

No. 98-

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

JESSIE TOMPKINS, *et al.*

*Petitioners,*

v.

ALABAMA STATE UNIVERSITY, *et al.*,

*Respondents.*

---

On Petition For A Writ Of Certiorari To  
The United States Court Of Appeals  
For The Eleventh Circuit

PETITION FOR  
WRIT OF CERTIORARI

MICHAEL E. ROSMAN\*  
RALPH CASALE  
CENTER FOR INDIVIDUAL RIGHTS  
1233 20th St., N.W., Suite 300  
Washington, D.C. 20036  
(202) 833-8400

\* Attorney of Record

*Counsel For Petitioners*

---

**QUESTIONS PRESENTED**

1. Where a court in a class action lawsuit alleging discrimination has sanctioned a "remedy" of a whites-only scholarship at a historically black state university, can African-American students precluded from obtaining such scholarships bring a separate lawsuit claiming that their Equal Protection rights have been violated by those whites-only scholarships?
2. Where the class in a certified class action includes, *inter alia*, "all black citizens of the State of Alabama," can alleged class members file a separate lawsuit challenging the institution of a whites-only scholarship created during the course of that class action?
3. Is the rule of Martin v. Wilks, 490 U.S. 755 (1989) -- that individuals alleging harm from a race-conscious program created during one lawsuit can bring a separate lawsuit challenging the legality

of that program -- applicable to such absent class members?

---

## PARTIES TO THE PROCEEDING

The parties to the litigation who appeared below are:

Plaintiffs (Petitioners):

Jessie Tompkins  
Audra Beasley  
James W. Scott  
Rodney Smith,

for themselves and all others similarly situated,

Defendants (Respondents):

Alabama State University  
Alabama State University Board of Trustees  
Dr. Roosevelt Steptoe  
Dr. William Harris  
State of Alabama

---

## TABLE OF CONTENTS

<a href="#">QUESTIONS PRESENTED</a>	i
<a href="#">PARTIES TO THE PROCEEDING</a>	ii
<a href="#">TABLE OF CONTENTS</a>	iii
<a href="#">TABLE OF AUTHORITIES</a>	v
<a href="#">OPINIONS BELOW</a>	1
<a href="#">JURISDICTION</a>	1
<a href="#">RELEVANT LAWS</a>	1
<a href="#">STATEMENT OF THE CASE</a>	3
<a href="#">A. Plaintiffs</a>	3
<a href="#">B. Alabama State University</a>	4
<a href="#">C. The <i>Knight</i> Litigation</a>	6
<a href="#">D. The Proceedings Below</a>	15

REASONS FOR GRANTING THE PETITION 18A. The Opinion Of The Courts Below Is Directly Contradicted By *Martin* 19B. The Decisions Of The Lower Courts Create A Circuit Split 22CONCLUSION 23**TABLE OF AUTHORITIES**CasesAyers v. Fordice, 111 F.3d 1183 (5th Cir. 1997) 8Garcia v. Bd. Of Ed., School District No. 1, 573 F.2d 676 (10th Cir. 1978) 22Hansberry v. Lee, 311 U.S. 32 (1940) 16, passim.Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973) 17, 21, 22Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 10, 11Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), aff'd in part, rev'd in part, vacated in part, and remanded, 14 F.3d 1534 (11th Cir. 1994) 4, passim.Knight v. Alabama, 900 F. Supp. 272 (N.D. Ala. 1995) 5, passim.Martin v. Wilks, 490 U.S. 755 (1989) i, passim.Miller v. Bd. of Ed., 667 F.2d 946 (10th Cir. 1982) 17, 21, 22Missouri v. Jenkins, 515 U.S. 70 (1995) 14Rivarde v. Missouri, 930 F.2d 641 (8th Cir.

1991) 17, 21

United States v. Fordice, 505 U.S. 717

(1992) 7, 10, 12

Constitutional Provisions, Statutes, Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 15

28 U.S.C. § 1343 15

28 U.S.C. § 1404 15

42 U.S.C. § 1981 1, 2, 16

42 U.S.C. § 1983 2, 16

42 U.S.C. § 2000d 3, 16

Sup. Ct. R. 10(a) 19

U. S. Const., amend. XIV, § 1 1, 16

---

### **OPINIONS BELOW**

The summary affirmance of the United States Court of Appeals for the Eleventh Circuit was filed on February 25, 1999, and is reprinted in the Appendix at A1.

