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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
TIMOTHY D. POPE,	)	
	)	
Intervenor-Plaintiff,	)	
	)	
JOHNNY REYNOLDS, et al.,	)	
	)	
Intervenor-Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO. 2:68-cv-2709-T
	)	
TOMMY G. FLOWERS, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF-INTERVENOR TIMOTHY D. POPE'S BRIEF AND EVIDENTIARY SUBMISSION IN SUPPORT OF SUMMARY JUDGMENT ON INTERVENOR'S MOTION TO MODIFY INJUNCTION (DOC. NO. 657)

Pursuant to Fed. R. Civ. P. 56, Intervenor Timothy D. Pope files this brief and evidentiary submission in support of his motion for summary judgment on his motion to modify the injunction in this case. Doc. no. 657. For the reasons set forth below, the Court should grant Pope's motion, permanently terminate the no-bypass rule and enter such further relief as may be necessary to ensure that the State's employment selection procedures comply with federal law.

I. HISTORY OF THE RECENT PROCEEDINGS

On February 25, 2003, Pope moved to intervene in this litigation to modify the injunction entered by this Court in *U.S. v. Frazer*, 317 F.Supp. 1079 (M.D. Ala., 1970), pursuant to *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992). Specifically,

Pope asserted that the portion of the *Frazer* injunction, commonly referred to as the "no-bypass rule" should be permanently ended because it "constitute[d] an unlawful and unconstitutional race-based remedy," that was "plainly beyond the scope of permissible remedies under Title VII of the Civil Rights Act of 1964, the anti-discrimination provisions of federal funding statutes at issue here, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Doc. no. 605 at 2. In the thirty months that have transpired since Pope's first pleading, nothing has occurred that would suggest Pope's original position in this matter is not correct.

On January 20, 2004 the Court granted Pope's motion to intervene. Doc. no. 655. Shortly thereafter, the Clerk filed Pope's motion to modify the *Frazer* injunction that was served with his intervention motion. Doc. no. 659. The motion to modify asserts:

- "Changes in both law and fact during the past three decades require modification of these injunctions, and particularly the *Frazer* no-bypass preference which is patently unconstitutional." *Id.* at ¶ 12.
- "The *Frazer* injunction classifies candidates on the basis of race and, as has happened here, provides and denies hiring and promotional benefits on the basis of race." *Id.* at ¶ 13.
- "This racial classification (and preference) is not supported by a compelling governmental interest . . . is not narrowly tailored to end any ongoing discrimination . . . has no fixed duration . . . ignores effective race-neutral alternatives . . . has no relationship whatsoever with the relevant labor market; and it has severe impact on the rights of innocent third parties . . . Under Supreme Court and Eleventh Circuit precedent, the *Frazer* injunctions are plainly unconstitutional." *Id.*
- "The injunction is plainly beyond the scope of permissible remedies under Title VII of the

Civil Rights Act of 1964, the anti-discrimination provisions of the federal funding statutes at issue here, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at ¶ 14.

In his motion Pope requested the following relief:

- "[M]odification of these injunctions and specifically the *Frazer* no-bypass preference, pursuant to Rule 60(b) and *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367 (1992). *Id.* at ¶ 17.
- Modification and revision of the injunction "to reflect that its true 'purpose is to remedy past and present discrimination, not to achieve workplace parity.'" *Quoting, Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1570-71 (11th Cir. 1994).
- That the Court "vacate the race-conscious provisions of the 1970 and 1976 injunctions including the no-bypass rule . . ." *Id.* at 10.

After a period of discovery and briefing, the Court entered an order granting Pope's motion for a preliminary injunction, finding "there has been 'a significant change . . . in factual conditions [and] in law'" (*quoting Rufo*), Doc. no. 735 at 3. Finally, the Court held, "Pending final resolution of the joint motion to terminate the no-bypass rule (Doc. no. 634) and the motion to modify injunction as to the no-bypass rule (Doc. no. 659), the application of the no-bypass rule is suspended . . ." Doc. no. 735 at 5.

Because there exists no disputed issues of material fact and he is entitled to judgment in his favor as a matter of law, intervenor Timothy D. Pope moves for summary judgment on his motion to modify the *Frazer* injunction. Doc. no. 659.

II. THE PROCEDURAL POSTURE OF THE CASE

At the outset it should be recognized that there are two motions pending before the Court (Doc. no. 723 at 3):

1. The Motion to Modify Injunction (hereinafter, the "motion to modify"), served by Pope with his motion to intervene on February 24, 2003, and filed on January 28, 2004. Doc. no. 605. *See also* Doc. no. 659.

