No. _____

In The
Supreme Court of the United States

CARLOS E. MOORE,

Petitioner,

v.

GOVERNOR DEWEY PHILLIP BRYANT,
In His Official Capacity,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment is violated when a state engages in government speech symbolically expressing support for white supremacy, but does not otherwise engage in disparate treatment of its African-American citizens.

Whether an African-American father and daughter, who are regularly and involuntarily exposed in their community, workplace, and school, to the state's symbolic endorsement of white supremacy, have standing to bring suit alleging an Equal Protection violation, without also alleging that the state has otherwise treated them disparately on account of their race.

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-14a) is reported at 853 F.3d 245 (5th Cir. 2017). The opinion of the Southern District of Mississippi (Pet. App. 15a-64a) is reported at 205 F. Supp. 3d 834 (S.D. Miss. 2016).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on March 31, 2017. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Mississippi statutes involved – Miss. Code Ann. § 3-3-15 (State flag; display); Miss. Code Ann. § 3-3-16 (Official state flag; design); Miss. Code Ann. § 37-13-5 (Displaying and studying of flags); Miss. Code Ann. § 37-13-7 (Pledges of allegiance to flags) – are included in the Appendix at Pet. App. 65a-68a.

STATEMENT OF THE CASE

The flag shown above, "being the flag adopted by the Mississippi Legislature in the 1894 Special Session," is the official state flag of Mississippi. Miss. Code Ann. § 3-3-16.[1] 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

[1] In a statewide referendum held in 2001, a majority of Mississippi voters chose to retain the 1894 flag.

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 all students be taught the "proper respect" for the flag and 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 flag replicates the flag known as the "Confederate flag" or "Confederate battle flag," under which Confederate armies fought the Civil War.

Mississippi seceded from the United States for the specific and paramount purpose of preserving slavery. *Moore v. Bryant*, 205 F. Supp. 3d 834, 838 (S.D. Miss. 2016); Pet. App. 18a-19a. "Mississippi was so devoted to the subjugation of African-Americans that it sought to form a new nation predicated upon white supremacy." *Id*. at 839; Pet. App. 19a. 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." *Id*. at 840; Pet. App. 22a.

In 1890, Mississippi adopted a new constitution, designed "to permit 'white people' to take back their state from the multi-racial coalition which had governed Mississippi after the War." *Id*. at 844; Pet. App. 32a-33a. It mandated racial segregation in schools, and "voting laws that imposed landownership, poll tax, and literacy requirements, and excluded persons with criminal convictions," all intended to "guarantee[] the exclusion of African-Americans from the electoral process." *Id*.; Pet. App. 33a. Reviewing the path leading to the adoption of its constitution, the Mississippi Supreme Court explained that the "control of public affairs had passed to a . . . race unfitted by education or experience." *Ratliff v. Beale*, 20 So. 865, 867, 868 (Miss. 1896). Under the new constitution, "the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power." *Id*. Attempting to justify the constitutional disenfranchisement of "the negro race," the court observed that it "had . . . peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites." *Id*. at 868. The Mississippi flag was adopted in 1894 to be the banner under which Mississippi's new constitution and its bedrock policy of white supremacy were to be implemented.

Just as Texas' decision not to put the Confederate flag on its state-issued license plates was an exercise in government speech (*Walker v. Tex. Div., Sons of Confederate Veterans Inc*., 135 S. Ct. 2239 (2015)), so is Mississippi's action in continuing to display its version

of the Confederate flag in its statutorily mandated official state banner. Indeed, in *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003), the Fifth Circuit held that the Mississippi state flag is intended to convey a secular message. As this Court has recognized, a flag can be a powerful means for a state to express its views and impose its orthodoxy as "[t]he use of an emblem or flag to symbolize some system, idea, [or] institution . . . is a short cut from mind to mind." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

The message in Mississippi's flag has always been one of racial hostility and insult and it 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. (Third Am. Compl. ¶ 13). The state's continued expression of its message of racial disparagement sends a message to African-American citizens of Mississippi that they are second-class citizens (*Id*. ¶ 18) and "encourages or incites private citizens to commit acts of racial violence." (*Id*. ¶ 12).[2]

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[2] The linkage between Confederate symbols and racial violence and intimidation remains strong in Mississippi. Since filing this case, Petitioner has been subjected to anonymous death threats, and just last month a member of the Mississippi House of Representatives, joined by two of his colleagues in the legislature and a Mississippi Highway Patrol official, publicly declared that those seeking to eliminate Confederate symbols, whether in New Orleans or in "our state," including presumably Petitioner, "should be LYNCHED." *See As Statues Fall, The Specter of*

Petitioner filed suit under the Equal Protection Clause, seeking a declaration that the statutes providing for the design and display of Mississippi's state flag and those mandating that Mississippi school children be taught to "respect" it be declared unconstitutional and that the Governor and the State Superintendent of Education be enjoined from enforcing such statutes. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 & 1343.

Petitioner, an attorney, is an African-American resident of Mississippi and a descendant of slaves. (Decl. of Carlos E. Moore ¶¶ 3-4). He is regularly and unavoidably exposed to the state flag flying in or near public buildings, school property and courtrooms in which he appears throughout the state. (*Id*. ¶¶ 7, 11). His continued exposure to the state's endorsement of white supremacy is "painful, threatening, and offensive," and makes him "feel like a second class citizen." (*Id*. ¶¶ 8-10). Moreover, the state's display of the state flag in courthouses where Petitioner appears as a private lawyer and as a part-time prosecutor creates a "hostile work and business environment" (*Id*. ¶ 11), an impact he could avoid only by sacrificing his profession in whole or in part. The impact of being labeled by the state as a second-class citizen and inferior human being has caused Petitioner to suffer concrete adverse

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the Noose Rises, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/opinion/confederate-memorial-mississippi-lynchings.html.

physical effects, including exacerbation of his hypertension, insomnia, and heart abnormality. (*Id*. ¶ 12).

Petitioner's 6-year-old daughter is also 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 respect and to pledge allegiance to a flag that implicitly endorses an insidious and demeaning message that she is inferior to her white classmates. (Fourth Am. Compl. ¶ 23).

The district court provided a thorough exposition of Mississippi's dedication to the institution of slavery as its motivation for seceding from the Union, its sordid efforts to disenfranchise African Americans under the banner of its state flag, and the use of the Confederate flag generally as a symbol of white supremacy and the subjugation of African Americans throughout the South. *Moore*, 205 F. Supp. 3d at 838-49; Pet. App. 16a-44a. But the court dismissed the case on standing grounds, holding that neither Petitioner's involuntary exposure to the state's demeaning and hostile message in his community and in courtrooms where he practices law nor his manifestation of adverse emotional and physical consequences flowing from such exposure were sufficient injury in fact to give him standing. *Id*. at 852-53; Pet. App. 53a-55a. The court also held that neither his young child's forced exposure to the flag's demeaning message nor the state's requirement that she be taught to "respect" that message were sufficient to create standing. *Id*. at 849-58; Pet. App. 59a-62a.

The court of appeals affirmed. While couched in terms of a lack of standing, the court's analysis of standing depends on its substantive holding, on the merits, that "differential government messaging," *i.e.*, government speech intended to endorse white supremacy, cannot violate the Equal Protection Clause without additional proof of some sort of more tangible disparate "treatment." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); Pet. App. 5a-6a.

Despite acknowledging a long line of precedent in this Court and in the courts of appeals holding that "differential government messaging" does indeed violate the Constitution when the state's message is one of preference for one religious group over another, the court of appeals drew a purported distinction between cases arising under the Establishment Clause and those arising under the Equal Protection Clause. The court first declared that the language of the Establishment Clause "prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion." *Id*.; Pet. App. 7a. In contrast, the court declared, "[t]he same is not true under the Equal Protection Clause: the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging." *Id*.; Pet. App. 7a. The court offered no rationale, other than supposed textual differences, for the constitutional distinction which forms the linchpin of its opinion.

In holding that mere government speech can never violate the Equal Protection Clause, and thus

"stigmatic injury" alone can never be sufficient for standing, the court of appeals cited *Allen v. Wright*, 468 U.S. 737 (1984). But *Allen* did not even involve government speech; rather it involved the alleged failure of the I.R.S. to adequately enforce federal tax regulations against private schools which plaintiffs neither attended nor sought to attend. In significantly expanding the reach of the "no standing" holding in *Allen* – to cover any and all cases arising under the Equal Protection Clause – the court of appeals ignored the principle articulated in *Allen* that every standing inquiry must turn on the "particular claims" articulated by the "particular plaintiff." *Allen*, 468 U.S. at 752. *Allen*, in holding that stigma alone was insufficient to confer standing on the particular claims at issue in that case, did not hold, as does the opinion below, that no one can have standing to challenge racially disparaging government speech under the Equal Protection Clause without additional proof of a tangible difference in "treatment."

In also rejecting Petitioner's claim that he and his daughter had standing based on the Mississippi law requiring that the state flag be given "all of the respect . . . given the American flag" and that all Mississippi children be taught the "proper respect" for the state flag's insidious message, the court of appeals held that "proper respect" did not "imply . . . a positive . . . level of respect," but merely "the respect that it is due, whatever that may be." *Moore*, 853 F.3d at 253; Pet. App. 12a-13a. Implicitly acknowledging that a state law requiring that African-American children be taught to give "positive" respect to a symbol of white supremacy

would implicate the Equal Protection Clause, the court relied on its curious interpretation of the words "proper respect" – which even the state had not argued at any point below – to conclude that Mississippi school children have no standing here.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's opinion is founded on an erroneously narrow view of the Equal Protection Clause which conflicts in principle with decisions of this Court

While ostensibly based on Petitioner's lack of the requisite "injury in fact" to confer standing, the decision below is actually founded on the court's extraordinarily narrow and mistaken view, on the merits, of the meaning of "equal protection" in the context of "government speech." The court's interpretation of the Equal Protection Clause as applied to government speech is of sufficient constitutional import and is so clearly erroneous that review by this Court is warranted.[3]

[3] Legal scholars have for decades made the case 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 Capitals*, 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);

While acknowledging that the Establishment Clause prohibits a state from expressing the view that one religion is superior to, or preferred over, others, the court of appeals reached the remarkable and unwarranted conclusion that the Equal Protection Clause does *not* similarly prohibit a state from expressing the view that one race is superior to, or preferred over, another. In striving to justify analyzing injury in fact differently under the Establishment Clause and the Equal Protection Clause, the court declared that "the injuries protected against under the Clauses are different":

> The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion. . . . The same is not true under the Equal Protection Clause; the gravamen of an equal protection claim is [solely] differential government treatment, not differential governmental messaging.

Moore, 853 F.3d at 250; Pet. App. 7a.

The textual distinction described by the court of appeals does not, however, exist. The two provisions are fundamentally parallel. *See, e.g., Bd. of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (The "Establishment Clause mirrors the Equal Protection Clause."). Neither clause explicitly "regulates" religious or racial endorsement specifically or government speech generally. The

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Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 Seton Hall L. Rev. 897 (1998).

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 terms, states that "no state shall . . . deny to any person . . . the equal protection of the laws." (U.S. Const. amend. XIV). The court of appeals' declaration that the injuries protected against are fundamentally different is illogical and unsupported by anything in the language of the Constitution or in case law. Nothing warrants the court of appeals' inexplicable conclusion that a state may not endorse one religion over another but may freely endorse one race over another.

The court of appeals' extraordinarily narrow view, that "differential government messaging" can never be sufficient to violate the Equal Protection Clause without additional proof of more tangible differential "treatment," cannot be reconciled with the purpose and scope of the clause as it has been interpreted over the past 150 years by this Court. In the Court's first case dealing with the Equal Protection Clause, decided shortly after it had been adopted, the Court made clear that it was – at least as applied to freed slaves and their descendants – to be given the most expansive and far-reaching scope:

> [T]he one pervading purpose . . . lying at the foundation of [the Thirteenth, Fourteenth, and Fifteenth Amendments is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the

> oppressions of those who had formerly exercised unlimited dominion over him.
>
> * * *
>
> [I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the . . . pervading spirit of them all, the evil which they were supposed to remedy . . . as far as constitutional law can accomplish it.

Slaughterhouse Cases, 83 U.S. 36, 71-72 (1872).

