IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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JAKE AYERS, JR. ETC.; *et al.*,
Plaintiffs,
JAKE AYERS, JR.,

Private Plaintiff-Appellant,

LILLIE B. AYERS, LEOLA BLACKMON, RANDOLPH WALKER, HENRY BERNARD AYERS, DR. IVORY PHILLIPS, DR. VERNON ARCHER, DOROTHY WALLS, DR. FRANCIS OLADELESHOWL, DR. ALEX D. ACHOLONU,
Appellants,
v.

UNITED STATES OF AMERICA
Plaintiff-Intervenor-Appellee,
v.

RONNIE MUSGROVE, ETC., *et al.*,
Defendants,

RONNIE MUSGROVE, GOVERNOR, STATE OF MISSISSIPPI,
Defendant-Appellee,

BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING,
Appellee,
v.

LOUIS ARMSTRONG,
Movant-Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Appellants have requested oral argument. The Court might find argument helpful because of the complexity of the case.

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RULES AND REGULATIONS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60493

JAKE AYERS, JR. ETC.; *et al.*,
Plaintiffs,

JAKE AYERS, JR.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment resolving an action to desegregate Mississippi's state-wide system of higher education, pursuant to federal statutes

and the United States Constitution. The district court entered final judgment on February 15, 2002 (R. 3171-3203; J.R.E. Tab D), and denied appellants' timely motions for reconsideration on May 17, 2002 (R. 3331; J.R.E. Tab C).[1] Appellants filed a timely notice of appeal on June 14, 2002 (R. 3332; J.R.E. Tab B). The district court had subject matter jurisdiction under 28 U.S.C. 1331. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court abused its discretion in approving the Settlement Agreement reached among the parties to this case.

2. Whether the district court abused its discretion in denying appellants' motion to opt out of the plaintiff class.

STATEMENT OF THE CASE

This is an action to desegregate Mississippi's formerly *de jure* segregated system of higher education. After twenty six years of litigation, the parties entered into a settlement agreement and submitted the agreement to the district court for its

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[1] Citations to "R. __" refer to pages in the record on appeal, as set forth in the district court docket sheet transmitted to this Court on September 25, 2002 (J.R.E. Tab A). "J.R.E. __" refers to documents in the appellees' Joint Record Excerpts by Tab and page number. "Def. Fairness Exh. __ " refers to defendants' exhibits at the Fairness Hearing. "State Opt Out Exh. __" refers to defendants' exhibits at the Opt Out Hearing. "Br. __" refers to pages in appellants' opening brief in this appeal. Citations to "Fairness Tr. __" and "Opt Out Tr. __" refer to pages in the transcripts of the fairness hearing and the hearing on the opt out motion, respectively.

approval. A group of named plaintiffs and other class members, appellants in this court, objected to the settlement and moved to opt out of the class. Following notice to the class, submissions by the parties and the objectors, a fairness hearing, and a hearing on the opt out motion, the district court approved the settlement and denied the objectors' motion to opt out of the class. This appeal followed.

1. *The Complaint Through The First Appeal*

Private plaintiffs filed a complaint in 1975 against the governor of the State of Mississippi, the Board of Trustees of Institutions of Higher Learning ("the Board"), and the Presidents of the State's five historically white institutions. They alleged that the defendants were maintaining and perpetuating a racially dual system of higher education, in violation of the Fifth, Ninth, Thirteenth, and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq*. (State Opt Out Exh. 4 at 2-3; *Ayers* v. *Allain*, 674 F. Supp. 1523, 1524 (N.D. Miss. 1987)). The United States intervened as a plaintiff shortly thereafter, alleging violations of the Fourteenth Amendment and Title VI (*ibid.*). Private plaintiffs' second amended complaint sought "declaratory, injunctive and other relief" to enjoin the defendants from violating the constitutional and statutory provisions under which the action was brought (State Opt Out Exh. 4 at 2-3, 40-42).

Private plaintiffs brought this action "on their own behalf and on behalf of all others similarly situated" (State Opt Out Exh. 4 at 8). They alleged that:

> As to such classes of persons, the members of the classes are so numerous that joinder of all members is impracticable. There are questions of law and fact common to all members of the classes. The claims of the plaintiffs are typical of the claims of the classes. The plaintiffs will fairly and adequately protect and represent the interests of the classes. And the defendants have acted in ways generally applicable to the classes thereby making appropriate final injunctive and declaratory relief with respect to the classes as a whole.

(State Opt Out Exh. 4 at 8-9). On September 17, 1975, the district court found that the "prerequisites are satisfied by private plaintiffs to maintain a class action under rule 23(b)(2)," and certified a class consisting of:

> all black citizens residing in Mississippi, whether students, former students, parents, employees, or taxpayers, who have been, are, or will be discriminated against on account of race in receiving equal educational opportunity and/or equal employment opportunity in the universities operated by [the] Board of Trustees [of State Institutions of Higher Learning].

(State Opt Out Exh. 3 at 2; 674 F. Supp. at 1526).

After twelve years of unsuccessful efforts by the parties to reach a settlement, the case proceeded to trial in 1987. *Ayers* v. *Allain*, 674 F. Supp. at 1526. Following a five-week trial, the district court ruled that the defendants had discharged their affirmative obligation to dismantle Mississippi's dual system of higher education through the adoption of race neutral admissions policies, and dismissed the plaintiffs' claims. *Id.* at 1563-1564. This Court affirmed the district court's judgment. *Ayers* v. *Allain*, 914 F.2d 676 (5th Cir. 1990) (*en banc*).

2. *The Supreme Court's Decision*

In *United States* v. *Fordice*, 505 U.S. 717 (1992), the Supreme Court vacated the judgment and remanded for further proceedings. The Court ruled that the adoption of race-neutral policies and practices was insufficient to dismantle a racially dual system of higher education, and that "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." 505 U.S. at 729; *id.* at 731 ("If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects * * * and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system"). The Court identified four "remnants of the prior system that are readily apparent" in this case --"admission standards, program duplication, institutional missions assignments, and continued operation of all eight public universities" -- and held that "Mississippi must justify these policies or eliminate them." *Id.* at 733. The Court emphasized that this list was not exclusive, and that any other practices challenged by the plaintiffs should also be examined on remand. *Ibid.*

The Court found the admission policies "constitutionally suspect" because they conditioned admission to a university on minimum scores on the American College Test (ACT), without regard to high school grades, and required higher minimum ACT scores at the historically white universities than at the historically

black universities. 505 U.S. at 733-738. The Court also found that the ACT had been adopted originally for discriminatory reasons; its continued use had discriminatory effects, including the disproportionate exclusion of African American students from the historically white universities; and its use as the sole determinant for admission was contrary to the recommendations of the test's maker. *Ibid.*

The court found that the institutional mission classifications were rooted in the *de jure* system, and likely had a discriminatory effect as well. *Id.* at 739-741. Three historically white universities – the University of Mississippi, Mississippi State University, and the University of Southern Mississippi – had been the "flagship institutions of the state system" through the *de jure* period, with the broadest program offerings and greatest resources. *Id.* at 739. The other two historically white institutions – Delta State University and Mississippi University for Women – provided only undergraduate education, while the three historically black institutions – Alcorn State University, Jackson State University, and Mississippi Valley State University – were even more restricted in their program offerings and designated missions. *Id.* at 739-740. In 1981, the Board had assigned mission designations to the universities that denominated the three large historically white institutions as "comprehensive" universities, Jackson State as an "urban university," and the remaining four universities as "regional" universities. *Id.* at 740-741. The Court found that, "when combined with the differential admission practices and unnecessary program duplication, it is likely that the

mission designations interfere with student choice and tend to perpetuate the segregated system." *Id.* at 741. It directed the lower courts to "inquire whether it would be practicable and consistent with sound educational practices to eliminate any such discriminatory effects of the State's present policy of mission assignments." *Ibid.*

The Court rejected the notion that the historically black universities should be upgraded "*solely* so that they may be publicly financed, exclusively black enclaves by private choice." *Id.* at 743. But it added that the question whether increased funding was necessary to fully dismantle the dual system "must be addressed on remand." *Ibid.*

3. *The 1995 Remedial Decree*

On remand, and after a second lengthy trial, the district court concluded that the State had not discharged its duty to dismantle the dual system, finding vestiges of segregation in the areas of undergraduate admissions, institutional mission designations, funding, equipment, program duplication, land grant programs, and number of universities. *Ayers* v. *Fordice*, 879 F. Supp. 1419, 1477 (N.D. Miss. 1995).