2. The Joint Motion to Terminate No-Bypass Provisions of Injunctive Orders (hereinafter, the "joint motion"), filed by plaintiff United States and the State defendants on May 20, 2003 (to the extent that the above motion sought termination of the no-bypass rule, Pope joined the motion on January 28, 2004). Doc. no. 634.

It is important that the Court recognize the different procedures for resolving the two motions. First, the joint motion seeks termination of the injunction solely on factual grounds. A careful reading of the joint motion reveals a precisely-worded pleading that obviously avoids the issue of whether the no-bypass rule should be ended on constitutional grounds. Even though the joint motion cites *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367 (1992) as a basis for the Court to modify an injunction, it is clear that the motion is in fact an effort to terminate the decree under *Freeman* principles.[1] Nowhere in the joint motion is it even suggested that an intervening change in *law* has occurred since entry of the order. The joint motion concludes by stating:

> In light of the *changed circumstances* described above, the parties jointly request the elimination of those provisions establishing and mandating the use of the no-bypass rule. *See Board of Education v. Dowell*, 498 U.S. 237, 248-49 (1991) (Judicial oversight of local institutions after a period of compliance should not extend beyond time necessary to remedy the violation); *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995); *People Who Care v. Rockford Board of Ed.*, 246 F.3d

[1] *See Freeman v. Pitts*, 503 U.S. 467 (1992).

1073, 1075 (7th Cir. 2001).

The joint motion is actually a *Freeman* motion to terminate an institutional reform decree. Under *Freeman*, the Court examines a motion to terminate a decree utilizing a three-prong standard of: (1) whether there has been full and satisfactory compliance with the Court's outstanding orders; (2) whether retention of judicial control is necessary and practical to achieve compliance; and (3) whether the governmental entity has demonstrated its good-faith commitment to the whole of the Court's orders and to the constitutional provisions at issue. *See* Doc. no. 634 at 12, *quoting Freeman v. Pitts*, 503 U.S. 467, 491 (1992), *also citing U.S. v. City of Montgomery*, 948 F.Supp. 1553, 1563 (M.D. Ala. 1996). In order for this Court to grant the joint motion it must make detailed factual findings of "changed circumstances" and make extensive determinations of compliance based upon the above-stated factors. In our view, substantial factual issues remain to be resolved before the Court can enter a *Freeman*-type order terminating this case. Such a decision would require extensive (and endless) discovery and fact finding.

By contrast, Pope's motion to modify the *Frazer* injunction is pursuant to the standards set forth in *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 383 (1992) and *Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) and with particular regard to the specific changes that have occurred in the law since the entry of the injunction. This Court need not delve extensively into the complex factual analyses proffered by the United States and State of Alabama and contested by the *Crum*/*Reynolds* intervenors to grant Pope's motion. Stated otherwise, Timothy Pope has put before the Court a motion by which the Court can (and should) end the no-bypass rule on undisputed grounds. The discovery that has been conducted in this case thus far has not addressed the broader issues of whether the State is due to be finally released from the decree pursuant to the *Freeman*

factors, above.[2]

In our view this case is in a similar procedural posture to that in the *Ensley Branch* litigation when the 11th Circuit rendered its 1994 opinion. A longstanding race-based remedy is in place that clearly no longer meets constitutional standards. The *Ensley Branch* court held that such an order should be modified to eliminate race-based remedies and ensure the implementation of race-neutral remedies. Under such circumstances, modification is warranted:

> We hold that, in the unusual circumstances of this case, the intervenors may bring challenges based on current law, regardless of whether that law has changed. Accordingly, modifications are warranted if necessary to prevent the decrees from violating governing constitutional standards – whether or not those standards had already been announced at the time the decrees were entered.

Ensley Branch NAACP v. Seibels, 31 F. 3d 1548, 1579 (11th Cir. 1994). The same "unusual circumstances" apply here because intervenor Pope, who was not an original party in this litigation, may now be granted modification "to make constitutional an otherwise unconstitutional decree." *See id.*

III. STANDARD FOR GRANT OF SUMMARY JUDGMENT

This motion seeks summary judgment pursuant to Fed.R.Civ.P. 56. A court may grant summary judgment only when the submissions in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there

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[2]Notwithstanding verbal and/or written comments made by the State defendants in recent status conferences or various filings, it has never *moved the Court* for relief from the no-bypass rule on constitutional grounds. Counsel for Pope does not believe that the United States has adopted this position, first set forth by Pope in his motion to intervene, in any respect. *See also* Response of Plaintiff United States, Doc. no. 756.

is the need of a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 485 U.S. 574, 586 (1986). If the opposing party's "evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. However, in determining whether summary judgment is appropriate, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

At issue here is the constitutionality of a race-based remedy under strict-scrutiny standards. That issue is a question of law. *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991).

