

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**JOHN F. KNIGHT, JR., etc., et al.,**

**Plaintiffs and Plaintiffs-Intervenors,**

**UNITED STATES OF AMERICA,**

**v.**

**THE STATE OF ALABAMA, et al.,**

**Defendants.**

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**Civil action number:  
CV 83-M-1676-S**

**Response of the State Defendants to  
Plaintiffs' Motion to Modify or Amend the Remedial Decree**

Come now the State Defendants and respond to the "Knight-Sims Plaintiffs' Objections to 2003 Annual Reports and Motion to Modify or Amend the Remedial Decree to Specify Compliance with Provisions Requiring Desegregation of HWI Faculties and Administrators," ("Motion"), asking that the requested relief be denied, and as grounds therefor, say as follows:

1. **Whether assessing compliance with its decrees or the effectiveness of those decrees, the Court must focus on the *policies* of the Defendants, not on benchmark numbers.**

This Court endured a six month trial in 1990-91 and a six week trial in 1995, compiled a "massive record," published two lengthy orders, and "found all the relevant facts that there are to be found about higher education in Alabama." *Knight v. State of Alabama*, 900 F.Supp. 272, 280 (N.D.Ala. 1995). It imposed "the most desegregative remedy that is educationally sound and practicable." *Id.* In the words of the Court, "The Court has done all it can do." *Id.*

And we agree. The burden carried for so long by this Court has shifted to the parties, particularly to the Defendants, who now must comply with the Court's orders and thereby eradicate the remaining vestiges of segregation present in higher education in Alabama.

In their Motion, Plaintiffs raise the question of how to gauge our compliance. Viewed most favorably, Plaintiffs' Motion seeks to establish concrete standards by which compliance with the existing remedial decrees can be measured. In so doing, Plaintiffs would substitute the achievement of measurable quantitative standards for the qualitative goal of eradicating past segregation and its vertiges. Viewed more cynically, Plaintiffs' Motion is yet another effort to obtain additional relief designed to extend the duration of the remedial period.

Under either view, the answer to the question of how compliance with the remedial decree is to be assessed is readily found in the acknowledged governing law of *United States v. Fordice*, 505 U.S. 717 (1992). As expressed by the 11<sup>th</sup> Circuit Court of Appeals:

Where plaintiffs show that a current policy is traceable to past segregation, and defendants fail to demonstrate either (1) that the policy, in combination with other policies, has no segregative effects, or (2) that none of the full range of less segregative alternative remedies are practicable and educationally sound, defendants must adopt the practicable and educationally sound alternatives that will bring about the greatest possible reduction in segregative effects. "If the State has not discharged [this remedial] duty, it remains in violation of the Fourteenth Amendment."

*Knight v. State of Alabama*, 14 F.3d 1534, 1542 (11<sup>th</sup> Cir. 1994), citing *United States v. Fordice*, 505 U.S. at 727 (Emphasis Added).

This Court set forth our remedial duties. It established exactly what was needed by imposing "the most desegregative remedy that is educationally sound and practicable." *Knight*, 900 F.Supp. at 281. The question of compliance is simply "have the Defendants adopted the policy changes required by this Court." If so, our present policies no longer are "traceable to

past segregation,” the threshold requirement for identification of a vestige. *Fordice*, 505 U.S. 717 at 728.

If compliance is proved, Plaintiffs likely will contend the decree proved ineffective, and that further relief should be ordered, citing cases such as *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). Assuming the Court is asked to address such a question, it is important to note that the focus remains on the vestiges identified in the Court’s prior decrees. *United Shoe* authorizes additional relief to achieve the purposes of the original decree, not to address new and different concerns. There should be no “new” vestiges. Indeed, given that this Court “found all the relevant facts that there are to be found about higher education in Alabama,” *Knight* at 280, any “new” vestiges would have to be based on policies initiated after the 1995 decree, policies which, by definition, could not arise during, or be vestiges of, the period of *de jure* segregation.

So whether the question is “Did Defendants comply?” or whether the question is “Did the decree, though complied with, prove ineffective?” the focus will remain on the *policies* required to be remediated. *Policies* were the focus of the Supreme Court in *Fordice* and of the 11th Circuit and this Court at all stages of this proceeding.

It is in this context the Plaintiffs’ Motion must be considered. Plaintiffs think the Court should impose numerical standards in order to gauge either compliance with the decree or the effectiveness of the decree. But the focus is *policies*, not *numbers*. Numbers might evidence policies, but numbers are just that – evidence. Indeed, factors *other than policies* are reflected in the numbers. Numbers are not the standard. The standard is that the *policies* must be remediated to the extent practicable and consistent with sound educational practices.