The district court entered a remedial decree. 879 F. Supp. at 1494-1496. The decree adopted new, uniform admission standards for all eight universities. *Id.* at 1494; see *id.* at 1477-1479. Under the new standards, regular admission would be granted to applicants having (1) a grade point average (GPA) of 3.20 in a core curriculum; or (2) a GPA in the core curriculum of at least 2.50 or class rank in the

top 50%, and an Enhanced ACT score of at least 16; or (3) a GPA in the core curriculum of at least 2.0 and an Enhanced ACT score of at least 18. *Id.* at 1477-1478. Students who did not meet these requirements might obtain admission to one of the Universities by attending a spring screening and successfully completing a summer remedial program. *Id.* at 1478-1479.

The decree also ordered the implementation of new programs and additional funding for two of the three historically black universities, Jackson State and Alcorn State. At Jackson State, the Board was ordered to offer new programs in allied health, a doctoral program in social work, masters and doctoral programs in urban planning, and a doctoral program in business. 879 F. Supp. at 1494. The Board was ordered to undertake an institutional study of Jackson State to consider additional program expansion "to best achieve the urban emphasis of its mission," including the feasibility and educational soundness of the establishment of an engineering school, a pharmacy program, and a law school. *Id.* at 1495. The decree also called for a $5 million endowment, and up to $15 million for property acquisition and facilities improvements at Jackson State. *Ibid.* At Alcorn State, the decree ordered the State to provide matching funds up to $4 million per year for a small farm development center, a $5 million endowment, and funding for an MBA program at Alcorn's Natchez campus. *Ibid*.

The remedial decree called for the establishment of a Monitoring Committee to monitor compliance with the decree, receive and evaluate required reports from the defendants, and make recommendations to the court. 879 F. Supp. at 1494.

The decree required the Board to report to the Monitoring Committee on the feasibility of centralizing control of facilities maintenance at the universities. *Ibid.* The court rejected "at this time" the Board's proposal to merge the two universities in the Delta area, historically black Mississippi Valley State University and historically white Delta State University. *Id.* at 1492. But it ordered the Board to report to the Monitoring Committee "[i]f, after further study of any available educationally sound alternatives, [it] determines that desegregation in the Mississippi Delta can be attained only through its DSU/MVSU consolidation proposal." *Id.* at 1495. The Board also was ordered to study and report to the Monitoring Committee by July 1, 1996, on the feasibility of coordinating the admissions standards and articulation procedures for all of the community colleges in the State. *Id.* at 1496.

4. *The 1997 Court of Appeals Decision*

Petitioners and the United States again appealed. This Court affirmed in part, vacated in part, and remanded for further proceedings. *Ayers* v. *Fordice*, 111 F.3d 1183 (1997), cert. denied, 522 U.S. 1084 (1998).

a. *Admission policies.* The Court of Appeals affirmed the new admission standards. 111 F.3d at 1193-1203. But it remanded to the district court for further examination of the spring screening and summer remedial program and remedial course offerings during the regular school year. *Id.* at 1194-1200. And it reversed the district court's approval of the use of ACT cut-off scores as the sole criteria for certain scholarships at the historically white universities, and remanded for

consideration of the "practicability and educational soundness of reforming" the scholarship policies. *Id.* at 1209.

The private plaintiffs and the United States argued on appeal that the new admission standards would impermissibly reduce the number of African American students eligible for admission to the system as a whole, and that educationally sound alternative standards, with a less discriminatory effect, were available. 111 F.3d at 1197-1198. This court agreed "that it would be inappropriate" to adopt a remedy "that itself caused a reduction in meaningful educational opportunity for black citizens." *Id.* at 1198. But the Court of Appeals did not understand the remedial decree to have done this. "The district court considered and rejected alternative proposals as educationally unsound, and expressly contemplated that the remedial route to admission could alleviate any potential disproportionate impact on those black students who are capable, with reasonable remediation, of doing college level work." *Ibid.* The Court of Appeals affirmed the district court's rulings that the alternative standards proposed by the plaintiffs were not educationally sound, *id.* at 1199-1200, and concluded that "[t]he district court's decision to order implementation of this system, rather than dilute standards for regular admission, was a proper exercise of its discretion." *Id.* at 1200.

The Court of Appeals also affirmed the district court's adoption of the spring screening and summer remedial program. 111 F.3d at 1200-1201. But it directed the district court to examine further the operation of that program on remand. *Ibid.* Private plaintiffs and the United States argued that the district court had erred in

relying upon the spring screening and summer program to mitigate the effect of the new admission standards on African American students, because the program was untested and ill-defined at the time of trial, and because the summer program would not be a viable option for students required to work during the summer to afford to go to college. *Id.* at 1197. The Court of Appeals, however, noted that the district court had retained jurisdiction over the action, and thus would be able to examine data on the actual operation of the program as it became available. *Id.* at 1201. It ruled that "[i]f the district court ultimately concludes that the spring screening and summer remedial program (as it may be modified) is unable to any significant degree to achieve its objectives, then the court should, if possible, identify and implement another practicable and educationally sound method for achieving those objectives." *Ibid.*

b. *Enhancement of the historically black universities.* The Court of Appeals substantially affirmed the district court's rulings regarding additional resources for the historically black universities, but remanded for further consideration of new programs at Alcorn State and Mississippi Valley State Universities, accreditation of Jackson State's business program, and disparities in funding for equipment. 111 F.3d at 1209-1225.

This Court began its analysis by rejecting the contention that the State's duty to dismantle the dual system required the "enhancement of the HBI's in order to rectify the detrimental effects of past *de jure* segregation, without regard to present policies and practices." 111 F.3d at 1210. "The appropriate inquiry under

Fordice," the Court held, "is whether changes in resource allocation are necessary to dismantle fully present policies and practices rooted in the prior system that serve to maintain the racial identifiability of the universities and that can practicably be eliminated without eroding sound educational policies." *Ibid.*

The district court had found that the mission designations adopted by the Board in 1981 had "effectively fixed the scope of programmatic offerings that were in place at each university during the *de jure* period." 111 F.3d at 1210, citing 879 F. Supp. at 1438-1439. While the remedial decree did not alter the mission designations *per se*, it did order new programs at both Jackson State and Alcorn State. 111 F.3d at 1211. Private plaintiffs and the United States did not challenge the retention of the mission designations. *Ibid.* Rather, they argued that the district court had erred by ordering only two new programs at Alcorn State and no programmatic enhancements for Mississippi Valley State. *Id.* at 1212-1213.

The Court of Appeals agreed that additional program enhancements should be considered. 111 F.3d at 1213-1214. On the one hand, it affirmed the district court's finding that "'merely adding programs and increasing budgets' is not likely to desegregate an HBI." *Id.* at 1213, quoting 879 F. Supp. at 1491. On the other hand, the Court of Appeals found that the addition of "well-planned programs that respond to the particular needs and interests of local populations can help to desegregate historically black institutions." *Id.* at 1213-1214. Thus, the remedial decree should have required the Board to study the potential of new academic programs to desegregate Mississippi Valley State and Alcorn State Universities, as

well as Jackson State. *Id.* at 1214. The Court of Appeals also directed the district court, on remand, to examine efforts to achieve accreditation of Jackson State's business programs, although it affirmed the district court's finding that no relief was required with respect to accreditation of programs generally. *Id.* at 1214-1215.

The Court of Appeals rejected most of the United States' and private plaintiffs' other resource-related contentions. It affirmed the district court's findings that it would be impractical and educationally unsound to alter the existing allocation of land grant programs between historically white Mississippi State University and historically black Alcorn State. 111 F.3d at 1215-1217. It affirmed the district court's ruling that no relief was warranted to reduce program duplication amongst non-proximate institutions, although it directed the court to examine program duplication between Delta State and Mississippi Valley State Universities on remand. *Id.* at 1217-1221. And it rejected the United States' and private plaintiffs' contentions that the State's formula for allocating funding amongst the universities should be revised, although it directed the district court to examine "the cause and segregative effect" of disparities in funding for equipment. *Id.* at 1221-1225.

c. *Employment and governance.* Finally, the Court of Appeals affirmed the district court's rulings regarding faculty and staff employment and system governance. 111 F.3d at 1225-1228. While acknowledging the district court's finding that the historically white universities "remain racially identifiable at the level of administrators and tenured faculty," *id.* at 1226, the Court of Appeals also

affirmed the district court's finding that the shortage of black faculty and staff at the historically white institutions was not due to any current policy or practice. *Id.* at 1226-1227. Similarly, the Court of Appeals affirmed the district court's finding that disparities in salaries paid to faculty at the historically black universities were not traceable to the dual system and did not warrant relief. *Id.* at 1227. Finally, the Court of Appeals affirmed the district court's findings that there was no current practice of "denying or diluting the representation of black citizens on the Board," *id.* at 1227, or of limiting the employment of African-Americans on the Board's staff. *Id.* at 1227-1228.

