CASE NO. 05-11527-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN F. KNIGHT, JR., AND ALEASE S. SIMS, ET AL.,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiffs,

v.

STATE OF ALABAMA, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND HISTORIANS WITH SPECIALIZED KNOWLEDGE OF ALABAMA'S STATE AND LOCAL TAX STRUCTURE AND ALABAMA'S 1901 CONSTITUTION URGING REVERSAL IN SUPPORT OF APPELLANTS

MARK SABEL
Sabel & Sabel, P.C.
2800 Zelda Road, Suite 100-5
Montgomery, AL 36106
(334) 271-2770
E-mail: mksabel@mindspring.com

ROBERT D. SEGALL
Copeland, Franco, Screws & Gill, P.A.
P. O. Box 347
Montgomery, AL 36101-0347
(334) 834-1180
E-mail: segall@copelandfranco.com

Counsel for *Amici Curiae*

Knight and Sims v. Alabama, No. 05-11527

CERTIFICATE OF INTERESTED PERSONS

Amici Curiae, through undersigned counsel, certify that the following persons, firms, and entities have an interest in the outcome of this case:

1. Algert S. Agricola, Jr.
2. State of Alabama
3. Alabama A&M University
4. Board of Trustees for Alabama A&M University
5. Alabama Commission on Higher Education
6. Alabama Public School and College Authority
7. Alabama State Board of Education
8. Alabama State University
9. Board of Trustees for Alabama State University
10. Edward S. Allen
11. James R. Andrews
12. Athens State College
13. Auburn University
14. Dennis Charles Barnett
15. Ella B. Bell

16. Stephanie W. Bell
17. James U. Blacksher
18. John G. Blackwell
19. Dr. Maree Macon Blackwell
20. David R Boyd
21. J. R. Brooks
22. Hall Bryant, Jr.
23. Paul W. Bryant, Jr.
24. Ralph Buffkin
25. Susan Buskey
26. David F. Byers, Jr.
27. Dr. Taylor Byrd
28. Judge John L. Carroll, Dean and Ethel P. Malugen Professor of Law, Cumberland School of Law, Samford University
29. Calhoun State Community College
30. Richard F. Calhoun
31. Frederick Carodine
32. Dr. Mary Jane Caylor

33. Jesse L. Cleveland

34. Bettye Fine Collins

35. Angus R. Cooper II

36. James C. Cox

37. Larry E. Craven

38. Oscar Crawley

39. Vonda Cross

40. Buford Crutcher

41. Thomas P. Davis

42. Elton N. Dean, Sr.

43. Armand Derfner

44. Gerald O. Dial

45. Roy H. Drinkard

46. Judge John H. England

47. Joseph C. Espy III

48. Thomas Figures

49. Wayne Flynt, Distinguished University Professor, History, Auburn University, Auburn, Alabama.

50. Jeffery A. Foshee

51. Byron P. Franklin

52. Alma S. Freeman

53. Charles W. Gamble, Henry Upson Sims Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama.

54. William F. Gardner

55. Edward M. George

56. H. Lewis Gillis

57. Jeremiah Glassman

58. Carlos A. Gonzalez

59. Fred D. Gray

60. Stanley F. Gray

61. Edgar R. Haden

62. Dr. Ethel H. Hall

63. Susan Pace Hamill, Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama (primary author of this Brief *Amici Curiae*).

64. John Harrison

65. R. Douglas Hawkins

66. Lamar P. Higgins

67. Robert Holmes, Jr.

68. Robert D Hunter

69. Andria S. Hurst

70. Harvey H. Jackson III, Professor and Head, Department of History and Foreign Languages, Jacksonville State University, Jacksonville, Alabama.

71. Johnnie Jackson-McDougald

72. Jacksonville State University

73. Clinton L. Johnson, Sr.

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105. Pauline Miller

106. Gary Mitchell, Jr.

107. Dr. Joe Morton

108. Hon. Harold L. Murphy, U.S. District Judge

109. C. Charles Nailen, Jr.

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120. Horace W. Rice

121. Robert W Rieder

122. Bob Riley, Governor of the State of Alabama

123. Mark Sabel, Attorney for *Amici Curiae*

124. Robert D. Segall, Attorney for *Amici Curiae*

125. Braxton Schell, Jr.

126. Stephen W. Shaw

127. Dr. Richard Showers

128. Alease S. Sims

129. Stacey Levise Sims by Her Parents Levi Sims and Alease S. Sims

130. Reginald L. Sorrells

131. Paul J. Spina, Jr

132. Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama.

133. Finis E. St. John IV

134. John Russell Thomas

135. William K. Thomas

136. Anthony Y. Lavonne Thompson by His Mother Lois N. Thompson

137. Sarah L. Thompson

138. Dan Tibbs, Jr.

139. Velma Tribue

140. Troy State University

141. Allen Tucker

142. Jean Walker Tucker

143. United States of America

144. University of Alabama

145. University of Montevallo

146. University of North Alabama

147. University of South Alabama

148. University of West Alabama

149. Kreslyon Lynette Valrie by Her Mother Georgia S. Valrie

150. Professor Howard P. Walthall, Sr., Cumberland School of Law, Samford University, Birmingham, AL.

151. Oliver Washington, III

152. Susan J. Watterson

153. Roberta O. Watts

154. Joe R. Whatley, Jr.

155. James W. Wilson III

156. Ronald W. Wise

157. R. M. Woodrow

158. Catherine W. Wright

159. Frankie Patricia Yarbrough

/s/Mark Sabel

Mark Sabel
Attorney for *Amici Curiae*

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STATEMENT OF PARTIES' CONSENT TO FILING BRIEF OF *AMICI CURIAE*

Pursuant to FRAP 29(a), *Amici Curiae* file this brief without seeking leave of court because all parties of record have consented to its filing.