The April 28, 1998, opinion and order of the United States District Court for the Northern District of Alabama granting defendants' motions to dismiss is reproduced in the Appendix at B1.

---

### **JURISDICTION**

The judgment of the United States Court of Appeals was entered on February 25, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

---

### **RELEVANT LAWS**

United States Constitution, amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

#### **(a) Statement of equal rights**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

#### **(b) "Make and enforce contracts" defined**

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

#### **(c) Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination

and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

---

**STATEMENT OF THE CASE**

Because this appeal challenges a judgment which affirmed an order dismissing a complaint, the allegations of the relevant complaint (the Second Amended Complaint -- see Appendix G) must be considered true.

**A. Plaintiffs**

The relevant complaint alleges that plaintiffs-appellants are African American students at Alabama State University ("ASU"), a historically black institution ("HBI") operated by the State of Alabama in Montgomery County. At the time of the filing of the Second Amended Complaint, Tompkins was a graduate student, and each of the other plaintiffs (Beasley, Scott, and Smith) were undergraduates. App. G6, G8. Each of plaintiffs Tompkins, Beasley, and Smith tried to apply for so-called "Diversity Scholarships" administered by ASU. They were each informed that they could not apply, and their requests for application forms were refused, because they were black. App. G3-G4. Plaintiff Scott would have applied for such a scholarship, but did not do so because he was black and knew he was ineligible. Id.

Applications for the Diversity Scholarships describe them as follows: "Diversity Scholarship Program For Undergraduate (White) Students." App. G7. See also App. D5 ("Scholarship Program For White Undergraduate Students").

The plaintiffs have each suffered financial hardship as a consequence of their inability to compete for Diversity Scholarships. App. G3. In fact, Tompkins could not continue with his studies in 1995, and was forced to take a year off to earn money before continuing with his studies in 1996. App. G7-G8.

**B. Alabama State University**

ASU is the successor to the private Lincoln School in Marion. It became state-supported in 1873 as a

state "normal" school for the training of African-American teachers. Knight v. Alabama, 787 F. Supp. 1030, 1075-76 (N.D. Ala. 1991), aff'd in part, rev'd in part, vacated in part, and remanded, 14 F.3d 1534 (11th Cir. 1994) (hereinafter "Knight I").

Along with Alabama A&M University ("AAMU"), ASU is one of two HBIs in the State of Alabama. Although a substantial majority of black college students in Alabama now attend predominantly or historically white institutions (Knight I, 787 F. Supp. at 1063, 1288), and although, by the mid-1980's, a majority of black first-time freshmen from the Montgomery County area were attending the majority white schools in that area (Auburn University Montgomery and Troy State University Montgomery) (id. at 1267), ASU retains an important role for the education of black citizens in Alabama.

Historically, ASU resisted the trend of many black colleges to follow the early 20th century trend toward the "Hampton-Tuskegee" model, which essentially required blacks to work in the fields from dawn to dusk, and then attend rudimentary classes from 7:00 to 9:00 p.m. ASU retained Latin and the classics in its curriculum, and incurred the wrath of the white-controlled General Education Board (the primary state funding organization) as a consequence. Id. at 1093-94. Its graduates, though, did as well or better than whites on state teacher examinations. Id. at 1094.

ASU also played a critical role during the civil rights movement in Alabama in the 1950's and 1960's. Indeed, faculty at ASU were catalysts for the event that began the modern Civil Rights Movement, the Montgomery bus boycott. Id. at 1117. Rosa Parks was a graduate of ASU's laboratory school, and ASU students played significant roles throughout the sit-ins of the 1960's. Id. at 1118-19. See also id. at 1047 (ASU and AAMU "were on the cutting edge of the Civil Rights Movement of the 1950's and 1960's and stood as beacons in the night, broadcasting the promise of the Constitution to millions of American citizens who were denied its protections").

