IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
TIMOTHY D. POPE,	)	
Intervenor-Plaintiff,	)	
JOHNNY REYNOLDS, et al.,	)	
Intervenor-Plaintiffs,	)	
EUGENE CRUM, et al.,	)	
Intervenor-Plaintiffs,	)	
v.	)	CIV. ACTION NO. 68-T-2709-N JUDGE MYRON H. THOMPSON
THOMAS G. FLOWERS, et al.,	)	
Defendants.	)	
ALABAMA STATE CONFERENCE OF NAACP BRANCHES,	)	
Amicus Curiae	)	

COMPLAINT-IN-INTERVENTION OF JOHNNY REYNOLDS, ET AL.

Pursuant to the Order entered in this action January 20, 2004 granting intervention to *Johnny Reynolds, et al.* [Doc nos. 637, 656], the following complaint-in-intervention is filed on behalf of: Johnny Reynolds, Peggy Allen, Martha Boleware, Jeffery Brown, Ouida Maxwell, Cecil Parker, Robert Johnson, Frank Reed, and the class they represent defined in their motion to intervene, this complaint-in-intervention and in *Reynolds, et al. v. Alabama Department of Transportation*, CV#85-

T-665-N. ["Reynolds" or "plaintiff-intervenors" hereafter].

1. This complaint-in-intervention is filed pursuant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.*, and its implementing regulations, which prohibit employers from discriminating on the basis of race in employment opportunities; and the injunctions and decrees heretofore entered in this action which found defendants to have engaged in a pattern and practice of racial discrimination against African-Americans and enjoined acts or omissions having the purpose or effect of perpetuating such discrimination. The plaintiff-intervenors are African-American applicants, potential applicants and/or employees of the defendants who are among the African-American employees and applicants that the decrees and injunctions entered in this case were meant to protect.

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1243, 1367, 2201 and 42 U.S.C. §§ 2000(e), *et seq.*

3. Peggy Allen is an African-American applicant for employment with the State of Alabama and Alabama Department of Transportation. She applied for the classifications of Graduate Civil Engineer and Environmental Engineer.

4. Martha Boleware is an African-American employee of the Alabama Department of Transportation. She was hired by ALDOT in 1978 and presently holds the classification of Civil Engineer.

5. Jeffery Brown is an African-American employee of the Alabama Department of Transportation. He first applied for employment with ALDOT in 1983 and was finally hired as a Civil Engineer V pursuant to the *Reynolds* Consent Decree in January 1995. Mr. Brown is presently

classified as a Civil Engineer Senior Administrator.

6. Ouida Maxwell is an African-American employee of the Alabama Department of Transportation. She was hired by ALDOT in 1983 and presently holds the classification of Civil Engineer.

7. Cecil Parker is an African-American former employee of the Alabama Department of Transportation. Mr. Parker was employed at ALDOT from 1986 until his termination in 1990.

8. Johnny Reynolds is an African-American employee of the Alabama Department of Transportation. He was initially hired by ALDOT in 1978 and presently holds the classification of Civil Engineer Manager.

9. Robert Johnson is an African-American employee of the Alabama Department of Transportation. He was hired by ALDOT in 1981 and presently holds the classification of Highway Maintenance Technician II/III.

10. Frank Reed is an African-American employee of the Alabama Department of Transportation. he was hired by ALDOT in 1981 and presently holds the classification of Highway Maintenance Technician II/III.

11. Each of the foregoing plaintiff-intervenors incorporate their prior facts and allegations set forth in *Reynolds, et al. v. Alabama Department of Transportation*, CV#85-T-665-N, as part of the current complaint-in-intervention. ["*Reynolds*" hereafter]

12. The plaintiff-intervenors bring this complaint-in-intervention on their own behalf and on behalf of the class incorporated in the motion to intervene granted by the Court on January 20, 2004. *Flowers* Docs. 637, 656. Such class consists of all African-Americans who: (1) applied for employment opportunities covered by the prior decrees and injunctions in this case; or (2) would

have applied for such opportunities in the absence of the wrongs found and enjoined in this action and/or alleged in this complaint-in-intervention; or (3) are employed by the defendants, or were formerly employed by them during the period since the decrees and injunctions in this case were entered.