INTEREST OF *AMICI*

The undersigned *Amici* are:

1. Judge John L. Carroll, Dean and Ethel P. Malugen Professor of Law, Cumberland School of Law, Samford University, Birmingham, Alabama;
2. Wayne Flynt, Distinguished University Professor, History, Auburn University, Auburn, Alabama;
3. Charles W. Gamble, Henry Upson Sims Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama;
4. Susan Pace Hamill, Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama (Professor Hamill is the primary author of this Brief *Amici Curiae*);
5. Harvey H. Jackson III, Professor and Head, Department of History and Foreign Languages, Jacksonville State University, Jacksonville, Alabama;
6. Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama;
7. Professor Howard P. Walthall, Sr., Cumberland School of Law, Samford University, Birmingham, Alabama.

Amici, whose institutional affiliations are listed for identification purposes only, are a group of law professors and historians with specialized knowledge of how Alabama's state and local tax laws operate, how Alabama's 1901 Constitution stymies any meaningful changes in the property and income tax structures, and how race discrimination dominated the formation and development of the 1901 Constitution and Alabama's property tax structure. *Amici* offer their knowledge of Alabama's tax law structure and its historical underpinnings to delineate how the District Court erred by effectively exempting Alabama's tax structure from race-based equal protection review.

The Appellants in this case allege that Alabama's property tax laws, in particular the Lid Bill, violate the Equal Protection Clause of the Fourteenth Amendment on the grounds of race discrimination. The District Court found that Alabama's property tax system "is a vestige of discrimination" and stated that "Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments." Doc. 3294 at 49. Despite additional findings of fact recognizing that African Americans are disproportionately harmed by Alabama's

woefully inadequate K-12 and higher education funding (*see, e.g.,* Doc. 3294 at 57, 72, 76, 78), and statements that "the *current tax structure* in Alabama cripples the effectiveness of state and local governments in Alabama to raise funds adequate to support *higher education*," (*id.* at 83-84 (emphases added)), "[t]he *Lid Bill* and low assessment ratios impede and restrict the ability of State and local governments from raising revenue from *taxation of property*" (*id.* at 84 (emphases added)), and "[t]he effect of low property tax revenues has had a crippling effect on poor, majority black school districts," (*id.* at 55), the District Court concluded as a matter of law that Alabama's property tax laws pass constitutional muster because they "do not continue to have a segregative effect." *Id*. at 86.

Amici recognize that tax policy seldom presents a federal constitutional issue. *Amici* do not herein argue that there is a general constitutional obligation owed by the states to ensure that the tax laws raise sufficient revenues to adequately fund education. *Amici* are unaware of any other case where the details of a tax law itself has been challenged under a race-based equal protection theory. However, in that all public policy must pass constitutional muster under the Equal Protection Clause of the Fourteenth Amendment, *Amici* urge reversal because the District Court effectively exempted not only Alabama's property tax laws but potentially other laws from race-based equal protection scrutiny. *Amici* explain that the District Court erroneously

failed to consider that tax laws operate differently from the policies challenged in the pertinent Supreme Court cases. *Amici* further offer suggestions as to how the Fourteenth Amendment should be applied so that tax policy receives the same scrutiny that the Supreme Court has applied to other policies.

STATEMENT ADOPTING APPELLANTS' STATEMENT OF THE ISSUES

Pursuant to FRAP 28(i), *Amici* adopt Appellants' Statement of the Issues found at pages 1-2 of Appellants' principal brief.

SUMMARY OF THE ARGUMENT

This case of first impression involves a race-based equal protection challenge to the details of tax laws embedded in a state's constitution. As a result of the testimony of several prominent experts at trial, the District Court held: (1) from 1875 all way through 1978 powerful legislators and governors anchored Alabama's property tax laws in the state's 1901 Constitution in order to starve funding in order to deny education opportunities to African-Americans; (2) African-Americans continue to be disproportionately denied access to both K-12 and higher education opportunities because of Alabama's lowest-in-the-nation revenues and property tax

revenues; and (3) the constitutionalizing of the property tax Lid Bill Amendments in 1971 and 1978 guarantees that no level of millage rates will produce minimally adequate property taxes. Despite these powerful findings of fact, the District Court held, as a matter of law, that Alabama's property tax passes constitutional muster under the Equal Protection Clause of the 14th Amendment.

This brief of *Amicus Curiae* argues that the District Court has erroneously applied the law of three distinct branches of equal protection cases in the race discrimination area. These branches, *United States v. Fordice*, 505 U.S. 717 (1992), *Hunter v. Erickson,* 393 U.S. 385 (1969), and its progeny, and *Hunter v. Underwood*, 471 U.S. 222 (1985), mostly involved public policies, such as admissions standards and voting restrictions, where the potential discriminatory effects to African-Americans are obvious. In other words, it was not necessary for the Supreme Court to probe deeply to discover whether the racially motivated public policy was causing the continuing racially discriminatory effects. Tax policy, however, is fundamentally different from most of these other policies in that tax laws are first and foremost about funding goals and consequences. The common error running through the District Court's legal analysis is the failure to appropriately evaluate the racially motivated tax laws and continuing racially discriminatory effects in the context of the funding goals and consequences flowing out of Alabama's property tax laws.

In its *Fordice* analysis, the District Court erroneously required the link between Alabama's property tax laws and the shortfall in higher education funding to meet a "super causation" standard, and then ignored its own findings of fact in holding that such a link was not present. Similarly, when applying *Erickson* and its progeny the District Court ignored the fact that African Americans are disproportionately harmed by the funding restrictions from the difficult-to-change 1971 and 1978 Lid Bill Amendments that were anchored in the 1901 Constitution. Finally, the District Court arbitrarily limited the scope of *Underwood* to taxpayer actions. This has the effect of limiting constitutional scrutiny to racially motivated tax laws disproportionately shifting the burden for paying taxes to African-Americans.

By imposing legal standards that effectively divorce tax laws from their funding goals and consequences, the District Court has exempted not only Alabama's property tax laws, but also tax laws in other states, and potentially other laws outside the tax area from race-based equal protection scrutiny. Although states generally have absolute power in shaping tax policy with respect to funding education, the District Court's legal analysis is erroneous because no area of public policy is exempt from scrutiny under the Equal Protection Clause of the 14th Amendment. Although tax laws generally do not raise constitutional issues, tax laws designed as a sophisticated tool to cause African-Americans to suffer the devastating consequences of inadequate

education funding more heavily than whites must be struck down as unconstitutional. The overwhelming factual evidence at trial proving the racially discriminatory motives and effects, coupled with the law of *Fordice*, *Erickson* and *Underwood* requiring tax laws to be evaluated in light of their funding goals and consequences, compels this Court to hold Alabama's property tax structure unconstitutional.