Even today, ASU is a "critically important institution for the life of the black community." Id. at 1117. Part of the difficulty of any efforts to "desegregate" ASU is that students, faculty, and alumni of that institution all feel strongly about maintaining its identity as a "black" institution. Knight v. Alabama, 900 F. Supp. 272, 313-14 (N.D. Ala. 1995) (hereinafter, "Knight III"). The vast majority of students (roughly 97%) attending ASU are black. Knight I, 787 F. Supp. at 1291, 1372. See also Knight III, 900 F. Supp. at 304.

### C. The Knight Litigation

Because the courts below, in dismissing plaintiffs' claims, relied on events in a separate lawsuit, Knight v. Alabama, N.D. Ala. No. CV 83-M-1676-S, a review of that litigation, and its relationship to the whites-only scholarships at issue here is appropriate.

On July 11, 1983, the United States Department of Justice sued the State of Alabama alleging vestiges of discrimination throughout Alabama's system of higher education. Shortly thereafter, John F. Knight, Jr. and other alumni, students, and faculty of ASU (who had previously filed a suit alleging that the desegregation of ASU was being impeded by duplicative programs in the two other state universities located nearby in Montgomery County: Auburn University Montgomery and Troy State University Montgomery) intervened in the action brought by the United States. Knight I, 787 F. Supp. at 1048-49.

A first trial began on July 1, 1985; the result was reversed on the ground, inter alia, that the judge on the case should have been disqualified. After remand, the court conditionally certified the following class on June 15, 1990:

all black citizens of Alabama and all past, present, and future students, faculty, staff, and administrators of Alabama State University and Alabama A&M University.

Knight I, 787 F. Supp. at 1051.<sup>(1)</sup> Subsequently, the court ordered the incorporation of all the proceedings from the 1985 trial, subject to objection, into the record for the new trial. It then held a new trial from October 29, 1990 through April 16, 1991. Id.

The court viewed its job as "address[ing] the intensely factual questions about whether vestiges of historical racial discrimination persist in Alabama's system of public higher education." Id. at 1066. Decided several months before this Court's decision in United States v. Fordice, 505 U.S. 717 (1992), though, the court was plainly troubled by the question of whether the Fourteenth Amendment required the elimination of all such "vestiges." At times, at least, the court understood that the racial identifiability of a school alone was not a "vestige" that properly should be eliminated. Knight I, 787 F. Supp. at 1166 (no legal obligation "that a previously segregated institution achieve a stated level or percentage of black students in it [sic] student body in order to defeat a Title VI or Fourteenth Amendment claim based on the vestiges of discrimination"); id. at 1320 n.141 (fact that Alabama HBIs have "predominantly black student bodies, and are under the control of predominantly black boards of trustees, . . . while having antecedents in the segregative past, do not automatically render them continuing illegal vestiges").

Yet throughout the course of its opinion, the court required Alabama institutions, both historically white and historically black, to change their racial identifiability by recruiting, admitting, hiring, and retaining more "other race" individuals. Thus, for example, although neither the Knight plaintiff class nor the United States introduced "any evidence that any individual was denied a faculty or administrative position at any state institution of higher education on the basis of race" (id. at 1187 (emphasis added)), the court ordered Auburn University to increase the number of both black faculty and black administrators (id. at 1190-91).<sup>(2)</sup> So, too, the court ordered ASU to "design and implement a recruitment policy directed at white students." Id. at 1291.

The court appeared equally torn about the use of race-conscious remedies to alleviate racial identifiability. The court recognized that race-conscious measures to increase black enrollment or presence would need to pass strict scrutiny. Id. at 1164 n.59 (lowering ACT entrance requirement only for blacks would raise "legal issues") and 1372-76 (Alabama code section requiring at least one-half of ASU's Board of Trustees to be from "the prevailing minority population of the state" failed strict scrutiny because it "cannot be justified as a remedy of past discrimination").<sup>(3)</sup> Yet the court not only ordered the various kinds of relief described above, it also identified various discriminatory "remedies" already being employed by Alabama's state colleges -- and never discussed (much less analyzed) what "present effect of past discrimination" aside from racial identifiability such "remedies" were intended to ameliorate and how they did so. E.g., Knight I, 787 F. Supp. at 1177 (University of Alabama has "made significantly higher salary offers to African Americans than similarly situated Caucasian faculty") and 1306 (University of Alabama Law School gives scholarship money to every African American student; "[n]on-minority students would need exceptionally high qualifications to be considered for the money black students receive").<sup>(4)</sup>

On the same date as the finding of facts and conclusions of law, the court entered an order certifying the class that it previously had certified "conditionally." App. C1.