13. The prior decrees in this case found and enjoined a pervasive pattern and practice of racial discrimination in hiring, training, promotions, and other employment opportunities by the State Personnel Department and various departments and agencies of the State of Alabama, including the Alabama Highway Department, now known as the Alabama Department of Transportation. *Flowers* Doc. 65 (reported at 317 F. Supp. at 1079); *Flowers* Docs. 141, 142 (reported at 1976 WL 729). The Court found that racial discrimination "has so permeated the employment practices of the defendants that it [is] necessary to enter a detailed and specific decree which will not only prohibit discrimination in the future but which will also *prescribe procedures* designed to prevent discrimination in the future and to correct the effects of past discrimination." *Flowers* Doc. 65 (reported at 317 F. Supp. 1079 (M.D. Ala. 1970)) (emphasis added). Such decree required, among other things: (1) that black eligibles not be passed over by *lower ranked* white eligibles "unless the defendants have first contacted and interviewed the higher-ranking Negro applicant" and have "documentary evidence" that such applicant "cannot perform the functions of the position, is otherwise unfit for it, or is unavailable" [hereinafter "no bypass injunction"]; (2) that Certificates of Eligibles "shall not be canceled or returned with vacancies unfilled unless each Negro applicant is appointed or is found to be unavailable or unqualified"; (3) that "[d]ocumentary evidence shall be maintained . . . that will sustain the finding of unavailability or lack of qualifications"; (4) that black applicants be notified of which position they were considered for and the action taken on their

application; (5) that "defendants shall assign employees on the basis of their training and ability" and "shall not be assigned to serve . . . predominantly Negro clientele"; and (6) that defendants "shall . . . implement a program of recruitment and advertising which will fully advise the Negro citizens of . . . Alabama of the employment opportunities available to them with the State . . . agencies." *Frazer*, 317 F. Supp. at 1090-1093.

14. This Court "permanently enjoined the defendants from the foregoing practices and "from encouraging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant, on the ground of race or color." *Frazer*, 317 F.Supp. at 1090 (*Flowers* doc. 65).

> Pursuant to the findings of fact and conclusions of law made and entered in this case this date, it is the order, judgment and decree of this Court:
>
> I. That the defendants, . . . their agents, officers, successors in office, employees and all persons acting in concert or participation with them, be and they are hereby permanently enjoined from engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color.

Frazer, 317 F. Supp. at 1090 (*Flowers* Doc. 65). Such pattern and practice has never been found to have been remedied and the resulting injunction remains in force today. The current plaintiff-intervenors are the African-American employees, applicants and potential applicants: (1) who such injunction was entered to benefit and protect; and (2) who seek to compete for such employment opportunities on the basis of the terms laid down in this Court's prior decrees and injunctions. Such

persons include the class of such persons covered by the motion to intervene granted in this action (*Frazer* docs. 638, 661), to-wit: all African-Americans who are or were employed by the defendants, or who applied, would have applied, or were otherwise injured by the practices found or enjoined in the prior decrees and injunctions in this case.

15. On May 25, 1985, plaintiff Johnny Reynolds brought suit on behalf of himself and a class of African-Americans denied hiring, promotion and other employment opportunities because of non-compliance with a permanent injunction against various discrete policies and practices which were found to be racially discriminatory in *United States v. Frazer*, Civ. No. 2709-N. Florence Belser, Jeffrey Brown, Peggy Allen and Ouida Maxwell intervened on behalf of themselves and three classes of persons seeking to enforce the permanent injunction in *Frazer* both prospectively and through remedies that would undo the injuries experienced from past non-compliance with its terms. *Reynolds* Docs. 11, 18, 33, 73, 74, 76, 78. The district court certified three plaintiff classes, one comprised of black merit system employees seeking promotions who were represented by Reynolds and Maxwell, a second comprised of black non-merit system employees seeking to be hired as merit system employees who were represented by Belser, and a third that included black non-employees who sought to be hired as merit system employees represented by Brown and Allen. R82. The two hiring classes were subsequently consolidated into a single class having hiring claims with Brown and Allen as the class representatives.

