No. 16-60616

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CARLOS E. MOORE,

Plaintiff - Appellant

v.

GOVERNOR DEWEY PHILLIP BRYANT,
In his Official Capacity,

Defendant - Appellee

On Appeal from the United States District Court
Southern District of Mississippi
CASE #: 3:16-cv-00151-CWR-FKB

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Plaintiff - Appellant: Carlos E. Moore of Grenada, Mississippi

2. Defendant - Appellee: Dewey Phillip Bryant in his official capacity as Governor of the State of Mississippi

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REQUEST FOR ORAL ARGUMENT

Appellant requests that the Court hear oral argument in this case. This appeal presents an important question concerning standing to bring an Equal Protection challenge to racially discriminatory and disparaging government speech.

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction (28 U.S.C. §§ 1331,1343) in that Plaintiff seeks relief under the United States Constitution and federal statutes, 42 U.S.C. §§ 1981 and 1983.

This Court has jurisdiction over the appeal from the district court's final order, dismissing Plaintiff's suit in its entirety, 28 U.S.C. § 1291.

The final order from which this appeal is taken was entered on September 8, 2016 and the Notice of Appeal was filed on September 14, 2016, making the appeal timely under Rule 4, Fed. R. App. P.

STATEMENT OF THE ISSUE PRESENTED

Where a state engages in racially motivated government speech through its official state flag, which disparages its African-American citizens and promotes notions of white supremacy and which is alleged to therefore be in violation of the Equal Protection Clause, does an African-American plaintiff have standing to seek judicial relief from the federal courts when he is repeatedly and involuntarily exposed to that flag and has alleged (i) that the state has effectively labeled him a second-class citizen causing him emotional pain; (ii) that his forced exposure to the flag in state courtrooms creates a hostile work environment interfering with his ability to practice his profession as a lawyer; (iii) that his forced exposure to the flag has caused damage to his physical health; and (iv) on behalf of his minor daughter, that she is being involuntarily exposed to the flag's message of white supremacy and wrongfully taught to honor it.

I. STATEMENT OF THE CASE

A. The Undisputed Facts

1. Mississippi's State Flag Is Government Speech That Endorses White Supremacy And The Second Class Status Of African-Americans

The flag shown above, "being the flag adopted by the Mississippi Legislature in the 1894 Special Session," is the official state flag of Mississippi (the "flag" or "state flag"). Miss. Code Ann. § 3-3-16. State law specifies that it "may be displayed from all public buildings from sunrise to sunset" or "twenty-four (24) hours a day if properly illuminated" and that it "shall receive all of the respect . . . given the American flag." Miss. Code Ann. § 3-3-15. State law further requires that the state flag "shall be displayed in close proximity" to all public schools. Miss. Code Ann. § 37-13-5. And state law mandates that students must be taught the "proper respect" for the flag and that they "shall be taught" the "official pledge of the State of Mississippi," which reads:

> I salute the flag of Mississippi and the sovereign state for which it stands with pride in her history and achievements and with confidence in her future under the guidance of Almighty God.

Id.; Miss. Code Ann. § 37-13-7 (internal quotation marks omitted).

The upper left hand corner, or canton, of the state flag replicates the flag known as the "Confederate flag" or "Confederate battle flag," under which Confederate armies fought the Civil War. Mississippi had seceded from the United States for the specific and paramount purpose of preserving slavery. "Mississippi was so devoted to the subjugation of African-Americans that it sought to form a new nation predicated upon white supremacy." (Mem. Op. at 4, ROA.185); (Miss. Decl. of Secession; Mem. Op. at 3-4, ROA.184-85).[1] Shortly after that effort failed and slavery was abolished "the South committed itself to . . . the continuation of a racial caste system" and the preservation of "white supremacy." (Mem. Op. at 5-6, ROA.186-87). In 1890, Mississippi adopted a new constitution, designed "with the specific aim of disenfranchising African-Americans . . . subjugating African-Americans to second class status and advancing the . . . idea of white supremacy." (Third Am. Compl. ¶ 7, ROA.33); (Mem. Op. at 11-12,

[1] The district court's opinion contains a detailed and thorough exposition of the historical context of the Mississippi flag and the Confederate flag including its post-Civil War use by Southern states as a banner of opposition to racial equality and integration. (Mem. Op. at 3-15, ROA.184-96). Its role in motivating racial violence remains strong in Mississippi. Just last week flag waving high school students in Stone, Mississippi, conducted a mock lynching. *See* Paul Hampton, *Students, Football Player Put Noose Around Neck of a Black Student, NAACP Says*, SUN HERALD (Oct. 24, 2016), http://www.sunherald.com/news/local/article110138072.html.

ROA.192-93). At about the same time, in 1894, Mississippi made the decision to enshrine the Confederate flag in its state flag. (Mem. Op. at 12, ROA.193).