The decision below, which insulates purposeful, racially demeaning government speech from the reach of the Equal Protection Clause, cannot be reconciled with these principles. Under the Fifth Circuit's decision, a city could adopt "White Supremacy Forever" as its official motto; or a county could incorporate an image of white hooded figures and a noose hanging from a tree into its county seal; or a state could incorporate a Nazi swastika, as an endorsement of Aryan/white supremacy, in its state flag. So long as the government's race-based message was "limited" to speech, without further proof of a more tangible denial of "equal treatment," it would be immune from attack under the Equal Protection Clause. Such free rein for state and local governments to demean their African-American citizens does undeniable violence to the "pervading spirit" of the Equal Protection Clause and runs afoul of the principle that the clause should be given as far reaching a construction as necessary to accomplish its overall purpose of freeing African Americans not only from the

shackles of involuntary servitude but also from state imposed labels of inferiority.

The decision below reeks of the "separate but equal" doctrine which this Court expunged from legitimate constitutional analysis over 60 years ago. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), it was assumed that the "treatment" of white and black railroad passengers was the same – the transportation services provided to each race was "equal" – so there was no denial of "equal" protection. But in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that the assumption of equal "treatment" in terms of the "tangible" elements of public education did not bar an Equal Protection challenge where there was "differential messaging." It was the state's insidious message to African-American schoolchildren of their inferiority – not differential "treatment" – which was the gravamen of the Equal Protection violation in *Brown*. 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." *Brown*, 347 U.S. at 494. The decision below, in immunizing disparate and demeaning "messaging" from Equal Protection scrutiny, cannot be reconciled with *Brown*.

The decision below is also fatally inconsistent with the principles underlying *Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson* there was no unequal treatment. Rather, the state was held to be in violation of the Equal Protection Clause solely because it informed

voters, pursuant to statute, of the race of all candidates, black, white, or other. There was no allegation that candidates were "treated" differently based on race, and it was stipulated that "Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot." *Anderson*, 375 U.S. at 402. The gravamen of the Equal Protection violation was entirely in the state's "messaging," *i.e.*, in the implicit suggestion by the state that a "candidate's race or color is an important – perhaps paramount – consideration in the citizen's choice." *Id*. If a state's mere disclosure of the candidates' races – without any differential treatment and without any endorsement by the state of the supremacy of one race over another – violates the Equal Protection Clause, then certainly a state's use of its state flag to endorse white supremacy and to label African Americans as second-class citizens cannot be entirely beyond its reach.

Nor can the decision below be reconciled with this Court's more recent approach to "government speech." In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), while acknowledging that government speech is neither protected by nor proscribed by the First Amendment's Free Speech Clause, this Court recognized that this does not mean "there are no [other] restraints on government speech." *Summum*, 555 U.S. at 468. By way of "example" the Court noted that "government speech must comport with the Establishment Clause." *Id*. In his concurring opinion, joined by Justice Ginsburg, Justice Stevens elaborated:

> [R]ecognizing permanent displays on public property as government speech will not give the government free license to communicate offensive . . . messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.

Id. at 482.

The court of appeals here came to the opposite conclusion. Under its opinion, the government does indeed have "free license" to communicate racially motivated "offensive" messages and government speech is *not* restricted by the proscriptions of the Equal Protection Clause.

Mississippi's state flag is alleged to be a state-sponsored endorsement of white supremacy, and the state's continual broadcasting of that message to its citizens cannot rationally be viewed as immune from scrutiny under the Equal Protection Clause. The interaction between the government speech doctrine and the Equal Protection Clause is too important for the Court to allow the unprincipled and anomalous decision below to stand.

II. The Fifth Circuit's opinion conflicts with cases in this Court and in the courts of appeals recognizing standing to challenge government speech that unconstitutionally expresses a preference for one group of citizens over another

The court of appeals' holding that neither Petitioner – nor implicitly any other citizen of Mississippi – has standing to challenge the state's symbolic speech under the Equal Protection Clause cannot be reconciled with legions of cases in this Court and in the courts of appeals dealing with standing to challenge symbolic government speech.

In *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court *sub silentio* recognized that citizens exposed to, and offended by, symbolic expressions of religious preference have standing to challenge such symbolic speech.[4] Courts of appeals, including the Fifth Circuit, have reached the same conclusion. *See, e.g.*, *Murray v. City of Austin, Tex.*, 947 F.2d 147 (5th Cir. 1991) (relying on *McCreary*, *County of Allegheny*,

[4] As this Court has observed "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).

and *Lynch*, *supra*, and recognizing standing to challenge alleged symbolic endorsement of Christianity in city insignia on the basis that plaintiff was regularly exposed to it and offended by it); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (concluding non-Christian plaintiffs had standing to challenge city insignia bearing the word "Christianity" because they "regularly receive[d] correspondence on city stationery," and the insignia "represent[ed] the City's endorsement of Christianity" making them "feel like second class citizens"); *Vasquez v. L.A. Cnty.*, 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) (finding standing for 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"); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004) (recognizing standing of atheist attorney to challenge courtroom display of Ten Commandments).

The court below purported to distinguish the extensive body of law governing standing to challenge government speech on the ground that those cases involved the state's expression of a preference for one religion over another, while this case involves the state's expression of a preference for one race over another. In so doing, the court of appeals directly contravened this Court's teaching in *Valley Forge Christian Coll. v. Ams.*

United For Separation of Church & State, Inc., 454 U.S. 464, 484 (1982), that the standing test in Establishment Clause cases is not somehow looser than the standing test applicable in other constitutional challenges:

> 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." [We] know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing. . . .

Valley Forge, 454 U.S. at 484 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)).

In holding that there is one test for standing to challenge symbolic government speech alleged to run afoul of the Establishment Clause, but an entirely different, and heightened, requirement for standing to challenge government speech alleged to run afoul of the Equal Protection Clause, the court of appeals imposed the very "hierarchy of constitutional values" and applied the very "sliding scale" which this Court has held do not exist. Other than its *ipse dixit* declaration that mere speech can never amount to an equal protection violation (*see* pp. 10-16 above) the court of appeals offered no rationale for its conclusion, and none exists.

Moreover, the history and purpose of the two clauses makes it clear that the court of appeals turned things upside down in adopting a "sliding scale" that favors an atheist's standing to bring an Establishment

Clause case over an African American's standing to bring an Equal Protection Clause case. The protection of the sensibilities of atheists was not even a consideration in the adoption of the Establishment Clause. *See, e.g.*, Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill Rts. J. 73, 99-100, 112, 138 (2005). In stark contrast, the very essence of the Equal Protection Clause is the guarantee to African Americans of full, first-class citizenship in every way possible. *See Slaughter House Cases, supra*. 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).

The court of appeals' standing analysis also grossly distorts – and unreasonably enlarges – the holding in

Allen v. Wright, *supra*. On the particular facts of that case – plaintiffs demanding that the I.R.S. more diligently enforce anti-discrimination regulations against remote third parties – the Court held that an allegation of inferred "stigma" was alone insufficient to create standing. But *Allen* did not involve government speech alleged to intentionally demean African Americans or to endorse white supremacy. And *Allen* itself emphasizes the importance of limiting the reach of its decision on standing to similar cases and the "particular claims" asserted:

> 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.
>
> Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Allen, 468 U.S. at 751-52.

The court of appeals' interpretation of *Allen* as a "one size fits all" rule, precluding standing in *every* Equal Protection case without an allegation of a personal and tangible difference in "treatment," is contrary to *Allen*'s requirement that it be limited to similar claims.[5] Moreover, to the extent *Allen* could be

[5] *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985), illustrates well the appropriate limits on *Allen*. In *Smith*, the court upheld the standing of a city resident to sue over the city's housing policy, on the basis that he was a member of the

read as such a severe limitation on standing in Equal Protection cases, it would squarely conflict with the legions of Establishment Clause cases recognizing standing based solely on religious "stigma." And it would, of course, contravene *Valley Forge*'s holding that the test for standing in Establishment Clause cases does not differ from the test for standing in other constitutional cases, including Equal Protection cases.

The Petition should be granted to reconcile the conflict between the court of appeals' heightened test for standing to challenge government speech favoring one race over another and the well-established, and much less demanding, test for standing to challenge government speech favoring one religion over another. Such a distinction contradicts the holding in *Valley Forge* that there is no "hierarchy of constitutional values" warranting a "sliding scale of standing." The court of appeals' holding that the test for standing turns on which constitutional prohibition the government speech allegedly violates is of sufficient import – and so clearly wrong – that the Petition should be granted.

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race that his city had declared "undesirable," even though he was not personally subject to any disparate treatment. On the facts of that case a government's intentional infliction of a "stigmatic" injury was sufficient for standing, as it should be in this case.

CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-60616

CARLOS E. MOORE,

Plaintiff-Appellant

v.

GOVERNOR DEWEY PHILLIP BRYANT,
In his Official Capacity,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Mar. 31, 2017)

Before BARKSDALE, GRAVES, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

The upper, left-hand corner of the Mississippi state flag depicts the Confederate battle flag. Plaintiff-Appellant, an African-American, Mississippi lawyer, sued Defendant-Appellee, the Governor of Mississippi, claiming that the Mississippi flag violates his rights under the Equal Protection Clause of the Constitution. The district court sua sponte ordered the parties to

brief standing and the political question doctrine. In response, Defendant moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff responded and additionally submitted a sworn declaration in support of his standing. Thereafter, Plaintiff moved to amend, seeking to file a Fourth Amended Complaint asserting an equal protection claim on behalf of his daughter. The district court held a hearing on the motion to dismiss. At the hearing, the parties agreed that Plaintiff could testify about his alleged injuries and that his testimony would be accepted as true for the purposes of the motion to dismiss. The district court dismissed for lack of standing and denied the motion to amend because any amendment would be futile. We AFFIRM.[1]

I

This Court reviews a dismissal for lack of standing de novo. *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009). "It is well settled in this circuit that '[t]he district court . . . has the power to dismiss [pursuant to Rule 12(b)(1)] on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.

[1] Plaintiff raised additional standing theories before the district court including a Thirteenth Amendment claim and a claim that the Mississippi flag incited racial violence. He has abandoned those theories here.

1996) (quoting *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384 (5th Cir.1989)).[2] In this case, the district court decided the motion to dismiss based on undisputed facts, "[t]herefore, our review is limited to determining whether the district court's application of the law is correct and . . . whether those facts are indeed undisputed." *Id.*

The requirement that a litigant have standing derives from Article III of the Constitution, which confines federal courts to "adjudicating actual 'cases' and 'controversies.'" *Henderson v. Stalder*, 287 F.3d 374, 378 (5th Cir. 2002) (quoting U.S. Const. art. III, § 2, cl. 1). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Id.* at 560 (internal quotation marks and citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (internal quotation marks and citations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will

[2] Dismissals for lack of Constitutional standing are granted pursuant to Rule 12(b)(1). *See Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011).

be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and citation omitted).

II

The district court found that Plaintiff failed adequately to plead injury in fact, the first element of standing. On appeal, Plaintiff puts forward three injury-in-fact theories. We find each unavailing.

1. Stigmatic Injury

Plaintiff first alleges that he is unavoidably exposed to the state flag and that the flag's message is "painful, threatening, and offensive" to him, makes him "feel like a second-class citizen," and causes him both physical and emotional injuries." At its core, Plaintiff's injury theory is that the Mississippi state flag stigmatizes him.

Stigmatic injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct[.]" *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Accordingly, to plead stigmatic-injury standing, Plaintiff must plead that he was personally subjected to discriminatory treatment. *See Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003) ("Being subjected to a racial classification differs materially from having

personally been denied equal treatment. . . . [Plaintiff] does not cite, and we do not find, any authority supporting the proposition that racial classification alone amounts to a showing of individualized harm."); *see also Miller v. Albright*, 523 U.S. 420, 451 (1998) (O'Connor, J., concurring); *Binno v. Am. Bar Assoc.*, 826 F.3d 338, 351 (6th Cir. 2016); *Rainbow/PUSH Coal. v. F.C.C.*, 396 F.3d 1235, 1241 n.6 (D.C. Cir. 2005); *Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 596 (10th Cir. 1996); *Kurtz v. Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987). He has not done so and thus, fails to plead injury.

Plaintiff resists this conclusion in three ways. First, drawing on Establishment Clause cases, which were not presented to the district court, Plaintiff argues that exposure to unavoidable and deleterious Government speech is sufficient to confer standing. Second, Plaintiff argues that *Allen* is factually inapplicable. Third, Plaintiff argues that if *Allen* applies, then symbolic, government, hate speech will be insulated from review. We disagree with each argument.