ARGUMENT

I. ALABAMA'S TAX LAWS SHOULD NOT BE EXEMPT FROM RACE-BASED EQUAL PROTECTION SCRUTINY.

A. The District Court Erred by Implicitly Imposing a "Super Causation" Requirement on Review of Race-Based Equal Protection Challenges to Alabama's Tax Laws.

In applying the law of *United States v. Fordice*, 505 U.S. 717 (1992), the District Court imposes what can best be described as a "super causation" requirement creating a strong presumption that the Lid Bill no longer carries the taint of its racially discriminatory origins unless the *plaintiff* proves that the Lid Bill is the one and only direct cause of the grossly inadequate funding for higher education. Although agreeing that "the current property tax system in Alabama has a crippling effect on the ability of local and state government to raise revenue adequately to fund *K-12 schools*," the District Court held "that the relationship between the funding of

higher education and f[u]nding of *K-12* is marginal insofar as ad valorem property tax is concerned." Doc. 3294 at 85 (emphases supplied). In other words, despite the disabling limitations on education funding for majority black school districts caused by the Lid Bill and the disproportionate denial of African Americans access to higher education resulting from the grossly inadequate revenues caused by Alabama's current tax structure, the District Court held that the *defendant* proved that Lid Bill bears little or no responsibility for the funding limitations crippling higher education.[1]

By inappropriately shifting an apparently heightened burden of proof to the plaintiff that *Fordice* neither requires nor contemplates, the District Court effectively removed tax policy from any meaningful race-based equal protection scrutiny. There is nothing in the nature of tax policy that would require, nor is there any legal basis for, shifting and magnifying the burden of proof. Of the four policies addressed in *Fordice*, the Supreme Court's evaluation of Mississippi's admissions standards

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[1] The District Court later clarified its ruling stating it "reached its conclusion based on the Knight-Sims Plaintiffs' failure to show that the ability of black students to attend college, or to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system." Doc. 3320 at 6. *Amici* agree that *Fordice* must also apply to unconstitutional denials of access to a higher education. Focusing solely on the choice between colleges, especially when scrutinizing tax policy, potentially ignores large numbers of low income African Americans being disproportionately denied access to higher education on the dubious theory that the challenged policy does not impact whether a few affluent African Americans choose to attend a historically white or black institution.

illustrates this best.[2] In its holding that the admissions standards were constitutionally suspect, the Supreme Court did not have to legally define the necessary degree of causation linking the minimum ACT requirements with the continuing segregative effects because the minimum ACT requirements directly caused a disproportionate number of African Americans to be denied admission into historically white institutions. Stated differently, admissions standards originally established to limit black enrollment will automatically constitute the direct cause of the continuing segregative effects if African Americans continue to be disproportionately denied admission for failing to meet the standards.[3]

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[2] The District Court's "super causation" requirement imposed on tax policy erroneously disregards the Supreme Court's clear legal standards applied to the other three challenged policies in that case. For Mississippi's duplication of programs, the Supreme Court explicitly rejected a "super causation" standard for continuing segregative effects in its holding that the lower courts erroneously "determined that 'there is no proof' that such duplication 'is directly associated with the racial identifiability of institutions.'" 505 U.S. at 738. In addition to finding that the burden of proof was erroneously shifted from the state to the plaintiff, the Supreme Court further held that "by treating this issue in isolation, the court failed to consider the combined effects of unnecessary program duplication with other policies." *Id.* at 739. For the other two policies, the Supreme Court required a broad examination of all the circumstances. *Id.* at 739-43.

[3] *Id.* at 734-35 (describing the "present discriminatory effects" in terms of far fewer African Americans being admitted to the historical white institutions with the higher minimum ACT requirements while noting "the segregative effect of this automatic entrance standard is especially striking" when compared to the admissions patterns of the historically black institutions with the lower minimum

However, unlike the challenged admissions standards under *Fordice*, tax laws generically focus on the funding goals of a variety of public needs, such as education. Consequently, any disproportionate negative effects on African Americans from restrictions in funding for education will not be automatically linked as being exclusively caused by the particular tax law that was adopted for racially discriminatory motives. This is because most state tax policy regimes do not link the vast majority of funding allocations with the particular tax provisions supplying the revenues; in other words, they keep earmarking under control.[4] Because of the inherent difficulties in tracing the exact source of funds raised from different tax provisions within one tax policy structure, the District Court's "super causation" requirement effectively exempts most tax laws from race-based equal protection scrutiny. This "super causation" requirement exempting most tax policy from scrutiny erroneously imposes a substantially heavier legal standard for constitutional evaluations of tax policy than what *Fordice* applied to the challenged policies under

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ACT requirements).

[4] Of the fifty states only fifteen earmark more than 25% (six of which earmark more than 50%) of their tax revenues with the national average at 21.7% and the national median (which excludes Alabama's 87.2% earmarking as an outlier) at 17.9%. *See* FISCAL PLANNING SERVICES INC., DEDICATED STATE TAX REVENUES: A FIFTY-STATE REPORT 15 (June 12, 2000) [Hereinafter "Fifty-State Report"].

its facts.

Amici recognize that the legal standard of *Fordice* evaluating a particular tax law must impose some level of causal link between the racially motivated restriction of funds from a particular tax law and the disproportionate denial of higher education access to African Americans due to inadequate funding. Otherwise racially motivated tax laws only tangentially linked to shortfalls in higher education funding would be potentially unconstitutional. This would effectively allow race-based challenges to tax laws to enjoy a lighter legal standard than *Fordice* applied to the challenged policies under its facts, a result not advocated by *Amici*. Rather this Court should apply the law of *Fordice* in a way that effectively imposes the same legal standard on race-based challenges to tax policy that the Supreme Court imposed on the challenged policies under the facts of *Fordice*.