Mississippi's incorporation of the Confederate flag into its state flag, was done for racially discriminatory purposes, specifically to "subjugat[e] African-Americans to second class status and [promote the notion] of white supremacy." (Third Am. Compl. ¶ 7, ROA.33). In continuing to display its version of the Confederate flag, adopted for the purpose of furthering the cause of white supremacy and the suppression of African-Americans, Mississippi is engaging in government speech.[2] Its message is pervasive and unavoidable by both children and adults, with the flag flying "atop the state capitol, on state property, in all state office buildings, . . . at or near all public school property" and in state courtrooms. (Id. ¶ 13, ROA.34). The state's continued expression of its message of racial disparagement and hostility "encourages or incites private citizens to commit acts of racial violence" (Id. ¶ 12, ROA.34) and sends a message to African-American citizens of Mississippi that they are second class citizens. (Id. ¶ 18, ROA.35-36).

Previous efforts to challenge the government's official display of the Confederate flag in Mississippi have been unsuccessful. In 1998, a state court challenge was rejected by the Supreme Court of Mississippi even though a

[2] In Briggs v. Mississippi, 331 F.3d 499 (5th Cir. 2003), this Court recognized that Mississippi's flag is intended to proclaim a secular, not a religious, message but it did not define or articulate what that message is.

concurring opinion noted that Mississippi had incorporated the Confederate flag into its flag for "the purpose and effect of institutionalizing white supremacy," and that as an emblem of "white supremacy, racism and oppression" the Confederate flag "takes no back seat to the Nazi Swastika." Daniels v. Harrison Cnty. Bd. of Supervisors, 722 So. 2d 136, 139, 140 (Miss. 1998). Despite these undeniable facts, the Mississippi Supreme Court held that the issue was not for the court to address, but one exclusively for majority rule through the political process. A subsequent state court challenge was also rejected. Miss. Div. of the United Sons of Confederate Veterans v. Miss. State Conference of NAACP Branches, 774 So. 2d 388 (Miss. 2000).

In 2001 the legislature submitted the issue to a statewide referendum. In a state with a minority of African-American citizens, (Third Am. Compl. ¶ 10, ROA.33), the majority of Mississippi voters chose to maintain the 1894 flag. (Mem. Op. at 14, ROA.195). More recent legislative efforts were spurred by the murder in South Carolina of nine African-Americans during a church service, after a photo of the white shooter embracing the Confederate flag was widely circulated. (Third Am. Compl. ¶ 15, ROA.34-35); (Mem. Op. at 14-15, ROA.195-96). While South Carolina promptly removed the Confederate flag from its capitol, the Mississippi legislature ultimately took no action, leaving Mississippi as the only state in the country to continue to pay homage to the Confederate flag and the

concept of white supremacy for which it stands. (Mem. Op. at 15-19, ROA.196-200).

2. Plaintiff Has Pled Sufficient Facts To Confer Standing For An Equal Protection Challenge

Plaintiff Carlos Moore filed suit shortly after the legislature failed to act and Governor Bryant proclaimed "Confederate Heritage" month. (Mem. Op. at 27-28, ROA.208-09). He seeks a declaration that the statutes providing for the design and display of Mississippi's "official" state flag and those mandating that Mississippi school children be taught to "respect" and "pledge allegiance" to it be declared unconstitutional and that the Governor and the State Superintendent of Education be enjoined from enforcing such statutes. Plaintiff's standing to seek such relief in the federal courts is founded on at least four direct, immediate, and adequate interests, all of which must be deemed to be true at this stage of the case:

First, Plaintiff has alleged that he is an African-American resident of Mississippi and a descendant of slaves (Decl. of Carlos E. Moore ¶¶ 3-4, ROA.124); that he is regularly and unavoidably exposed to the state flag flying on school property and other public buildings and in courtrooms where he appears throughout the state (Id. ¶¶ 7, 11, ROA.124-25); and that his continued exposure to the state's endorsement of white supremacy is "painful, threatening, and offensive," makes him "feel like a second class citizen," and causes him to "suffer stigmatic, physical, and emotional injuries." (Id. ¶¶ 8-10, ROA.124-25).

Second, Plaintiff has alleged that the state's display of the state flag in courthouses where he appears as a private lawyer and as a part-time prosecutor creates a "hostile work and business environment" (Id. ¶ 11, ROA.125), an impact he could avoid only by sacrificing his profession in whole or in part. (Tr. at 23-24, ROA.240-41).

Third, Plaintiff has alleged that the impact of being labeled by the state as a second-class citizen and inferior human being has caused him to suffer concrete adverse physical effects, including exacerbation of his hypertension, insomnia, and heart abnormality. (Decl. of Carlos E. Moore ¶ 12, ROA.125);(Tr. at 6, ROA.223).

Fourth, Plaintiff (in his proposed Fourth Amended Complaint) has alleged, on behalf of his 5-year old daughter, that she, as an African-American child, is harmed by her exposure to the state flag, particularly by virtue of state laws requiring the display of the flag in proximity to all public school buildings and mandating that she be taught to salute a flag that implicitly endorses an insidious and demeaning message of white supremacy. (Fourth Am. Compl. ¶ 23, ROA.178).