First, the Establishment Clause case law, though vital for its purpose and settled as doctrine, is inapplicable. In an Establishment Clause case, a plaintiff adequately alleges standing by alleging direct and unwelcome exposure to a religious display. *See Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc) ("The question is whether there is proof in the record that Doe or his sons were exposed to, and may thus claim to have been injured by, invocations given at any Tangipahoa Parish School Board

meeting."); *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991); *see also Catholic League for Religious & Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1072-73 (9th Cir. 2010) (en banc) (Graber, J., concurring in part, dissenting in part) (collecting cases). But *Allen* and its progeny make clear that those same types of injuries are not a basis for standing under the Equal Protection Clause – that is, exposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case. *Allen*, 468 U.S. at 755. Indeed, other courts have rejected attempts to cross-pollinate Equal Protection Clause standing jurisprudence with Establishment Clause cases. *See, e.g.*, *Nat'l Ass'n for the Advancement of Colored People v. Horne*, 626 F. App'x 200, 201 (9th Cir. 2015) (unpublished) ("Plaintiffs have not alleged that their members were personally denied equal treatment under *Allen*, as stigmatic injury caused by being a target of official discrimination is not itself a personal denial of equal treatment.").[3]

Plaintiff argues that the test for Equal Protection Clause standing must mirror the test for Establishment Clause standing because there is no "hierarchy of constitutional values" warranting a "sliding scale of

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[3] In *Horne*, the plaintiffs argued that Establishment Clause cases were relevant to show standing. *See* Br. for Appellants, *Nat'l Ass'n for the Advancement of Colored People v. Horne*, at 23 n.5, 626 F. App'x 200 (9th Cir. 2015) (No. 13-17247), 2014 WL 1153838 (arguing that Establishment Clause cases could demonstrate stigmatic injury standing in an equal protection case). Nonetheless, without citation to Establishment Clause cases, the Ninth Circuit straightforwardly applied *Allen*.

standing." True enough, but standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The reason that Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are different. The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."). Accordingly, Establishment Clause injury can occur when a person encounters the Government's endorsement of religion. *See Murray*, 947 F.2d at 151. The same is not true under the Equal Protection Clause: the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *Allen*, 468 U.S. at 757 n.22 ("The stigmatic injury thus requires identification of some concrete interest with respect to which respondents are

personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine."); *Bowlby v. City of Aberdeen*, 681 F.3d 215, 227 (5th Cir. 2012) (noting that an equal protection claim requires proof of unequal treatment).

Second, Plaintiff argues that *Allen* is inapplicable. On Plaintiff's reading, *Allen* does not apply because "the allegation here is that the State has itself acted with a discriminatory purpose in the design of its state flag, that Plaintiff is unavoidably, and frequently, and personally exposed to the state's demeaning and discriminatory message, and that it has impacted him personally in a variety of ways." However, Plaintiff's reading does not comport with *Allen*'s text or its subsequent interpretation. *Allen* held that when plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment. *Allen*, 468 U.S. at 755. That Plaintiff alleges that he personally and deeply feels the impact of Mississippi's state flag, however sincere those allegations are, is irrelevant to *Allen*'s standing analysis unless Plaintiff alleges discriminatory treatment. *See, e.g.*, *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 822 (7th Cir. 2014) (holding that the *Allen* inquiry is unchanged when plaintiffs claimed to be part of small group facing discrimination); *In re U.S. Catholic Conference*, 885 F.2d 1020, 1026 (2d Cir. 1989) (finding that under *Allen* clergy do not have special standing status based on the sincerity of their beliefs); *Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721, 731

(S.D.N.Y. 1997) ("Plaintiffs in this case have not alleged a personal denial of equal treatment, and thus any claim that the Postal Service has denied the plaintiffs equal protection by refusing to put up the Muslim Crescent and Star must be dismissed for want of standing.").

Third, Plaintiff contends that if he does not have standing to challenge Mississippi's flag then no plaintiff would ever have standing to challenge discriminatory government speech. Preliminarily, in cases where the Government engages in discriminatory speech, that speech likely will be coupled with discriminatory treatment.[4] *See, e.g.*, *Allen*, 468 U.S. at 755 (distinguishing *Heckler* because there the stigmatic speech was coupled with discriminatory treatment). In any event, "[t]he assumption that if [Plaintiff has] no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

2. Hostile Workplace and Physical Injury

Plaintiff next argues, in an analogy not presented to the district court, that he has standing because he encounters the flag in his work as a prosecutor and "[i]t is well established that the presence of a Confederate

[4] Moreover, discriminatory government speech would certainly be useful in proving a discriminatory treatment claim, because it loudly speaks to discriminatory purpose.

flag even in a place of private employment, and even less than continuously, can create or contribute to an actionable 'hostile work environment.'" He also contends that, as a result of his exposure to the Mississippi flag, he suffers various physical injuries.

Both arguments suffer the same defect as Plaintiff's stigmatic-injury claim. Plaintiff's exposure to the Mississippi flag in courtrooms where he practices and his alleged physical injuries resulting from that exposure demonstrate that he strongly feels the stigmatic harm flowing from the flag. *Allen* recognized that "[t]here can be no doubt that [stigma] is one of the most serious consequences of discriminatory government action. . . ." *Allen*, 468 U.S. at 755. Nonetheless, *Allen* found that stigma alone was insufficient to satisfy the injury-in-fact requirement. *Id.* Accordingly, under *Allen* and its progeny, stigmatic injury does not transform into injury in fact just because the source of the stigmatic injury is frequently confronted or the stigmatic harm is strongly, sincerely, and severely felt. *See, e.g.*, *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (applying *Allen* even when the Plaintiff argued that he personally suffered harm as a result of the Government's stigmatizing speech); *Harris v. United States*, 447 F. Supp. 2d 208, 212 (D. Conn. 2005) ("However, it is not the seriousness of the harm but its generality that determines whether a federal court is the proper forum for addressing it."). Moreover, analogizing Plaintiff's equal protection claim to a hostile work environment claim fails for the same reason that the Establishment Clause analogy fails: under Title VII, 42

U.S.C. § 2000e *et seq.*, exposure to a hostile work environment alone is the injury; under the Equal Protection Clause it is not. *Compare Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting that Title VII "is not limited to economic or tangible discrimination . . . [but also] includes requiring people to work in a discriminatorily hostile or abusive environment" (internal quotation marks and citations omitted)), *with Allen*, 468 U.S. at 755 (equal protection standing requires more than stigma alone). Accordingly, we conclude that Plaintiff's hostile workplace and physical injury theories are insufficient to plead injury in fact.

3. Harm to Plaintiff's Daughter

Last, Plaintiff alleges in his proposed Fourth Amended Complaint that his daughter is harmed by two Mississippi statutes, which require her to be exposed to the Mississippi flag in school. Section 37-13-5 requires that the Mississippi flag be flown in close proximity to all public schools and that "there shall be given a course of study concerning . . . the flag of the State of Mississippi. The course of study shall include the history of [the] flag and what [it] represent[s] and the proper respect therefor." Miss. Code § 37-13-5(1), (3). Section 37-13-7 requires that "[t]he pledge of allegiance to the Mississippi flag shall be taught in the public schools of this state[.]" Miss. Code § 37-13-7(2). Plaintiff does not allege that either statute has yet violated his daughter's rights; instead, he claims that when she begins school she will "be forced to learn,

adopt, utter or communicate speech which she finds objectionable" in violation of the First Amendment.

The district court rejected this standing theory. It reasoned that Section 37-13-5 does not facially violate the Constitution because it merely requires "children to be taught about the history of the Mississippi flag" and that Section 37-13-7 does not facially violate the Constitution because it "does not require any student to recite the Mississippi pledge." Finding that Plaintiff failed to plead that either statute clearly risked violating his daughter's constitutional rights, the district court concluded that Plaintiff could not show injury. We agree.

The district court properly construed both Mississippi statutes. As always, statutory interpretation begins "with the plain language and structure of the statute." *Coserv Ltd. Liab. Corp. v. Sw. Bell Tel. Co.*, 350 F.3d 482, 486 (5th Cir. 2003). Section 37-13-5 requires that Mississippi students be "given a course of study" concerning the Mississippi flag and be taught "proper respect" for the flag. Miss. Code § 37-13-5(3). Plaintiff argues that the statute mandates that his daughter be taught to "respect" the flag "no matter its origins, no matter the malicious intent of the State in adopting it, and no matter the destructive and demoralizing impact on young minds." We do not agree that the statute requires so much. Instead, the statute demands that children be taught "proper respect" for the flag. "Proper" means "correct" or "marked by suitability, rightness, or appropriateness." Merriam-Webster's Collegiate Dictionary 932 (10th ed. 2002). The words

"correct" or "suitable" imply neither a positive nor a negative level of respect; under a plain reading of the statute all that is required to be taught is the history of the flag and the respect that it is due, whatever that may be. Likewise, Section 37-13-7 does not require that students pledge allegiance to the Mississippi flag. Instead, the statute only requires that the Mississippi pledge be taught in public schools, without mandating that schools teach a particular viewpoint about the pledge. *See* Miss. Code § 37-13-7(2). Accordingly, neither statute requires anything more than that students be taught about the flag and the pledge. The statutes do not facially violate the Constitution. *See, e.g.*, *Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 342 (5th Cir. 1999) (absent constitutional violation, states "have the right to prescribe the academic curricula of their public school systems").

Because neither statute compels the violation of Plaintiff's daughter's rights, Plaintiff's claim boils down to an assertion that Mississippi could, but need not, apply its law in an unconstitutional way. This assertion is too speculative to support standing. *See, e.g.*, *Henderson*, 287 F.3d at 380 (finding that plaintiffs did not have standing to bring a facial challenge when plaintiffs' alleged injury was that a newly created state council might violate the Establishment Clause).

III

We agree with the district court that Plaintiff failed adequately to plead injury in fact and therefore

failed to establish standing. *See Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (en banc) ("If any one of these three elements . . . is absent, plaintiffs have no standing in federal court[.]"). Accordingly, we need not reach causation, redressability, or the political question doctrine.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
NORTHERN DISTRICT

CARLOS E. MOORE — **PLAINTIFF**

V. — **CAUSE NO. 3:16-CV-151-CWR-FKB**

GOVERNOR PHIL BRYANT, ***in his Official Capacity*** — **DEFENDANT**

MEMORANDUM OPINION AND ORDER

(Filed Sep. 8, 2016)

Plaintiff Carlos Moore filed this lawsuit against Governor Phil Bryant challenging the constitutionality of the Mississippi state flag. The flag includes the Confederate battle emblem in the top left corner. Moore alleges that the incorporation of the Confederate battle emblem in the state flag violates the Thirteenth Amendment as well as various clauses of the Fourteenth Amendment.

Before reaching the merits of the case, the Court asked the parties to submit simultaneous briefing on standing and the political question doctrine. The parties did so and presented oral argument on April 12, 2016.[1] After considering the briefing, oral argument, and applicable law, the Court is ready to rule.

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[1] At the hearing, Moore and one of the associates from his firm presented argument on his behalf. A third lawyer was also at

I. Factual and Procedural Background

A. The Parties

Carlos Moore is an African-American attorney and Mississippi native who has lived in the state for most of his life. He resides in Grenada, Mississippi where he operates his own law firm and represents clients in state and federal courts throughout Mississippi.

Governor Phil Bryant, the chief executive officer of the state, is sued in his official capacity. He is statutorily mandated to "see that the laws are faithfully executed."[2]

B. Constitutional Claims

Moore contends that Mississippi's state flag "is tantamount to hateful government speech [which has] a discriminatory intent and disparate impact" on African-Americans, in violation of the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment.[3] He alleges that this hate speech damages him personally along with all other African-American residents of Mississippi,[4] causing him to

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counsel table and advised the Court that he was going to enter his appearance, but he apparently has changed his mind.

[2] Miss. Code Ann. § 7-1-5(c).

[3] Docket No. 7, ¶ 11.

[4] At oral argument, his counsel argued that Moore is among "approximately 600 African-American lawyers who are confronted with state-approved discrimination by the adornment of the flag on a daily basis while attending court." Tr. of Oral Arg. at 5; *see also id.* at 9 ("the flag endorses discrimination against Mr.

suffer physical and emotional injuries, and "incit[ing] private citizens to commit acts of racial violence."[5] Additionally, Moore contends that the Confederate battle emblem is a vestige of slavery prohibited by the Thirteenth Amendment.[6]

To support his allegation that the Confederate battle emblem incites racial violence, Moore points to the June 2015 mass killing of nine African-Americans at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. In addition, he cites a November 2015 incident at a Wal-Mart in Tupelo, Mississippi when a man set off an explosive to protest Wal-Mart's decision to cease the sale of Confederate-themed merchandise. Finally, Moore references a 2014 hate crime at the University of Mississippi where university students draped a noose and the former Georgia state flag – which contained the Confederate battle emblem – around the neck of a statue of James Meredith, the University's first African-American student.[7]

Moore and other African-Americans in both the private and public spheres").