**2. Failure to meet a benchmark figure for employment of black faculty and administrators does not constitute a continuing vestige of discrimination.**

The Plaintiffs have failed to allege why any modification of the existing remedial decree is justified, or what vestiges of discrimination identified in the remedial decree remain. Instead, Plaintiffs point only to the existing numbers of black faculty and administrators [Motion, ¶¶28-87], implying that those numbers, alone, are sufficient evidence of a continuing discriminatory practice. Plaintiffs' analysis misses the mark.

Plaintiffs concede that this Court's opinion was "silent with respect to the question of when the small numbers of black faculty and administrators themselves represent continuing vestiges of segregation." [Motion, ¶2] The Court's silence on that issue was not challenged on appeal, and it is now the law of the case. This Court and the court of appeals decided on the proper measure of relief, and that judgment is now final. Those decisions are binding on Plaintiffs, and the Court should not allow them an opportunity to re-litigate them after nearly a decade. See *United States v. McMahon*, 715, F.2d 498, 500-01 (11th Cir. 1983).

Defendants submit, however, that this Court correctly refused to hold that "small numbers of black faculty and administrators themselves represent continuing vestiges of segregation." [Motion, ¶2] Standing by themselves, numbers – even small numbers – do not constitute a constitutional violation. *U. S. v. Fordice*, 505 U.S. 717, 743 (1992) (noting "that an institution is predominantly white or black does not in itself make out a constitutional violation"). If numbers alone are insufficient to constitute a constitutional violation, such numbers, without more, do not represent a vestige that must be remedied by the Defendants.

Furthermore, selecting a number as a benchmark is problematic for at least two reasons. First, it cannot be said that an institution is or is not complying with the Constitution based solely on its performance relative to the benchmark. An institution might act unconstitutionally

but still exceed the benchmark, and an institution might act constitutionally without meeting it. The fact-finder must look behind the benchmark in either event. Second, there is “no principled reason” to select one benchmark figure over another. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality op.) In *Holder*, the Supreme Court rejected a challenge under §2 of the Voting Rights Act to the size of the county commission in Bleckley County, Georgia. The Court rejected the suggestion that a hypothetical five-member commission, “(instead of, say, a 3-, 10-, or 15-member body),” *id.*, should be used to determine whether the current single-member system diluted the voting rights of minority voters because there was “no principled reason” to pick one size over another. The Court observed:

One gets the sense that respondents and the United States have chosen a benchmark for the sake of having a benchmark. But it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place.

*Id.*

The folly of relying on numbers, rather than policies, to measure the violation or its remediation is perhaps illustrated by the following data from the 1993 Integrated Postsecondary Education Data Systems (“IPEDS”) Fall Staff Survey,<sup>1</sup> showing the percentages represented by African-Americans among full-time faculty at various institutions:

University of Michigan	4.30%
Ohio State University	3.51%
UCLA	2.98%
University of Alabama	2.57%
Auburn University	2.25%
University of Illinois	2.23%
Pennsylvania State University	1.97%

Numerous factors caused these numbers to be as they were. Assume, as Plaintiffs seem to

---

<sup>1</sup> 1993 Data have been selected because they were probably the most recent data available when the Court entered its 1995 decree.

suggest, that this Court found that one such factor, in the case of the University of Alabama and Auburn University, was a vestige of segregation and ordered that it be eradicated.<sup>2</sup> The numbers for the other institutions listed above are not influenced by any vestiges of segregation so, whether better or worse than those of Alabama or Auburn, are due to other causes. It would make no sense to establish a benchmark, such as 2.75%, and declare that the failure of an institution to meet that standard would constitute a violation of the Constitution. This Court, quite properly, based its findings not on mere numbers, but on the wealth of information developed through months of testimony.

Just as the Court looked at more than mere numbers in finding Constitutional violations, one must look at more than numbers to assess compliance with, or the effectiveness of, the remedial decree. Consider the same data, from the same source, for 2001, the most recent data available:

<b>University of Alabama</b>	<b>4.27%</b>
<b>Auburn University</b>	<b>4.04%</b>
University of Michigan	3.94%
Ohio State University	3.48%
University of Illinois	3.19%
Pennsylvania State University	2.75%
UCLA	2.38%

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. And it would be inappropriate to require UCLA to match, over the next 8 years, the success of Alabama and

---

<sup>2</sup> This Court does not need the State Defendants to further explain the Court's findings at 787 F.Supp. at 1378 or in its Order of April 3, 2003. Suffice it to say the State Defendants reject any suggestion by Plaintiffs that this Court found vestiges of segregation in the faculty hiring policies of all defendant institutions, or that any vestiges found were "equal" in scope or in required remedy. The State Defendants use Alabama and Auburn in this and subsequent examples only in order to compare comparable institutions, not to suggest their faculty hiring policies were anything other than as found by this Court.