5. *Remand Proceedings*

On remand, district court proceedings included: (a) implementation of the 1995 remedial decree and the matters specified in this Court's 1997 opinion; (b) hearings relating to the Board's proposal to expand course offerings at the University of Southern Mississippi's Gulf Coast Center; (c) designation of a lead plaintiff and class counsel; (d) consideration and approval of the settlement agreement; and (e) the motion to opt out of the class.

a. *Implementation of the 1995 decree and of the Court of Appeals' remand instructions.* On remand, the following matters were before the district court: (1) establishment of the monitoring committee; (2) examination of the effect of the new admission standards and the effectiveness of the summer remedial program as an alternative means of admission for students who do not meet the regular admission standards; (3) the status of remedial or developmental course offerings

during the regular academic year; (4) the use of ACT cut-off scores for scholarships; (5) implementation of new programs at Jackson State and Alcorn State, as provided in the remedial decree; (6) studies of possible new programs designed to attract other-race students to Jackson State, Alcorn State, and Mississippi Valley State;[2] (7) efforts to achieve accreditation of Jackson State's business program; (8) a study of the cause and effect of disparities in equipment funding; (9) a study of the feasibility of centralizing facilities maintenance funding; and (10) a study of the feasibility of coordinating admission standards and articulation procedures for community colleges. See 879 F. Supp. at 1494-1496 (remedial decree); 111 F.3d at 1228-1229 (summarizing rulings); R. 1115-1116; 1138-1141.

By early 2001, most of these matters had been resolved by the district court. In August, 1998, the district court appointed a Monitor to aid the parties and the court in the implementation of the decree (R. 1148-1149). In making this appointment, the court noted that the decree had provided for appointment of a three-member monitoring committee by the court if the parties could not agree on its membership (R. 1148-1149) The court amended its order to provide for a committee of one, rather than three (R. 1149).[3]

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[2] The Board informed the district court that it had abandoned its proposal to merge Mississippi Valley State and Delta State Universities (R. 1138).

[3] The court initially ordered the Board to nominate six persons for the Monitoring Committee, and the United States and private plaintiffs jointly to nominate six (R.

Following two reports from the Monitor and submissions from the parties, the district court ordered the universities to continue offering remedial or developmental courses during the regular academic year, but declined to order additional funding for these courses (R. 1736-1742; J.R.E. Tab K, Tab R). The court adopted the Monitor's findings that "funding for developmental/remedial education has been distributed equitably among the eight universities for fiscal years 1997-2000" (R. 1738; J.R.E. Tab R at 3), and that the historically black universities – which had the greatest number of students enrolled in developmental courses – had been the highest funded universities on a head count basis during the years 1997 to 2000 (R. 1740; J.R.E. Tab R at 5). The court concluded that there was "no evidence of systematic underfunding of the HBIs with respect to the cost of developmental/remedial instruction during the last four years following implementation of the new admission standards" (R. 1740-1741; J.R.E. Tab R at 5-6).

The court also resolved all outstanding matters regarding Jackson State University. Based upon the Monitor's report, the court found that the existing business programs had been accredited, and that the Board had approved and implemented a doctoral program in business, and masters and doctoral programs in

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885-886). The United States submitted its nominations independently because counsel for the private plaintiffs indicated that he was seeking relief in the Supreme Court and was unable to address issues then pending in the district court (R. 915-917). The Board submitted its nominations to the court alone (R. 1008-1009).

urban and regional planning (R. 1412-1413; J.R.E. Tab L at 1-2). A school of social work and a doctoral program in social work had been approved and implemented (R.1413; J.R.E. Tab L at 2). And a school of allied health had been approved and implemented, with a masters program in communicative disorders and a masters program in public health (R. 1413; J.R.E. Tab L at 2). The allied health programs did not duplicate those at the University of Mississippi Medical Center (R. 1413-1414; J.R.E. Tab L at 2-3). The Board had proposed and the legislature had appropriated $15 million "to fund property acquisition, campus entrances, campus security and grounds enhancement" at Jackson State (R. 1414; J.R.E. Tab L at 3). The Board had completed an on-site institutional study of Jackson State, which identified the institution's strengths and weaknesses (R. 1414-1415; J.R.E. Tab L at 3-4). In accordance with the study's recommendation, the Board proposed, and the court approved, opening a school of engineering at Jackson State (R. 1415; J.R.E. Tab L at 4). The court also found, based upon the study's recommendation, that instituting new programs at Jackson State would be a more effective means of attracting other-race students than eliminating or transferring duplicative programs from other institutions (R. 1416; J.R.E. Tab L at 5). Nonetheless, the court ordered the Board to consider whether the existing masters in public health program at the University of Southern Mississippi should be discontinued in favor of the new MPH program at Jackson State (R. 1416; J.R.E. Tab L at 5).

The district court subsequently ruled, after reviewing the Monitor's reports and the parties' responses, that "establishing a public law school or a five-year pharmacy school 'under the direction and control of JSU' [was] neither feasible nor educationally sound at this time and, therefore, not required by the court as an element of the *Ayers* Remedial Decree" (R. 1724; J.R.E. Tab Q at 4). The court first noted that "[n]one of the parties propose the establishment of a new law school, independent of the existing UM law school" (R. 1722; J.R.E. Tab Q at 2). Rather, the private plaintiffs and the United States contended that joint operation of a law school in Jackson by the University of Mississippi and Jackson State should be further studied and considered, while the Board proposed no change in public legal education in the State, and the Monitor recommended investigation of demand for part-time public legal education in Jackson in conjunction with Mississippi College (R. 1722; J.R.E. Tab Q at 2). The district court found, based on enrollment data, that "demand for legal education in the Jackson area is satisfied and that a stable and continuing demand for a public law school at JSU does not exist" (R. 1722; J.R.E. Tab Q at 2). The court further noted that minority enrollment at the University of Mississippi law school had increased (R. 1772 n.4; J.R.E. Tab Q at 2 n.4). The court concluded that racial diversity at Jackson State would be better advanced through the other new programs and enhancements, rather than diverting funds to establish a new law school (R. 1722-1723; J.R.E. Tab Q at 2-3).

The district court also approved the Board's proposal, endorsed by the Monitor, the private plaintiffs and the United States, for an inter-institutional pharmacy program to be implemented by Jackson State, the University of Mississippi, and the University of Mississippi Medical Center (R. 1723-1724; J.R.E. Tab Q at 3-4). The court found that the program would both attract white students to Jackson State and contribute to the desegregation of the pharmacy program at the University of Mississippi (R. 1724; J.R.E. Tab Q at 4). The court further found that the data did not support the creation of a new or moved five-year pharmacy program at Jackson State and that none of the parties advocated such a program (R. 1724; J.R.E. Tab Q at 4).

The court found, in July 2000, that funds had been allocated for the MBA program at Alcorn State (R. 1635; J.R.E. Tab P at 1). And it adopted guidelines for allocation of the $5 million endowments at Jackson State and Alcorn State (R. 1577-1578).

The district court found that the Board had fully complied with paragraph 14 of the decree, regarding admission and articulation agreements with the State's community colleges (July 28, 1999, Order). The court found that the universities, the community colleges, and their boards, had entered into agreements and issued regulations providing a standardized procedure for transfer from community college to university, as well as open admissions to the community colleges (*ibid.*).

Finally, the court adopted the Board's proposal, recommended by the Monitor, to centralize control of facilities maintenance funds (R. 1730-1735).

Thus, by February 2001, the only unresolved remedial issues related to the admission standards and summer remedial program, the use of the ACT in awarding scholarships,[4] and consideration of programmatic enhancements at Alcorn State and Mississippi Valley State Universities to aid their desegregation. The court had scheduled a hearing on the admission standards, but, on joint motion of the parties, the hearing was continued, pending settlement negotiations (R. 1655).

While the district court did not resolve the issues relating to admissions and the summer program, the monitor submitted a report on the effectiveness of the summer remedial program (Def. Fairness Exh. 4) and an analysis of enrollment data (Def. Fairness Exh. 5). The enrollment analysis compared enrollment data for Mississippi residents for the years before and after the institution of the new admission standards. It showed that the numbers of African American freshmen enrolling in the State's universities and community colleges had increased by 10.7%, from 7,094 in 1994 to 7,852 in 1998, while white enrollments had increased by only 0.6%, from 13,126 to 13,207 (Def. Fairness Exh. 5 at 5-8).[5]

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[4] In June 1998, the district court found that the Board had discontinued use of ACT scores as the sole criterion for awarding scholarships, and ordered the Board to submit additional information to the court and the plaintiffs about the other factors used in awarding scholarships (R. 1140).

[5] The monitor did not view 1995, the last year before the institution of the new admission standards, as a "stable base" for analyzing the effects of the new standards, since there had been a large, unexplained, increase in enrollments over 1994 (Def. Fairness Exh. 5 at 4).