[5] Docket No. 20-1, ¶ 10; Docket No. 7, ¶¶ 11-12. Moore filed this case on behalf of himself; he has not adequately pled or filed any motions that would cause the Court to treat it as a class action on behalf of all African-Americans.

[6] Docket No. 7, ¶ 11.

[7] *See* Factual Basis, *United States v. Edenfield*, No. 3:15-cr-108-MPM-SAA (N.D. Miss.), available at https://www.justice.gov/opa/pr/second-man-pleads-guilty-tying-rope-around-neck-james-meredith-statue-ole-miss-campus; *see also* Information, Docket No. 10, *United States v. Edenfield*, No. 3:15-cr-108-MPM-SAA

Moore argues that the Governor should be enjoined from enforcing state statutes that adopt the flag's design and mandate or allow it to fly on public property.[8]

Although the Governor has not been required to answer these specific allegations, he has filed a motion to dismiss contending that Moore's allegations fail to state a plausible claim for relief.

II. Historical Context

A. The Origin of the Confederate Battle Flag

Moore's claims challenge the constitutionality of the Mississippi state flag; however, his allegations hinge on the Confederate battle emblem contained in the state flag. Thus, the appropriate starting point is the historical landscape which spawned such a divisive emblem.

On January 9, 1861, Mississippi followed South Carolina's lead and became the second state to secede from the Union. Some argue that Mississippi's decision to secede was not at all connected to slavery, and instead assert that it was in response to an overreach of

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(N.D. Miss. Mar. 24, 2016). Plaintiff's complaint incorrectly states that it was a Confederate battle flag.

[8] Docket No. 7, ¶ 14. In his complaint and at oral argument, Moore failed to cite specific state statutes. Based on his allegations and arguments, the Court presumes he seeks to enjoin the enforcement of Miss. Code Ann. § 3-3-15 (display of state flag at public buildings); § 3-3-16 (design of state flag); and § 37-13-5 (display and study of flags at public schools).

the federal government. Those who put forth this narrative need only read Mississippi's Declaration of Secession. It said:

> In the momentous step which our State has taken of dissolving its connection with the government of which we so long formed a part, it is but just that we should declare the prominent reasons which have induced our course.
>
> **Our position is thoroughly identified with the institution of slavery** – the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun. These products have become necessities of the world, and a blow at slavery is a blow at commerce and civilization. That blow has been long aimed at the institution, and was at the point of reaching its consummation. There was no choice left us but submission to the mandates of abolition, or a dissolution of the Union, whose principles had been subverted to work out our ruin.[9]

To put it plainly, Mississippi was so devoted to the subjugation of African-Americans that it sought to

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[9] Mississippi Declaration of Secession, "A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union" (1861), http://docsouth.unc.edu/imls/missconv/missconv.html (emphasis added).

form a new nation predicated upon white supremacy. As Confederate Vice President Alexander H. Stephens stated in March 1861, the "corner-stone" of the Confederacy "rests upon the great truth that the negro is not equal to the white man; that slavery – subordination to the superior race – is his natural and normal condition. This, our new government, is the first in the history of the world, based upon this great physical, philosophical, and moral truth."[10] Although America's Constitution initially fell short of its promise to treat all people equally,[11] the Constitution of the Confederate States of America was a definitive step backward. It "overtly protected 'Negro slavery' "[12] by codifying the

[10] Alexander Stephens, Vice President of Confederate States of America, Cornerstone Speech in Savannah Georgia (Mar. 21, 1861), http://www.ucs.louisiana.edu/~ras2777/amgov/stephens.html.

[11] "While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws." Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Ass'n (May 6, 1987) [hereinafter *Marshall Bicentennial Speech*].

[12] Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 Temp. L. Rev. 539, 543 (2002) (citation omitted).

exclusion of people of African descent from civil protections in perpetuity.[13] In short, a core tenet of the Confederate Constitution "was the interminable white man's right to own black slaves."[14]

At his inauguration in February 1861, Confederate President Jefferson Davis said, "[t]he time for compromise has now passed, and the South is determined to maintain her position, and make all who oppose her smell Southern powder and feel Southern steel."[15] On April 12, 1861, the Civil War began at Fort Sumter in South Carolina. A bloody four years followed, during which more American soldiers died than in any war before or since.[16] In reflection of the war, President Lincoln noted: "All dreaded it, all sought to avert it. . . . Both parties deprecated war but one of them would make war rather than let the nation survive and the other would accept war rather than let it perish, and the war came."[17]

The banner commonly referred to as the "Confederate flag" was not the flag of the Confederacy; it was

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[13] Confederate States of America Const. art. I, § 9(4) ("No . . . law denying or impairing the right of property in Negro slaves shall be passed").

[14] Tsesis, *supra*, at 557.

[15] Jefferson Davis, Confederate States of America Inaugural Speech (Feb. 16, 1861).

[16] *See* Megan Crigger and Laura Santhanam, *How Many Americans Have Died in U.S. Wars?*, PBS News Hour, May 24, 2015; Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. Times, Apr. 2, 2012.

[17] President Abraham Lincoln, Second Inaugural Address (March 4, 1865), http://avalon.law.yale.edu/19th_century/lincoln2.asp.

adopted primarily for use by Confederate armies during battle.[18] While the battle flag never flew as the official pennant for the Confederacy,[19] it nevertheless is the most recognized symbol of the Confederacy.

B. Keeping the Spirit of the Confederacy Alive

Upon the readmission of the Confederate states to the Union, the South committed itself to two "new" causes – the continuation of a racial caste system and the endurance of Antebellum culture. During Reconstruction, organizations like the Ku Klux Klan, Knights of the White Camellias, and the White League sought to preserve white supremacy by using intimidation and violence to terrorize African-Americans.[20]

In 1866, there were riots in Memphis and New Orleans; more than 30 African-Americans were murdered in each melee.[21] In 1874, 29 African-Americans were

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[18] E. Merton Coulter, *The Flags of the Confederacy*, 37 Georgia Historical Quarterly, Sept. 1953, at 188, 188.

[19] The Confederacy had a number of official flags. According to one source, the flag adopted by General Robert E. Lee was incorporated into the design of the Confederacy's final official flag, first adopted in 1863. Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 Seton Hall L. Rev. 897, 898 n.3 (1998).

[20] Derrick Bell, Race, Racism, and American Law 229-30 (2008); *see also* Charles Reagan Wilson, Baptized in Blood: The Religion of the Lost Cause 1865-1920 110-12 (1980).

[21] Howard Zinn, A People's History of the United States 203 (2001); *see also* A. Leon Higginbotham, Shades of Freedom: Racial Politics and Presumptions of the American Legal Process, 88-89

"massacre[d]" in Vicksburg, according to Congressional investigators.[22] The next year, "amidst rumors of an African-American plot to storm the town," the Mayor of Clinton, Mississippi gathered a white "paramilitary unit" which "hunted" and killed an estimated 30 to 50 African-Americans.[23] Violence also broke out in Meridian, Austin, and Yazoo City, among many other towns in Mississippi.[24] The death and destruction, moreover, were not confined to the borders of the Southern states.[25] Racial violence continued through the 1870s as local Klan groups lynched, beat, burned, and raped

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(1996) (describing the brutal attack by Ku Klux Klan members on a group of African-American Republicans, killing at least 60 people).

[22] Nicholas Lemann, Redemption 88, 91 (2006). In Lemann's telling, the Congressional investigating committee claimed "that what the whites preferred to see as the suppression of a Negro uprising was actually cover for a program of officially encouraged, random, unpunished violence against innocent Negroes with the overall political aim of disenfranchisement." *Id.* at 98.

[23] Melissa Janczewski Jones, *The Clinton Riot of 1875: From Riot to Massacre*, Mississippi History Now, Sept. 2015.

[24] Lemann, *supra*, at 71, 75, 109, 112.

[25] *See* Bell, *supra*, at 230 (noting a riot after the turn of the century in East St. Louis, Illinois where the estimates of African-Americans killed ranged from 40-200, and nearly 6,000 were forced to leave their homes); Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (2015) (documenting 4,075 lynchings of African-Americans in 12 Southern states between 1877 and 1950 – at least 800 more lynchings in these states than previously reported); *see also* Kenneth O'Reilly, Nixon's Piano: Presidents and Racial Politics from Washington to Clinton 91-92, 122 (1995) (noting riots in East St. Louis, Chicago, Washington, D.C., Philadelphia, and Sikeston, Missouri).

African-Americans.[26] Despite the Klan's record of violence, "Southerners romanticized it as a chivalrous extension of the Confederacy."[27]

Alongside the terror permeating the South, there was a prominent movement to ensure the "proper" historical recollection of the Civil War – that the Southern cause had been just and necessary. This campaign was

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[26] Zinn, *supra*, at 203. Klan membership declined with the end of Reconstruction, but rebounded in the 1920s, when it boasted over 4 million members. *Id.* at 382.

To be clear, these organized groups were not the only perpetrators of this terror. "[L]ynchings and whippings, . . . arson and random shooting[s], were just as frequently carried out by ad hoc mobs or even individuals." Bell, *supra*, at 230; *see generally* Ralph Ginzburg, One Hundred Years of Lynching (1988) (reprinting hundreds of newspaper articles chronicling lynchings throughout the United States); O'Reilly, *supra*, at 122 (noting nearly 4,000 lynchings in the United States between 1889 and 1941); Mark V. Tushnet, Thurgood Marshall: His Speeches, Writing, Argument, Opinions and Reminiscences ix (2001) (writing that between the 1880s and the 1930s more than 4,700 persons were lynched). One of the most pernicious things about these killings is that they were public spectacles, open to the community at large, with women and children as gleeful participants. *See* Manfred Berg, Popular Justice: A History of Lynching in America 91 (2011) ("During the decades between the end of Reconstruction and the 1920s 'spectacle lynchings' before large crowds, often involving drawn out torture, mutilation, burning, and the dismemberment of the victim's body, occurred regularly in the New South); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 Yale J. L. & Feminism 31, 36-37 (1996) ("Men constituted the majority of the actual lynchers, . . . women and children took an active role in the murders by cheering on the lynchers, providing fuel for the execution pyre, and scavenging for souvenirs after the lynchings.").

[27] Wilson, *supra*, at 111.

taken up by Confederate veterans and social groups.[28] Women's auxiliary groups initially organized locally, but evolved into an influential national organization called the United Daughters of the Confederacy (UDC).[29] By 1912, the UDC had 45,000 members spread across over 800 chapters.[30] It raised funds for Confederate monuments, promoted the celebration of Confederate holidays, maintained Confederate museums, and established "Children of the Confederacy" educational programs.[31] Children in these programs learned history in the form of catechisms (a series of fixed questions and answers used for instruction), a

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[28] Gaines M. Foster, Ghosts of the Confederacy 161-62 (1987).

[29] *Id.* at 172. The UDC was founded in 1894 and is still in existence today with active chapters in over 30 states. *See* United Daughters of the Confederacy, http://www.hqudc.org/history-of-the-united-daughters-of-the-confederacy/. There was also a reshaping of the national memory through film. "*The Birth of a Nation*, in the judgment of more than one historian of the period, was uniquely responsible for encoding the white South's version of Reconstruction on the DNA of several generations of Americans." David L. Lewis, W.E.B. DuBois: The Fight for Equality and the American Century, 1919-1963, 86-87 (2000). That film merited a private screening at the White House where all of President Woodrow Wilson's cabinet members and their families were encouraged to attend. O'Reilly, *supra*, at 90.

[30] Foster, *supra*, at 172.

[31] *Id.* at 108, 116, 172. Children of the Confederacy learned a narrow version of Southern history, often from textbooks authored or explicitly approved by UDC members. Amy Lynn Heyse, *The Rhetoric of Memory-Making: Lessons from the UDC's Catechisms for Children*, 38 Rhetoric Society Q., Fall 2008, at 408, 409.

method typically reserved for teaching religious doctrine.[32] As one historian noted, "to the children memorizing the UDC's catechisms, not only did the correct answers come from the truth-telling chapter leaders, but more importantly, they came straight from God."[33]

What the South lost on the battlefield, it sought to recover in the collective memory of the next generation. "We have pledged ourselves to see that the truth in history shall be taught," proclaimed UDC officer Kate Noland Garnett, and there "shall be no doubt in the minds of future generations as to the causes of the war, and why Southern men were forced to take up arms to defend their homes from the invading North."[34]

The UDC also defended the KKK. One set of catechisms ended with a lesson teaching children that the Klan "protected whites from negro rule."[35] At a speech at the 1913 UDC Convention, UDC Historian General Mildred Rutherford stated, "[t]he Ku Klux Klan was an absolute necessity in the South at this time. This Order was not composed of 'riff raff' as has been represented in history, but of the very flower of Southern manhood.

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[32] Heyse, *supra*, at 419.

