information provided in the discovery responses about full-time positions that were filled in just the most recent 2002-2003 school year. Many of the applicants could not be identified by race, so the figures for black candidates are undoubtedly smaller than the actual numbers.

Faculty and EEO-1 Positions Filled 2002-03⁶

HWI	Full-time positions filled	Blacks selected	Black candidates for all positions	Black candidates for jobs filled by non-Blacks
ASC	6	0	6	6 ⁷
AU	117	10	118	65
AUM	16	3	?	?
JSU	?	?	?	?
TSU	50	2	73	71
TSUM	7	1	21	20
TSUD	9	3	13	10
UA	77 ⁸	8	49	29
UAB	255	13	65	52
UAH	40	6	24	18
UM	26	2	31	29
UNA	27	2	40	38
USA	123	11	69	58
UWA	10	2	12	10
Totals	624	50	397	335

⁶ Extracted from responses to plaintiffs' discovery request 8. Much data is missing, even where not indicated. In particular, the race of many applicants was unknown.

⁷ One African American declined an offer.

⁸ 13 of these are EEO-1 positions, 3 of which were filled by African Americans and only one of which, President, was filled competitively. Candidates for President not available.

Of course, by themselves, these data would not be sufficient to establish disparate impact in an employment discrimination context. The number of non-black applicants is not provided, nor are the qualifications of the candidates or the job criteria published by the HWIs. But the fact that there were literally hundreds of blacks who were available for vacancies occurring in a single year debunks the HWIs' heretofore generalized complaints implying that the pool of African-American applicants is virtually non-existent, and it reinforces doubts about the aggressiveness of defendants' compliance efforts and the priority the desegregation mandate is given in their selection procedures.

The need for closer inquiry behind the numbers and cryptic reports of the HWIs is illustrated by the case of Norris Gunby, identified in UAB's response to discovery request 13 as an SREB scholar who "was being considered for a position as Visiting Instructor in Management in UAB's School of Business. He accepted a position at UAH." According to Mr. Gunby, he was being considered for a full-time tenure track position at UAB, and on his own he got Dr. Louis Dale, recently appointed Vice President for Equity and Diversity, to promise some of the funds he controls to supplement his salary. This commitment of supplemental funds (perhaps moneys earmarked by the April 3, 2002, order) was withdrawn when Dr. Dale was notified of his reduced budget for 2003-04. The dean and department head then decided to hire two non-tenure track instructors instead of Mr. Gunby, who eventually found a lower paying position at UAH. Mr. Gunby's story provides examples of how the current public school funding crisis is negatively impacting the remedial objectives of this Court's orders, how diversity seed money may be defining the outer limits of the institutions' commitments to the hiring and retention of African-American faculty, and how desegregation has a lower priority than it should in

institutional decisions about how to manage their regular budgets.

D. The State Defendants Continue To Ignore Supreme Court Instructions For Courts To Monitor and To Modify School Desegregation Decrees.

The State defendants (but not the HWIs) repeat earlier arguments that this Court lacks the discretion to modify its Remedial Decrees, citing *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), and related Eleventh Circuit cases. State defendants' response at 10-11. They make no attempt to address the school desegregation case law cited in plaintiffs' motion to modify the faculty and administrator provisions of the Decree, which is reiterated and extended in plaintiffs' October 29, 2003, reply to defendants' opposition to the motion for additional relief with respect to the property tax system. Thus there is no point in reciting these precedents a third time. If the Court has questions about any aspect of this issue, plaintiffs request the opportunity to respond to them.

Conclusion

Plaintiffs' motion to modify the Remedial Decree should be granted. An evidentiary hearing to consider defendants' proposed critical mass goals and to assess the time needed to reach those goals should be scheduled promptly after defendants report the results of their critical mass review. If the Court believes further evidence is required before it decides whether or not to order the HWIs to undertake the critical mass process plaintiffs seek in their motion, plaintiffs request that an evidentiary hearing in Birmingham be scheduled at the Court's earliest convenience.

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record on November 12, 2003, by first class mail or by hand.

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