Much of this increase resulted from enrollment of African American freshmen at the community colleges, which increased from 5,011 in 1994 to 5,862 in 1998 (Def. Fairness Exh. 5 at 5). The numbers of African American freshman entering a university dropped from 2,083 in 1994 to 1,990 in 1998 (Def. Fairness Exh. 5 at 5). More African American freshmen were enrolling in the historically white universities, while fewer were enrolling in the historically black universities (Def. Fairness Exh. 5 at 9).

The monitor found that most students who enrolled in the summer program completed it successfully and went on to enroll in a university (Def. Fairness Exh. 4 at 3 & Att. 2). He further found, based upon a comparison of students enrolled in the summer program and earlier students who had attended remedial courses at the universities, that the summer program was more effective in remediating educational deficits than the remedial courses offered at the universities in earlier years (Def. Fairness Exh. 4 at 6-7 & Att. 5). While the monitor found that more than half of those who attended the spring screening did not enroll in the summer program (Def. Fairness Exh. 4 at 5), he reported that one-third of those who did not enroll went on to a Mississippi community college (Def. Fairness Exh. 4 at 5). The monitor did not view this move toward community colleges as a negative development, since those students could later transfer to a university (Def. Fairness Exh. 4 at 9). The monitor concluded that the summer program should be deemed a success (Def. Fairness Exh. 4 at 8-11).

b. *Proceedings regarding the University of Southern Mississippi's Gulf Coast campus*. In 1999, the Board proposed expanding the programs at the University of Southern Mississippi's Gulf Coast campus to include lower division (freshman and sophomore) courses, thereby making the campus a four-year institution (R. 661). Following motions by the private plaintiffs and the United States and an evidentiary hearing, the district court initially enjoined the proposal because of its concerns about the admission standards proposed for the Gulf Coast campus (R. 673-676).

After the Board submitted a revised proposal, with revised admission standards, the court vacated its injunction (R. 688-693). The court rejected the private plaintiffs' and the United States' objection that the Board should not be allowed to expend funds on expansion of the Gulf Coast campus when the full scope of its remedial obligations was still unresolved (R. 689, 691-693). The court declined to inject itself into Board funding decisions apart from the implementation of the remedy (R. 692). Because the court found that "the Board's funding obligations under *Ayers* will continue to have priority," and the court's previous concerns about the admission standards had been resolved, the court found "no legal basis for prohibiting the Board from expanding USMGC" (R. 692). It therefore permitted the Board to proceed with its expansion proposal with freshman enrollment to begin in June 2000 (R. 693).[6]

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[6] Private plaintiffs appealed from the district court's Gulf Coast rulings (R. 1478). That appeal is pending in this Court (No. 00-60073), but has been held in abeyance

c. *Designation of lead plaintiff and class counsel.* Bennie G. Thompson, now a member of Congress from the State of Mississippi, was one of the original named plaintiffs in this case (State Opt Out Exh. 4). Since at least 1996, he has taken a leading role in the litigation, and, in March 1996, the district court declared him "a fit and qualified person to continue to speak as a representative of the class" (R. 187; J.R. E. Tab J at 2; see also Fairness Tr. 34). In the same order, the district court recognized Alvin Chambliss as the attorney of record for the private plaintiffs (R. 187; J.R.E. Tab J at 2).

On March 27, 2000, Byrd and Associates entered an appearance on behalf of the private plaintiffs (R. 1483; J.R.E. Tab M). This notice was "acknowledged and agreed to" by Mr. Thompson, as well as all of the private plaintiffs' counsel, including Mr. Chambliss (R. 1484; J.R.E. Tab M at 2). In response to this notice, the district court entered an order on March 30, 2000, again designating Mr. Thompson as "lead plaintiff in this case" (R. 1502; J.R.E. Tab N at 2). In making this designation, the court stated that Mr. Thompson had "been more active than any other plaintiff in pursuing this case, having appeared before the court on several occasions as a witness and representative of the plaintiff class and also at conferences" (R. 1502; J.R.E. Tab N at 2). This order also directed Mr. Thompson to name a lead counsel within 30 days (R. 1502; J.R.E. Tab N at 2). In the interim, the court named Robert Pressman as lead counsel, finding that "Mr. Pressman has

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pending the settlement of this case.

been the primary attorney for the private plaintiffs since North Mississippi Rural Legal Services resigned its representation of the private plaintiffs in 1995. Mr. Pressman has been at times the only attorney appearing in court at post-trial hearings on behalf of the private plaintiffs and the only attorney in regular contact with the court in the court's monitoring of the implementation of the remedial decree to end this case" (R. 1502; J.R.E. Tab N at 2). On May 18, 2000, the court entered an order acknowledging Mr. Thompson's designation of Isaac K. Byrd as lead counsel for the plaintiff class (R. 1576; R.E. Tab O).

d. *The parties' settlement agreement and its approval by the district court.* On April 20, 2001, the parties submitted a proposed settlement agreement to the district court (R. 1865-1905; see J.R.E. Tab E). The agreement was signed by Bennie G. Thompson, individually and as class representative on behalf of the class, counsel for the United States, the Governor and Attorney General of the State of Mississippi, the President of the Board, counsel for the State defendants, and all of the counsel for the private plaintiffs except Mr. Chambliss (R. 1892-1894; J.R.E. Tab E at 25-27).

1. In accordance with the parties' motion, the court scheduled a fairness hearing, ordered notice to the class, and established a schedule for submissions by the parties and others regarding the proposed settlement (R. 2047-2049; J.R.E. Tab I at 8-10). The order required the Board to publish the Notice of Proposed Settlement of Class Action in 17 newspapers across the State of Mississippi, and to make the Notice available on the Board's website, and in libraries at all eight

universities (R. 2047; J.R.E. Tab I at 8). The Notice was also to be posted on the court's website (R. 2047; J.R.E. Tab I at 8). The Board complied with the publication directive (R. 2062-2066). The order provided that "[e]very resident citizen of the State, including Class Members, has the right to present his or her position on this proposed Agreement to the District Court" (R. 2048; J.R.E. Tab I at 9). All such submissions were to be filed, in writing, with the Clerk by July 25, 2001 (R. 2048; J.R.E. Tab I at 9). Those who wished to appear in person at the hearing were required to notify the court by the same date of that intention (R. 2048; J.R.E. Tab I at 9). The court retained the discretion to "determine how many and how much time will be allotted [at the hearing] for personal appearances" (R. 2048; J.R.E. Tab I at 9).

2. Section II of the settlement agreement provides financial assistance for needy students attending the summer remedial program (R. 1871-1872; J.R.E. Tab E at 4-5). The agreement requires the Board to seek and the State Legislature to provide $500,000 per year for five years and $750,000 per year for an additional five years for this purpose (R. 1872; J.R.E. Tab E at 4). It further requires the Board to publicize widely the availability of the summer program and other admissions opportunities, as well as the financial aid policies (R. 1872; J.R.E. Tab E at 4).

Section III of the agreement provides for the development of new and the enhancement of existing academic programs at Alcorn State, Jackson State, and Mississippi Valley State Universities (R. 1872-1876; J.R.E. Tab E at 5-9). The

agreement calls for eight new academic programs at Alcorn State: masters degree in business administration (at Natchez), masters in accounting (at Natchez), bachelors degree in finance (at Lorman), masters in finance (at Natchez), masters for physicians' assistants (at Natchez or Vicksburg), masters in biotechnology (at Lorman), bachelors in computer networking (at Vicksburg), and bachelors in environmental science (at Lorman) (R. 1873; J.R.E. Tab E at 6). It calls for sixteen new programs at Jackson State: Ph.D. in business, masters and Ph.D in urban planning, Ph.D. in social work, bachelors in civil engineering, bachelors in computer engineering, bachelors in telecommunications engineering, masters and Ph.D. in public health, bachelors in health care administration, masters in communicative disorders, Ph.D. in higher education, the Mississippi Interinstitutional Pharmacy Initiative, a School of Allied Health, a School of Public Health, and a School of Engineering (R. 1873-1874; J.R.E. Tab E at 6-7). Seven new programs are to be placed at Mississippi Valley State: bachelors in history, bachelors and masters in special education, masters in computer science, masters in bioinformatics, masters in leadership administration, and masters in business administration (R. 1874; J.R.E. Tab E at 7). The agreement further provides for enhancements in the nursing, teacher education, mathematics and science, and computer science programs at Alcorn, the business and education programs at Jackson State, and the biology, chemistry, computer science, mathematics, and special education programs at Mississippi Valley State (R. 1874-1875; J.R.E. Tab E at 7-8).