Amici submit that the appropriate causation standard for showing the racially motivated restriction of funds of a particular tax law resulted in the under-funding of higher education and produced the racially discriminatory effects should be along of the lines of "materiality," meaning the consequential facts show some logical connection linking the two.[5] This would mean the defendant could prove that the segregative effects of the challenged tax law no longer continues unless the racially

[5] BLACK'S LAW DICTIONARY (8th ed. 2004).

motivated funding restrictions of the challenged tax law materially contributes to the under funding of higher education, disproportionately denying African Americans access to a higher education.[6] As discussed below, Alabama cannot possibly meet the burden of proving that the Lid Bill fails to materially cause the grossly inadequate higher education funding and the resulting discriminatory effects on African Americans. Said another way, when viewing the property tax provisions with the combined effects of the sales and income tax structures, under the District Court's own findings of facts the Lid Bill can be the only cause of the inadequate funding which disproportionately denies African Americans access to a higher education.

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[6] *Amici's* suggestion that materiality should be the legal standard defining the causation link between the racially discriminatory tax law and the inadequate higher education funding disproportionately impacting African Americans is consistent with established tort law requiring proximate cause, meaning there is "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered," in order to limit liability to the reasonably foreseeable consequences of one's actions. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 264, 281(5th ed. 1984). *Amici* recognize that the Supreme Court has been unwilling to adopt a tort law standard as definitive proof of purposeful discrimination for establishing an equal protection violation. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Nonetheless, the Court has acknowledged the potential relevance to constitutional cases of evidence grounded in a tort law model. *Id.* at 279, n.25. Accordingly, tort law standards can be helpful by analogy in this case where the question of purposeful discrimination has been conclusively resolved in Appellants favor and the evidence amply reveals causal links to racially discriminatory effects.

B. <u>The District Court's Assumption That "Super Causation" is not Established Erroneously Ignores its Own Findings of Fact</u>.

Even if this Court holds that the legal standard of *Fordice* requires the Lid Bill to be the only cause of the crippling level of funding for higher education, based on its own findings of fact as well as the published legal scholarship that the opinion endorses, the District Court erred by assuming that the Defendant proved that this causation link was absent. The District Court's statements - that "Alabama's per capita property tax and revenues are the lowest of all fifty states....", "the *property tax provisions* are the primary force driving both injustices....[of].....the grossly inadequate revenues supporting education....[and the]....regressive income and sales tax laws", and, "the Lid Bill, by constitutionally keeping the property tax base at a mere fraction of the property's value, guarantees that no level of millage rates will produce minimally adequate property taxes"– causally link the grossly inadequate property tax revenues resulting from the Lid Bill to the grossly inadequate revenues of Alabama's entire state and local tax structure.[7] Doc. 3294 at 50, 52 (emphasis

[7] The District Court relied heavily on an extensive study of Alabama's state and local tax laws, especially the portion proving that timber (which covers 71% of Alabama's land and accounts for major profits) pays only 2% of Alabama's lowest-in-the-nation property taxes, averaging less than $1 an acre. The Lid Bill, by allowing only ten percent of timber's current use value to be subject to the millage rates, is responsible for effectively exempting timber from property taxes leaving most of Alabama's sixty-seven largely rural counties unable to raise even minuscule property tax revenues. Doc. 3294 at 49-50, 52-53 and Susan Pace

supplied). Given these clear factual findings and its holding that only a marginal connection exists between the inadequate property tax revenues and the grossly inadequate funding of higher education, the District Court had to be assuming that the Lid Bill is not the only cause of the shortfall because it is possible to increase higher education funding to a sufficient level with other sources of revenue from either the sales or income tax structures.[8]

The District Court's findings of fact preclude any presumption that additional sales taxes can fund higher education. The District Court factually connected "Alabama's over-reliance on sales taxes [as] support[ing] the conclusion that inadequate property taxes cause Alabama's inadequate revenues." Doc. 3294 at 51.

Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 22-33 and app. C & E (2002) [hereinafter "Alabama Law Review Article"].

[8] The sales or income tax structures are the only other two sources of revenue that could even theoretically raise sufficient additional revenues. Although state and local tax regimes raise revenues from numerous sources, it is well established that the sales, income and property tax structures are the big three sources supplying most of the revenues. It is also well understood that well-designed state and local tax structures draw a balanced proportion from each of these three major sources, with property taxes contributing at least a fourth, keeping sales taxes contained at no more than a third, with income and other taxes accounting for the rest. JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZENS GUIDE TO THE DEBATE OVER TAXES, 14, Table 2.1 (3rd ed. 2004). *See also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶¶ 13.09[4]-20.10[6] (3rd ed. 2000).

The District Court also recognized that "a greater reliance on sales taxes cannot compensate for disproportionately low property taxes" because "most rural and low-income counties have small commercial sales bases." *Id.* at 51-52. From this the District Court further concluded that "the state's low revenues demonstrate that reliance on sales taxes cannot compensate for disproportionately low property taxes" because "sales taxes will never raise adequate revenues to meet minimum needs, including educational needs." *Id.* at 51-52. These clear factual findings recognize that as a practical matter Alabama's sales taxes are fully tapped out and offer no potential toward providing the additional funding necessary to absolve the Lid Bill as the only culprit causing the inadequate funding of higher education.[9]

The District Court's findings of fact also implicitly preclude any presumption that additional income taxes can fund higher education. In recognizing that Alabama's income tax is currently regressive and earmarked for K-12 teacher salaries, the District Court had to be assuming that the state has the practical ability to raise

[9] The extensive study of Alabama's state and local tax structure relied on heavily by the District Court documents that Alabama's sales taxes are among the highest in the nation, fully applying to food and other necessities, and account for more than half of Alabama's lowest-in-the-nation revenues. Most areas across the state due to the rural nature of their economies have no ability to raise significant sales tax revenues because of low levels of gross retail sales. Alabama Law Review Article, *supra* note 7 at 18-20 and app. B.