Auburn over the past 8, as too many factors beyond the control of the institution or this Court contribute toward that success or the lack thereof.

Or consider the change in the data from 1991 to 1993:

<b>Auburn University</b>	<b>1.79%</b>
<b>University of Alabama</b>	<b>1.70%</b>
University of Illinois	0.96%
Pennsylvania State University	0.78%
Ohio State University	(0.03%)
University of Michigan	(0.36%)
UCLA	(0.60%)

Using Plaintiffs' Counsel's analysis (that "[a]t this rate, it will take [x] years for black representation . . . to reach [y] . . .," Motion, pp. 18-28) it appears that in 32 years UCLA will have no black faculty members, yet the time will come when no white faculty will remain at either Auburn University or the University of Alabama. Were the Court to conclude that the changes from 1993 to 2001 for Auburn and Alabama result from continued vestiges of *de jure* segregation, perhaps we need to inject similar vestiges into the policies of the other institutions listed above – then they could approach Auburn and Alabama in their success at diversifying their faculties!

Numbers are neither the violation nor the remedy. The good faith actions of the Universities in revising and implementing employment policies and practices are the issue, for that is what the Court required of them. 787 F.Supp. 1378. Numbers are only evidence, and result from many factors beyond the control of the universities or this Court. To make them the standard is inappropriate.

**3. Plaintiff's Motion is a disguised attempt to impose unconstitutional quotas on the HWIs with regard to black faculty and administrators.**

The Plaintiffs assert that establishing race-conscious numerical goals designed to achieve a "critical mass" of black faculty and administrators is "constitutionally permissible."

[Motion, ¶26] Because such numerical goals are permissible, Plaintiffs contend, the remedial decree should be modified to **require** each of the HWIs to establish race-conscious “numerical goals and timetables for achieving a critical mass of African Americans on their faculties and administrations.” [Motion, ¶90] The Plaintiffs’ Motion misapplies the holdings of the Supreme Court in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). To require Defendants to meet numerical hiring goals within prescribed time-tables, under the threat of contempt, is tantamount to ordering unconstitutional quotas. Neither *Grutter* nor *Gratz* permit race to be elevated to the status of such a predominant factor in the hiring process.

**4. “Critical Mass” cannot be defined as a number.**

Plaintiffs do not identify any standard for identifying “critical mass.” Indeed, the definitions asserted by Plaintiffs (Motion, ¶3) make it clear that the existence of a critical mass is very much “in the eye of the beholder.” That deemed an adequate “critical mass” by one individual may be deemed inadequate by another, because the determination is based upon the individual’s feelings and perceptions. Yet Plaintiffs ask the Court and the HWIs to quantify that inherently vague and judgmental term, without showing or alleging that the HWIs have ever used the concept, just so Plaintiffs can contend that the HWT’s do not meet it.

In entertaining this claim, this Court should keep in mind the fact that the Supreme Court has “sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation.” *City of Mobile v. Bolden* 446 U.S. 55, 79 (1980) (plurality op.); *see also Davis v. Bandemer*, 478 U.S. 109, 139 (1986) (plurality op.); 42 U.S.C. § 1973(b) (“*Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”) Furthermore,

in the employment context, the reference point is the qualified applicant pool. *See In re Employment Discrimination Litigation*, 198 F.3d 1305, 1312 and n. 11 (11th Cir. 1999). To the extent Alabama's HWIs compete with institutions that some view as more attractive, academically prestigious, or both, for the same pool of applicants, *and outperform those institutions*, Plaintiffs' attempt to impose "critical mass" by judicial fiat is misguided.

State Defendants do not dispute that the HWIs may take, and have taken, ethnic and racial diversity into account in their hiring decisions for faculty and administrators. Holding that diversity is a permissible consideration is not the same as mandating a numerical "critical mass," however. If this Court modified its injunction to require the HWIs to set "numerical goals" according to identified time-tables, this Court would be forced to monitor the HWIs' progress in achieving "critical mass." Factors beyond the control of the HWIs could interfere with the ability of HWIs to achieve any Court-approved "numerical goals," however. Thus, the modification would improperly subject the State to "judicial tutelage for the indefinite future." *Board of Education of Oklahoma City Public Schools, Indep. Sch. Dist. No. 89, v. Dowell*, 498 U.S. 237, 249 (1991). The Supreme Court has observed that injunctions entered in school desegregation cases "are not intended to operate in perpetuity." *Id.* at 248. Therefore, the requested modification should be denied.