Shortly after the 1991 decision, the State began appropriating funds to ASU for Recruiting/Minority

Scholarships, so that ASU could better attract white students. Knight III, 900 F. Supp. at 309-10. ASU spent about a half million dollars in the years 1992 through 1995 for scholarships for 144 students. Id. at 310.<sup>(5)</sup>

The Knight plaintiffs appealed part of the court's judgment; most of the defendants did not. Several years later, the Eleventh Circuit affirmed in part, reversed in part, vacated in part, and remanded. Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) ("Knight II"). The court focused on this Court's analysis in Fordice, holding that Fordice required a determination of whether (1) a particular challenged policy "is 'traceable' to decisions that were made or practices that were instituted in the past for segregative reasons, thus rendering it a vestige of segregation," (2) the challenged policy continues to have segregative effects, and (3) the challenged policy can be reformed practicably and consistent with sound education practices. Knight II, 14 F.3d at 1540-41. It applied this standard to the various claims plaintiffs had raised and considered whether the district court's pre-Fordice analysis was sufficient.

Primarily dealing with issues not directly relevant here, the court of appeals held that (1) in considering the "limited missions" that had been given the HBIs, the district court had failed to consider whether such limited missions have segregative effects (Knight II, 14 F.3d at 1544-46); (2) the district court erred in concluding that the distribution of federal funds to the two state "land grant" colleges (Auburn and AAMU) was not traceable to the de jure era and that, accordingly, the district court needed to consider whether such distribution had segregative effects (id. at 1549-51); (3) the district court had not properly considered whether the absence of curricula of African American thought, culture and history constituted a "policy" rooted in past discrimination, and thus a remand was necessary for that purpose as well (id. at 1552-53); and (4) the district court did not clearly err in holding that the historically white institutions ("HWIs") did not maintain a racially hostile atmosphere (id. at 1553).

Upon remand, the district court, for reasons not altogether clear from its subsequent 1995 opinion, held another plenary trial. Moreover, the court did not limit itself to considering the possible segregative effects of the HBIs' limited missions and the distribution of federal land grant funds, and the traceability of any purported absence of curricula dealing with African American heritage and culture. It also considered additional "policies and practices with continuing segregative effects." Knight III, 900 F. Supp. at 306. These "practices" apparently included the HBIs' outspoken commitment to their black heritage (id. at 313). The court recognized the pressure from alumni, faculty, and students to maintain such a commitment, but believed that such commitment made it more difficult to desegregate. ASU and AAMU, the court found,

have maintained and asserted their black heritage in ways, and to a degree, that has had a segregative effect on student choice.

The Court concludes that ASU and AAMU must henceforth act in a manner such that their pride in their heritage does not hinder their, the state's or the Court's efforts to reduce segregative effects on student choice . . .

Id. at 314. See also id. at 319 ("Some HBIs have difficulty attracting white students because they aggressively and outspokenly maintain their black heritage in a manner that discourages whites from attending . . . Unfortunately, ASU and AAMU currently labor under such a difficulty, ASU more so than AAMU").

Similarly, although it had not been part of the court of appeals' remand, the court also reexamined the

historic underfunding of the HBIs (outside of the federal land grant aid that had been addressed by the court of appeals). The court repeated both many of its findings from the 1991 trial, *id.* at 308-09, 311-12, and its conclusion that such historic underfunding was attributable to the *de jure* era.<sup>(6)</sup> It did note, however, the funding of Recruiting/Minority Scholarships at AAMU and ASU to assist in recruiting white students, although it expressed dissatisfaction with the manner in which such moneys were being spent at ASU.<sup>(7)</sup>

The court concluded that the historic underfunding of the HBIs had led to white students perceiving the HBIs as inferior institutions and, consequently, these "perceptions" were traceable to the *de jure* era. *Knight III*, 900 F. Supp. at 320. See also *Knight I*, 787 F. Supp. at 1046 ("the Court must be certain that students who choose to attend the state's predominantly black institutions are not, as a result, stamped with the badge of inferiority resulting from the history of segregation"). The court did not discuss any survey or other evidence that led it to conclude that white students have such perceptions. Nonetheless, the court further concluded that "other race" scholarships were the "most educationally sound and practicable mechanism to eliminate those particular perceptive barriers." *Knight III*, 900 F. Supp. at 320.