[33] *Id.*

[34] Garnett was the Chair of the History Committee of UDC's Virginia Chapter in 1907. Fred Arthur Bailey, "*Play the Bitter Loser's Game": Free Speech and the Lost Cause in Old Dominion*, 103 Va. Mag. of Hist. & Biography, Apr. 1995, at 237, 237.

[35] Heyse, *supra*, at 428.

The chivalry of the South demanded protection for the women and children of the South."[36]

How the War would be remembered continued to be a point of contention between Union and Confederate veterans. At an event in 1900, Union veteran Albert D. Shaw argued that "the keeping alive of sectional teachings as to the justice and rights of the cause of the South, in the hearts of the children, is all out of order, unwise, unjust, and utterly opposed to the bond by which the great chieftain Lee solemnly bound the cause of the South in his final surrender."[37] Confederate veteran John B. Gordon responded,

> In the name of the future of the manhood of the South I protest. What are we to teach them? If we cannot teach them that their fathers were right, it follows that these Southern children must be taught that they were wrong. Are we ready for that? For one I am not ready! I never will be ready to have my children taught I was wrong, or that the cause of my people was unjust and unholy.[38]

Even into the 20th century, Southerners continued to defend secession and their supposed God-ordained supremacy. In 1904, Mississippi Congressman and

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[36] Mildred Lewis Rutherford, Four Addresses 39 (1916). Rutherford was the Historian General of the UDC from 1911 to 1916.

[37] Steven E. Sodergren, "*The Great Weight of Responsibility": The Struggle Over History and Memory in Confederate Veteran Magazine*, Southern Cultures, Fall 2013, at 26, 27.

[38] *Id.*

later United States Senator John Sharp Williams offered the following reason for the war: "This other thing for which we fought was the supremacy of the white man's civilization in the country which he proudly claimed as his own; 'in the land which the Lord his God had given him;' founded upon the white man's code of ethics, in sympathy with the white man's traditions and ideals."[39]

Another piece of the South's revisionist campaign was the movement to construct Confederate monuments throughout the country.[40] The construction of these memorials happened in waves connected to the racial climate of the South.[41] The first wave occurred at the turn of the 20th century and coincided with the rise of Jim Crow.[42] The next significant wave occurred

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[39] *Confederate Veteran* was the publication of the United Confederate Veterans (UCV). John Sharp Williams, *Issues of the War Discussed*, 12 Confederate Veteran, Nov. 1904, at 517, 517. The UCV, composed of thousands of Confederate veterans from all classes, was viewed as the companion organization to the UDC. It also held meetings and reunions, which were premiere social events in which women and children attended and participated. The 1894 reunion in Birmingham, for example, drew more than 20,000 attendees to its Confederate battle emblem-adorned festivities. Gaines, *supra*, at 133.

[40] John J. Winberry, "*Lest we Forget" The Confederate Monument and the Southern Townscape*, 55 Southeastern Geographer, Spring 2015, at 19, 20.

[41] *Id.* at 23.

[42] Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy*, at 9 (2016).

in conjunction with the modern Civil Rights Movement.[43] Between schools, public buildings, state holidays, monuments, and roads, Mississippi's landscape became inundated with memorials to the Confederacy.[44]

In the 1940s, the Confederate battle flag became the emblem of the States' Rights Democratic Party, often referred to as the Dixiecrats.[45] What the Dixiecrat Party lacked in electoral votes, it made up for by energizing the next generation of segregationists.[46] Student delegates entered the 1948 Democratic National Convention carrying images of the Confederacy.[47] Dixiecrat opposition to the budding Civil Rights Movement breathed new life into the Confederate battle emblem.[48]

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[43] *Id.*

[44] *Id.* at 24-26.

[45] "The Dixiecrats were a reactionary protest organization comprised of economically conservative, segregationist southern Democrats who sought to reclaim their former prestige and ideological prominence in a party that had moved away from them." Kari Frederickson, The Dixiecrat Revolt and the End of the Solid South 5 (2001).

[46] Students from Birmingham Southern marched onto the Convention floor behind a larger-than-life photo of General Lee. University of Mississippi students entered the arena waving the Confederate battle flag. Staff Post Writers, *Around the Hall – Wallace Pickets Greet Delegates*, Birmingham Post, July 17, 1948.

[47] Frederickson, *supra*, at 136.

[48] *Id.* at 136-37.

Inspired by the Dixiecrats, after the Convention, University of Mississippi students adopted the Confederate battle emblem as a prominent symbol, synonymous with their school spirit. It remained on campus for decades.[49]

In this era, States also hoisted the Confederate battle emblem in symbolic defiance of changing laws that threatened Jim Crow. In 1956, Georgia redesigned its flag to include the Confederate battle emblem, and in 1962, South Carolina placed the Confederate battle emblem atop its State Capitol.[50] Alabama followed suit

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[49] *See* James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L.J. 505, 505 n.6 (1991). Actually referring to it as a *prominent* image is an understatement. It was the *predominant* symbol. Among other things, the university "distributed small Confederate flags before each football game as fans entered into the stadium and cheerleaders carried large flags down on the field." Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 Tul. L. Rev. 1411, 1416 (1992). The scene is described in the 1981 University of Mississippi yearbook in this way: "amidst a sea of Rebel flags waving to strains of *Dixie*, these Confederate Soldiers fight for the Gallant Cause." *Id.*

[50] Forman, *supra*, at 505. The South Carolina Legislature had first hung the flag in the House Chambers and then in the Senate Chambers. We do not have to guess at the meaning it ascribed to the flag. During a 1960 speech celebrating South Carolina's secession centennial, the legislator instrumental in raising the flag stood before the State Senate and heaped praise upon the Ku Klux Klan. "We honor them and we are proud of them," he declared. He went on to challenge the members to "dismiss from your consideration any little-sister sob stories about the South's brutality to the slave and its inhuman treatment of captive and fugitive slaves." L. Darnell Weeden, *How to Establish Flying the*

in 1963, when Governor George Wallace raised the emblem at the state capitol as a visual reminder of his "Segregation Forever" campaign.[51]

The centennial of the Civil War gave Southern states yet another reason to commemorate the Confederacy. By early 1960, every Southern state had a commission to coordinate local centennial events.[52] Mississippi's commission included state agencies and civic organizations, and it received $200,000 in state appropriations to support its efforts.[53] Governor Ross Barnett noted during a speech to the delegates of the Confederate States Civil War Centennial Conference that everyone was welcome to come to Mississippi to celebrate the centennial – except the freedom riders.[54] In Jackson, Governor Barnett led a Secession Day parade as he rode in a horse-drawn carriage. Hundreds of white Mississippians dressed in Confederate uniforms marched behind a large Confederate battle flag borrowed from the University of Mississippi.[55]

Confederate Flag with the State as Sponsor Violates the Equal Protection Clause, 34 Akron L. Rev. 521, 531 (2001).

[51] Forman, *supra*, at 505.

[52] Robert Cook, (*Un)Furl That Banner: The Response of White Southerners to the Civil War Centennial of 1961-1965*, 68 J. of Southern Hist., Nov. 2002, at 879, 885.

[53] *Id.* $200,000 in 1960 is equivalent to $1,625,993.24 today. *See* http://www.usinflationcalculator.com/ (last viewed on Aug. 28, 2016).

[54] Cook, *supra*, at 899.

[55] *Id.* at 893. One writer described this battle flag as the "world's largest, . . . stretch[ing] from one side of Capitol Street to

The Confederate battle emblem's meaning has not changed much in the intervening decades. It should go without saying that the emblem has been used time and time again in the Deep South, especially in Mississippi, to express opposition to racial equality. Persons who have engaged in racial oppression have draped themselves in that banner while carrying out their mission to intimidate or do harm.

C. The Mississippi State Flag

1. 1890 Constitutional Convention and Adoption of the State Flag

Now, let us turn to Mississippi's banner. In 1890, Mississippians held a Constitutional Convention. Its purpose was clear. "Our chief duty when we meet in Convention, is to devise such measures, consistent with the Constitution of the United States, as will enable us to maintain a home government, under the control of the white people of the State," said State Senator Zachariah George.[56] In other words, the Convention was not intended to ensure the proper implementation of the post-Civil War Constitutional Amendments, but rather to permit "white people" to

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the other." Robert S. McElvaine, *Mississippi Grays*, N.Y. Times, Apr. 13, 2011.

[56] James P. Coleman, *The Mississippi Constitution of 1890 and the Final Decade of the Nineteenth Century*, in A History of Mississippi 8 (Richard Aubrey McLemore, ed., University and College Press of Mississippi) (1973).

take back their state from the multi-racial coalition which had governed Mississippi after the War.[57]

During the Convention, delegates adopted voting laws that imposed landownership, poll tax, and literacy requirements, and excluded persons with certain criminal convictions.[58] These voting restrictions guaranteed the exclusion of African-Americans from the electoral process; Nicholas Lemann concluded that there was only *one* "Mississippi election in the century following emancipation in which there was truly free Negro voting."[59] It was not until the passage, implementation, and enforcement of the Voting Rights Act of 1965, a law which has been described as "the greatest civil rights legislation since Reconstruction," that some semblance of order was restored.[60]

Against this backdrop of legalized segregation, the current Mississippi state flag was adopted in 1894.[61] Senator E.N. Scudder is credited with its design. He

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[57] *See* Lemann, *supra*, at 81 (describing the violence of the 1870s as "terrorism in service of a coherent cause, the overthrow of Reconstruction").

[58] Coleman, *supra*, at 14.

[59] Lemann, *supra*, at 101. As one editor of a Mississippi newspaper put it, "[t]he negroes are as far from participating in governmental affairs in this state as though they were [in] a colony in Africa." Gordon A. Martin, Jr., Count Them One by One: Black Mississippians Fighting for the Right to Vote 8 (2010) (citation omitted).

[60] Martin, *supra*, at ix.

[61] *Mississippi Div. of United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches*, 774 So.2d 388, 391 (Miss. 2000).

"loved the memory of the valor and courage of those brave men who wore the grey," his daughter later remembered.[62] "He told me that it was a simple matter for him to design the flag because he wanted to perpetuate in a legal and lasting way that dear battle flag under which so many of our people had so gloriously fought."[63]

The flag adopted during that special session has remained, either officially or unofficially, the state banner.

2. Legal Challenges to the State Flag and the 2001 Referendum

This is not the first time parties have sought to litigate the constitutionality of the Mississippi flag.[64] The most notable of those challenges is the 1993 case brought by the Mississippi State Conference of NAACP Branches; the Jackson, Mississippi NAACP Chapter; and 81 individual plaintiffs, *Mississippi Div.*

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[62] David G. Sansing, *Flags Over Mississippi*, Mississippi History Now, Aug. 2000. Her quote is a telling example of her era's collective historical myopia.

[63] *Id.*

[64] *See Daniels v. Harrison Cnty. Bd. of Supervisors*, 722 So.2d 136 (Miss. 1998) (challenging the flying of the Confederate battle flag on beaches and public property within the county); *see also United Sons of Confederate Veterans*, 774 So.2d at 389 (seeking injunctive relief to enjoin future purchase, display, and maintenance of state flag on public property); *Briggs v. State of Mississippi*, 331 F.3d 499 (5th Cir. 2003) (alleging that the state flag which includes the St. Andrew's Cross violates the Establishment Clause).

of United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches.[65] In that case, the Mississippi Supreme Court concluded that the 1894 statute creating the state flag had technically been repealed in 1906 when the legislature voted to repeal all statutes not brought forward as part of the Mississippi Code of 1906.[66] The Court, however, determined that it was the responsibility of the legislative and executive branches to keep or change the state flag.[67]

Following the Supreme Court's decision, Governor Ronnie Musgrove appointed a special commission to examine the issue, determine an alternate design, and make a recommendation to the legislature.[68] The commission convened public hearings and heard from citizens across the state.

Emotions ran high during the hearings. At the Meridian forum, those who opposed the state flag were called "scalawags who want to spit on the graves of my ancestors."[69] One person supported changing the flag

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[65] 774 So.2d 388, 391 (Miss. 2000). The case was originally filed against then-Governor Kirk Fordice, and the court permitted the United Sons of Confederate Veterans to intervene. The plaintiffs' claims were dismissed, the NAACP appealed, and the case was remanded to determine whether sanctions were appropriate. In 1999, the Mississippi Supreme Court reinstated the case based solely on a claim under the Mississippi Constitution. *Id.* at 389.

[66] *Id.* at 391.

[67] *Id.* at 392.

[68] Jere Nash and Andy Taggart, Mississippi Politics: The Struggle for Power, 1976-2006, 280 (2006).