Section IV of the settlement agreement provides for the creation of two endowments for the benefit of the Alcorn State, Jackson State, and Mississippi Valley State Universities (R. 1876-1879; J.R.E. Tab E at 9-12). A publicly-funded endowment is to be created over a 14-year period in the amount of $70 million (R. 1876; J.R.E. Tab E at 9). The Board also promises to use its best efforts to establish a privately-funded endowment in the amount of $35 million, over a seven-year period (R. 1878; J.R.E. Tab E at 11). Income from the endowments is to be used for the recruitment of other-race students, as well as for the academic programs and enhancements listed in Section III (R. 1876-1878; J.R.E. Tab E at 9-11). Both endowments will be managed initially by a seven-person committee consisting of the Presidents of Alcorn, Jackson, and Mississippi Valley State Universities, the Commissioner of Higher Education, two Board members, and an individual to be agreed upon by the other six (R. 1876-1878; J.R.E. Tab E at 9-11). However, once a university attains, and maintains for three consecutive years, a total other-race enrollment of 10%, the university's pro rata share of the endowments will be transferred from the Board to the university, which will then have discretion to use the income from the endowments for educationally sound purposes (R. 1877-1879; J.R.E. Tab E at 10-12). If a university does not achieve a 10% other-race enrollment by the fall of 2018, the settlement provides that it will still receive its share of income from the endowments if it is making a good faith effort to increase other-race enrollment (R. 1878-1879; J.R.E. Tab E at 11-12).

Section V of the settlement agreement authorizes a list of capital improvements at the three universities, at a cost of up to $75 million (R. 1879-1881; J.R.E. Tab E at 12-14). The improvements at Alcorn State are: equipment for the MBA program at Natchez, a new fine arts center in Natchez, repair and renovation of Dumas Hall at Lorman, purchase of property to improve security at Lorman, and a new biotechnology building at Lorman (R. 1880; J.R.E. Tab E at 13). At Jackson State, the improvements include an engineering building and purchase of the Allstate Building (R. 1880; J.R.E. Tab E at 13). At Mississippi Valley State, the improvements include library enhancements, a science and technology building, landscape and drainage, and repairs and renovations (R. 1880; J.R.E. Tab E at 13).

Section VI sets out the means of funding the provisions of the settlement (R. 1881-1884; J.R.E. Tab E at 14-17). This section commits the Board to seek and states that the legislature is expected to appropriate a total of $245,880,000 over 17 years for the new programs and program enhancements identified in Section III, $70 million over 14 years for the public endowment, and $75 million for the capital improvements over five years, as well as $6.25 million for financial assistance to students attending the summer program (R. 1881-1884; J.R.E. Tab E at 14-16). This funding "does not supplant regular funding for ASU, JSU, and MVSU" (R. 1881; J.R.E. Tab E at 14). The agreement also provides that $3.6 million in funds frozen by the district court will be released and divided between Alcorn and Mississippi Valley State (R. 1884; J.R.E. Tab E at 17), and that $2.5 million is to

be provided by the State to pay private plaintiffs' attorneys fees (R. 1884; J.R.E. Tab E at 17).

Section VII of the agreement recognizes that Jackson State is a comprehensive university, but states that that designation "does not imply any change in JSU's institutional mission classification" (R. 1884-1885; J.R.E. Tab E at 17-18). Section VIII provides that Mississippi Veterans Memorial Stadium will be the home of the Jackson State Tigers, and that the president of Jackson State shall be a member of the Stadium Commission (R. 1885; J.R.E. Tab E at 18). This section also provides that Jackson State shall have control over the Universities Center, subject only to the Board (R. 1885; J.R.E. Tab E at 18).

Section IX of the agreement concerns attorneys fees (R. 1886; J.R.E. Tab E at 19).

Section X requires the parties to cooperate to achieve the approval of the settlement by the court, and provides that, for the agreement to be effective, the final judgment must, *inter alia*, bind all members of the class; find the settlement fair, reasonable, and adequate; order the State to implement the settlement, including providing its funding; provide for continuing jurisdiction by the district court to resolve any disputes concerning the settlement; find that the defendants are in full compliance with their obligations to dismantle the former *de jure* system of higher education; and dismiss the action on the merits (R. 1886-1889; J.R.E. Tab E at 19-22). This section further provides that the agreement will become final upon approval by the district court and affirmance by the court of last resort in case of

appeal (R. 1889-1890; J.R.E. Tab E at 22-23). It requires the dismissal of private plaintiffs' appeal of the district court's order regarding expansion of the University of Southern Mississippi's Gulf Coast campus (R. 1890; J.R.E. Tab E at 23). It provides that the agreement shall be enforced exclusively by the district court (R. 1890; J.R.E. Tab E at 23). And it provides for annual reports by the Board to counsel for the United States and for the private plaintiffs on implementation of the settlement agreement (R. 1891; J.R.E. Tab E at 24).

3. As the Board's witnesses explained at the fairness hearing, the new and enhanced programs and improved facilities provided in the settlement were designed to aid in the desegregation of the historically black universities (Fairness Tr. 105-216). The commissioner of Higher Education explained the philosophy underlying the selection of programs in the settlement agreement: "looking at programs that are consistent with institutional missions, institutional strengths, institutional capacities, programs that are needed, programs that are marketable, that will produce marketable degrees" (Fairness Tr. at 145). Some of the programs, particularly those at Jackson State, grew out of the court's remedial decree and subsequent orders (Fairness Tr. 105-106). Others had been recommended by the experts who conducted the studies required by the district court's order (Fairness Tr. 107-108, 123-127, 138, 140-146, 172-173). While some of the programs were selected because they were necessary to improve the institution's core undergraduate offerings (*e.g.*, the addition of the history program and enhancements in the undergraduate science and mathematics offerings at

Mississippi Valley) (Fairness Tr. 128-129, 144, 156-157, 213), most of the programs were selected because the Board's consultants expect them to be particularly marketable and to provide degrees in high demand fields (Fairness Tr. 126-129, 136, 140-141, 145-147, 188-192, 205-217). Some programs are to be offered at off-campus locations, such as Natchez and Vicksburg for Alcorn State, and at Greenville or Greenwood for Mississippi Valley State, because those institutions have shown success in attracting other-race students to existing programs at those locations (Fairness Tr. 127-128, 132-134, 142, 148, 155-156, 187-189). Governor Musgrove summed up the intent of this part of the agreement: "we have crafted an educationally sound way in which we can expand the programs of the three historically black universities; we expand the facilities and we put in place mechanisms to insure that they can offer a quality educational opportunity in a desegregated way in which all citizens of Mississippi would have the opportunity for quality education whether they attended a historically white university or a historically black university" (Fairness Tr. 26-27).

The lead plaintiff testified that the settlement was a compromise, and that while it did not provide all the relief that he wished for, he had agreed to it because he believed that it was the best that could be achieved for the class, particularly in light of the judicial decisions that already had narrowed the scope of relief that was likely to be achieved through litigation (Fairness Tr. at 41-49, 52). The Governor, the Attorney General, and Board officials stated that approval of the settlement was important so that the litigation could be put to rest and the continued drain on

resources and strains on relationships within the higher education system brought to an end (Fairness Tr. at 23, 25-27, 63-64, 80-82, 95-96, 168-169).

4. Even before the parties submitted the proposed settlement agreement to the district court, a group of plaintiffs and class members, represented by Alvin Chambliss, opposed the settlement and filed motions to opt out of the class (R. 1743-1858, R. 1906-1983, 2071-2079).[7] The objectors contended that the court should reject the settlement agreement because it did not provide adequate relief in the areas of admission standards, remedial programs, institutional missions, funding, strengthening of the programs at the historically black universities, facilities, faculty salaries at the historically black universities, and a lack of African American faculty at the historically white universities (R. 2071-2079, 1745-1758; see pp. 33-34, *infra*). The objectors also opposed the settlement's provision that the historically black universities will not gain control over the income from the endowments until they achieve and maintain an enrollment that is 10% other-race (Opt Out Tr. 145, 148-149, 209).

With respect to the admission standards, the objectors contended that the new admission standards adopted by the district court in 1995 and implemented in 1996 had reduced the numbers of African American freshmen admitted to the

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[7] The motion to opt out and the district court's resolution of it will be discussed below. Because the objecting plaintiffs presented evidence at the opt out hearing regarding what they believed were the deficiencies in the settlement, we discuss those contentions here.

system as a whole, and particularly had reduced the numbers of students admitted to the historically black universities (Fairness Tr. 349-350, 354-355, 369-370, 377-400, 422; Opt Out Tr. 13, 45-46, 98-99, 111, 127-128, 154-157, 250, 275-277). They advocated open admissions (Opt Out Tr. 13, 127-128), significantly lower admission requirements (*e.g.*, admitting all students with at least a 10 on the ACT and a 2.5 grade point average) (Fairness Tr. 399-400), or tiered admission standards under which the historically black universities and Delta State would have lower admissions requirements than the other four universities (Opt Out Tr. 277).