B. Procedural History

Suit was filed below on February 29, 2016, naming Governor Bryant in his official capacity. (Compl. at 1-7, ROA.7-13). A Third Amended Complaint was filed on March 5, 2016. (Third Am. Compl. at 1-7, ROA.32-38). On March 14,

2016, the district court *sua sponte* directed the parties to simultaneously file briefs within 7 days as to whether Plaintiff had standing and the applicability of the political question doctrine. (Order at 4, ROA.91). On March 21, 2016, Governor Bryant moved to dismiss under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., arguing that Plaintiff lacked standing and that the case was barred by the political question doctrine. (Governor Phil Bryant's Mot. to Dismiss Third Am. Compl. for Lack of Subject Matter Jurisdiction or, in the Alternative, for Failure to State a Claim at 1-3, ROA.100-02). Plaintiff filed a brief the same day arguing that he did have standing and that the political question doctrine did not apply. (Pl.'s Br. Regarding Justiciability at 1-5, ROA.119-23). Plaintiff simultaneously submitted a sworn Declaration in support of his standing. (Decl. of Carlos E. Moore at 1-3, ROA.124-26). On March 23, 2016, Governor Bryant filed a Reply Memorandum, responding to Plaintiff's arguments but not rebutting any of the factual averments of Plaintiff's Declaration. (Governor Phil Bryant's Reply Mem. Supporting Mot. to Dismiss at 1-13, ROA.147-59). On March 25, 2016, Plaintiff filed a motion for leave to file a Fourth Amended Complaint, naming his minor daughter as a plaintiff and adding the State Superintendent of Education and the Grenada public school system as defendants. (Pl.'s Mot. to Amend Compl. at 1-3, ROA.170-72); (Fourth Am. Compl. at 1-9, ROA.173-81).

The district court held oral argument on the Motion to Dismiss on April 12,

2016. (ROA.5). At oral argument Defendant explicitly accepted as true the factual averments set forth by Plaintiff in his Declaration as well as those presented orally to the court during argument. (Tr. at 29, ROA.246); (Tr. at 120, ROA.337). On September 8, 2016, the district court issued a Final Judgment and Memorandum Opinion denying leave to file the Fourth Amended Complaint as "futile" and dismissing the case for lack of standing. (Memo. Op. at 29, ROA.210); (Memo. Op. at 31, ROA.212); (Final Judgment at 1, ROA.214). Plaintiff filed a timely Notice of Appeal on September 14, 2016. (Notice of Appeal to United States Court of Appeals Fifth Circuit at 1-3, ROA.215-17).

II. SUMMARY OF ARGUMENT

Just as the First Amendment prohibits the state from symbolically asserting the superiority of, or expressing a preference for, one religion over another religion, the Equal Protection Clause prohibits the state from symbolically expressing a preference for one race over another. There is no legitimate basis for imposing more stringent standing requirements in a constitutional challenge to the state's endorsement of one race over another than are applied in a constitutional challenge to the state's endorsement of one religion over another.

This case presents the question of whether an individual who is subjected to emotional, professional, and physical harm because of racially motivated "hate speech" by the government may seek redress for those injuries in federal court.

Where, as here, Plaintiff has alleged that he is personally and unavoidably and repeatedly exposed to a state flag which symbolically endorses white supremacy and that such exposure personally causes him, an African-American, psychological and emotional pain and suffering, nothing further should be required.

Plaintiff's status as an attorney in private practice and as a part-time prosecutor, and his allegation that exposure to the state flag in Mississippi courtrooms subjects him to a hostile work environment, provides a further basis for his standing. Workplace exposure to the Confederate flag and other racist messages has frequently been recognized as sufficient to confer standing to sue for imposition of a "hostile work environment," without proof of any concrete impact on the actual terms of employment. *See, e.g.*, Jones v. UPS Ground Freight, 683 F.3d 1283, 1300-04 (11th Cir. 2012). The district court's conclusion that Plaintiff could escape the hostile work environment imposed by the state flag by "limiting his practice to federal court" and accepting any associated financial losses (Mem. Op. at 26, ROA.207), vividly emphasizes Plaintiff's standing rather than negates it. Where a state's unconstitutional conduct puts someone to the Hobson's choice of simply turning the other cheek to the government's demeaning message or suffering economic harm there can be no doubt that he has a sufficiently personal and concrete interest to confer standing. The result here should be no different from that in Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese, 633 F.3d

424, 428-30 (6th Cir. 2011), where an attorney who alleged psychological injury resulting from his exposure to a courtroom display of the Ten Commandments had standing to challenge that display.