[69] *Id.*

by saying: "Some traditions are made to be kept. Some need to be thrown away."[70] Another citizen responded to a poll concerning voters' attitudes with this: "I don't think we should change something we hold sacred to make a point to (Northerners). I don't believe in turning to what the colored people want. We've got our rights too."[71]

In February 2001, the Mississippi legislature set a special election for April 17, 2001, where voters had the option of selecting the current flag or an alternate design as the state's official emblem.[72] The special election results substantially favored the 1894 flag, with 65% voting to keep it and 35% favoring the alternate design.[73] It once again was the State's official banner.

3. Charleston Shooting

Although the Confederate battle emblem has been debated for decades, it was the June 2015 mass murder of nine African-Americans during Wednesday night prayer and Bible study at Charleston's Emanuel AME Church that forced the country's most recent reevaluation. Shortly after the massacre, a photo emerged of

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[70] *Id.*

[71] *Id.* at 281.

[72] *See* Miss. Laws 2001, HB 524.

[73] Mississippi Official and Statistical Register, 2000-2004, 657-58 (2001); *see also* David Firestone, *Mississippi Votes by Wide Margin to Keep State Flag That Includes Confederate Emblem*, N.Y. Times, Apr. 18, 2001.

the alleged shooter holding the Confederate battle emblem. The media also reported that the shooter had intended to start a "race war."[74]

The massacre had the opposite effect. Shocked and appalled, Americans came together with renewed appreciation for the racial divisiveness of the Confederate battle emblem. South Carolina and Alabama took action to remove the racially-charged symbol from their respective state houses.[75] Flag manufacturers announced they were going to discontinue the production of the emblem.[76] Several national retailers followed suit and announced they would stop selling Confederate battle emblem merchandise.[77] The vicious slaughter in Charleston had shifted the tide. Regardless of whether some viewed the flag as a way to honor their heritage and fallen ancestors, its connection to racial hatred and white supremacy could no longer be ignored.

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[74] Janell Ross, *Dylann Roof reportedly wanted a race war. How many Americans sympathize?*, Wash. Post, June 19, 2015.

[75] *See* Stephanie McCrummen and Elahe Izadi, *Confederate Flag Comes Down on South Carolina's Statehouse Grounds*, Wash. Post, July 10, 2015; Brian Lyman, *Bentley Orders Removal of Confederate Flags*, Montgomery Advertiser, June 24, 2015.

[76] Edward McAllister, *Major U.S. flag makers to stop making Confederate flags*, Reuters, June 24, 2015.

[77] *See* MJ Lee, *Walmart, Amazon, Sears, and eBay to Stop Selling Confederate Flag Merchandise*, CNN Politics, June 24, 2015; Susanna Kim and Rebecca Jarvis, *Amazon, Etsy to Ban Confederate Flag Merchandise, Joining Walmart, eBay*, ABC News, June 23, 2015.

Today, Mississippi stands alone. It is the *only* state to include the notorious "stars and bars" in its official flag.[78]

4. Mississippi's Response

While waiting on the State to act on the flag, Mississippi's cities, counties, and universities took action. They did not want to stand alone. Instead, they understood the divisiveness of the flag and voted to remove it from their property.[79]

Today, all but one of Mississippi's public universities – including traditionally white institutions like the University of Mississippi, the University of Southern Mississippi, and Mississippi State University –

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[78] Because it includes the Confederate emblem, the Mississippi flag has been removed from display in other parts of the country. *See* Deborah Barfield Berry, *Confederate emblem removed at U.S. Capitol*, USA Today, Apr. 21, 2016; Bracey Harris, *Mississippi flag removed from Avenue of the States at DNC*, The Clarion-Ledger, July 26, 2016; Gordon Friedman, *Mississippi flag removed from Oregon Capitol*, Statesman Journal, Mar. 11, 2016.

[79] Associated Press, *Mississippi county will stop flying state flag*, AL.com, Jan. 6, 2016; Associated Press, *Mississippi Flag Banned in Leflore County*, WKRG.com, Aug. 15, 2015; Vershal Hogan, *State Flags taken down at Adams County buildings*, Apr. 5, 2016; Emanuella Grinberg, *Battle over Confederate symbols continues with Mississippi state flag*, CNN, June 19, 2016; *Oxford, Greenwood Removing Miss. Flag from City Property*, Jackson Free Press, Aug. 20, 2015; Donesha Aldridge, *Yazoo City Officials Removing Mississippi State Flag From City Buildings*, WJTV, Sept. 2, 2015 (incidentally, Yazoo County is the home of Senator John Sharp Williams, and he maintained his law practice in Yazoo City); Campbell Robertson, *Mississippi Flag, a Rebel Holdout, Is in a New Fight*, N.Y. Times, Nov. 7, 2015.

have removed the state flag from their campuses.[80] Considering the University of Mississippi's long history with the Confederate battle emblem, it is noteworthy that students and faculty recognized its impact and voted to remove it.[81]

In Tupelo, racial tension has continued to swell following the shooting of an unarmed African-American man by a police officer.[82] During a recent public rally, the city lowered the flag because officials believed it aggravated racial discord.[83] On a separate occasion, Mayor Jason Shelton removed it from the city council chambers during a meeting. "You know there is no question that the state flag is offensive to a very large segment of the population," he commented.[84] "The people in the room today were universally opposed to the current state flag. I thought it was a gesture of respect to the people in the room today."[85]

Religious entities in Mississippi have also revisited the issue. The Episcopal Diocese of Mississippi

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[80] Grinberg, *supra*; Vanessa Gillon, *State Flag Quietly Removed from Campus*, The Reflector, Aug. 29, 2016 (describing how Mississippi State University has also removed the flag from campus, but has been less public about its removal).

[81] Eliott C. McLaughlin, *Ole Miss Removes State Flag from Campus*, CNN, Oct. 26, 2015.

[82] Anna Wolfe, *Shooting in Tupelo: A Mississippi City Tries to Heal*, The Clarion-Ledger, July 20, 2016.

[83] *Id.*

[84] Katelyn Patterson, *State Flag Removed from Tupelo Council Chambers*, WTVA, Aug. 11, 2016.

[85] *Id.*

urged state leaders to adopt a flag that "represents, unites, and respects" all Mississippians.[86] The Mississippi United Methodist Convention approved a resolution urging state leaders to change the state flag.[87] At the national level, the Southern Baptist Convention passed a resolution calling "brothers and sisters in Christ to discontinue the display of the Confederate battle flag as a sign of solidarity of the whole Body of Christ, including our African-American brothers and sisters."[88] To place the importance of its decision in context: the Southern Baptists formed in 1845 because of disagreements with the larger Baptist denomination regarding slavery.[89]

When the national discussion about the Confederate battle emblem came to Mississippi in 2015, Mississippi's highest political leaders also weighed in. Governor Bryant stated, "[a] vast majority of Mississippians voted to keep the state's flag, and I don't believe the Mississippi Legislature will act to supersede

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[86] Bob Burks, *Mississippi Episcopal Diocese Supports Changing State Flag*, Mississippi News Now, Feb. 19, 2016.

[87] Sarah Fowler, *Southern Baptist Convention Opposed Confederate Battle Flag*, The Clarion-Ledger, June 16, 2016.

[88] *Id.* During a recent hearing on another case, the Court heard testimony that Southern Baptists are the largest Christian denomination in Mississippi. *See Tr. of Mot. Hr'g.*, at 16, June 24, 2016, Cause No. 3:16-cv-417.

[89] Glen Jeansonne, *Southern Baptists Attitudes Towards Slavery 1845-1861*, 55 Georgia Hist. Q., Winter 1971, at 510, 510.

the will of the people on this issue."[90] Philip Gunn, Speaker of the Mississippi House of Representatives, however, came out in support of changing the flag. "We must always remember our past, but that does not mean we must let it define us," he wrote. "As a Christian, I believe our state's flag has become a point of offense that needs to be removed. We need to begin having conversations about changing Mississippi's flag."[91] As Gunn suggested that conversations were welcome, Lieutenant Governor Tate Reeves, who presides over the Mississippi Senate, was of the view that those discussions had occurred 14 years ago, and added that the flag issue should not be decided "by outsiders or media elites or politicians in a back room."[92]

January 2016 came. The Mississippi legislature convened with an opportunity to change the state flag. And to that end, at least 16 bills were introduced regarding the flag. The bills varied, yet generally fell into three categories: proposing a new state flag design;[93]

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[90] Associated Press, *Mississippi Governor: State Flag Not Likely to Change*, Jackson Free Press, June 23, 2015. The Governor declined to call a special session to change the flag. *See* Bobby Harrison, *Bryant Rejects Call for Special Session about State Flag*, Daily Journal, June 26, 2015.

[91] Nick Gass, *Mississippi House Speaker: Flag 'has Become a Point of Offense*,' Politico, June 23, 2015.

[92] Press Release, *Lt. Gov. Reeves: Fate of State Flag Will 'Be Decided by the People of Mississippi*,' Jackson Free Press, June 23, 2015.

[93] *See* Miss. Laws 2016, HB 1538; Miss. Laws 2016, HB 1540; Miss. Laws 2016, HB 1547; Miss. Laws 2016, HB 1548; Miss. Laws 2016, HB 1551; Miss. Laws 2016, HB 1553; Miss. Laws 2016, SB 2148.

creating a commission to recommend a new flag design or proposing a referendum;[94] or requiring public universities and municipalities to display the flag or suffer financial penalties.[95] Despite their differences, they suffered the same fate – they all died in committee, unable to clear even the first hurdle of the legislative process.[96] Thus, when sine die came, the stars and bars continued to wave.

It was in February 2016, the month designated as Black History Month, that Governor Bryant declared

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[94] *See* Miss. Laws 2016, HB 1539; Miss. Laws 2016, HB 1544; Miss. Laws 2016, HB 1545; Miss. Laws 2016, HB 1552; Miss. Laws 2016, SB 2147.

[95] For instance, one bill would have required state, county, and municipal offices, as well as public colleges and universities, to display the flag or else suffer a $2,500 per day penalty. *See* Miss. Laws 2016, HB 1546; *see also* Miss. Laws 2016, HB 1542; Miss. Laws 2016, HB 1543; Miss. Laws 2016, HB 1549; Miss. Laws 2016, HB 1550; and Miss. Laws 2016, SB 2487. Presumably some of these bills were introduced in response to state universities, cities, and counties taking unilateral action to remove the state flag. *See* Singer & Singer, Statutes and Statutory Construction § 49:3 (7th ed. 2014) ("courts generally turn to a law's pre-enactment history to discover its purpose, or object, or mischief at which it was aimed, when the statute's language is inadequate to reveal legislative intent.").

[96] Arielle Dreher, *All Flag Bills Die; House Speaker on State Flag: 'I have not Wavered,'* Jackson Free Press, Feb. 23, 2016. Since Mississippi does not maintain legislative history, it is not known whether any of these bills were even openly discussed during committee meetings. The inaction is remarkable since Speaker Gunn was in perhaps the best position to lead a legislative conversation on this issue. It is also noteworthy that his motivation for changing the flag, his Christian faith, inspired him to author *and pass* a "religious liberties" bill in 2016 (HB 1523).

that April would be celebrated as Confederate Heritage Month.[97] This combination of legislative inaction and executive decree motivated Moore to file this suit.[98]

After the session, Speaker Gunn expressed his disappointment that action was not taken on the state flag.[99] At this summer's Neshoba County Fair, "Mississippi's Giant House Party,"[100] Governor Bryant concurred. "I think this November would have been a great opportunity (for people to vote on the state flag); we would have had more people turning out than almost any election," he said. "I'm sorry that we don't

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[97] Jacob Threadgill, *Mississippi Declares April Confederate Heritage Month*, The Clarion-Ledger, Feb. 25, 2016.

[98] At oral argument, Moore explained that he "filed this lawsuit in February shortly after the governor announced Confederate Heritage Month in the month of February. . . . He could have declared Confederate Heritage Month in the month of March. He could have done it on April the 1st. But to do it in February was the straw that broke the camel's back. I had enough." Tr. of Oral Arg. at 86-87.

[99] R.L. Nave and Adam Ganucheau, *Gunn, Reeves Tout Religious Freedom Bill, Tax Cuts*, Mississippi Today, Apr. 21, 2016.

[100] For decades, the Neshoba County Fair has been Mississippi's premiere political event; it is where state and national politicians have taken to the stage to sway voters. When Ronald Reagan wanted to win over the rural white vote, he became the first presidential candidate to speak at the Fair. Nash & Taggart, *supra*, at 119. Then in 1995, gubernatorial candidates Dick Molpus and Kirk Fordice faced off at the Neshoba County Fair in what came to be known as the "Great Debate." *Id.* at 252-53.

have it on the ballot, and the people's voices won't be heard."[101]

III. Discussion

The Court, acting *sua sponte*, ordered the parties to brief two procedural issues – standing and the political question doctrine. Finding that standing is the controlling question, the Court will limit its analysis to this single issue.