16. The district court consolidated *Reynolds* with *Frazer* on July 31, 1992. After a six month trial in 1992-1993 on the claims based, *inter alia*, on violations of the *Frazer* injunction, the parties entered a partial settlement of such claims which bolstered such injunction and provided additional means for the *Reynolds* plaintiffs to challenge any further non-compliance. *Reynolds* Doc.

553-50, 52. The parties settled plaintiffs' *Frazer* claims in Consent Decree I by: (1) incorporating various parts of the *Frazer* injunction into such Decree; (2) providing additional relief to prevent various means of circumventing such injunctions; (3) providing the *Reynolds* plaintiffs a continued right "to enforce such [*Frazer*] remedies in this case" (Article Nineteen, ¶6(c)); and (4) allowing individual remedies for such violations to be pursued through the Article Twenty proceedings provided by Consent Decree I. *Reynolds* Doc. 553-50, 52.

17. The terms of Article Nineteen of the *Reynolds* Decree provide that "the issues challenged in the case have been premised upon the existence of the prior remedies in the *Frazer/Ballard* case," that defendants would "remain bound by the injunctive and declaratory relief entered in *U. S. v. Frazer*" as a part of the *Reynolds* Consent Decree, and that plaintiffs would be "entitled to enforce such [*Frazer*] remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree." Art. 19, ¶1 & ¶6(c) (*Reynolds* Doc. 553-50, 52). The full text of this provision of Consent Decree I was as follows:

> 1. Frazer/Ballard: Defendants remain bound by the injunctive and declaratory relief entered in U.S. v. Frazer (now Ballard).
>
> * * *
>
> (c) The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the Frazer/Ballard case and, to the extent that any future acts or omissions violate the remedies ordered in Frazer/ Ballard, the plaintiffs will be entitled to enforce such remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree.
>
> (d) It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case

> and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court.

R553, Art. 19, ¶1 &¶6(c) & (d).

18. The *Notice of Proposed Consent Decree* sent to the homes of all employees also described the claims that were brought in the lawsuit and covered by the Consent Decree, stating that the proposed Consent Decree "strengthens the intensified recruitment obligations imposed by the Federal court in *United States v. Frazer* in 1976" and that the relief provided in the Consent Decree was to encompass plaintiffs' "claim of perpetuation of the discrimination found to exist in *United States v. Frazer* in 1976 . . . ." *Id. Reynolds* Doc. 499.

19. In early 2000, the State Personnel Department and the Alabama Department of Transportation were held in contempt for non-compliance with the entirety of Consent Decree I, including the incorporated terms of the *Frazer* injunction. *Reynolds v. Alabama Department of Transportation,* 84 F. Supp. 2d 1339 (M.D. Ala. 2000). *Frazer*-based claims had also already been litigated in various other motions and proceedings in this case by the time the motion to dismiss such claims was filed in 2002. *See, e.g., Order* entered in *Reynolds* on April 24, 1998 ((R2609) (interpreting ¶2 and ¶3 of § II of the *Frazer* injunction of July 28, 1970); *Order* entered December 14, 2000 (Doc. no. 4660) (interpreting "no-bypass" injunction in *Frazer*).

20. Defendants have not complied with decrees and injunctions entered in this case, have not eliminated the vestiges of the prior racial discrimination found and enjoined in this case, and have continued to discriminate on the basis of race in the various ways that such decrees and injunctions were intended to prohibit. African-Americans are still stratified into lower classifications

and pay grades. They constitute more than 50% of pay grades 38 to 45, but less than 20% of pay grades 75 to 93, and less than 30% of pay grades 69 to 75.