The court hastened to add that the problem at the HBIs was a perception, not necessarily reality, and that "increasing the number of white students at an HBI helps eliminate that perception." *Id.* Thus, the court concluded, the concerns of Justice Thomas expressed in his concurrence in *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J. concurring) did not pertain because "the perception of inferiority is not a guess or a bias but a reality born out by evidence." *Knight III*, 900 F. Supp. at 320.<sup>(8)</sup> The court rejected less race-conscious remedies for these perceptions, like a merger between ASU and the nearby Troy State Montgomery, as impracticable and not "educationally sound." *Knight III*, 900 F. Supp. at 321.

The court required the State to make annual appropriations of \$ 1,000,000 to be made to each of ASU and AAMU, available only for undergraduate students with Alabama residency.<sup>(9)</sup> It further required an auditing of the funds by an accounting firm, with the report to be filed with the court (*id.* at 356), and a report from a certifying official of each institution to describe "how the use of the scholarship funds during the previous year has assisted in diversifying the student body of the University . . ." (*id.* at 357). The court also required an accounting of the moneys ASU had spent on Recruiting/Minority Scholarships since 1992. *Id.* at 373.

Although the court stated that it would review the certifying official's report to determine whether the funds were being used properly (*id.* at 358), there was nothing in the court's order that required any subsequent surveys of "white perceptions" to be made, to determine if the scholarships were remedying the perception of inferiority. The record does not disclose any such survey ever having been done.

Although appeals were filed from the court's 1995 judgment, all of them were dismissed voluntarily. App. E2. The court did not order notice of the terms of its remedial decree to be transmitted to the class, and the plaintiffs in this case had no notice of those terms.

#### D. The Proceedings Below

This action was commenced on March 31, 1997 with the filing of the original complaint by plaintiff Jessie Tompkins, acting *pro se*, in the Middle District of Alabama. Because the original complaint alleged violations of various federal civil rights laws, the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Pursuant to a motion made by the defendants, and a recommendation by a magistrate judge, the court transferred the case to the Northern District of Alabama pursuant to 28 U.S.C.

§ 1404 by order dated June 16, 1997.

After transfer, the other plaintiffs joined the suit, and they jointly filed and served a Second Amended Complaint (the "Complaint") on or around October 1, 1997. The Complaint set forth the allegations described above in Part "A," supra, and asserted violations of the Equal Protection Clause and 42 U.S.C. §§ 1981, 1983, and 2000d et al. See Appendix G.

Subsequently, defendant ASU Board of Trustees, along with certain individual defendants associated with ASU (Steptoe and Harris), moved to dismiss the Complaint on the ground that plaintiffs were obligated to challenge the all-white scholarships in the Knight litigation. The State of Alabama filed a separate motion to dismiss, arguing, inter alia, that principles of res judicata and collateral estoppel required dismissal. Plaintiffs opposed, arguing (inter alia) that this Court had rejected the "impermissible collateral attack" in Martin v. Wilks, 490 U.S. 755 (1989) and that this Court had found principles of res judicata and collateral estoppel inapplicable to inadequately-represented absent class members in Hansberry v. Lee, 311 U.S. 32 (1940). Plaintiffs argued that they were not adequately represented in the Knight action, and that, indeed, no one could possibly represent the interests of all class members when the class is defined to include both "all black citizens of Alabama" and "all past, present, and future students, faculty, staff, and administrators" (both black and white) of the HBIs in Alabama.

The Knight class representatives moved to intervene in the litigation and filed a proposed motion to dismiss arguing that the relief sought in the Complaint was beyond the authority of the court to grant and, alternatively, that dismissal on res judicata grounds was appropriate. (The court had previously instructed the Knight class representatives to submit an amicus brief, and apparently treated the motion to dismiss as such. App. B4, E3.) The United States submitted a letter which primarily echoed the motion of ASU, arguing that plaintiffs could not attack the all-white scholarships in a separate litigation, but were required to intervene in the Knight litigation. App. B4.