income taxes to sufficiently fund higher education.[10] Doc. 3294 at 50, 23. Income taxes cannot be raised, however, without amending the 1901 Constitution.[11] The District Court's findings of fact, stating the "Lid Bill *constitutionally....guarantees*"that there will never be minimally adequate property taxes, recognizes that the cumbersome procedures for amending the 1901 Constitution effectively locks the status quo of the property tax structure in place, thereby preventing changes that will raise more revenue. Doc. 3294 at 52, 84 (emphasis supplied). Yet the District Court failed to recognize the similar difficulty presented by the income tax structure. The District Court erred in assuming that the 1901 Constitution fails to similarly block additional income tax revenues given that

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[10] Alabama's income tax overtaxes poor and low income Alabamians to a disconcerting degree, applying at income levels for a family of four starting at $4,600 a year, the lowest threshold in the nation. *See* Alabama Law Review Article, *supra* note 7 at 11-18. *See also* Phillip Rawls, *State's Working Poor Hit Hard*, MONTGOMERY ADVERTISER, April 24, 2005 at 1A (discussing recent changes to Kentucky's income tax structure that ease the burden on the poor, which leaves Alabama as the state that taxes people deeper into poverty than any other state, requiring a family of four at the poverty line to pay more than $500 in state income taxes).

[11] ALA CONST., of 1901, amend. 25 (1932) (caps the individual income tax rate at 5%); ALA CONST., of 1901, amend. 225 (1965) (requires that individual taxpayers be allowed a deduction for federal taxes paid). The only way to significantly increase income tax revenues is to raise the constitutionally capped 5% rate, eliminate the constitutionally mandated federal taxes paid deduction (which costs the state at least $450 million a year) or both. *See* Alabama Law Review Article, *supra* note 7 at 11-18.

both the income and property tax structures are subject to similar cumbersome amendment procedures under the 1901 Constitution.[12]

The District Court's findings of fact, in addition to being backed up by the extensive trial testimony of several experts and the published legal scholarship endorsed in the opinion, are also backed up by an overwhelming consensus among thoughtful opinion makers, leaders and historians across the State of Alabama[13] and

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[12] The District Court implicitly relies on an extensive study documenting how Alabama's 1901 Constitution prevents any meaningful tax reform in Alabama. Doc. 3294 at 49-50 and Susan Pace Hamill, *Constitutional Reform in Alabama: A Necessary Step Toward Achieving A Fair And Efficient Tax Structure*, 33 CUMB. L. REV. 437, 447 (2002-2003) [hereinafter "Cumberland Law Review Article"](describing the cumbersome procedures necessary to amend the 1901 Constitution with respect to both the property and income tax structures, noting that the Lid Bill "leaves the state and local areas perpetually revenue starved and unable to fund minimum needs such as public education"). Although the procedures for amending the property tax are more elaborate (because the property tax law is more complicated) when compared to the income tax law (*id.* at 440-447), this study supports the conclusion that the 1901 Constitution locks the status quo in place with regard to the income tax, thus preventing changes that will raise more revenue. *See id.* at 452 (concluding that "[b]ecause Alabama's Constitution and its elaborate procedures locks in place the inequitable features of both the income and property tax structures... as a practical matter constitution reform is a necessary prerequisite to tax reform").

[13] A consensus that no adequate education funding either at the K-12 or higher education levels is possible without property tax reform and that constitution reform is necessary to make that possible has been recognized by prominent Alabama historians (*see* WAYNE FLYNT, ALABAMA IN THE 20TH CENTURY 17, 20 (2004) [hereinafter Flynt] and HARVEY H. JACKSON III, INSIDE ALABAMA: A PERSONAL HISTORY OF MY STATE 288, 298 (2004) [hereinafter Jackson]), several respected leaders (*see* Thomas E. Corts, *Out of Fairness,*

the indisputable facts surrounding the entire Alabama state and local tax picture. In addition to having the lowest revenues and property tax revenues in the nation, almost ninety percent of Alabama's revenues are earmarked, leaving little discretion to change the funding allocation ratios among all of Alabama's grossly underfunded public needs, including higher education.[14] More than any other state Alabama has constitutionalized the ability to raise additional revenues through property and income taxes, thus effectively miring the present in the past.[15] Finally, all efforts to

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Alabama Deserves a new Constitution, BIRMINGHAM NEWS, April 13, 2003 at 5C; William V. Muse, *State Should Heed North Carolina's Example*, MONTGOMERY ADVERTISER, July 8, 2001at 9A and Jim Williams, *Alabama's Broke; It's Time to Fix It*, MONTGOMERY ADVERTISER, Jan. 21, 2003 at 6A), and the editorial boards of the state's major newspapers (*see* ANNISTON STAR, *Unequal Education*, Sept. 6, 2003 at 4A; ANNISTON STAR, *What are You Voting for Tuesday*, Sept. 8, 2003 at 4A; BIRMINGHAM NEWS, *Malicious Intent: Writers of Constitution Gave Power to Only a Few*, Jan. 30, 2001at 6A; MOBILE REGISTER, *Legislature Can't Keep Thinking in Short-Term*, Jan. 30, 2005 at 2D; MOBILE REGISTER, *In 2004, Let's Redouble Our Efforts to Reform*, Jan. 1, 2004 at 14A; MONTGOMERY ADVERTISER, *Study Highlights Need for Reform*, May 15, 2004 at 6A; TUSCALOOSA NEWS, *Constitutional Reform Remains a Vital Issue*, April 7, 2005 at 6A; TUSCALOOSA NEWS, *Time for State to Consider Raising Property Taxes*, March 18, 2004 at 6A).

[14] *See* Fifty-State Report, *supra* note 4 at 15 (Alabama earmarks 87.2% of its tax revenues, by far the highest percentage of any state; by comparison the second highest percentage belongs to Nevada, which earmarks 64.5%).

[15] *See* Bruce P. Ely and Howard P. Walthall, Sr., *State Constitutional Limitations on Taxing and Spending: A Comparison of the Alabama Constitution of 1901 To Its Counterparts*, 33 CUMB. L. REV. 463, 471-489 (2002-2003) (comparing Alabama's constitutional tax structure with that of the other

reform Alabama's income and property tax structures have been futile.[16] Given the District Court's findings of fact and this other evidence, there can be no other cause of the grossly inadequate funding of higher education beyond the property tax structure. The District Court's holding that the Lid Bill fails to cause the higher education shortfall and the racially discriminatory effects under the *Fordice* standard is tantamount to treating Monopoly Money as real currency able to buy the actual

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Southeastern states, noting that the authors "were unable to locate a state constitution anywhere in the United States that contained such a level of detail on taxes and taxing restrictions as Alabama's").