IV. UNDISPUTED FACTS

Pope submits that the legality of a race-based remedy is a question of law and the Court may address this matter based on the undisputed facts.

A. It is undisputed that the no-bypass rule is a race-conscious remedy.

As stated above, the no-bypass rule sets forth clearly defined benefits for black applicants and conversely disadvantages white applicants. As stated plainly by this Court, "the no-bypass rule is a race-conscious provision . . ." Doc. no. 723 at 5.

In relevant part the *Frazer* injunction states:

> 2. Negro applicants shall be appointed to positions other than

> custodial, domestic, laborer or laboratory aide, when said Negro applicants are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy (or all the vacancies) in the listed position, or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position.
>
> 3. Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable. In every instance where a determination is made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding.

U.S. v. Frazer, 317 F.Supp. 1079, 1091 (M.D. Ala. 1970).

The above-stated provision remained in effect without interruption since 1970 until it was preliminarily enjoined on May 20, 2005. Doc. no. 735. The motion to modify asks this Court to permanently end the rule and ensure that the State's selection procedures are race neutral.

B. It is undisputed that the *Frazer* Rule is applied by the State in its employment decisions.

Attached herein as Exhibit A is the affidavit of intervenor Timothy D. Pope. The affidavit provides evidence of how the no-bypass rule adversely affected his employment. It is undisputed that Pope was certified to the Alabama Department of Corrections for the promotional position of Correctional Officer II and was interviewed for the job. *Id*. at ¶2, *also* Exh. A.1. It is undisputed that Pope was identified in ALDOC's interview process as the most appropriate/qualified candidate for the position. *Id.* at ¶3, also Exh. A.2 and A.3. It is undisputed that ALDOC selected Pope for the promotion and later rescinded that offer. *Id.* at ¶4, *also* Exh. A.3. It is undisputed that the promotion

was rescinded solely because of Pope's race. *Id.* at ¶¶ 5-6, *also* Exh. A.3. It is also undisputed that the black candidate who was eventually appointed was not ranked higher than Pope, but rather was in the same band of the employment register as Pope. *Id.* at ¶6, also Exh. A.3. It is undisputed that Pope filed a complaint of race discrimination with the Equal Employment Opportunity Commission (EEOC) and received a right-to-sue letter on December 4, 2002. *Id.* at ¶7, also Exhs A.3 and A.4.

V. THE NO-BYPASS RULE FAILS TO MEET THE STANDARDS OF STRICT SCRUTINY.

As previously stated by this Court:

> First, the no-bypass rule is a race-conscious provision and as such, must meet "strict scrutiny" standards and must be "narrowly tailored." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995); if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting. Second, the rule has been in effect for approximately 35 years without an independent court review to determine if it continues to meet legal requirements. Because the rule cannot be everlasting, this circumstance is impermissible; in other words, the rule simply cannot continue without a court finding that it continues to meet the demanding requirements for race conscious relief.

Doc. no. 723 at 5-6.

As the Court stated above, the no-bypass rule differentiates among job applicants solely on the basis of each applicants' race and is utilized to make employment decisions by the State of Alabama. It is undisputed that the State has applied this rule granting benefits to black applicants and excluding some white applicants from consideration for positions for which they are certified. Because the rule affords a preference solely to black applicants, it must be subjected to strict scrutiny. *See* Exhibit A.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Supreme Court explained, "With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of

all race-based action by state and local governments." *Id.* at 515 U.S. at 222. However, the *Croson* decision left some uncertainty with respect to review for federal racial classifications. *Adarand* clarified the issue in the boldest of terms in holding:

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Id. at 227.

In this matter, the plain language of the injunction proves that there can be no serious dispute that the no-bypass rule "classifies" applicants by race and discriminates among them on the basis of race. Therefore, it must be determined whether the rule can survive strict scrutiny.

Strict scrutiny requires that a governmental action "be based upon a 'compelling governmental interest' and must be 'narrowly tailored' to achieve that interest." *Ensley Branch*, 31 F.3d at 1564, quoting *S.J. Groves and Sons Co. v. Fulton County*, 920 F.2d 752, 767, (11th Cir. 1991), also citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-508 (1989).