By decision and order dated April 28, 1998, the district court granted defendants' motion to dismiss, without prejudice to plaintiffs moving to intervene in the Knight litigation. The court recognized the general rule of Hansberry v. Lee, that inadequately-represented class members could bring an independent action challenging issues considered in an earlier class action. App. B7. But it never reached the issue of whether plaintiffs were "adequately represented" by the class representatives in the Knight litigation. Rather, it concluded that lower courts had "carve[d] out an exception to the general rule in Hansberry" (App. B11) in cases involving school desegregation, and that, in such cases, an independent action could not be brought. It cited three cases for this proposition: Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973); Miller v. Bd. of Ed., 667 F.2d 946 (10th Cir. 1982); and Rivarde v. Missouri, 930 F.2d 641 (8th Cir. 1991). App. B8-B11.

The district court at least recognized that none of the cases it relied upon "made any attempt whatsoever to reconcile the two lines of authority." App. B11. Concluding that the task of reconciliation fell upon it, though, the district court concluded that Hines, Miller, and Rivarde carved out an exception to the general rule enunciated in Hansberry for two reasons: first, that "the Hines rule is premised upon interests in judicial economy in desegregation cases" (id.), and, second, that desegregation cases are ongoing, and thus distinguishable from Hansberry in that regard (App. B11-B12). The district court did not explain whether its newly-discovered exception to the rule of Hansberry applied to any kinds of desegregation cases other than school desegregation cases, and did not distinguish desegregation cases from other ongoing institutional litigation.

In a footnote, the court concluded that the holdings of the lower court cases it relied upon were not "altered in any respect by the Supreme Court's decision in [Martin]" because "Martin involved the claims of nonparties who failed to intervene in a class action and thus were permitted to attack collaterally the class judgment" whereas the plaintiffs in the three cases relied upon by the court "included members of the original class who were parties in the original class action." App. B9-B10 n.4 (emphasis in original).

Plaintiffs appealed. By Per Curiam order dated February 25, 1999, the Eleventh Circuit Court of Appeals "affirmed for the reasons set forth in the comprehensive ORDER of the district court . . ." App. A1.

After the district court's dismissal, in an attempt to protect their rights, and pursuant to the court's instructions, plaintiffs in this action moved to intervene in the Knight litigation. The district court ordered a period of discovery to resolve that motion. Appendix F (order requiring discovery). More than one year after the dismissal of their own lawsuit, and over two years since the filing of the original complaint in this action, plaintiffs are still litigating the propriety of intervention.

---

## REASONS FOR GRANTING THE PETITION

The lower courts in this case held that a group of African Americans precluded from even applying for scholarship moneys reserved for whites cannot commence a lawsuit to seek reasonably expeditious relief from this affront to the Constitution, but rather must wade into the morass of a multi-party, multi-issue, 15-year old "monumental desegregation lawsuit" (App. B2). If that were really the law, it would be time to change it.

It is not the law. In the legal jurisprudence of this country, there have been two principal means of precluding collateral attacks on judgments: (1) the principles of res judicata and collateral estoppel, applicable to parties, and (2) the "impermissible collateral attack" doctrine that existed prior to Martin v. Wilks. The innovative creation of yet a third means of precluding collateral attack -- apparently applicable only to parties, but based, remarkably enough, on the very same principles of "judicial efficiency" that animated the "impermissible collateral attack" doctrine prior to Martin -- simply cannot be reconciled with this Court's precedents and the limits it has placed on the two standard doctrines. Indeed, the new "impermissible collateral attack" doctrine is at war with Martin, the case that buried the old "impermissible collateral attack" doctrine.

### **A. The Opinion Of The Courts Below Is Directly Contradicted By *Martin***

In considering whether to grant a petition for a writ of certiorari, this Court considers whether a lower court has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The decision of the court of appeals falls squarely in this category.