**5. The Scope of the Remedial Decree should not be expanded through the requested Modification.**

Defendants acknowledge that this Court retained the power to "modify or amend the terms and conditions of th[e] Decree to guarantee the elimination of any remaining vestiges of discrimination." 900 F. Supp. 374. Even so, this Court should not exercise that power unless Plaintiffs meet the standards for modifying a permanent injunction. Defendants addressed those standards in the "Response of the State Defendants to Knight-Sims Plaintiffs' Motion for

Additional Relief with Respect to State Funding of Public Higher Education," heretofore filed in this cause, and will not repeat that discussion here.

In its prior opinion, this Court found that "vestiges remain within the practices of some Defendants" in the areas of "faculty and administrative employment." 787 F.Supp. at 1368. Plaintiffs apparently now want to expand those findings to faculty and administrative employment for all defendant institutions. To do so would ignore this Court's recent reaffirmation that "Not all predominantly white defendant institutions were found by the Court to be deficient or equally deficient in employment practices." Order, April 3, 2002, ¶1. Plaintiffs should not be allowed, yet again, to seek additional relief in these areas so thoroughly addressed through previous hearings and rulings by this Court.

In *Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002), the Eleventh Circuit found that a district court abused its discretion in modifying a consent judgment. The consent judgment called for the establishment of TMDLs ("Total Maximum Daily Loads"), *i.e.*, the maximum amount of a pollutant that may pass through a body of water a day. After the consent judgment was entered, the Sierra Club sought to compel the United States Environmental Protection Agency to establish implementation standards and, after Georgia developed and filed implementation standards with the court, objected to the adequacy of Georgia's plan. The district court held that the decree required implementation plans and directed EPA and the Sierra Club to confer on the adequacy of Georgia's implementation standards.

The Eleventh Circuit concluded that the obligation to prepare implementation plans represented a modification of the decree. *Id.* at 1032. The court rejected the contention that the modification was justified by changes in the law or the factual circumstances. Sierra Club also argued that modification was warranted "because the decree had not achieved its purpose, and

such a failure can be a changed circumstance justifying modification,” invoking *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), and *Sizzler Family Steak House v. Western Sizzler Steak House, Inc.*, 793 F.2d 1529, 1539 (11th Cir. 1986). The Eleventh Circuit observed:

That contention is based upon the premise that the purpose of the decree was to achieve clean water in Georgia, a state of affairs which everyone concedes is a long way off. But the purpose of the decree is not nearly so ambitious. Clean water may have been Sierra Club’s motivation, its reason for bringing the lawsuit to begin with, but the bargain it struck with EPA which produced the consent decree was much more limited.

*Id.*, at 1034. In sum, the court held that the decree focused only on the establishment of TMDLs and left the achievement of the “ultimate goal of cleaning up the water to the statutory and regulatory scheme which requires compliance by Georgia subject to some oversight by EPA. The consent decree does not supplant the [Clean Water] Act....” *Id.*

While the decrees entered in this case are not consent decrees, they represent final judgments imposing injunctive relief. As in *Sierra Club*, when this Court is asked to modify an injunction, it should be careful to stay within the limited scope of the remedial decree. The decree in this case involved the entry of “the most desegregative remedy that is educationally sound and practicable” in an effort to eradicate the vestiges of *de jure* segregation. The Defendants have complied with this decree, and Plaintiffs have pointed to no change in the law or the factual circumstances that would support modification of the decree.

## CONCLUSION

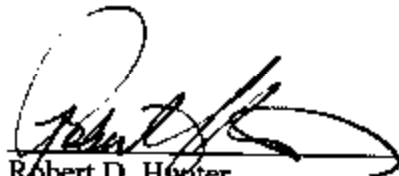
For each of the reasons stated above, the relief requested by the Knight Plaintiffs is due to be denied.

Respectfully submitted,

WILLIAM H. PRYOR JR.  
ATTORNEY GENERAL

### OF COUNSEL:

Office of the Attorney General  
Alabama State House  
11 South Union Street  
Montgomery, AL 36130-0152  
Telephone: (334) 353-3738  
Facsimile: (334) 353-8440



Robert D. Hunter  
Deputy Attorney General

210 Inverness Center Drive  
Birmingham, AL 35242  
Telephone: (205) 408-8078  
Facsimile: (205) 991-9993

## CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record on this 14<sup>th</sup> day of OCTOBER, 2003, by first class mail.