The objectors also contended that the settlement did not go far enough in enhancing the historically black universities. They contended that these universities needed higher faculty salaries (Fairness Tr. 231, 285-286, 402, 410-411, 412; Opt Out Tr. 46, 66-67, 138, 170-171), improvements in and expansions of their core undergraduate programs (Fairness Tr. 285, 422; Opt Out Tr. 14-15, 46-47 157-158, 272), more graduate and professional programs (Fairness Tr. 287-288, 293-294, 409; Opt Out Tr. 18-20, 99-100, 170, 293- 295), and more funds to improve and expand facilities (Fairness Tr. 288-289, 351-352, 359, 371, 402, 409; Opt Out Tr. 16-17, 47, 67, 135-136, 154, 158-159, 232). The objectors and their witnesses complained that the settlement did not alter the Board's funding formula; some believed that the purpose of the lawsuit was to obtain funding for the historically black universities equal to that for each of the historically white universities (Fairness Tr. 292, 363-365; Opt Out Tr. 116, 154, 160-162, 206, 260).

The President of the Faculty Senate at Alcorn State contended that his institution's programs should be upgraded and expanded to make it a full-fledged land grant institution (Fairness Tr. 409; Opt Out Tr. 133-137).

5. The district court approved the settlement agreement (R. 3159-3168, 3171-3174; J.R.E. Tab D, Tab F). First, the court entered an order stating that, before it ruled on the proposal, it "wishe[d] to receive a concurrent resolution or similar statement on the record from the Mississippi State Legislature, indicating whether the Legislature endorses this Proposal and agrees to fund it on the terms called for or, alternatively, prefers the continuation of the Court Plan" (R. 3167; J.R.E. Tab F at 9). The court first described the "Court Plan," that is, the remedy set forth in the district court's remedial decree and subsequent orders on remand (R. 3160-3163; J.R.E. Tab F at 2-5). The court stated that with this plan in place, with its uniform admission standards and enhancements at Jackson State, "it would appear that the majority of the work necessary to meet constitutional requirements for the overall plan has been accomplished" (R. 3163; J.R.E. Tab F at 5). The court noted that if it did not approve the settlement, the Court Plan would remain in effect (R. 3163; J.R.E. Tab F at 5). But, if the legislature formally joined the Governor, the Attorney General, the Board, and the other parties to the case in endorsing the settlement, the court would "not stand in the way, and the Proposal will be accepted by this court" (R. 3167-3168; J.R.E. Tab F at 9-10).

On February 15, 2002, having received the Legislature's endorsement of the proposed settlement agreement, the district court entered final judgment (R. 3171-

3174; J.R.E. Tab D). The court acknowledged that the settlement agreement differed from the Court Plan (R. 3172; J.R.E. Tab D at 2). But, "if the State of Mississippi through its elected representatives, the policymakers of the State, wants to go further in the enhancements to the historically black institutions than called for by the court – and they have advised the court they do – then their actions will be given precedence" (R. 3172; J.R.E. Tab D at 2). The judgment, *inter alia*, affirmed the certification of the proceeding as a class action under Rule 23(b)(2), Fed. R. Civ. P.; found that the notice given to class members and the opportunities afforded them to provide their views to the court met the requirements of Rule 23 and of due process; found that it had jurisdiction over the entire class; and found that "the Settlement Agreement affords the Class Members considerable relief in light of the established law of this case the present stage of these proceedings and the range of possible recovery through further litigation, and is, in all respects, fair, reasonable, adequate and in the best interests of the Class" (R. 3172-3173; J.R.E. Tab D at 2-3). The judgment ordered the defendants to implement the settlement agreement (R. 3173-3174; J.R.E. Tab D at 3-4). It ruled that approval of the settlement established that:

> [T]he defendants, and the State of Mississippi are in full compliance with the law. As a result, there are no continuing State policies or practices, or remnants traceable to *de jure* segregation, with present discriminatory effects which can be eliminated, altered or replaced with educationally sound, feasible and practical alternatives or remedial measures. This finding extends to all facets of this case and to all facets of public higher education under the direction, supervision or

> control of the Board of Trustees of State Institutions of Higher Learning.

(R. 3174; J.R.E. Tab D at 4). Finally, the court found that the settlement "accomplishes a full, complete and final resolution of this controversy" and dismissed all claims "on the merits and with prejudice" (R. 3174; J.R.E. Tab D at 4).

e. *The motion to opt out of the class.* Individual members of the plaintiff class also moved to opt out of the class (R. 1853-1858). They contended that they had a right to opt out under Rule 23, Fed. R. Civ. P., that their interests had not adequately been represented by the lead plaintiff and class counsel, and that the settlement was inadequate (R. 1853-1858, R. 3114-3115; Opt Out Tr. at 338-348). They also alleged collusion in the settlement negotiations (Opt Out Tr. at 5-6, 47-48, 55-58, 65-66).

The district court received submissions from the parties and held a hearing on the motion to opt out on October 23 and 24, 2001. Most of the testimony at the opt out hearing concerned the objectors' contention that the settlement agreement did not provide adequate relief (see pp. 33-34, *supra*). The objectors also presented testimony from class members that they had not been permitted to participate personally in the settlement negotiations and that their views had not been taken into account by the lead plaintiff and class counsel (Opt Out Tr. 30-33, 50-55, 61-64, 75-77, 88, 211). One witness also objected that lead counsel had no experience in civil rights litigation and that he had brought in new expert witnesses

(Opt Out Tr. 50, 64-65). Although their counsel made reference to alleged collusion in the negotiation process (Opt Out Tr. 5-6, 47-48, 55-58, 65-66), the objectors presented no evidence to support this allegation (see Opt Out Tr. 365).

The district court denied the motion to opt out of the class (R. 3117-3129; J.R.E. Tab G, Tab H). The court first held that, because the class in this case had been certified under Rule 23(b)(2), the movants had no absolute right to opt out of the class (R. 3119-3120; J.R.E. Tab H at 3-5. The absolute right to opt out, the court held, is expressly limited to class actions brought under Rule 23(b)(3), which typically involve claims for individual monetary relief (R. 3119-3121; J.R.E. Tab H at 3-5). The court acknowledged that a court has discretionary power to permit class members to opt out of a Rule 23(b)(2) class under Rule 23(d)(2), where "'such a right is desirable to protect the interests of the absent class members'" (R. 3121; J.R.E. Tab H at 5, quoting *Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981)). The cases in which such opt out rights have been granted, however, "involve hybrids of a Rule 23(b)(2) class action and a Rule 23(b)(3) class in that class members seek equitable relief as a group and monetary relief, such as back pay, as individuals" (R. 3121; J.R.E. Tab H at 5, citing *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983). In such cases, the court explained, opt out rights might be warranted "if **individual** claims cannot be adequately represented" (R. 3121; J.R.E. Tab H at 5, emphasis in the original). Here, there was no ground for granting such a discretionary right to opt out, since "movants have failed to show the existence of individual claims separate and distinct from

the claims for classwide relief" (R. 3122; J.R.E. Tab H at 6; see also R. 3118; J.R.E. Tab H at 2, noting that private plaintiffs had sought class certification on the ground that "final injunctive and declaratory relief with respect to the classes as a whole" was appropriate).

The court next rejected the movants' claim that the lead plaintiff and lead class counsel were inadequately representing their interests (R. 3122-3126; J.R.E. Tab H at 6-10). The court observed that the order naming Bennie G. Thompson lead plaintiff had found that he had "been more active than any other plaintiff in pursuing this case" (R. 3123; J.R.E. Tab H at 7). The court found that neither Mr. Chambliss nor any member of the class had objected to this designation or to the designation of Isaac Byrd as lead counsel (R. 3123; J.R.E. Tab H at 7). The court found that the fact that Mr. Thompson is a Member of Congress "does not establish that his interest in upgrading and desegregating the HBIs in the State of Mississippi [is] atypical of the claims of all other class members" (R. 3124; J.R.E. Tab H at 8). The movants' allegation of inadequate representation, the court found, "is based solely on their dissatisfaction with the terms and omissions in the settlement proposal, thereby confusing the right to opt out of the class with the right to object to the settlement proposal" (R. 3124; J.R.E. Tab H at 8). The court also found that the fact that Mr. Byrd's practice is predominantly personal injury litigation did not disqualify him as lead counsel in a civil rights case (R. 3124-3125; J.R.E. Tab H at 8-9). The court thus found "the allegations of inadequate representation of class members wholly unsubstantiated" (R. 3125; J.R.E. Tab H at 9). Mr. Byrd, the

court found, is a competent attorney (R. 3125; J.R.E. Tab H at 9). Moreover, his "co-counsel, Mr. Pressman and Mr. Derfner, undisputedly competent and long-time attorneys for the class, actively participated in the settlement negotiation process, along with the independent participation of the United States Department of Justice attorneys, whose competent representation of the United States for more than twenty-five years is undisputed" (R. 3125; J.R.E. Tab H at 9).