21. Two of the principal means of undoing the vestiges of defendants' past racial discrimination and preventing further discrimination were: (1) the no-bypass injunction previously entered in this case; and (2) the injunction against examinations and other selection procedures that have not been shown to be valid pursuant to the guidelines of the United States Department of Justice and other federal agencies charged with enforcing Title VII of the Civil Rights Act of 1964. The pattern and practice of racial discrimination already found by this Court included "the State's use of written tests which have an adverse racial impact" and cause black applicants to be "clustered at the bottom of the employment registers." *Frazer*, 1976 WL 729 at *3. Defendants were enjoined not to use examinations for ranking purposes unless they were shown to be valid under the federal guidelines requiring such examinations to "differentiate among levels of job performance" and demonstrate that "a higher score . . . is likely to result in better job performance." 29 C.F.R. § 14C(9); *see also Frazer*, 1976 WL 729 at *7, ¶10 ("No written test shall be used as a ranking device, unless and until it has been validated in accordance with the Guidelines On Employee Selection Procedures . . . 29 C.F.R. § 1607 *et seq.* . . ."). The ranking provision of the Uniform Guidelines on Employee Selection Procedures reads as follows:

> (9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

29 C.F.R. §1607.14C(9). The prior decrees and injunctions in this case require both that

examinations scores be shown to distinguish better performance and qualifications and that such better performers not be bypassed by persons with lower scores. Defendants have not complied with such requirements of the decrees and injunctions entered in this case and have disproportionately refused to include qualified African-American eligibles on certificate of eligibles based on invalid examination rankings that do not differentiate between applicants on the basis of performance or merit. Compliance with the examination provisions of the Court's prior decrees and injunctions in this case would have provided defendants a valid basis for selecting from certificate of eligibles on the basis of merit-based rankings consistent with the no-bypass injunction, rather than subjective opinions of relative qualifications or merit. The no-bypass injunction is based on the requirement that defendants develop valid examinations having scores that distinguish between applicants who are likely to be better performers on the job. The no-bypass paragraph of that injunction is an integral part of the remedies necessary to eliminate the vestiges of defendants' past racial discrimination and to prevent further discrimination. Rather than terminating the no-bypass injunction, it should be enforced by requiring the defendants to comply with the validation requirements of the prior decrees and injunctions in this action.

22. The no-bypass injunction also reduces the discriminatory effect of the overall selection process which is an important part of the Uniform Guidelines incorporated in the *Frazer* injunction. 29 C.F.R. § 1607.3B (requiring use of alternative "which has as little adverse impact as possible"). Examination scores continue to be severely discriminatory in eliminating African-Americans who passed the test from certificates-of-eligibles, but such effect is mitigated to some degree by the no-bypass injunction by requiring that examination scores be respected in making appointments in the same way as in forming certificates of eligibles.

23. Defendants have also continued to follow the following practices which were declared discriminatory and enjoined in the prior decrees of this case: (1) "[e]xamination for many classified positions are conducted on a non-continuous basis, i.e., a register is established at a given time, and no one is added to the register until it is depleted and another examination is given" so that "[o]ften registers will remain 'closed' in this fashion for over two years;" (2) "avoid[ing] compliance with the decrees in this case by examining job registers" and "requesting certificates of eligibility only at times when no blacks were available for certification;" and (3) administering written tests and other selection criteria which "screen[ ] out disproportionate numbers of black applicants" and that "cluster[ ] [them] at the bottom of the employment registers where they were less likely to be selected" without any showing that such criteria is "significantly related to job performance." *Frazer*, 12976 WL 729.

24. The Court has already "permanently enjoined" the defendants from the foregoing practices and "from engaging in any employment practices . . . for the purpose or with the effect of discriminating . . . on the ground of race or color." *Frazer*, 1976 WL 729 at *6. Such injunction was extended to the class of defendant departments and agencies in a second decree that is still in full force and effect:

> Pursuant to the findings of fact and conclusions of law made and entered in this case and incorporated in the memorandum opinion of the Court filed this date, it is the ORDER, JUDGMENT and DECREE of this Court that:
>
> 1. Defendants, including the class of defendants represented by Bass, Boswell, Gray and Locke, their officers, agents, successors in office, employees, and all persons in active concert and participation with them are hereby permanently enjoined from engaging in any employment practice, including but not limited to any practice relating to recruitment, appointment, training, promotion or retention,

> which has the purpose or the effect of discriminating against any employee or actual or potential applicant for employment on the basis of race.

Frazer, 1976 WL 729 at *6. Such injunction was entered for the benefit of qualified African-Americans who seek to compete for employment opportunities on the basis of the terms laid down in that injunction, including, but not limited to, the current plaintiff-intervenors and the class they represent. Since the entry of such decrees and injunctions in this case, defendants have continued to engage in the same racially discriminatory practices in recruitment, examinations, hiring, assignment, training, pay, promotions, and retention already found to be racially discriminatory and enjoined in this action.