The rationale of the lower courts in this case is a direct affront to this Court's decision in Martin v. Wilks. Martin specifically rejected the "impermissible collateral attack" doctrine; the lower courts here resurrect it. Martin stated the rule that a person "cannot [be] obligate[d] . . . to intervene . . ." (Martin, 490 U.S. at 763) and that any effort to change that rule would require the rewriting of the Federal Rules of Civil Procedure (id. at 767); the courts below held that the plaintiffs here were obligated to intervene. Martin held that considerations of "judicial efficiency," even in an ongoing litigation to remedy systemic discrimination, were simply inadequate to overcome the fundamental right of each individual to have his

or her own day in court (id. at 767 (rejecting argument that, if collateral attacks are allowed, "[j]udicial resources will be needlessly consumed in litigation of the same question")); the courts below specifically relied upon these same "judicial efficiency" and "ongoing litigation" arguments.

Even the district court's half-hearted footnote effort to distinguish Martin conspicuously ignores the plain text of that opinion. The district court's footnote claimed that Martin dealt only with non-parties, and thus did not pertain to absent class members, who (the court claimed) are "parties." App. B9-B10 n.4. But, again, such a characterization flies in the face of Martin, which stated that absent class members like those in Hansberry are not parties:

A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.<sup>2</sup>

Ftn. 2 : We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940) ("class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same) . . .

Martin, 490 U.S. at 762 & n.2 (emphasis added).

Thus, the district court's effort to "distinguish" Martin is directly contradicted by Martin itself. Absent class members are not parties; they are "strangers to the litigation." They may be bound by a judgment nonetheless if their interests were adequately represented -- precisely the analysis called for by this Court's decision in Hansberry v. Lee. Thus, Martin makes clear that its analysis does apply to absent class members, unless those asserting preclusion can meet the requirement of "adequate representation" set forth in Hansberry -- precisely the analysis that the lower courts here refused to do.<sup>(10)</sup>

## **B. The Decisions Of The Lower Courts Create A Circuit Split**

The view of the lower courts in this action, that there is an exception to the application of Hansberry v. Lee for school desegregation cases, creates a split between the Eleventh and Tenth Circuits. In Garcia v. Bd. Of Ed., School District No. 1, 573 F.2d 676 (10th Cir. 1978), the Tenth Circuit considered a lawsuit by Hispanic schoolchildren in Denver who had been included within the class definition of an earlier desegregation lawsuit. Id. at 678 (earlier desegregation lawsuit included plaintiff class of Hispanic children attending schools with a predominantly minority population). The Court specifically applied Hansberry to determine whether those plaintiffs could bring their independent action or were bound by the decree in the earlier case. Garcia, 573 F.2d at 679-80. (Garcia, then, also demonstrates that Miller simply does not create the exception that the decisions of the courts below would have it create. See n.10, supra.) While the court in Garcia ultimately concluded that the plaintiffs had been adequately represented, it did so in the separate litigation, and did not require the plaintiffs there to intervene in the school desegregation litigation.

This Court, then, should grant the petition in order to resolve this split in authority.

---

## **CONCLUSION**

This Court should grant the petition.

Michael E. Rosman  
Ralph Casale

CENTER FOR INDIVIDUAL RIGHTS  
1233 20TH St. NW, Suite 300  
Washington, DC 20036  
(202) 833-8400