The court also found there was "no evidence in the record of collusion in the settlement negotiations" (R. 3125; J.R.E. Tab H at 9). Nor did class members have a right to opt out because they had not been directly involved in the negotiation of the settlement agreement (R. 3125-3126; J.R.E. Tab H at 9-10). Class members, the court held, have no right to such participation; indeed, the very purpose of class certification "is to eliminate intractable problems of all aspects of litigation, including settlement efforts" (R. 3126; J.R.E. Tab H at 10).

The district court denied the objectors' motions for reconsideration and/or clarification (R. 3331; J.R.E. Tab C). This appeal followed.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in approving the settlement agreement. The settlement is fair, reasonable, and adequate. The objectors' complaint that it does not provide adequate relief is foreclosed by prior rulings in this case that established the scope of available relief. The settlement is fully consistent with this Court's directive that the district court consider enhancements at the historically black universities that would "respond to the particular needs and interests of local populations [and] help to desegregate historically black institutions." 111 F.3d at 1213-1214.

The district court did not abuse its discretion by denying the motion to opt out of the class. The class was certified under Rule 23(b)(2), Fed. R. Civ. P., and there is no absolute right to opt out of such a class. A district court has discretion to permit opting out of a Rule 23(b)(2) class when the class seeks individual monetary relief as well as injunctive relief. But this is not such a "hybrid" class action. Throughout the litigation of this case, plaintiffs have sought solely injunctive relief; they have never sought damages or any other type of individual relief.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT APPROVED THE SETTLEMENT AGREEMENT

Rule 23(e), Fed. R. Civ. P., requires court approval of a class action settlement. Before approving the settlement, the district court must determine that

the agreement is "fair, adequate, and reasonable and is not the product of collusion between the parties." *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). On appeal, the district court's approval of a settlement should not be overturned "unless the court clearly abused its discretion." *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982). This "limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement." *Ibid.*, citing *United States* v. *City of Miami*, 614 F.2d 1322 (5th Cir. 1980).

When considering whether a settlement is fair, reasonable, and adequate, the court should consider six factors: "(1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members." *Parker*, 667 F.2d at 1209, citing *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), cert. denied, 435 U.S. 1115 (1979).

As set forth below, the district court did not clearly abuse its discretion in approving the settlement in this case.

A. *Plaintiffs Were Unlikely To Obtain Any More Relief Through Litigation Than The Settlement Provides.*

As this Court held in *Parker*, "[i]n deciding whether a clear abuse of discretion has occurred, * * * absent fraud or collusion, the most important factor is the probability of the plaintiffs' success on the merits." 667 F.2d at 1209. We will therefore first address the fourth and fifth factors – the factual and legal obstacles to prevailing on the merits, and the possible range of recovery. In light of the rulings already rendered in this litigation, it is highly unlikely that the plaintiffs could obtain through litigation the relief sought by the objectors. Indeed, the settlement provides *more* relief than either the district court or this Court would have required.

The objectors contend that the settlement is deficient because it did not achieve the relief that the plaintiffs had sought when the action was filed in 1975 (see pp. 32-34, *supra*). In particular, they complain that the settlement leaves in place the admission standards ordered by the district court in 1995, and fails to provide adequate remedies in the areas of funding, land grant programs, faculty salaries, a deficiency of African American faculty at the historically white universities, governance, facilities, institutional missions, academic programs, and remedial education (see p. 33-34, *supra*; Br. 40-43, 49-50). They also argue that the settlement fails to provide all the relief that would be available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* (Br. 42-43).

The objectors would have this Court measure the settlement against the relief sought in the private plaintiffs' complaint. But, after more than twenty-five years of litigation, the appropriate benchmark is the extent of relief that could be achieved in light of the evidence adduced and the decisions already issued in this case. Against that background, it is apparent that further relief in most if not all of the areas listed by the objectors is foreclosed by prior decisions in this case and that the relief provided by the settlement is fully consistent with the remedies contemplated by this Court's 1997 decision.

As set forth above (pp. 11-14, *supra*), this Court has already affirmed the district court's 1995 rulings that no relief is warranted to reform the formula by which funding is allocated to the universities, 111 F.3d at 1221-1225; to expand land grant programs at Alcorn State, *id.* at 1215-1217; to remedy disparities in faculty salaries or the hiring or promotion of African American faculty, 111 F. 3d at 1226-1227; or to address the composition of the Board, or its staff. *Id.* at 1227-1228. With respect to facilities, this Court ordered a remand only on the question of disparities in funding for equipment. 111 F.3d at 1221-1225. These rulings are the law of the case, and should not be disturbed unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision on the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *Hopwood* v. *Texas*, 236 F.3d 256, 272 (5th Cir. 2000) (quoting *Alberti* v. *Klevenhagen*, 46 F.3d 1347,

1351 n.1 (5th Cir. 1995)), cert. denied, 533 U.S. 929 (2001). None of these factors are present in this case.

The objectors also complain that the settlement leaves in place the mission designations and does not sufficiently expand or improve the program offerings at the historically black universities. But the extensive programmatic enhancements called for by the settlement are in accordance with the mandates of this Court and of the Supreme Court on these topics. The district court did find, in 1995, that "[p]olicies and practices governing the missions of the institutions of higher learning are traceable to *de jure* segregation and continue to foster separation of the races." 879 F. Supp. at 1477; see *id.* at 1445. But it concluded that the Board's proposal of enhancing the mission and program offerings at Jackson State, as set forth in the remedial decree, was the appropriate remedy for this remnant of the dual system. *Id.* at 1484-1486. Private plaintiffs and the United States argued on appeal, and this Court agreed, that additional relief was necessary with regard to the expansion and/or improvement of program offerings at Alcorn State and Mississippi Valley State. 111 F.3d at 1212-1215. The Court of Appeals agreed with the district court, however, that "'merely adding programs and increasing budgets' is not likely to desegregate an HBI." *Id.* at 1213, quoting 879 F. Supp. at 1491. Thus, it directed the district court, on remand, to require the Board "to study and report to the Monitoring Committee on new academic programs that have a reasonable chance of increasing other-race presence" at both Mississippi Valley and Alcorn. *Id.* at 1214.

As documented by the Board's witnesses at the fairness hearing (see pp. 30-31, *supra*), the new programs and program improvements in the settlement agreement were selected, after careful study, to respond to this Court's finding that "well-planned programs that respond to the particular needs and interests of local populations can help to desegregate historically black institutions." 111 F.3d at 1214. In contrast, the objectors' contention that program offerings at the historically black universities should be made equal to those at all of the historically white universities, without regard to mission, is inconsistent with this Court's rulings. As this Court held, the State's duty to dismantle the dual system does not require the "enhancement of the HBIs in order to rectify the detrimental effects of past *de jure* segregation, without regard to present policies and practices." 111 F.3d at 1210. "The appropriate inquiry under *Fordice*," this Court held, "is whether changes in resource allocation are necessary to dismantle fully present policies and practices rooted in the prior system that serve to maintain the racial identifiability of the universities and that can practicably be eliminated without eroding sound educational policies." *Ibid.* The settlement responds to this directive by targeted programmatic enhancements designed to attract other-race students and thereby desegregate the institutions in an educationally sound manner.

The objectors also contend that the settlement should be rejected because it leaves in place the admission standards and summer remedial program, and that additional relief relating to remedial programs is necessary. But this Court already

has affirmed the adoption of the new admission standards and the summer remedial program. 111 F.3d at 1193-1203. And it specifically affirmed the district court's findings that it would be educationally unsound to adopt lower standards for admission. *Id.* at 1198-1200. Thus, the alternative admissions standards proposed by the objectors below -- whether open admissions or the kind of significantly lower standards advocated by the objectors' expert (see p. 33, *supra*) -- have already been foreclosed by prior litigation in this case.

This Court did remand with instructions to examine the summer remedial program as it was implemented. The settlement agreement's provision of significant financial assistance to students attending the summer program represents a fair compromise of the parties' positions on this contentious issue. This Court ruled that "[i]f the district court ultimately concludes that the spring screening and summer remedial program (as it may be modified) is unable to any significant degree to achieve its objectives, then the court should, if possible, identify and implement another practicable and educationally sound method for achieving those objectives." 111 F.3d at 1201. The district court had not completed this process before the settlement agreement was proposed; a hearing on admission policies was continued, on the parties' motion, when settlement talks began (R. 1655). But the court did resolve one of the concerns expressed by the United States and the private plaintiffs in the last appeal: that the summer remedial program was inadequate to replace the existing remedial courses offered by most of the universities during the regular academic year (see pp. 10-11, *supra*). As

explained above, the district court found, on remand, that remedial courses would still be offered, and ordered their continuation (see p. 16, *supra*). The settlement agreement addresses another of the United States' and private plaintiffs' concerns: that the summer program was not a viable means of admission for students who need to work in the summer to afford to go to college in the fall. See 111 F.3d at 1197. The settlement responds to this concern by providing $500,000 per year – increasing to $750,000 after five years – in need-based financial assistance to students attending the summer program. It is unlikely that the plaintiffs could obtain any additional relief relating to the admissions policies through litigation.