[16] Attempts to improve Alabama's tax structure occurred during the first half of the 20th century, especially under the administrations of Governors Kilby, Graves, Miller and Big Jim Folsom. *See* Flynt, *supra* note 13 at 64-65 and Jackson, *supra* note 13 at 166-167, 170, 179-181, 214. In the early 1990s Bo Torbert, former Alabama Supreme Court Chief Justice, and Tom Carruthers, Bradley, Arant senior partner, each led serious but ultimately unsuccessful attempts to reform both the income and property tax structures. *See* REPORT OF THE ALABAMA COMMISSION ON TAX AND FISCAL POLICY REFORM (January 1991), *reprinted in*, 43 ALA L. REV. 745 (1992) and Barbara Larson, Executive Director, Leadership Alabama, *Tyranny of Alabama's Tax System*, Speech Given at Rally for Constitutional Reform, April 7, 2000 *at* http://accr.constitutionalreform.org/speeches/speech_b1.html. State Representative John Knight in recent years has consistently but unsuccessfully attempted to introduce legislation that would exempt taxpayers below the poverty line from the income tax. *See* Hamill, *supra* note 7 at n. 268 (documenting numerous bills in 2001 and 2002) and *Upgrade State's Image and Help the Poorest*, MOBILE REGISTER, May 1, 2005 at 2D (discussing the inability of Knight to get his 2005 income tax bill even considered by the Legislature). For a discussion of the defeat at the polls on September 9, 2003 of Governor Riley's tax reform plan, *see* text accompanying *infra* notes 27-28.

Boardwalk.

C. The District Court's Interpretation of *Hunter v. Erickson* and its Progeny and *Hunter v. Underwood* Similarly Exempts Tax Policy From Race-BasedEqual Protection Scrutiny.

In applying the law of *Hunter v. Erickson*, 393 U.S. 385 (1969), and its progeny, despite factual findings that "[t]he historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978", the District Court held that the anchoring of the property tax provisions in Alabama's Constitution does not unconstitutionally restrict black political participation because "Alabama's property tax structure uniformly affects all citizens of Alabama, regardless of race, burdening all of the constituency by making it difficult to influence or change the property tax structure." Doc. 3294 at 47, 89. Although the constitutionalizing of Alabama's property tax laws makes it exceedingly difficult for both black and white Alabamians to change the structure,[17] it is well

[17] *See* Cumberland Law Review Article, *supra* note 12 at 447-452 (discussing the difficulty of changing the details of tax laws embedded in a state constitution and using the 16th Amendment of the U.S. Constitution, which delegates taxing authority to Congress, as a basis to recommend to the Alabama Citizens Commission For Constitutional Reform that the authority over state tax matters should be delegated to the Legislature and the authority over local tax

settled that a discriminatory policy does not survive equal protection scrutiny simply because it harms members of all races.[18] In addition, the District Court failed, as it did when it applied *Fordice*, to consider that tax law operates differently from the challenged policies addressed in *Hunter v. Erickson* and its progeny.[19] Because the purpose of tax laws is to fund public needs, an analysis of Alabama's tax laws anchored in Alabama's racially discriminatory 1901 Constitution must determine if African Americans continue to be disproportionately harmed by the *funding restrictions* that were intended to be locked in place by the state constitution.

The District Court's failure to treat the disproportionate impact suffered by blacks from the funding restrictions of Alabama's constitutionally anchored Lid Bill

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matters should be delegated to locally elected officials and the people living there).

[18] *See Loving v. Virginia,* 388 U.S. 1, 8-9 (1967) (holding laws forbidding interracial marriage unconstitutional even if they are applied to, and restrict the rights of, all racial groups).

[19] *Hunter v. Erickson* involved a city charter amendment that required the enactment of local ordinances forbidding discrimination in housing for a number of reasons including race to be passed by a majority of the voters when other ordinances could be passed by the city council. 393 U.S. 386. One of its progeny, *City of Mobile v. Bolden*, addressed a local governance structure that centralized power in three elected members. 446 U.S. 55 (1980). Unlike tax policy, which cannot be evaluated without examining the effect of the funding restrictions flowing out of the difficult-to-change tax laws, both of these examples involved structures where the potential dilution of the political power of African Americans was obvious on the face of the public policy.

as causing blacks to disproportionately suffer greater political harm from the difficulty in changing that structure erroneously exempts from scrutiny under *Hunter v. Erickson* and its progeny not only Alabama's property tax laws, but also other tax laws anchored in a state constitution under similar circumstances. This is because, regardless of the strength of the connection between the constitutionally anchored tax laws restricting funding that disproportionately impacts blacks and the intent to thwart black political participation behind the choice of a state constitution as the vehicle to accomplish this goal, all constitutionally embedded tax laws when narrowly viewed apart from their funding goals and consequences are equally difficult for both black and white citizens to change.[20]

In applying the law of *Hunter v. Underwood*, 471 U.S. 222 (1985), the District Court refused to hold Alabama's property tax laws unconstitutional on the grounds that "those provisions do not have a continuing segregative effect on higher education" and that the relief requested "is beyond the scope of this litigation ....[because]....this is not a taxpayer action." Doc. 3320 at 4, 5. The District Court's holding that no segregative effects continue in higher education is erroneous for the

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[20] We respectfully disagree with any implication (*see* Doc. 3294 at 89, note 10) that the failure of Alabama's voters to ratify Governor Riley's tax reform proposal on September 9, 2003 cleanses the racially motivated constitutionalizing of the property tax structure. For a full discussion, *see* text accompanying *infra* notes 27-28.

same reasons discussed under the analysis of *Fordice* in Part A, *supra*. However, because *Hunter v. Underwood* is broader than either *Fordice* or *Hunter v. Erickson* and its progeny, in that it deems unconstitutional any public policy where race discrimination motivated the creation of the policy and disparate impact on racial lines continues,[21] *Amici* assume that the District Court's principal reason for refusing to hold Alabama's property tax laws unconstitutional under this standard focuses on the fact that the constitutional challenge is not a taxpayer action.