Article III of the Constitution does not grant federal courts unfettered power to consider any issue. Instead, the authority of the federal courts extends only to cases and controversies.[102] "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[103]

To demonstrate a case or controversy, a plaintiff, "based on [his] complaint, must establish that [he has]

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[101] Arielle Dreher, *Bryant on State Flag: 'I'm Sorry We Don't Have it on the Ballot,'* Jackson Free Press, Aug. 1, 2016. The Governor's disappointment is striking, especially since he possesses the sole authority to remedy the fact that the "people's voices won't be heard." He could have called a special session during the regular session to revive the bills that died in committee, or even called the legislators back to Jackson after the session ended, as he had to do in June 2016 to address a budget issue. *See* Miss Const. art. 5, § 121.

[102] *See* U.S. Const. art. III, § 2.

[103] *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation and quotation marks omitted).

standing to sue."[104] The Article III standing requirement, "which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."[105]

It is well-established that standing requires the plaintiff to demonstrate three elements: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury and the conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable judicial decision.[106] "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[107]

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately

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[104] *Id.* (citation omitted).

[105] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (citations omitted).

[106] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[107] *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

> appear from all materials of record, the complaint must be dismissed.[108]

In other words, courts may dismiss due to lack of subject matter jurisdiction on any of the following bases: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[109]

Because standing is a jurisdictional issue, the Court may act on its own motion and it must dismiss where subject matter jurisdiction is lacking.[110]

A. Injury in Fact

To demonstrate an injury, the plaintiff must suffer "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[111]

An injury is particularized if it "affect[s] the plaintiff in a personal and individual way."[112] To meet the concreteness requirement, an injury must be "real, and

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[108] *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (citation omitted).

[109] *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

[110] *See* Fed. R. Civ. P. 12(h)(3). The parties submitted multiple filings in response to the Court's order, and the Court will consider all pleadings in the record.

[111] *Lujan*, 504 U.S. at 560 (citation and quotation marks omitted).

[112] *Id.* at 560 n. 1.

not abstract."[113] "Concreteness, therefore, is quite different from particularization."[114] Intangible injuries can meet the concreteness requirement.[115]

To demonstrate an actual or imminent injury, "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct."[116] "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending."[117]

In his third amended complaint, Moore contends that the state flag violates his Fourteenth Amendment rights because it (1) makes him fear for his safety; (2) denies him equal treatment and dignity under the law; and (3) causes high blood pressure, anxiety, sleep disturbances, and abnormal EKGs.[118] "I'm entitled to be

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[113] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation and quotation marks omitted).

[114] *Id.*

[115] *Id.* at 1549.

[116] *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations and quotation marks omitted).

[117] *Lujan*, 504 U.S. at 565 n. 2 (citation and quotation marks omitted).

[118] Moore also alleges that the Confederate emblem violates the Thirteenth Amendment because it constitutes a "badge and indicia of slavery." Docket No. 7, ¶ 11. Congress alone has the right to pass legislation regarding the Thirteenth Amendment. *See United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 120 (5th Cir. 1973); *Wong v. Stripling*, 881 F.2d 200, 203 (5th Cir. 1989)

treated as a first-class citizen. I'm nobody's second class citizen, and I do not appreciate being treated as such," he said.[119] When the Court inquired as to how the state flag makes him feel like he is not equal to others, Moore responded,

> Because the State is saying, *We endorse the system, the oppressive regime that brutalized, enslaved your ancestors, not only by lynching them, raping them, murdering them, forcing them to inservitile [sic] labor. I support that. That was something I'm proud of. This is Confederate Heritage Month. We still relish the good ol' days in Mississippi and it's almost a constant threat and reminder that we could take you back to those days.*[120]

1. Fear for his Safety

In light of the June 2015 mass shooting in Charleston, the November 2015 Wal-Mart bombing in Tupelo, and the 2014 noose brandishing at the University of Mississippi, Moore alleges he fears for his safety.[121]

(concluding that Congress is empowered "to define and abolish the badges and the incidents of slavery"). Moore fails to properly argue how any Congressional action gives him standing to challenge the Confederate emblem.

[119] Tr. of Oral Arg. at 69.

[120] *Id.*

[121] To be clear, these events involved only the Confederate battle emblem, not the full Mississippi flag.

Without question, each of these incidents was an atrocious act of violence or intimidation with clear racial overtones. In the University of Mississippi case, the students ultimately pled guilty to charges reflecting the racial motivation of their conduct, and they have been punished.[122] Similarly, the alleged Charleston shooter is currently facing charges on multiple criminal counts, including federal hate crime charges.[123] If he is convicted, he may be executed.[124]

These incidents, however, cannot show that Moore is particularly at risk of harm as a result of the Confederate battle emblem.[125] An act of racial or ethnic violence does not establish a constitutionally-recognized injury for anyone who falls into the racial or ethnic group. He does not allege he was in the vicinity when

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[122] *See* Plea Agreement of Austin Edenfield, Docket No. 11, *United States v. Edenfield*, No. 3:15-cr-108-MPM-SAA (N.D. Miss. Mar. 24, 2016); Plea Agreement of Graeme Phillip Harris, Docket No. 20, *United States v. Harris*, 3:15-cr-22-MPM-SAA (N.D. Miss. June 18, 2015).

[123] Michael Martinez, *Dylann Roof Pleads Not Guilty to Federal Charges in Charleston Church Attack*, CNN, July 31, 2015.

[124] Mark Berman and Matt Zapotosky, *Justice Department will seek death penalty for accused Charleston church gunman Dylann Roof*, Wash. Post, May 24, 2016. For his state charges, Roof also faces death. *Id.*

[125] At the hearing, Moore attempted to raise arguments related to threats on his life that occurred *after* the filing of this suit. Tr. of Oral Arg. at 115. Although he contended that some of those threats occurred between the filing of his initial complaint and the third amended complaint, he did not include them in his third amended complaint; therefore, those allegations are not properly before this Court and will not be considered. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 289, 291 (5th Cir. 2006).

any of these events occurred; he likely heard about them from news coverage as did thousands of other citizens. Because there is nothing showing that fear of racial violence is particular to him, Moore lacks standing to make this claim.[126]

Moore also does not show that any injury is imminent. He says that "[t]ime is of the essence for the removal of the current state flag" because of the Charleston shooting, but does not demonstrate how that incident increased the imminent threat of a similar attack.[127]

To find an injury based on this plaintiff's fear for his safety would stretch the elasticity of imminence well beyond its purpose. Sadly, any person can be a victim of violence. And, while there are countless examples of violence against minority groups, including African-Americans, Moore's fear that the State flag and its continued display will lead to imminent violence against him falls short of Constitutional standing.

2. Denial of Equal Treatment

Next, the Court considers Moore's allegations that he has been deprived of equal dignity and equal treatment in violation of the Fourteenth Amendment of the United States Constitution.

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[126] *See Spokeo*, 136 S. Ct. at 1548.

[127] Docket No. 7, ¶ 15.

Courts have recognized stigmatic injuries, which are often intangible, as sufficient to meet the Article III injury requirement.[128] "Stigmatic injury stemming from the discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine."[129] This Court, for example, has previously found that same-sex marriage bans stigmatized same-sex couples by denying them an equal opportunity to receive a State-issued marriage license and the rights and benefits associated with that license.[130]

Moore points to the Sixth Circuit's decision in *Smith v. City of Cleveland Heights* to support his argument that he has suffered a stigmatic injury.[131] In that case, Cleveland Heights passed policies to maintain the city's racial composition of 75% white and 25% African-American residents.[132] Potential white residents were steered toward Cleveland Heights and potential African-American residents were steered elsewhere.[133] The plaintiff in that case, who already lived in the city, filed suit alleging that the city's policies "stigmatize[d]

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[128] *See Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 917 (S.D. Miss. 2014).

[129] *Id.*

[130] *Id.*

[131] 760 F.2d 720 (6th Cir. 1985).

[132] *Id.* at 721.

[133] *Id.*

him as an inferior member of the community" and limited his ability to "associate freely" with other African-Americans who may move into the city.[134] The Sixth Circuit found standing and concluded that the policy directly impacted plaintiff's "interest in his own self-respect, dignity, and individuality."[135]

Moore contends the Mississippi flag has the same effect on him, but the cases are not analogous. In *Smith*, the plaintiff's stigmatic injury was directly related to a city policy that expressly denied equal treatment to him on the basis of race.[136] In other words, it was "a stigmatic injury suffered as a direct result of having personally been denied equal treatment."[137]

In contrast, Moore has failed to allege any specific facts or incident where he was denied equal treatment due to the state flag or the message it communicates. Because the third amended complaint lacks such allegations, at oral argument, the Court asked him how he has been denied equal treatment. Moore was unable to provide an example of a deprivation of a legal right.

Moore also claims a right to "equal dignity" based on the Supreme Court's recent same-sex marriage decision, *Obergefell v. Hodges*.[138] "Prior to *Obergefell*," he said at oral argument, "I had no knowledge that I had

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[134] *Id.* at 722.

[135] *Id.*

[136] *Id.* at 723.

[137] *Allen v. Wright*, 468 U.S. 737, 755 (1984).

[138] 135 S. Ct. 2584 (2015)

a right to equal dignity under the law."[139] Moore also references *Loving v. Virginia* and *Brown v. Board of Education* as examples of when the federal courts had to intervene to protect individuals' Constitutional rights and dignity.

The Court is well-aware of those cases, but Moore's argument attempts to contort their holdings beyond recognition. All of those cases involved a legal right guaranteed by the Fourteenth Amendment – specifically, the right to marry and the right to receive a public education free from racial discrimination. Those plaintiffs' rights had been infringed upon because they were actually treated differently than others. Moore alleges no analogous legal right; he feels like "a second-class citizen simply because of the fact [he is] African-American."[140] Without sufficient facts that Moore is *treated* differently because of the state flag, his argument that he *feels* like a second-class citizen does not give rise to a legal injury. Where there is no legal right being violated, an injury is not real – and thus cannot be deemed concrete.

3. Physical Injuries

Moore says he feels "great concern and anxiety when I enter public property adorned with the state flag," which "has probably contributed to or caused the exacerbation of medical ailments, including but not

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[139] Tr. of Oral Arg. at 66.

[140] *Id.* at 64.

limited to hypertension, insomnia and abnormal EKGs."[141] He adds that "since what happened in South Carolina and since what happened in Walmart in Tupelo in November, I have experienced abnormal EKGs."[142]

Plaintiff's counsel specifically argued that Moore experiences stress when he enters courtrooms that display the state flag.[143] But in addition to engaging in the private practice of law for a living, Moore also accepted an appointment to be the city prosecutor in Webb, Mississippi. This position requires regular courtroom appearances. Moore argued that declining the position would economically impact his family. "[O]nly with a state appointment can I get state benefits," he asserted. "I could not get on PERS. That would be a detriment to me. I needed to start PERS as soon as I could."[144]

To the extent Moore experiences stress because of the state flag, he appears willing to experience it for economic gain. When the Court asked about limiting his practice to federal court, where he would not necessarily encounter the state flag, he said that his wife "has got accustomed after 15 years of marriage to a certain quality of life. And it's not fair to her" to accept

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[141] Docket No. 7, ¶¶ 11-12.

[142] Tr. of Oral Arg. at 115.

[143] *Id.* at 22.

[144] *Id.* at 81. Moore is adamant that the State makes him feel like a second-class citizen, yet he gladly accepted a voluntary state appointment in order to collect state benefits.

"a lower standard of living because I only had certain cases in federal court."[145]

Moore's arguments are phrased as constitutional claims, yet his allegations of physical injuries suggest that he is making an emotional distress tort claim. To succeed in constitutional litigation, however, Moore needs to identify that part of the Constitution which guarantees a legal right to be free from anxiety at State displays of historical racism.[146] There is none. We are again back at a stigmatic injury untethered to a legal right, and that – even a stigmatic injury causing physical ailments – is not sufficient for standing.

B. Injury Traceable to Conduct

Even assuming that there is a cognizable injury in this case, that injury must be "fairly traceable to the

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[145] *Id.* at 92.