Attorneys For Petitioners Tompkins,  
Beasley, Scott, and Smith

---

## FOOTNOTES

1. At trial, the court found that there were over one million blacks in Alabama, roughly two-thirds of whom were over the age of 18. Knight I, 787 F. Supp. at 1064.
2. Compare, e.g., Ayers v. Fordice, 111 F.3d 1183, 1226 (5th Cir. 1997) (rejecting argument that district court should have ordered State of Mississippi to modify its race-neutral hiring practices to hire more black faculty as a means of redressing racially-identifiable tenured faculty and administrators at colleges and universities; "Fordice rejects the notion that the State must remedy all present discriminatory effects without regard to 'whether such consequences flow from policies rooted in the prior system' . . . Plaintiffs identify no such policies with respect to selection of tenured faculty and administrators").
3. See also Knight III, 900 F. Supp. at 342 n.47 (if proposed remedy to "empower black faculty and students to have an equal voice in deciding whether and how Black Studies will be included in the curriculum" was a "race-conscious" one, it would be subject to strict scrutiny).
4. Finally, the court made a number of factual findings that can only be described as counterintuitive. For example, it apparently accepted the testimony of one expert who asserted that the University of Alabama Board of Trustees in the 1950's "had adopted the policy of resisting segregation" (id. at 1108 (emphasis added)) and that then-Governor George Wallace had not, at that time, yielded, in "[his] opposition to segregation" (id. at 1109 (emphasis added)).
5. In its 1995 decision, the court characterized these moneys as part of the "sums appropriated, awarded or transferred because of this Court's orders and Decrees." Knight III, 900 F. Supp. at 373. Presumably, then, the court believed such scholarship awards to be, at the very least, authorized by its 1991 decree.
6. Curiously, though, in light of the court of appeals' emphasis on this Court's three-part Fordice analysis, the district court never considered whether the underfunding had a continuing segregative effect. While it is, of course, true that such underfunding makes it more difficult for HBIs to attract white students, it also makes it more difficult to attract some black students, who are thus more likely to go to HWIs. E.g., Knight I, 787 F. Supp. at 1046 (danger of creating parallel historically white and historically black institutions is that it "cuts too close to the doctrine repudiated by Brown v. Board of Ed."), 1282 n.109 (sound academic programs and strong facilities will attract both black and white students), and 1288 (noting that the number of black students enrolled at the University of Alabama at Huntsville had increased, but that the number of non-blacks also had increased, leaving the percentage of black students roughly the same).

7. Knight III, 900 F. Supp. at 310 ("Unfortunately, ASU officials saw fit to spend . . . \$ 100,000 of the first Scholarship appropriation on administrative expenses"). In both decisions, the court expressed profound dissatisfaction with the management of the HBIs on a variety of different matters. E.g., Knight I, 787 F. Supp. at 1282 n.109 (court is "perplexed by certain of the choices which ASU and AAMU have made respecting capital expenditure decisions") and 1283 (concluding that ASU should receive \$ 9,873,078 in capital expenditures to eliminate the vestiges of past discrimination, but that ASU must secure Court approval before spending it); Knight III, 900 F. Supp. at 297 (noting AAMU's "skewed priorities" in spending money on a new dorm and a new stadium, and expressing disagreement with AAMU officials that such expenditures will enhance significantly its image), 303 (finding "problematic conduct" by ASU officials in losing cable channel and failing to cooperate with other Montgomery universities in creating joint program), 304 (noting that the American Association of University Professors had put ASU on its censure list in 1989 and characterizing ASU's "attitude for the five years following censure" as "disinterest in being removed from the censure list"), 304-05 (enumerating negative publicity about ASU), and 374 ("former presidents [of the HBIs] have unfortunately acted in the past in ways bringing disrepute to their institutions").

8. Although the court did not identify which of Justice Thomas's concerns it was distinguishing, it may have been alluding to Justice Thomas's statement that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." Jenkins, 515 U.S. at 114 (Thomas, J. concurring).

9. In 1996, ASU moved to expand the whites-only scholarships to graduate students. The Knight plaintiffs apparently did not contest that motion, and it was granted by the court. App. D1-D4.

10. Nor do the cases cited by the district court suggest that Martin should be inapplicable where plaintiffs are "members of the original class" (App. B10 n.4), much less that there is a special exception to Hansberry for school desegregation cases. In Hines, there is nothing in the court's opinion that states the plaintiffs were members of the original class. (Indeed, the earlier class was not even defined in that decision.) See 479 F.2d at 763-64. In Miller, the court specifically refused to answer the question of whether the litigants seeking to challenge the judgment were absent members of the original class. See 667 F.2d at 949. (And, as shown below, the Tenth Circuit does not create any exception to Hansberry for school desegregation cases.) Thus, both Hines and Miller are best seen as pre-Martin "impermissible collateral attack" cases whose validity was undermined by Martin.

In Rivarde, it is true, the Eighth Circuit did refuse to permit a separate suit by absent class members in a post-Martin case. But the Eighth Circuit relied primarily on Hines and Miller and failed even to consider whether the holdings of those cases had been undermined by Martin. Moreover, as with Hines and Miller, it is somewhat presumptuous to assume that any lower court is making a specific exception to a precedent of this Court (like Hansberry) without even bothering to mention that precedent.