Plaintiff has also alleged that exposure to Mississippi's endorsement of white supremacy has exacerbated his hypertension, insomnia, and cardiac abnormality. Physical injury is sufficient to confer standing. The district court's speculation that Plaintiff's injuries might instead be due to "genetics, stress, the practice of law, diet, and lack of exercise" (Mem. Op. at 28, ROA.209) had no place in a threshold examination of standing on a motion to dismiss. The extent to which exposure to the state flag has harmed Plaintiff's physical health and whether removal of the flag would eliminate or reduce that harm are for resolution by summary judgment or at trial, not on a motion to dismiss where Plaintiff's allegations must be deemed to be true.

Finally, Plaintiff's proposed Fourth Amended Complaint, which would have added claims on behalf of his daughter, and against the State Superintendent of Education and his daughter's local school district, was not futile and the district court erred in denying the motion for leave to file it. The exposure of Plaintiff's 5-year old child to the state flag and its message of second-class citizenship, while being subjected to mandatory instruction that the flag should be honored and

respected, provided a further basis for Plaintiff's standing and the motion for leave to amend should have been granted.

For all these reasons the Court should reverse the judgment below and remand the case for trial on the merits.[3]

III. ARGUMENT

A. Introduction

The district court's dismissal for lack of standing, on a Rule 12(b) motion to dismiss, is subject to de novo review. Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 795-96 (5th Cir. 2011). In assessing standing on a motion to dismiss the Court must accept as true the averments of the Complaint as well as any additional unrebutted facts submitted by Plaintiff. *See, e.g.*, Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd., 627 F.3d 547, 550 (5th Cir. 2010) ("[W]hen standing is challenged on the basis of the pleadings, [the court] must accept as true all material allegations of the complaint and . . . construe the complaint in favor of the complaining party." (first and third alteration in original)(internal quotation marks omitted)); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)(allowing district court to look at the "complaint supplemented by undisputed facts" when determining subject matter jurisdiction).

[3] Plaintiff is not contesting the district court's dismissal of his claim under the Thirteenth Amendment on the basis that Congress has not declared the Confederate flag to be a "badge"or "indicia"of slavery. (Mem. Op.at 21 n.118, ROA.202). Plaintiff also is not challenging on appeal the conclusion below that the prospect of flag-inspired racial violence against himself or others is too speculative to create standing. (Mem. Op.at 22-23, ROA.203-04).

When the government chooses to speak, symbolically or otherwise, it generally does not infringe the free speech rights of individuals, but there are nevertheless constitutional limits on what it may say. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 468 (2009); Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 331 n.9 (1st Cir. 2009) ("The Establishment Clause is [a] restraint on government speech and the Equal Protection Clause may be as well." (citation omitted)).Legal scholars have for decades argued that governmental displays of the Confederate flag constitute a form of government speech which endorses white supremacy and violates the Equal Protection rights of African-Americans. *See, e.g.*, James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag From Southern State Capitols*, 101 YALE L.J. 505 (1991); L. Darnell Weeden, *How to Establish Flying the Confederate Flag With the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521 (2001); I. Bennett Capers, *Flags*, 48 HOW. L.J. 121 (2004); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159 (2012).

Just last year the Supreme Court held that Texas's decision not to display the Confederate flag, because of its association with "expressions of hate directed toward people or groups that is demeaning to those people," is an exercise of symbolic government speech. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (internal quotation marks omitted). This Court

in Briggs, supra, similarly recognized that the Mississippi state flag conveys a secular message and is thus a form of government speech. Briggs, 331 F.3d at 505-06. In Briggs, this Court entertained—without any expressed concerns about standing or its jurisdiction—a constitutional challenge to the very flag at issue in this case and decided the case on its merits or lack thereof. Id. at 503-08. That is what should occur here.

The decision below is a judicial version of the childhood taunt "sticks and stones may break my bones but names will never hurt me," but the truth is that words and symbols, when they are proclaimed by the state and purposefully demean a segment of its population, do indeed hurt. "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." Cole v. Gen. Motors Corp., 484 F.3d 717, 723 (5th Cir. 2007) (quoting Parker v. Dist. of Columbia, 478 F.3d 370, 377 (D.C. Cir. 2007))(internal quotation marks omitted).

Standing in any given case is intensely fact specific and requires the consideration and weighing of a variety of case-specific factors. "In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Allen v. Wright, 468 U.S. 737, 751-52 (1984). Standing is "more or less determined by the specific

circumstances of individual situations . . . ." United States *ex rel.* Chapman v. Fed. Power Comm'n, 345 U.S. 153, 156 (1953).

This case bears no resemblance to the facts and circumstances of the Supreme Court standing cases cited by the district court. In Allen, for example, the plaintiffs were not exposed to any discriminatory government action or speech; rather they were complaining that the government was failing to adequately enforce certain tax regulations against third parties, with whom plaintiffs had no connection. *See also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (remand for consideration of whether an inaccurate credit report caused any "concrete" injury); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (plaintiffs challenging the alleged impact of a federal regulation on wildlife in foreign countries); City of L.A. v. Lyons, 461 U.S. 95 (1983) (plaintiff seeking injunction against speculative future misconduct by police); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (plaintiffs challenging the government's conveyance of property in a remote state to a third party); Warth v. Seldin, 422 U.S. 490 (1975) (plaintiffs challenging allegedly exclusionary zoning without allegations that a change in such zoning would benefit them).