25. Defendants have continued to discriminate on the basis of race in recruitment in the same way as already found in the prior decrees in this case. They have also failed and/or refused to comply with the permanent injunction which required that "[a]ll defendants shall engage in intensive recruiting efforts, including media advertising and individual contact with black leaders in communities throughout the state, to secure qualified black applicants and black employees." *Frazer*, 1976 WL 729. Defendants have continued the following practices previously found to be racially discriminatory and enjoined:

> The defendants' methods of advertising employment opportunities do not reach substantial portions of the Negro population of Alabama. The advertising and recruiting practices of the defendants tend to perpetuate the existing racial patterns of employment. These practices have resulted in discrimination against Negro citizens on the ground of their race or color.
>
> * * *
>
> The defendants shall adopt and implement a program of recruitment and advertising which will fully advise the Negro citizens of the State of Alabama of the employment opportunities available to them with

the State of Alabama agencies

> The defendants shall institute regular recruitment visits to predominantly Negro high schools, business and vocational schools, and colleges and universities throughout the State of Alabama, such visits to be made in person by appropriate officials of defendant agencies from both local and central offices.

The defendants have continued the foregoing discriminatory recruitment practices and have not fully engaged in the recruitment methods ordered in this case. As a result, many of the best qualified African-Americans never knew about or are able to apply for classifications that are historically and disproportionately occupied by non-black employees. The result has been a continuing pattern and practice of racial discrimination that injures the plaintiff-intervenors and the class they represent

26. Defendants have violated the decrees and injunctions in this case by continuing to utilize closed registers which freeze-out African-American eligibles for prolonged periods and perpetuate past racial discrimination. Because African-Americans have only been able to gain entrance to the historically white lines of progression in recent years, the use of "closed" registers and "promotional" registers perpetuates the discriminatory effect of the past by precluding application even after the discriminatory exam eligibility criteria begin to be overcome by some African-Americans. Continuous open-competitive announcements and examinations would have allowed class members to apply as soon as they satisfy the exam eligibility criteria, which is usually a discriminatory "prior experience" requirement.

27. Defendants have continued to administer examinations and apply exam eligibility criteria which perpetuate the historical pattern of racial discrimination and are independently discriminatory. Defendants structure the examinations and exam eligibility criteria so as to favor

those who have had experience in the historically white job classifications and positions within classifications through training and out-of-classification assignments and to disadvantage black applicants who have not been able to gain such experience or training to the same decree. By depressing scores and ranks of black eligibles so that they continue to be clustered at the bottom of registers, the defendants are able to avoid the certification of black eligibles and the remedial effect of the decrees in this case. When the few black eligibles who have been able to survive the backlog of discriminatory selection procedures begin to be reachable on the register in significant numbers, defendants announce the formation of new registers so that a new influx of white eligibles can retake the upper levels of the register and keep the black eligibles at the bottom.

28. The few black eligibles who occasionally break through this battery of discriminatory practices are avoided through various manipulative devices already described in the certificate-forming phase of the selection procedure and in the appointment phase once certificates of eligibles are issued. Defendants have continued to manipulate the racial composition of certificates of eligibles by: (1) previewing upcoming eligibles before the certificate is issued ; (2) timing the issuance of certificates in a way that advantages white eligibles and/or disadvantages black eligibles, either by choosing between multiple registers (open competitive vs. promotional), delaying or canceling the formation of the certificate until the racial composition changes through ingress or egress of eligibles on the register, or using alternative means of filling positions which avoid or delay the issuance of the certificate of eligibles, such as out-of-classifications assignment, transfers, use of contract employees, reallocations, etc. This Court has already found such practices to be racially discriminatory and that the defendant state agencies "have generally avoided compliance with the decrees in this case by examining job registers maintained by the Personnel

Department and by requesting certificates of eligibles only at times when no blacks were available for certification." *Flowers,* 1976 WL 729 at *6. These practices were enjoined, not only by the direct prohibition of "deferring requests for certification until blacks are unavailable"and the injunction against practices having a discriminatory "effect," but by continuing "in full force and effect" the 1970 injunction which required as follows:

> IV. It is further ORDERED that each of the defendants be and is hereby enjoined from failing to certify Negro applicants whose rank and geographical availability entitle them to certification. If a Negro applicant is removed from any certification, he shall have a right to the next available position in that classification in the geographical area, subject only to a finding of lack of qualification or fitness.