**The Honorable Harold L. Murphy**  
United States District Judge  
Northern District of Georgia  
P.O. Box 53  
Rome, GA 30161

**The Honorable Carlos A. Gonzalez**  
Court Monitor  
P.O. Box 450888  
Atlanta, GA 30345

**For Plaintiff-Appellants, John F. Knight, et. al:**  
Mr. James U. Blacksher, Esq.  
710 Title Building  
300 N. Richard Arrington Jr. Blvd.  
Birmingham, AL 35203-3352

**For Plaintiff-Appellants, John F. Knight, et. al:**  
Ms. Sarah L. Thompson, Esq.  
2422 Sixth Street  
Tuscaloosa, AL 35401

Susan J. Watterson, Esq.  
2610 19<sup>th</sup> Street South  
Birmingham, AL 35209

Demetrius Newton, Esq.  
P.O. Box 2525  
Birmingham, AL 35202

**For the United States of America:**  
Mr. Jeremiah Glassman, Esq.  
Ms. Pauline Miller, Esq.  
U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, N.W.  
Educational Opportunities Section, PHB 4300  
Washington, D.C. 20530

**For the State Superintendent of Education,  
Board of Education, K-12 Capacity**  
Mr. Reginald Sorrells, Esq.  
Office of General Counsel  
5103 Gordon Persons Building  
P.O. Box 302101  
50 North Ripley Street, 4<sup>th</sup> Floor  
Montgomery, AL 36130

**For Alabama A&M University:**  
Mr. W. Braxton Schell, Jr., Esq.  
1125 Financial Center  
505 20<sup>th</sup> Street North  
Birmingham, AL 35202

**For Auburn University**  
Mr. David R. Boyd, Esq.  
Robin G. Laurie  
Balch & Bingham  
P.O. Box 78  
Montgomery, AL 36101

Mr. Edward S. Allen, Esq.  
Mr. M. Stanford Blanton, Esq.  
Balch & Bingham  
P.O. Box 306

**For Troy State University:**  
Mr. William F. Gardner, Esq.  
Mr. William K. Thomas, Esq.  
Cabaniss, Johnston, Gardner, Dumas & O'Neal

Birmingham, AL 35201-0306

P.O. Box 830612  
Birmingham, AL 35283-0612

**For University of North Alabama:**  
Mr. Thomas M. Lovett, Esq.  
University of North Alabama  
UNA Box 78  
Florence, AL 35632-0001

**For University of South Alabama:**  
Ms. Jean Walker Tucker, Esq.  
University of South Alabama  
Room 131- Admin. Building  
Mobile, AL 36688-0002

**For University of Montevallo:**  
Mr. Carl E. Johnson, Jr., Esq.  
Bishop, Colvin, Johnson & Kent  
317 North 20<sup>th</sup> Street  
P.O. Box 370404  
Birmingham, AL 35237

**For the University of Alabama:**  
Mr. C. Glenn Powell, Esq.  
Ms. Norma M. Lemley, Esq.  
Office of Counsel  
The University of Alabama System  
1818 University Boulevard  
Tuscaloosa, AL 35401-1518

**For Alabama State University:**  
Mr. Fred D. Gray, Esq.  
Mr. Stanley F. Gray, Esq.  
P.O. Box 830239  
Tuskegee, AL 36082-0239


Mr. Armand Derfner, Esq.  
116 Church Street  
Charleston, SC 29402-0600

Mr. Solomon Seay, Jr., Esq.  
P.O. Box 210998  
Montgomery, AL 36121-9998

**For University of West Alabama:**  
Mr. Michael G. Kendrick, Esq.  
Ms. Victoria J. Franklin-Sisson, Esq.  
Gorham & Waldrep  
2101 N. 6<sup>th</sup> Avenue, Suite 700  
Birmingham, AL 35203

**For Alabama State Board of Education,  
Athens State College and Calhoun State  
Community College:**  
Mr. Jeffrey A. Foshee, Esq.  
Mr. Edward M. George, Esq.  
Jeffrey A. Foshee & Associates  
900 South Perry Street, Suite B  
Montgomery, AL 36104

**For Jacksonville State University:**  
Mr. R.M. Woodrow, Esq.  
Doster & Woodrow  
303 SouthTrust Building  
P.O. Box 2286  
Anniston, AL 36202

  
Robert D. Hunter  
Deputy Attorney General  
Counsel for the State Defendants