In relying on the above referenced cases, which are factually and legally distinguishable from the present case, the district court ignored more instructive and relevant case law on standing in a challenge to allegedly unconstitutional

government speech. The Supreme Court's approach to standing in McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005), Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984) and this Court's analysis of standing in cases such as Murray v. City of Austin, Tex., 947 F.2d 147, 151-52 (5th Cir. 1991) and Croft v. Governor of the State of Texas, 562 F.3d 735 (5th Cir. 2009) are far more instructive and relevant to the standing issue in the instant case. In McCreary, in County of Allegheny, and in Lynch the Supreme Court adjudicated claims by local citizens that municipal displays of the Ten Commandments and Christmas nativity displays were unconstitutional symbolic endorsements of religion, without even discussing the question of the plaintiffs' standing.

In Murray, this Court relied on the Supreme Court's *sub silentio* recognition of standing in such cases and held that a resident of Austin, Texas had standing to challenge an allegedly Christian city insignia because he was routinely exposed to it and was "offended" by its implicit endorsement of religion, without requiring anything more. Murray, 947 F.2d at 151-52.[4] Similarly, in Croft, there was

[4] Whether discussed or not, a federal court has an obligation in every case to satisfy itself on standing and its own jurisdiction. *See, e.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). The Court's consideration of the merits, particularly where plaintiffs prevailed, thus demonstrates that standing existed.

In Doe v Tangipahoa Parish Sch. Dist., 494 F.3d 494, 498 (5th Cir. 2007), the majority of the en banc court questioned, in dicta, the significance of the Supreme Court's recognition of

enough to establish standing" at the summary judgment stage because plaintiffs were exposed to the allegedly unconstitutional speech and "they or their parents have been offended . . . ." Croft, 562 F.3d at 746; *see also* Doe, 494 F.3d at 497 (en banc Court holding , after trial, that standing turned on "whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by" allegedly unconstitutional speech). Under these factually similar cases Plaintiff has alleged more than enough to establish his standing in this case.

The above cases were all brought under the First Amendment's Establishment Clause, challenging symbolic governmental endorsement of religious beliefs. But the Supreme Court has made it clear that the elements of standing do not vary depending on which constitutional provision is allegedly violated and that the "fundamental" nature of the Establishment Clause does not provide for any looser test for standing. *See* Valley Forge, 454 U.S. at 484 ("The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' [W]e know of no principled basis on which to create a hierarchy of constitutional values or a

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standing in cases in which the issue was not explicitly "ruled on by the Court." But the Supreme Court has stated "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper in previous cases." E. Enters. v. Apfel, 524 U.S. 498, 522 (1998)(internal quotation marks omitted).

complementary 'sliding scale' of standing' . . . ." (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968))).

Moreover, there is no sound reason why a plaintiff challenging symbolic governmental endorsement of one race over another should face any greater burden to establish standing than a plaintiff who complains that the government has symbolically endorsed one religion over another. There is certainly nothing in the text of the two Amendments to give rise to any difference in standing to enforce the rights conferred. The Establishment Clause provides simply that "Congress shall make no law respecting an establishment of religion" (U.S. CONST. amend. I), while the Equal Protection Clause, in similarly prohibitory language, states that "[n]o state shall . . . deny to any person . . . the equal protection of the laws." (U.S. CONST. amend. XIV). The fact that the First Amendment is only applicable to the states by virtue of the Fourteenth Amendment makes it all the more implausible that there would be fundamentally different tests for accessing the federal courts to enforce their respective provisions. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975) (First Amendment binds states through application of the Fourteenth Amendment).

Finally, there is no logical or principled reason to elevate one's right to be free of the state's expression of a religious preference over one's right to be free of

the state's expression of a racial preference effectively labeling members of one race "second-class citizens." As one commentator has noted:

> Surely the message that one is an "outsider[ ], not [a] full member[] of the political community" because of one's race is not somehow less injurious than the message that one is an outsider because of one's religion. For many, race is just as central to self-identity as religion; indeed, race may be more central because it is immutable. Moreover, the scars that remain from our nation's sad history of excluding racial minorities from full political participation are surely at least as deep as those that remain from past instances of religious exclusion, and very likely a good deal deeper.

Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2018 (2010)(alterations in original)(footnotes omitted).

B. Plaintiff Has Alleged Sufficient Facts To Have Standing

It is well-established that "Constitutional standing has three elements: (1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." Croft, 562 F.3d at 745. Each of these elements is easily satisfied in this case.