29. In those instances where African-Americans overcame the discriminatory recruitment, examination and certification process, the final phase of the appointment process after the issuance of a certificate of eligibles has remained a formidable discriminatory obstacle. Defendants still do not require that certified black eligibles be interviewed or that their candidacy be assessed through objective, race-neutral criteria. Defendants select anyone on the certificate of eligibles regardless of rank, except in the increasingly rare instance that a black eligible is available and higher ranked.

30. All of the foregoing practices are either expressly condemned in the prior decrees and injunctions in this case or have the effect of perpetuating past discrimination. The prior findings and decrees in this case condemned defendants' refusal to interview certified black eligibles and required that they be given fair consideration according to non-discriminatory selection procedures and criteria, including the requirement that "[d]ocumentary evidence shall be maintained by the State Personnel Department that will sustain the finding of unavailability or lack of qualifications of the

Negro applicants when they are not appointed." *Frazer*, 371 F.Supp. at 1091-93, 1086-87.

31. The State Personnel Department, which is the agent of all of the State agencies enjoined in *Frazer*, has repeatedly been found in contempt of a consent decree in *Reynolds* which has many of the same requirements as the *Frazer* injunction, such as the development and use of valid selection procedures. The State Personnel Department was found in non-compliance with such requirements in 1996-1997, found in contempt in June and July, 1998, found in contempt again in September 1998 and January 2000, and found in contempt a fourth time in July 2002. *Reynolds* Doc. 4147 (Defendants' stipulation of non-compliance); *Reynolds*, Doc. 1131 (Order and Injunction); *Reynolds* Doc. 1132 (Writ of Injunction);*Reynolds* Doc. 2890 (Civil Contempt Order) at pages 34-35; *Reynolds* Doc. 2954 (Supplemental Civil Contempt Order) at pages 6-7 ("Therefore, in light of the defendants' past contumacious conduct and in light of their evident reluctance to participate in fruitful efforts to move this litigation forward as quickly as possible toward the creation and implementation of open and competitive race-neutral promotion procedures for both provisional and permanent appointments, the court concludes that significant and substantial monetary sanctions are not only appropriate, they are desperately needed."); *Reynolds*, Doc. 3163 (Order) at pages 1-2; *Reynolds* Doc. 4284 (Order of Civil Contempt Against The Alabama Department Of Transportation And The Alabama State Personnel Department (finding of noncompliance and further sanctions); *Reynolds* Doc. 6026. Coercive fines are still being paid on the Articles of the *Reynolds* Decree that are most like the *Frazer* injunction's requirement to develop and use valid selection procedures — Articles Two, Three, and Eight of the *Reynolds* Decree. These are the Articles for which the State Personnel Department has principal responsibility. In addition, coercive fines are still being paid for contempt of Article Nineteen of the *Reynolds* Decree which incorporates the *Frazer* injunction itself

and makes it enforceable in *Reynolds*. *See* Article Nineteen, ¶1 and ¶6(c) (*Reynolds* Doc. 553). Article Nineteen of the *Reynolds* Decree provides as follows:

> 1. Frazer/Ballard: Defendants remain bound by the injunctive and declaratory relief entered in U.S. v. Frazer (now Ballard).
>
> * * *
>
> 6(c). The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the Frazer/Ballard case and, to the extent that any future acts or omissions violate the remedies ordered in Frazer/ Ballard, the plaintiffs will be entitled to enforce such remedies in this case in the same way that they are entitled to enforce the remedies of any other provision of this Decree.