Whether the no-bypass rule furthers a compelling governmental interest need not be fully addressed here because the rule so clearly fails the narrow-tailoring requirement of strict scrutiny. But, we do note that the *Crum/Reynolds* intervenors' expert, Dr. Edwin L. Bradley testified that he agreed with statistics that indicated that by 1990 there was an increase of no less than 33% of African-Americans in the employment of each State agency studied in the past 33 years, *see* deposition of Edwin L. Bradley, attached as Exhibit B at 492; that more 70% of the State's agencies have more than 20% African-American employees, *id*. at 495-96; that by 1990 (with the exception of the EEO-III category) the percentage of African-American employees in each EEO category was

higher than the percentage of African-Americans for the same EEO category in the State's general workforce, *id*. at 497-98; and that in 2000 and 2003 the percentage of African-Americans employed by the State in all EEO categories exceeded the percentage of African-Americans in Alabama's workforce, *id.* at 498. This is hardly the situation faced by Judge Johnson when the rule was entered in 1970.

Under strict scrutiny's narrow tailoring prong a racial classification must be evaluated against the following factors:

- "the necessity for the relief and the efficacy of alternative remedies"
- "the flexibility and duration of the relief, including the availability of waiver provisions"
- "the relationship of numerical goals to the relevant labor market"
- "the impact of the relief on the rights of [innocent third parties]"

See Ensley Branch at 1569, citing *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989), quoting *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

The *Frazer* injunction simply cannot pass strict scrutiny considering that it classifies candidates on the basis of race and provides and denies hiring and promotional benefits on the basis of race. This racial classification (and preference) is not supported by a compelling governmental interest or by a strong evidentiary showing of ongoing discrimination, *see Ensley Branch*, 31 F.3d at 1564-68, nor is it narrowly tailored to end any ongoing discrimination:

- the *Frazer* preference has continued now for over 25 years with no fixed duration;
- it ignores effective race-neutral alternatives (such as the development of valid, race-neutral selection procedures);
- it has no relationship whatsoever with the relevant labor market;

- it has severe impact on the rights of innocent third parties (here, non-black candidates) by the diminution of job opportunities; and
- the rule is absolute, there are no flexible waiver provisions.

See id. at 1569. Under the Supreme Court precedents of *Croson* and *Adarand*, as well as *Ensley Branch*, the *Frazer* injunction is plainly unconstitutional.

VI. THE COURT SHOULD VACATE THE NO-BYPASS RULE AND ENSURE THAT DEFENDANTS HAVE RACE-NEUTRAL SELECTION PROCEDURES.

As noted above, this case is in much the same posture as that before by the Eleventh Circuit in *Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). The defendants have been under orders to use race as a criteria in the selection process for some thirty years. The *Frazer* injunction also requires that the State utilize lawful selection procedures.[3] The State should be required to demonstrate that it has complied with that part of the *Frazer* injunction requiring race-neutral selection procedures.

In *Ensley Branch*, the Court found that the failure of the district court "to set deadlines for the development of valid selection procedures . . . was an abuse of discretion." 31 F.3d 1573. We believe the Court should require the defendants to promptly demonstrate their compliance with that

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[3]The 1976 injunction provides, at ¶ 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 Procedure promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. 1607, *et seq.*, and approved by this Court. Defendants shall validate all written tests used by them as screening devices in accordance with the EEOC Guidelines. The results of all validation studies shall be submitted to opposing counsel for possible objections and to this Court for approval.

part of the injunction entered in 1976 requiring the adoption of lawful procedures. To our knowledge, the Court has not approved the defendants' selection procedures as validated in accord with the *Guidelines*. The Court may wish to appoint a special master to review the defendants' compliance with that aspect of the injunction. *See Ensley Branch* at 1574 ("if the process of approving selection procedures places undue strain on the district court's resources, it may appoint a special master to assist with the task.").

CONCLUSION

The *Frazer* no-bypass rule grants preferences to black applicants for State employment solely upon the basis of their race. Pursuant to the Supreme Court's holdings in *Croson* and *Adarand*, such actions must pass constitutional strict scrutiny and must be "narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. As written and applied, the no-bypass rule is "everlasting" and "has been in effect for approximately 35 years without an independent court review to determine if it continues to meet legal requirements." Doc. no. 723 at 6.

Based upon the undisputed facts set forth above and evidentiary submission attached to this brief, intervenor Timothy D. Pope's motion to modify the *Frazer* injunction, to vacate its race-conscious provisions, is due to be granted on summary judgment as a matter of law and undisputed fact. There is no necessity for the Court to rule on the complex statistical analyses offered in the State defendants' and United States' joint motion to terminate, nor is the joint motion ripe for consideration on its stated grounds of whether the State has met the factors for termination as enunciated under *Freeman v. Pitts*. The Court should grant summary judgment in favor of intervenor Pope's motion to modify the *Frazer* injunction. Doc. No. 677. Moreover, the Court should ensure that race-neutral procedures are in place before terminating this case.

Respectfully submitted,

s:/ Gary L. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following (or by U.S. Mail to the non-CM-ECF participants, as indicated):

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