1. Plaintiff Has Alleged The Requisite Injury In Fact

At this stage of the case Plaintiff's allegations, both in his Complaint and in his stipulated-to Declaration, must be taken as true and they unquestionably establish the sufficient "injury in fact" to confer standing to challenge the state's

racially biased glorification and endorsement of white supremacy. Plaintiff alleges that he is a descendant of slaves and an African-American and that he has been labeled a second-class citizen by the state. He has alleged that he is repeatedly and unavoidably exposed to the state flag (and therefore its racially motivated message of disparagement) as it is displayed throughout the state on school property and other public buildings and in courtrooms where he must appear. He has also alleged that the state's message is "painful, threatening, and offensive" to him, personally, making him "feel like a second-class citizen" and that it causes him both physical and emotional injuries. (Decl. of Carlos E. Moore ¶¶ 8-10, ROA.124-25).

Under well-established precedent, these allegations of injury are clearly sufficient to establish his standing to challenge the state's symbolic endorsement of one group of citizens over another. In Croft, supra, the Court upheld standing on a summary judgment challenge, noting that at that stage "the plaintiffs' burden on standing is only to raise an issue of material fact." Croft, 562 F.3d at 746. The allegation that plaintiffs' children were exposed to an allegedly unconstitutional religious exercise and that plaintiffs were thereby "offended" was sufficient to confer standing. In Murray v. City of Austin the Court held that plaintiff had standing to challenge the alleged symbolic endorsement of one religion as superior to others in the city's "insignia" on the basis that he was regularly exposed to it in

city correspondence and on public vehicles, and that it was "offensive" to him. Murray, 947 F.2d at 150-52. *Accord* Saladin v City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987) (non-Christian plaintiffs had standing to challenge city insignia bearing the word "Christianity" because they "regularly received correspondence on city stationery", and the insignia "represent[ed] the City's endorsement of Christianity" making them "feel like second class citizens"); Vasquez v. Los Angeles, 487 F.3d 1246, 1253 (9th Cir. 2007) (recognizing standing to challenge an allegedly anti-religious county seal based on "unwelcome direct contact" with the seal"); Foremaster v City of St. George, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (sufficient non-economic injury to confer standing on plaintiff challenging municipal logo based on allegation that "the visual impact of seeing [the] official emblem . . . has and continues to greatly offend intimidate and affect me").

The decision in ACLU v. DeWeese, supra, also reinforces Plaintiff's claim that his workplace/courtroom exposure to the state flag creates standing to challenge that display. DeWeese, 633 F.3d at 429 (holding plaintiffs' "direct and unwelcome contact with the contested object demonstrates psychological injury in fact sufficient to confer standing." (internal quotation marks omitted)). There, an attorney objected to a display of the Ten Commandments in a courtroom in which he sometimes appeared. It is inconceivable that unwanted courtroom exposure to

the Ten Commandments would constitute "injury in fact" while unwanted courtroom exposure to the hateful messages embodied in the Confederate flag would not. Again, the fact that DeWeese was an Establishment Clause case rather than an Equal Protection is of no constitutional or other legal significance.

The cases of Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997) and NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) also support standing in this case. In Coleman, a citizen of Georgia filed suit against the Governor of Georgia, arguing that the flying of the Georgia flag, which at the time incorporated the "Confederate battle flag emblem," violated, *inter alia*, his Equal Protection rights. Neither the district court nor the Eleventh Circuit questioned his standing to bring the case and the case was decided on summary judgment based on plaintiff's failure to "present sufficient specific factual evidence." Coleman, 117 F.3d at 529. Similarly, in NAACP where plaintiff challenged Alabama's flying of the Confederate flag, the Eleventh Circuit noted that it was "important that all issues be laid to rest on the merits." NAACP, 891 F.2d at 1562. Plaintiff's standing to bring the claim was not challenged.[5]

Even more directly on point is the Court's implicit recognition of standing to challenge Mississippi's state flag in Briggs, supra. There, the Court addressed on

[5] The NAACP court did comment that Alabama's decision to fly a flag "that offends a large proportion of its population" was "unfortunate" but "that is a political matter which is not within our province to decide." *See* NAACP, 891 F.2d at 1566. To the extent the court was suggesting that the issue was a non-justiciable political question, that was incorrect. *See infra* pp. 30-32.

the merits a challenge to the state flag on the basis that it reflected not an endorsement or promotion of one race over another but on an allegedly "offensive" symbolic endorsement of one religion over another. As in the Supreme Court's decisions in McCreary, County of Allegheny, and Lynch, supra this Court decided the case without a discussion of standing, thus implicitly recognizing that standing existed. The Court rejected plaintiff's claim on its merits, acknowledging that there was indeed a message in Mississippi's flag but concluding that it was a secular message, not a prohibited religious message.

This case of course, alleges that the flag's secular message is one of racial disparagement. As discussed above, there is no basis in standing law or in constitutional law for allowing an Establishment Clause challenge to Mississippi's flag to be decided on its merits but dismissing a parallel challenge to the very same flag under the Equal Protection Clause. If adequate "injury in fact" was pled in Briggs it has certainly been pled here.