32. The United States and the defendants in this action have jointly moved to terminate the part of the permanent injunction in this case known as the "no-bypass rule." Disposition of the joint motion to terminate will, as a practical matter, impair or impede the movants' ability to protect their interests in the decrees and injunctions entered in this action, as well as the prohibition against racial discrimination guaranteed by Title VII of the Civil Rights Act of 1964, the Constitution of the United States and 42 U.S.C. §§ 1981 and 1983. The current plaintiff-intervenors have a direct interest in the decrees and injunctions entered in this case. Disposition of the joint motion to terminate may impair or impede the plaintiff-intervenors' claim that the vestiges of past discrimination continue into the present and that current practices perpetuate that discrimination. In deciding the joint motion to terminate, the Court "must determine whether the decree's basic purpose of eliminating the effects of past discrimination has been achieved." *United States v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993) "In making this determination, the district court must certainly consider the . . . Department's progress, or lack thereof, toward the long term goal of work

force parity," even though this is "not the determining factor." *Id.* at 1507. The Court must also consider "whether the City has 'complied in good faith' with the decree and whether the vestiges of past discrimination have 'been eliminated to the extent practicable,'" including the defendants' "record of compliance with the decree, as well as . . . other affirmative action undertakings" and "whether the current under representation of favored groups in the promotion ranks of the . . . Department is a vestige of past discrimination, or the result of other neutral causes." *Id.* "In sum, termination . . . would be appropriate if the district court finds that the decree is clearly no longer necessary either to prevent discrimination in the future or to remedy the effects of past discrimination." *Id.*

Wherefore, the plaintiff-intervenors respectfully request that this Court:

a. Declare that the defendants have denied African-Americans equal protection of the laws in violation of the Fourteenth Amendment; 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964 and the prior decrees and injunctions in this case;

b. Hold defendants in civil contempt of court for non-compliance with the prior decrees and injunctions in this case; award sufficient coercive fines to achieve prompt compliance prospectively; and undo the effects of past non-compliance retrospectively through both monetary and non-monetary compensatory relief, including, but not limited to, backpay, damages, instatement, and other retrospective relief necessary to make the plaintiff-intervenors whole;

c. Permanently enjoin defendants, their officers, agents, employees, successors, assigns, and all persons in active concert or participation with them, from all unlawful discrimination against the plaintiff-intervenors on the basis of race;

d. Deny all requests to vacate or modify the prior decrees and injunctions entered in

this case so that such decrees and injunctions, including the no by-pass injunction, remain in effect until no vestiges of the defendants' past discrimination in employment practices remain;

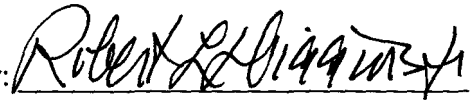
e. Order defendants to provide such relief as is necessary to compensate the plaintiff-intervenors for the racial discrimination they have suffered and to restore them to their rightful place;

f. Grant the plaintiff-intervenors an award of all costs and expenses including an award of reasonable attorney's fees, and;

g. Grant other such relief as may be appropriate.

Respectfully submitted,

Robert L. Wiggins, Jr.
Alabama State Bar Number: 1754-G63R
Kell A. Simon
Alabama State Bar Number: SIM-061

By: 

Counsel for *Reynolds* Plaintiffs and the Class

OF COUNSEL:
WIGGINS, CHILDS, QUINN & PANTAZIS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served, either by hand delivery, facsimile transmittal, or by placing same in the United States Mail, properly addressed and first class postage prepaid, on this the 12th day of March, 2004, on the following:

Henry C. Barnett
Christopher W. Weller
Capell, Howard, Knabe & Cobbs, P.A.
P.O. Box 2069
Montgomery, AL 36102-2069

William F. Gardner
Joe Musso
Cabaniss, Johnston, Gardner,
Dumas & O'neal
700 Park Place Tower
Birmingham, Alabama 35203

Lisa W. Borden
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 SouthTrust Tower
Birmingham, Alabama 35203

John J. Park
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130

Alice Ann Byrne
Alabama Department of Personnel
64 N. Union Street, Room 300
Montgomery, Alabama 36130

Mr. Jay D. Adelstein
Employment Litigation Section
Attn. 4026 PHB
Civil Rights Division
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Raymond P. Fitzpatrick, Jr.
R. Scott Clark
Fitzpatrick, Cooper & Clark
Suite 600 - Farley Building
1929 Third Avenue North
Birmingham, Alabama 35203

OF COUNSEL