By assuming that only a taxpayer can challenge the constitutionality of tax laws, the District Court has implicitly limited the general constitutional scrutiny of tax laws to how the *burden for paying* taxes is being allocated among black and white taxpayers. This is because the nature of taxpayer actions usually involves taxpayers claiming that their tax burden is too great. For example, challenges to tax laws on equal protection grounds outside the race discrimination area typically come from out-of-state taxpayers complaining they are being unconstitutionally required to bear

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[21] *Hunter v. Underwood* holds that any "neutral state law that produces disproportionate effects along racial lines ... violates the Equal Protection Clause of the Fourteenth Amendment ... [if] racial discrimination is shown to have been a "substantial" or "motivating" factor behind the enactment of the law ... [and] ... the law's defenders ... [are unable] ... to demonstrate that the law would have been enacted without this factor." 471 U.S. at 227-28 (citations omitted).

a greater tax burden than in-state taxpayers.[22]

Amici agree with the District Court's implicit recognition that tax laws enacted with the intent of allocating the burden disproportionately to African Americans which continue to have that racially discriminatory disproportionate impact are unconstitutional under *Hunter v. Underwood*.[23] However, the District Court failed, as it did in applying *Fordice* and *Hunter v. Erickson*, to appreciate that tax laws are also about *funding* goals. In limiting constitutional scrutiny under *Hunter v. Underwood* to taxpayer actions, the District Court has erroneously exempted from scrutiny race-based equal protection challenges where the racially motivated purpose and continued racially discriminatory effects of a tax law are in the tax law's *funding*

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[22] *See, e.g.*, *South Central Bell Telephone v. Alabama*, 526 U.S. 160, 169 (1999) (Alabama franchise tax which taxed domestic corporations at lower levels than foreign corporations unconstitutional); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (favoring domestic corporations over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent"); *Zobel v. Williams*, 475 U.S. 55 (1982) (greater rebates for longer in-state residency unconstitutional); *See also Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, W. Va.,* 488 U.S. 336 (1989) (holding, while striking down a tax scheme, that the Equal Protection Clause permits a state to divide different kinds of property into classes and to assign to each a different tax burden so long as those divisions and burdens are neither arbitrary nor capricious).

[23] For example, regressive income taxes and grossly excessive sales taxes deliberately enacted for racially discriminatory reasons under circumstances where African Americans disproportionately fall below the poverty line would be unconstitutional.

restrictions rather than the tax law's scheme for allocating the burden.

Alabama's property tax laws must be declared unconstitutional under the *Underwood* standard because the District's Court's findings of fact clearly state that the property tax provisions, including the 1971 and 1978 Lid Bill amendments, were enacted for the racially discriminatory purpose of restricting funding to limit educational opportunities for African Americans. And the property tax provisions continue to be directly responsible for the grossly inadequate funding of majority black school districts that in turn disproportionately impair the ability of black students to access higher education as well as numerous other disproportionate effects along racial lines. Failure to recognize this erroneously exempts not only tax laws, but also potentially other laws from race-based equal protection scrutiny. In other words, the District Court's arbitrary limitations on the scope of *Underwood* open the door for other courts to create arbitrary limitations both inside and outside the tax policy area. This is because the legal standard set out by *Underwood* contains no limitation as to the type of policy subject to race-based equal protection scrutiny. Imposing arbitrary limitations on equal protection review in this case, as the District Court has erroneously done, would allow future courts broad discretion to remove additional areas from the scope of *Hunter v. Underwood.*

CONCLUSION

The difficulty of this case of first impression extends far beyond the nuances of figuring out how to evaluate tax laws under the Supreme Court's legal standards interpreting Fourteenth Amendment race-based equal protection law. Although *Amici* have identified the common error running through the District Court's legal analysis -- the failure to appropriately consider the funding goals and consequences when evaluating tax laws -- and have provided the Court with detailed analysis, this does not even begin to address the elephant in the room. The truth is courts are reluctant to interfere with a state's tax policy, particularly the amount of revenues to be raised and the purposes for which those funds will be used. This is because tax policy is generally determined by the will of the majority of the people subject to the tax laws and the Supreme Court has never explicitly required the states to adequately fund education. Stated more bluntly, the states are generally free to adopt any tax policy, regardless how inadequate, unfair, or poorly designed.

However, the Constitution provides important safeguards limiting the general unbridled will of the majority of the people to craft whatever public policy they choose. All public policy must comply with the Equal Protection Clause. Just over fifty years ago, overruling the majority will of the people at that time, the Supreme Court declared that "separate but equal" has no place in public education, finally

eliminating what *Fordice* referred to as a "simple minded mode of discrimination" that shamefully provided African Americans substantially fewer opportunities than whites to achieve an adequate education. In that more sophisticated modes of race discrimination still exist, the Supreme Court views racially neutral laws as offensive to the Equal Protection Clause if the law was created to have a greater negative impact on African Americans and if those effects continue, even if the racially discriminatory intent is no longer present. Given the central role of history in forming our laws and their effects and the regrettable historical baggage of race discrimination, the Supreme Court's focus on the historical intent behind the law not only makes sense but is a crucial element towards eliminating these much more hidden but no less insidious forms of race discrimination.[24]

Although states generally have absolute power in shaping tax policy with respect to funding education, tax laws designed as a sophisticated tool to cause African Americans to suffer the devastating consequences of inadequate education funding more heavily than whites cannot withstand constitutional scrutiny. Congressman John Lewis recently wrote, "The problem ... now [is]... not something

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[24] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV 457, 469 (1897) ("The rational study of law is still to a large extent the study of history. History must be part of the study, because without it we cannot know the precise scope of rules which it is our business to know.").

so visible or easily identifiable as a Bull Connor blocking our way." Lewis further observed that civil rights leaders must now recognize that African Americans face an even greater struggle to "attain economic and political power... [because of] ...attitudes and actions held deep inside people and institutions that, now that they [are] forced to allow us through the door, [can] still keep the rewards inside those doors out of our reach."[25] Given that adequate funding for education supported by tax revenues are absolutely essential for anyone, black or white, to have a chance to realize their full economic and political potential, and, the Supreme Court's clear commitment to eliminate and remedy all vestiges of America's shameful legacy of race discrimination, allowing tax laws designed to disproportionately keep African Americans from enjoying adequately funded educational opportunities to escape constitutional condemnation under a sham of "equal inadequacy" destroys the spirit of the Equal Protection Clause and renders the justice promised by the demise of "separate but equal" illusory.[26]

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[25] JOHN LEWIS, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT, 364 (1998).

