(15)

Nos. 90-1205, 90-6588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *et al.*,

Respondents.

JAKE AYERS, *et al.*,

Petitioners,

v.

RAY MABUS, GOVERNOR OF MISSISSIPPI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE, OF JOHN F. KNIGHT, JR., AND ALEASE S. SIMS IN SUPPORT OF PETITIONERS

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John F. Knight, Jr., and Alease S. Sims, plaintiffs in *Knight v. Alabama*, C.A. No. CV 83-M-1676-S (N.D. Ala.), the Alabama higher education desegregation case, move for leave to file out of time the attached brief amicus curiae in support of the petitioners

Counsel for the private plaintiffs have consented to the filing of the attached brief. Due to the shortness of time,

undersigned counsel have been unable to obtain the consent of the Solicitor General of the United States or counsel for the Mississippi respondents.

The purpose of this amicus brief is simply to alert this Court to the unreliability of materials contained in two amicus briefs recently filed on behalf of the respondents, one by the University of Alabama and the other by the Governor of Louisiana.

Those two amicus briefs (University of Alabama and Governor of Louisiana) rely heavily on snippets of testimony plucked from the record of the Alabama case. That case, which took five and one-half months to try, is under submission by the district court and a decision is expected shortly. Notwithstanding the inappropriateness of attempting to characterize evidence in a case before findings of fact are made by the district judge, the University of Alabama and Governor of Louisiana have filed amicus briefs in this Court replete with appendices that extract distorted bits and pieces from the Alabama trial record; they present these fragments in support of factual assertions that are vigorously contested by the Alabama plaintiffs.

The Knight and Sims amici therefore seek to file this brief to provide necessary information to this Court by which it can recognize the incompleteness of the appendix material—and the unreliability of the factual assertions based thereon—contained in the amicus briefs filed by the University of Alabama and the Governor of Louisiana.

Undersigned amici have not previously filed an amicus brief in this case. This brief could not have been filed before now because it is only the recent filing of the University of Alabama's and Governor of Louisiana's amicus briefs that has occasioned the need for us to file this amicus brief in response.

Moreover, in an effort to comply substantially with the timeliness requirement of Rule 37, this motion and the accompanying amicus brief are being filed within the time allowed for the petitioners to file their reply briefs.

Wherefore, movants respectfully request that they be permitted to file the attached brief amicus curiae out of time.

Respectfully Submitted,

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BRIEF AMICUS CURIAE OF JOHN F. KNIGHT, JR. AND ALEASE S. SIMS IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

John F. Knight, Jr., and Alease S. Sims are plaintiffs and plaintiffs-intervenors in Knight v. Alabama, C.A. No. CV 83-M-1676-S (N.D. Ala.), the pending action concerning desegregation of public higher education in Alabama. They are certified representatives of the class of all black citizens of Alabama and all students, faculty and alumni of

the two historically black universities in Alabama, Alabama State University and Alabama A&M University.

The Alabama higher education desegregation case has recently been tried on the merits and is currently under submission.[1] The trial, before United States District Judge Harold Murphy of Rome, Georgia, took five and one-half months and ended in April 1991. Judge Murphy has indicated that his decision will be rendered shortly.

This Court's decision in the instant appeal likely will bear on the outcome of the Alabama case. But the amici's interest in the Mississippi appeal is an extremely limited one: to point out the misuse of evidence from the record of the Alabama case in the amicus briefs filed by the University of Alabama and the Governor of Louisiana, and to emphasize the critical dependency of these cases on the particular facts in each state.

The amici support the petitioners.

ARGUMENT

1. This Court should disregard the amicus brief filed by the University of Alabama and the amicus brief filled by the Governor of Louisiana as prejudicial attempts to represent as actual facts fragments of evidence that have never been the basis of adjudicated findings of fact.

These two amicus briefs submit to this Court lengthy appendices containing distorted snippets from the massive record of evidence presented to the district court in Alabama during a five and one-half month trial. There were 88 days of testimony, 170 witnesses, and thousands of exhibits, producing a transcript over 20,000 pages long. Judge Murphy has notified the parties that he hopes to render findings of fact and conclusions of law shortly.

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[1] This was the second trial. The first trial, in 1985, lasted a month and resulted in a finding of liability in December 1985, but a new trial was ordered when the district judge was disqualified. United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), 828 F. 2d 1532 (11th Cir. 1987), cert. denied, 487 U.S. 1210 (1988).

Under these circumstances, it would be inappropriate for this Court to rely in any way on the Alabama and Louisiana amici's one-sided and hotly-contested characterization of the facts underlying the higher education controversy in Alabama.

For example, appended to the University of Alabama's brief is one page of transcript from the testimony of one of the Knight plaintiffs' key witnesses, the expert historian, Dr. James D. Anderson. Dr. Anderson testified for three full days, and his testimony covers 668 pages of the transcript. The fragment offered by the University of Alabama is taken out of context and is cited in a way that misrepresents the thrust of Dr. Anderson's opinions. Similar points could be made about the other record excerpts in amicus briefs of both the University of Alabama and Louisiana amici.

2. Even if the Alabama and Louisiana amici's snippets of testimony were not so distorted, facts relating to the Alabama case would be of scant value to this Court in deciding the Mississippi case. The complicated issues presented by cases challenging the vestiges of de jure segregation and official white supremacy in public higher education are extraordinarily fact-intensive. What constitutes an unconstitutional continuation of historical policies and practices designed by white supremacist state governments to subordinate African Americans by denying them equal access to higher education depends on the historical facts and current circumstances found in each state. Therefore the persistence of unconstitutional racial discrimination in statewide systems of higher education requires an intensely local appraisal of the facts in each state.

The University of Alabama and the Governor of Louisiana have represented that "information" they have selected from the records of the Alabama litigation will assist this Court in the Mississippi case. In truth their briefs

would cloud the issues and introduce error, distortion, and irrelevancy.[2]

CONCLUSION

For these reasons, this Court should ignore the factual representations in the amicus briefs of the University of Alabama and the Governor of Louisiana.

Respectfully submitted,

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[2] The amicus brief of the Governor of Louisiana also cites fragments of testimony from several other higher education desegregation cases, which appear to suffer from the same defects as the portions he selects from the Alabama case.