The facts alleged in this case go far beyond the claims of "being offended" by unconstitutional expressions of state favoritism which have been repeatedly held to be sufficient to establish standing. In addition to the allegation that he suffers emotional pain and suffering by virtue of the state's endorsement of white supremacy, Plaintiff has alleged that he has been injured in his profession and in his physical health.

As an attorney in private practice and as a part-time city prosecutor Plaintiff has alleged that the prominent, state-sponsored display of the Mississippi flag has created a hostile work environment for him. It is well established that the presence of a Confederate flag even in a place of private employment, and even less than continuously, can create or contribute to an actionable "hostile work environment." *See, e.g.*, Adams v. Austal, U.S.A., L.L.C., 754 F.3d 1240, 1253 (11th Cir. 2014); Jones, 683 F.3d at 1300-04; Mack v. St. Mobile Aerospace Eng'g, Inc., 195 F. App'x 829, 837-38 (11th Cir. 2006). Moreover, the Supreme Court has held that the existence of such a racially hostile work environment is a judicially cognizable injury "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive [without] need for it also to be psychologically injurious." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993)(citation omitted). It is difficult to comprehend why a state-created hostile work environment would not constitute an "injury-in-fact" for standing purposes when such a privately created environment, without more, provides standing.

The district court's attempt at disposing of this aspect of Plaintiff's injury in fact simply reinforced Plaintiff's standing. The district court dismissed the hostile work environment injury by suggesting that Plaintiff could avoid courtroom exposure to the Mississippi flag by limiting his practice to federal court and suffering the resulting loss of earnings and loss of retirement benefits. (Mem. Op.

at 26, ROA.207). But where an individual's only means to escape a hostile work environment is to "quit," that reinforces the existence of an injury and the entitlement to seek judicial relief. *See generally* Young v. Sw. Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) ("The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.").

Plaintiff's individualized injury in fact has also been established in his allegation that exposure to the state flag has caused him to suffer actual physical harm in the form of exacerbating his physical ailments, including his hypertension and cardiac function. The district court's disregard for those averments is contrary to the most fundamental notions of "injury." *See, e.g.*, Rideau v. Keller Indep. Sch. Dist., 819 F.3d 155, 163 (5th Cir. 2016) ("In the case of . . . physical harms, of course, the 'injury in fact' question is straightforward." (quoting Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 642 (2007))(internal quotation marks omitted)). If damage to one's body is not a judicially cognizable injury, then what would be?

The district court suggested, without any legal authority, that Plaintiff's claim that the unconstitutional display of the Mississippi flag had caused damage

to his health "suggest[s] that he is making an emotional distress tort claim" (Mem. Op. at 26, ROA.207), but that is not what is being alleged. The allegations here are simple and direct. What is alleged is that the state flag so demeans African-Americans that the Plaintiff, a target of the state's demeaning symbolic speech, has personally suffered direct, immediate, and concrete physical injury. That such a claim might be brought as a mere tort claim, in addition to being an Equal Protection claim, in no way negates the fact that an adverse effect on one's health is clearly an injury in fact for standing purposes.

Finally, Plaintiff also alleged in his proposed Fourth Amended Complaint adequate injury in fact in his capacity as father of his 5-year old daughter. Standing of a parent to bring constitutional challenges on behalf of a child, particularly in the context of school-based conduct, is well established. *See*, *e.g.*, Croft, 562 F.3d at 746. Plaintiff's child is exposed in school, by virtue of state law to the state flag. The white supremacist message of that flag is patently more harmful to a child of 5 than to an adult. *See* Brown v. Bd. of Educ., 347 U.S. 483, 492, 494 (1954) (even where the physical facilities and all "tangible factors" were assumed to be equal in "Negro and white schools" the Equal Protection Clause barred separate schools because their existence "generates a feeling of inferiority [in African-American children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"). Mississippi state law

requires that Plaintiff's child not only be exposed to the degrading message of the flag but, taught to respect it and "pledge allegiance" to it. (Fourth Am. Compl. ¶¶ 21-23, ROA.177-78). The fact that Mississippi statutes do not require any student to actually recite the pledge of allegiance to the state flag, does not mean that she suffers no injury when she is exposed to the flag's symbolic speech and told that its message of white supremacy should be respected. The Fourth Amended Complaint was thus not "futile" and leave to file it should have been granted under the liberal standards of Rule 15, Fed. R. Civ. P.

2. Plaintiff Has Alleged The Requisite Link Between His Injuries And The Conduct Complained Of

Plaintiff has clearly and specifically alleged that the state flag's message of African-American inferiority has caused his emotional injuries; his workplace injuries; his physical injuries; and the harm suffered by his daughter. Causation, at the motion to dismiss stage, simply requires injury to be "fairly traceable" to defendant's conduct. Comer v. Murphy, 585 F.3d 855, 862 (5th Cir. 2009).