[146] Within our state, there are countless "displays" of historical racism stemming from slavery, the Confederacy, and the killing of Native Americans. Counties, municipalities, streets, and a reservoir are named in honor of those who lived and died for the cause of the Confederacy and its hateful legacy. Numerous counties have public spaces, including courthouse squares that should be associated with justice, adorned with statues commemorating the Confederacy and white supremacy. Every day, Mississippians work and transact business in public buildings named for individuals who could not fathom in their lifetime that *all* Mississippians would have the legal and moral right to enter such a building. One can only wonder what figures such as Robert E. Lee, Andrew Jackson, Nathan Bedford Forrest, Hernando de Soto, Carroll Gartin, and Walter Sillers would have to say about the diversity of citizens living and working in the counties and buildings named in their honor.

challenged action of the defendant, and not the result of the independent action of some third party not before the court."[147]

The current state flag has been flying in Mississippi for Moore's entire lifetime. He did not file the instant case until February 2016, when he was 39 years old. The catalyst for this suit was evidently his fear resulting from recent instances of racial violence and intimidation in South Carolina and Mississippi, and the lack of action by Mississippi's leaders. Moore's fear and the necessity of this suit were apparently compounded by the Governor's proclamation of April as Confederate Heritage Month during Black History Month.[148]

Although the Confederate battle emblem has some varying connection to those incidents, Moore has not traced his fear stemming from those events to the State's conduct. The Confederate battle emblem has been used by white supremacists, but Moore fails to show how the flag is responsible for his fears, as opposed to individuals who are not before this Court. His fear is not any more traceable to the acts of terror in South Carolina and Mississippi than it is to any of the many other racially-motivated crimes that have occurred in Mississippi and across the country during Moore's life. And Moore's stigmatic injury is not any more traceable to the flag than it is to the racist beliefs

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[147] *Lujan*, 504 U.S. at 560 (citation, quotation marks, brackets, and ellipses omitted).

[148] Tr. of Oral Arg. at 87.

he feels elected leaders and other Mississippians harbor.

During oral argument, the Court inquired into the start date of Moore's physical injuries to determine how they are traceable to the state flag. Plaintiff's counsel stated that they were ongoing injuries that did not begin on a specific date.[149] She said Moore was injured by his birth in Mississippi, the 2001 flag referendum, local entities declining to remove the flag, and the failed legislative bills in the 2016 session.[150] Later, Moore himself argued that his physical injuries and associated stress began and have continued to mount since 2002, when he was sworn into the Mississippi Bar.[151] He added, "[b]ut this specifically what happened in the month of February before I filed the lawsuit. There was the legislature refusing to act and then the Governor declaring Confederate Heritage Month. I went to the doctor around that time and I had these abnormalities."[152]

A problem with Moore's argument is that any number of factors can contribute to these types of chronic health conditions: genetics, stress, the practice of law, diet, and lack of exercise, to name a few. Even the stress and anxiety he experiences when entering a courthouse (or awaiting a Court's ruling) could easily be attributable to concern about a pending proceeding.

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[149] *Id.* at 7.

[150] *See id.* at 27.

[151] *Id.* at 96, 117.

[152] *Id.* at 117.

Moore offers no plausible allegation that these physical injuries are directly attributable or even exacerbated by the state flag, when there are so many other competing explanations of their cause. Thus, it is impossible for the Court to see how Moore could establish those injuries as fairly traceable to a flag that has been in existence for his entire life.

Lastly, Moore is again unlike the gay couples in the same-sex marriage cases. In those cases, the plaintiffs' injuries were traceable to state statutes and constitutional amendments which explicitly forbade governmental officials from issuing marriage licenses to gay couples, effectively giving government officials a license to discriminate. There is no comparable legal injury here, much less an injury traceable to the state flag.

C. Redressability by Favorable Judicial Decision

The final prong of standing requires the plaintiff to demonstrate that a favorable judicial decision is likely to redress his injury.[153] The determination of redressability turns on the specific facts plaintiff presents.

Here, Moore contends,

> [a] favorable decision would eliminate the discriminatory laws, eliminate stigmatic injury, eliminate the imminent threats to Plaintiff,

[153] *Lujan*, 504 U.S. at 561.

> his health, and his family, as well as eliminate the potential of Plaintiff inadvertently violating his oaths due to his inability to support the discriminatory laws of the state that he is currently bound by oath and statute to support.[154]

At oral argument, when Moore was asked whether the removal of the flag would improve his insomnia, EKGs, and stress, he responded, "[i]mmediately."[155]

As the Court has discussed in detail, the injuries alleged by Moore are untethered to a legal right. In instances where this Court has found that a plaintiff's stigmatic injury could be redressed by a favorable judicial decision, the injury has been connected to a fundamental right. On the facts of this case, however, there is no legal right at issue which the Court can remedy.

For these reasons, Moore does not have standing to bring this action.

IV. Motion to Amend Complaint

Lastly, Moore filed a motion seeking leave to amend his third amended complaint. "The court should freely give leave when justice so requires."[156] Leave to

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[154] Docket No. 23, at 7.

[155] Tr. of Oral Arg. at 96. Considering the seriousness of this case, the Court finds that response not worthy of credence.

[156] Fed. R. Civ. P. 15(a)(2). Pursuant to Federal Rule of Civil Procedure 15(a)(1)(A), a plaintiff can amend his pleading once as a matter of course within 21 days of serving it. Here, the Governor

amend is guided by the following factors: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of the amendment.[157]

Since the Court found no standing based on Moore's third amended complaint, the present analysis focuses on whether the proposed fourth amended complaint would confer standing. If it would not, allowing Moore to amend would be futile.

Moore's fourth amended complaint adds his minor child, A.M., as a plaintiff and the State Superintendent of Education and the Grenada Public School System as defendants.[158] Moore explains that his daughter is five years old and set to begin kindergarten in the Grenada Public School system in fall 2016.[159] He then identifies two state statutes that allegedly violate A.M.'s First Amendment rights: Mississippi Code § 37-13-5, which requires public schools to fly the state flag and teach

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was served on March 7, 2016. By that time, Moore had already amended his complaint three times. In its Order setting a briefing schedule, the Court required him to seek leave of Court to further amend his complaint. Docket No. 13, at 4.

[157] *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

[158] Docket No. 26-1, at 1.

[159] Moore filed this motion in March 2016, when his daughter was not required to attend public school. At the time, she attended an optional educational program at the school two days a week. Tr. of Oral Arg. at 114. Thus, at the time Moore filed his motion to amend his complaint, any claims involving his daughter were not ripe.

its history, and Mississippi Code § 37-13-7, which requires public schools to teach students the pledge of allegiance to the Mississippi flag.[160] He argues that A.M. "will suffer imminent and irreparable harm should she be required to start public school in August 2016 with the aforementioned statutes still in place and in force."[161]

Section 37-13-5 indeed requires public schools to provide a course of study about the American and Mississippi flags, as well as their history. In this facial challenge, however, Moore's complaint lacks any allegations that would allow this Court to conclude that requiring teachers to provide instruction regarding the state flag and its history in any way encroaches upon A.M.'s constitutional rights. The very purpose of our public education system is to provide instruction and in many instances present different viewpoints. The classroom is an appropriate place for academic discourse and critical thinking. On its face, a statute requiring children to be taught about the history of the Mississippi flag does not encroach upon a constitutional right.

The same is true for § 37-13-7. The statute does not require any student to recite the Mississippi pledge, and even if it did, Supreme Court precedent clearly prohibits students from being forced to say a

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[160] Docket No. 26-1, ¶¶ 21-22.

[161] *Id.* ¶ 23.

pledge of allegiance.[162] Thus, Moore's facial challenge is unavailing. If future conduct gives rise to specific facts in which Moore's daughter is being forced to recite the pledge, then he could bring an action.

Because Moore's proposed fourth amended complaint does not cure the issue of standing, allowing him to amend would be futile. The motion is denied.[163]

V. Conclusion

To millions of people, particularly African-Americans, the Confederate battle emblem is a symbol of the Old Mississippi – the Mississippi of slavery, lynchings, pain, and white supremacy. As Justice Fred Banks noted, the Confederate battle emblem "takes no back seat to the Nazi Swastika" in its ability to provoke a visceral reaction.[164]

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[162] *See West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943). Section 37-13-7 requires teachers to have their students repeat the United States pledge of allegiance at least once a month. But § 37-13-6, which was enacted in 2002 and addresses only the United States pledge, states that "[a]ny student or teacher who objects to reciting the oath of allegiance shall be excused from participating without penalty." Therefore, it does appear there is analogous state law (in addition to federal precedent) that prohibits students from being forced to state a pledge of allegiance.

[163] *See Blackwell*, 440 F.3d at 291 ("Plaintiffs had three attempts to produce a sufficient complaint. The court dismissed the complaint and denied leave to amend only after the third insufficient attempt.").

[164] *Daniels*, 722 So.2d at 140.

The emblem offends more than just African-Americans. Mississippians of all creeds and colors regard it as "one of the most repulsive symbols of the past."[165] It is difficult to imagine how a symbol borne of the South's intention to maintain slavery can unite Mississippians in the 21st century.[166]

Since the Civil War, this nation has evolved and breathed new life into "We the People" and "all men are created equal."[167] Mississippi is known for its resistance to that evolution. Part of that resistance stems from electing demagogues and those with empty rhetoric and false courage. The result is a State increasingly isolated from the rest of the nation.

At times there is something noble in standing alone. This is not one of those times. The Confederate battle emblem has no place in shaping a New Mississippi, and is better left retired to history.

For that change to happen through the judiciary, however, the Confederate battle emblem must have

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[165] Rychlak, *supra*, at 1421 (citation omitted); *see N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) ("Citizens of all races are offended by its position.").

[166] *See Hunt*, 891 F.2d at 1566 ("It is unfortunate that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population."); *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997) ("[B]ecause the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia.").

[167] *See* Marshall Bicentennial Speech, *supra*.

caused a cognizable legal injury. In this case no such injury has been articulated.[168] Whether that could be shown in a future case, or whether "the people themselves" will act to change the state flag, remains to be seen.[169]

This case is dismissed. A separate Final Judgment will issue.

SO ORDERED, this the 8th day of September, 2016.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

[168] "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) (holding that burning the American flag was expressive conduct entitled to First Amendment protection).

[169] "I know no safe depository of the ultimate powers of the society but the people themselves." Letter from Thomas Jefferson to William C. Jarvis (1820).

APPENDIX C

Relevant Constitutional and Statutory Provisions

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code. Ann. § 3-3-15. State flag; display

The state flag may be displayed from all public buildings from sunrise to sunset; however, the state flag may be displayed from all public buildings twenty-four (24) hours a day if properly illuminated. The state flag should not be displayed when the weather is inclement, except when an all-weather flag is displayed. The state flag shall receive all of the respect and ceremonious etiquette given the American flag. Provided, however, nothing in this section shall be construed so as to affect the precedence given to the flag of the United States of America.

Miss. Code. Ann. § 3-3-16. Official state flag; design

The official flag of the State of Mississippi shall have the following design: with width two-thirds (2/3) of its length; with the union (canton) to be square, in width two-thirds (2/3) of the width of the flag; the ground of the union to be red and a broad blue saltire thereon, bordered with white and emblazoned with thirteen (13) mullets or five-pointed stars, corresponding with the number of the original States of the Union; the field to be divided into three (3) bars of equal width, the upper one blue, the center one white, and the lower one, extending the whole length of the flag, red (the national colors); this being the flag adopted by the Mississippi Legislature in the 1894 Special Session.

Miss. Code. Ann. § 37-13-5. Displaying and studying of flags

(1) The flag of the State of Mississippi and the flag of the United States shall be displayed in close proximity to the school building at all times during the hours of daylight when the school is in session when the weather will permit without damage to the flag. It shall be the duty of the board of trustees of the school district to provide for the flags and their display.

(2) Whenever the flag of the United States is to be flown at half-staff by order or instructions of the President or pursuant to federal

law, all public schools shall lower the United States flag in accordance with the executive order or instructions or federal law. The school shall announce the reason that the flag is being flown at half-staff to all students in assembly or by teachers in the various classrooms or by prominently displaying written notice throughout the school stating the reason that the flag has been lowered.

(3) In all public schools there shall be given a course of study concerning the flag of the United States and the flag of the State of Mississippi. The course of study shall include the history of each flag and what they represent and the proper respect therefor. There also shall be taught in the public schools the duties and obligations of citizenship, patriotism, Americanism and respect for and obedience to law.

Miss. Code Ann. § 37-13-7. Pledges of allegiance to flags

(1) The boards of trustees of the public schools of this state shall require the teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at least once during each school month, such oath of allegiance being as follows:

> "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one nation

> under God, indivisible, with liberty and justice for all."

(2) The official pledge of the State of Mississippi shall read as follows:

> "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."

The pledge of allegiance to the Mississippi flag shall be taught in the public schools of this state, along with the pledge of allegiance to the United States flag.