[26] As Professor Wayne Flynt observed, "Striking down the overtly racist sections of Alabama's constitution became the easy task of the civil rights movement. The less obvious and more profound discrimination was deeply embedded in provisions dealing with tax policy, education, and home rule." Flynt, *supra* note 13 at 17.

In Alabama, the idea that the sham of "equal inadequacy" can justify the grossly inadequate higher education and K-12 funding caused by the property tax laws has smoldered below the surface throughout this case. Although not remotely relevant under either *Fordice* or *Underwood*, Defendants have implied, and are likely to argue, that the recent defeat of Governor Bob Riley's tax reform proposal somehow cleanses the property tax of both its racially discriminatory origins and effects. Even though more than half of all Alabamians would have enjoyed a tax cut, and a greater tax burden would have been shifted to wealthier Alabamians and large landowners, Riley's plan failed at the polls by a two-to-one margin on September 9, 2003.[27]

This defeat stands as a monument to the strength and permanence of the racially discriminatory motives that anchored Alabama's property tax laws in the 1901 Constitution and underscores the difficulty, even with the support of Alabama's majority African-American counties, of changing these provisions that tie us to the past. Although no detailed study has been done on racial voting patterns at the precinct level, the big picture suggests that African Americans supported Riley's plan proportionally more than whites. Of Alabama's sixty-seven counties, only thirteen

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[27] *See* David M. Halbfinger, *Alabama Voters Crush Tax Plan Sought by Governor*, N.Y. TIMES, Sept. 10, 2003 at A11. According to the election results released by the Alabama Secretary of State Governor Riley's tax reform proposal failed by a vote of 866,860 to 417,721. *See id. at* http://www.sos.state.al.us/election/2003/scae/results.cfm.

voted in favor of the plan. Nine of those thirteen are majority black, the only majority black counties in the state, all of which are located in the Black Belt, which is the poorest region in the state.[28] The defeat of Governor Riley's plan indicates that Alabama's property tax structure, especially the Lid Bill enacted during the height of George Wallace's resistance to desegregation, metaphorically constitutes Wallace's spirit continuing to block the schoolhouse door. Despite the understandable discomfort at having to take such action, the overwhelming factual evidence at trial proving racially discriminatory motives and effects, coupled with the law of *Fordice*, *Erickson*, and *Underwood* requiring tax laws to be evaluated in light of their funding goals and consequences, compels this Court to hold Alabama's property tax structure unconstitutional.

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[28] According to the election results (*see id.*), nine counties (Bullock, Dallas, Greene, Hale, Lowndes, Macon, Perry, Sumter and Wilcox), all of which are within the Black Belt region, voted for Riley's tax reform proposal and are the only counties in Alabama with a majority black population. The other four counties that voted in favor of the plan were Barbour, Chambers, Lee, and Montgomery. *See* U.S. DEPT. OF COMMERCE, 2000 CENSUS: NUMBER OF PERSONS IN ALABAMA AGED 18 AND OLDER *at* http://cber.cba.ua.edu/edata/census2000/cntybyraceadult.prn.

Respectfully submitted on behalf of *Amici*,

/s/Mark Sabel
MARK SABEL
Sabel & Sabel, P.C.
2800 Zelda Road
Suite 100-5
Montgomery, AL 36106
(334) 271-2770
Fax: (334) 277-2882
mksabel@mindspring.com

/s/Robert D. Segall
ROBERT D. SEGALL (SEG003)
Copeland, Franco, Screws
& Gill, P.A.
444 South Perry Street
P. O. Box 347
Montgomery, AL 36101-0347
(334) 834-1180
Fax: (334) 834-3172
segall@copelandfranco.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), Fed.R.App.P. This brief contains 5,132 words.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record on May 17, 2005, by first class mail.

Hon. Carlos A. Gonzalaz, Court Monitor, P. O. Box 450888, Atlanta, GA 30345;

James U. Blacksher, Title Bldg., Ste. 710, 300 North Richard Arrington Blvd., Birmingham, AL 35203-3352;

JSU: Randall M. Woodrow, P. O. Box 2286, Anniston, AL 36202;

ASU:

Fred D. Gray, Stanley F. Gray, P. O. Box 830239, Tuskegee, AL 36083-0239;

Solomon S. Seay, Jr., P. O. Box 210998, Montgomery, AL 36121-9998;

Armand Derfner, 116 Church St., 3d Floor, P. O. Box 600, Charleston, SC 29402;

UA: Norma Lemley, The Office of Counsel, The University of Alabama System, 1818 University Blvd., Tuscaloosa, AL 35401;

SBE and Postsecondary Chancellor:

Jeffrey A. Foshee, Edward M. George, 900 South Perry Street, Suite B, Montgomery, AL 36104

A&M:

Braxton Schell, Jr., 1125 Financial Center, 505 N. 20th Street, Birmingham, AL 35203-4601;

SBE: Reginald L. Sorrells, Office of General Counsel, State Dept. of Education, Room 5103 Gordon Persons Bldg., P. O. Box 302101, Montgomery, AL 36130-2101;

Larry E. Craven, Alabama Department of Education, 5107 Gordon Persons Bldg., 50 N. Ripley St., Montgomery, AL 36130;

STATE:

Robert D. Hunter, Deputy Attorney General, 210 Inverness Center Drive, Birmingham, AL 35242;

John B. Tally, Jr., Adams and Reese/Lange Simpson LLP, 2100 3d Avenue North, Suite 1100, Birmingham, AL 35203-3367;

Troy King, Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, AL 36130-0152.

/s/Mark Sabel
ATTORNEY FOR *AMICI CURIAE*