The district court's speculation that certain of his injuries could be caused by other factors and its skepticism of Plaintiff's ability to prove a causal link between them and the state's message of hatred and condescension were improper in a motion to dismiss. Comer, 585 F.3d at 863 ("[T]o evaluate the merits of [causation] is misplaced at this threshold standing stage of the litigation."). Nor is the fact that Plaintiff has been exposed to the flag his whole life but did not file suit

until February, 2016, at the age of 39, of any significance. As Plaintiff more than plausibly explained, he reached the tipping point after the horrendous murders in South Carolina by an embracer of the Confederate flag and its message of racial hatred, after the Mississippi legislature obstinately refused to follow the lead of South Carolina in banishing the flag from its state capitol, and after the defendant Governor Bryant rubbed salt in his wounds by urging Mississippi to celebrate "Confederate Heritage" month. (Mem. Op. at 18, ROA.199). These frightful and demeaning incidents could plausibly lead to the psychological and physical injuries that Plaintiff claims.

Whether Plaintiff might have filed his lawsuit 10, 15, or 20 years ago does not diminish its viability now. History is replete with injustices which have been tolerated for far too many years before a court is asked to act. *See, e.g.*, Campaign for S. Equality v. Bryant, 64 F. Supp. 3d 906, 921-22, (S.D. Miss. 2014) (cataloguing numerous instances in which unconstitutionally discriminatory behavior persisted for decades before federal court relief was requested and obtained). There is no applicable statute of limitations and no basis for a laches defense. And if there were, those are defenses, with no bearing on Plaintiff's standing.

3. Plaintiff Has Alleged That The Requested Relief Would Redress His Injuries

Plaintiff has alleged that a favorable decision would redress each of his injuries. (Mem. Op. at 29, ROA.210). He would no longer be subject to the unwanted and hurtful official endorsement of white supremacy and he would no longer suffer the injuries he has alleged are caused by that message. Where, as here, a plaintiff has alleged that the government has unconstitutionally favored one group over another courts have routinely accepted the contention that removal of the insidious endorsement would benefit the offended and objecting plaintiff. *See, e.g.*, Cnty. of Allegheny, 492 U.S. 573 (1989); Croft, 562 F.3d 735 (5th Cir. 2009); Feld v. Zale Corp., 62 F.3d 746, 751 n.13 (5th Cir. 1995)("When the plaintiff is himself an object of the action . . . at issue there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."); Murray, 947 F.2d 147 (5th Cir. 1991). There is no valid basis for disregarding Plaintiff's allegations of redressability and that prong of constitutional standing has been satisfied.

C. This Case Does Not Present A Non-Justiciable Political Question

In moving to dismiss Defendant argued that the case was barred by the alleged absence of standing as well as by the "political question" doctrine. (Governor Phil Bryant's Mot. to Dismiss Third Am. Compl. for Lack of Subject Matter Jurisdiction or, in the Alternative, for Failure to State a Claim at 1,

ROA.100). The district court did not reach the political question argument and it has no merit. The political question doctrine "is primarily rooted in the constitutional separation of powers among the three branches of the federal government." Saldano v. O'Connell, 322 F.3d 365, 368 (5th Cir. 2003). "The parameters of the political question doctrine generally extend to cover the federal judiciary's relationship to the *federal* government and not the federal judiciary's relationship to the States." Id. at 370. Where, as here, a federal court is asked to decide whether a state government's actions violate the Equal Protection Clause, there is no political question obstacle to the exercise of federal court jurisdiction.

In any event, none of the factors which have been identified as suggesting a non-justiciable political question are present in this case. They are: (1) "a textually demonstrable commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless

Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978)(quoting Baker v. Carr, 369 U.S. 186, 217 (1962))(internal quotation marks omitted).

That Mississippi's legislature could -- but has not -- put an end to the wrongful conduct at issue here is irrelevant, as is the fact that in 2001 a majority of Mississippi voters approved the continued flying of the 1894 flag. The Fourteenth Amendment was adopted for the specific purpose of requiring states to provide "equal protection" and "due process" to African-Americans regardless of any contrary wishes of "the majority."

> The judiciary enforces individual rights against the tyranny of the majority. It does not matter how political the issue; how reviled the individual; or how vocal, politically savvy, and passionate the majority. That is its duty under Article III of the United States Constitution.
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> * * * *
>
> [T]he judiciary does not defer to the voters' decision to deprive others of constitutional rights.

Campaign for S. Equality, 64 F. Supp. 3d at 922, 945.

The political question doctrine has no applicability to this case.

IV. CONCLUSION

For all the reasons set forth above, the judgment entered by the district court dismissing this case should be reversed. The case should be remanded to allow for the development of a full factual record, the submission of expert reports, and a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 1, 2016, the foregoing Brief was filed electronically using the Court's ECF system, which will give notice of the filing to counsel for the Appellee. In addition, a copy of the Brief was served on counsel for the Appellee by First-Class Mail, addressed as follows:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,637 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14 for text and size 12 for footnotes.

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