Finally, the objectors contend (Br. 42-43) that the settlement is deficient because it does not conform to the requirements of Title VI of the Civil Rights Act of 1964; a Title VI regulation requiring States to "take affirmative action to overcome the effects of prior discrimination," 34 C.F.R. 100.3(b)(6)(i); and the Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Higher Education, 43 Fed. Reg. 6653 (Feb. 15, 1978). The Supreme Court disposed of this argument when it ruled that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." *Fordice*, 505 U.S. at 732 n.7. Thus, continuing to litigate this case would not lead to any additional relief under Title VI.

Because it is highly unlikely that plaintiffs could achieve the additional relief they seek through litigation, their challenge to the settlement should be rejected.

B. *The Settlement Is Fair, Reasonable, And Adequate.*

The settlement agreement does not provide all of the relief that the plaintiffs sought in this case. But, as explained above, the agreement provides relief in all of the areas that remained open following this Court's remand in 1997. Indeed, it is clear that the settlement provides more relief in the areas of programs and facilities than the plaintiffs could have expected to obtain from the district court (see R. 3161-3163, 3172; J.R.E. Tab F at 3-4, Tab D at 2). As this Court has emphasized, "compromise is the essence of a settlement. * * * '[I]nherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton* v. *Hinton*, 559 F.2d at 1330, quoting *Milstein* v. *Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972). This settlement is a fair compromise of the plaintiffs' and defendants' goals in the litigation. Applying the remaining four factors (see *Parker*, 667 F.2d at 1209), it is clear that the settlement in this case is fair, reasonable, and adequate.

First, the district court found that there was no evidence of collusion (R. 3125; J.R.E. Tab H at 9), and the objecting plaintiffs have pointed to no evidence to contradict that finding. Where, as here, the United States is a party to the settlement, there is special reason to find that the settlement is fair, for the court "can safely assume that the interests of all affected have been considered." *City of*

Miami, 614 F.2d at 1332. Counsel for the United States, who was personally involved in negotiating the settlement, stated that the United States had played an independent role in the negotiations and that the negotiations had been conducted "at arms' length" (Opt Out Tr. 351-352; see also R. 3125; J.R.E. Tab H at 9).

Second, without the settlement, there would be multiple evidentiary proceedings concerning complex issues such as the admission standards, the summer remedial program, and the identification of new and/or enhanced programs for Mississippi Valley and Alcorn State Universities. By reaching a compromise, the parties and the district court have avoided the expense of these proceedings, and the burdens of litigation, including probable appeals, that would have continued for years. Through this settlement, the plaintiffs will obtain relief without further delay, and the State may focus its efforts and resources on implementation of the remedy, rather than on the costs and divisiveness of litigation.

Third, this case has been litigated for more than a quarter century. After two extended liability trials, two appeals, a Supreme Court decision, and multiple proceedings since the remand from this Court in 1997, most of the issues have been resolved and controlling principles established. The parties and the district court have a wealth of information about the remaining issues. Thus, they are in a

particularly good position to evaluate the merits of the plaintiffs' claims and the State's defenses.

Finally, the court should consider the opinion of class counsel, class representatives, and absent class members. As the district court found, class counsel included not only Mr. Byrd, an experienced litigator, but also two "undisputedly competent and long-time attorneys for the class" (R. 3125; J.R.E. Tab H at 9). These counsel, along with the United States, all participated in negotiating the settlement and recommended its approval. In addition, Mr. Thompson, the lead plaintiff and "a distinguished member of the class" (R. 3124; J.R.E. Tab H at 8), was actively involved in crafting the settlement and recommended its approval. There were a large number of class members who objected to the settlement. But, while the number of objectors to a settlement is a "factor to be considered," it "is not controlling." *Cotton* v. *Hinton*, 559 F.2d at 1331. "A settlement can be fair notwithstanding a large number of class members who oppose it." *Ibid.* In *Parker*, for example, this Court affirmed the approval of a settlement even though nine of the eleven named plaintiffs opposed it. 667 F.2d at 1207-1208. It did so because it concluded that the objecting plaintiffs were unlikely to obtain the additional relief they sought through litigation. *Id.* at 1209-1210.

In this case, as demonstrated in Part A, most of the relief sought by the objectors is precluded by prior rulings. Thus, as in *Parker*, the plaintiffs are unlikely to obtain any additional relief through litigation. The fact that a large number of class members nonetheless believe that broader relief is still possible should not prevent approval of a settlement agreement that promises substantial relief that will benefit the class.

In the subject areas not already resolved through litigation, the settlement agreement is fully consistent with the remedial guidelines established by this Court's 1997 decision. The settlement seeks to ameliorate the effect of the admission requirements by providing financial aid to students attending the summer program. It seeks to promote desegregation of the historically black universities by adding new, marketable programs, improving existing programs, adding needed facilities, upgrading existing facilities, and providing substantial, guaranteed funding to accomplish these goals.

Appellants object to the requirement that the historically black universities achieve 10% other-race enrollment before gaining control over the income from the endowments created by the settlement agreement. But the 10% provision is designed to ensure that the endowment funds are used to promote the desegregation of those institutions, and not to upgrade them "so that they may be

publicly financed, exclusively black enclaves by private choice." *Fordice*, 505 U.S. at 743. It is important to understand that this provision is not a quota. Nor is there any chance that it could lead the historically black universities to discriminate in admissions. The admission standards are uniform for all the universities, and all students who meet those criteria are admitted. The 10% provision will act only as an incentive for the recruitment and attraction of other-race students to the historically black universities. That function is fully consistent with both *Fordice* and this Court's 1997 decision.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION TO OPT OUT OF THE CLASS

As the district court correctly concluded, there is no absolute right to opt out of a class certified under Rule 23(b)(2). *Penson* v. *Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981). The defining characteristic of a 23(b)(2) class is that the defendant has acted "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief *with respect to the class as a whole*." Rule 23(b)(2), Fed. R. Civ. P., emphasis added. As this Court explained in *Penson*, "[T]his rule was intended primarily to facilitate civil

rights class actions, where the class representatives typically sought broad injunctive or declaratory relief against discriminatory practices." 634 F.2d at 993.

In contrast, certification under Rule 23(b)(3) is appropriate where there are questions of law or fact "affecting only individual members" as well as questions of law or fact applicable to the class as a whole. The absolute right to opt out of such a class acknowledges the potential conflict between individual and class interests in a Rule 23(b)(3) class action. "This opt-out right is required in 23(b)(3) actions because it was presumed that, where personal monetary relief is being sought, the individual class members may have a strong interest in pursuing their own litigation." *Penson*, 634 F.2d at 993.

Some actions where the class has been certified under Rule 23(b)(2) involve both class-wide injunctive relief and individual monetary relief. Such a "hybrid" class action, "at least in the relief stage, begins to resemble a 23(b)(3) action," and some courts permit individual class members to opt out of the class so that they may pursue individual monetary relief apart from the class. *Penson*, 634 F.2d at 994. Even in such hybrid actions, however, there is no absolute right to opt out. *Ibid.* Rather, the district court may exercise its discretionary power to permit opting out. *Ibid.*

This case, in which the class was certified under Rule 23(b)(2), is not a hybrid class action. Private plaintiffs have sought solely injunctive and declaratory relief in their complaint and throughout the litigation. No party has ever sought individual relief, whether monetary or otherwise. Even at the fairness hearing and the opt out hearing, the objectors and their witnesses identified only the additional *injunctive* relief that they sought. There is therefore no basis for opt out rights in this case.

The district court also correctly rejected the objectors' contentions that the lead plaintiff and class counsel had not adequately represented their interests. As this Court held in *Parker*, "an attorney who secures and submits a fair and adequate settlement has represented the client class fairly and adequately." 667 F.2d at 1211. As the district court correctly stated, the objectors have confused their right to object to the settlement with a right to opt out of the class. The district court did not abuse its discretion in denying their motion.[8]

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[8]Appellants' contention (Br. 32-35) that their First Amendment rights have been violated is misplaced. Under the procedures set by the district court, the settlement was widely publicized, and all class members who objected to the settlement had an opportunity to express their views to the court (R. 2047-2049; J.R.E. Tab I at 8-10). The denial of the opt out motion simply means that all class members are bound by the settlement agreement. It does not bar them from speaking out, require them to endorse the agreement, or require them to associate themselves with those with whom they disagree. Nor is there any merit to appellants'

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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contentions that denial of their motion violates Mississippi state law (Br. 38-39). This is an action in federal court to enforce the United States Constitution and federal statutes. It is governed by federal law.