No. 17-23

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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS AND THE MISSISSIPPI LEGISLATIVE BLACK CAUCUS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are members of the Congressional Black Caucus ("CBC") and the Mississippi Legislative Black Caucus ("MLBC"). The individual members of the CBC who join this brief are listed in the appendix to this brief.[1]

Since its establishment in 1971, the CBC has been committed to ensuring that black Americans and marginalized communities in the United States have the opportunity to achieve the American dream. Discriminatory government speech that targets these communities—and in particular the insidious message communicated by a state's endorsement and dissemination of the Confederate battle emblem—is antithetical to the CBC's mission, which includes supporting social and economic progress, equality, and fairness.

The MLBC is an organization of elected officials in Mississippi founded to advocate for the interests of black citizens of that state, remove roadblocks to equality, and increase participation and representation by black citizens in all levels of government.

SUMMARY OF ARGUMENT

Declaring the racial inferiority of a subjugated people, Mississippi and the other members of the Confederacy went to war in 1861, willing to tear apart the nation in order to preserve the institution of slavery and the economic benefits it afforded their free, white

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[1] No counsel for any party authored this brief in whole or in part. No party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief. Amici have timely notified the parties of its intent to file this brief, and letters from the parties consenting to its filing are being submitted with it.

citizens. The Confederate battle emblem was the rallying symbol of those who would have destroyed the union rather than acknowledge the equality, and indeed the humanity, of black people. It is a vestige of America's darkest hour.

In 1894—just four years after approving a new state constitution designed "to permit 'white people' to take back their state from the multi-racial coalition which had governed Mississippi after the War"—Mississippi incorporated the Confederate battle emblem into its official state flag. Pet. App. 32a-33a. Petitioner Carlos Moore has alleged that the state did so in order to inform all that its newly freed black citizens—and generations of their descendants, including Mr. Moore—would continue to be second-class citizens. The state continues to force this message on Mr. Moore and his family today, where they live, work, and learn.

The court of appeals held that Mr. Moore lacked standing to challenge this official state conduct under the Equal Protection Clause, i.e., lacked standing to ask the courts to hold that states may not declare that certain citizens have a subordinate status. But this Court's precedent recognizes that the injury inflicted by a racially discriminatory government message suffices to establish a plaintiff's standing to challenge that message under the Equal Protection Clause. The Fifth Circuit's decision is not faithful to that precedent, unduly constricting the scope of injuries that confer standing for an equal protection claim. The decision is also in tension with Eleventh Circuit cases involving similar constitutional challenges to a state's endorsement of the Confederate flag. Both the standing question and the underlying equal protection question are important, and this Court should grant certiorari to reaffirm its recognition of the harm caused when the gov-

ernment promulgates a message that subordinates a protected class of people.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE IMPORTANT BECAUSE THE CONFEDERATE BATTLE FLAG IS A DIVISIVE AND HARMFUL SYMBOL OF RACISM THAT SOME GOVERNMENTS NONETHELESS CONTINUE TO EMBRACE

As the vice president of the Confederacy acknowledged in 1861, the supposed "truth that the negro is not equal to the white man[,] that slavery subordination to the superior race is his natural and normal condition" was the "corner-stone" upon which the Confederacy "rest[ed]." Alexander H. Stephens, "Corner Stone" Speech (Mar. 21, 1861).[2] The enduring symbol of this "corner-stone" principle of white supremacy is the Confederate battle emblem. As the district court observed here, "the emblem has been used time and time again in the Deep South, especially in Mississippi, to express opposition to racial equality." Pet. App. 32a. Indeed, "the state display of the Confederate flag itself functions as a pledge … to protect one class of citizens over another, to mark an entire state and its resources as belonging … to one class of citizens over another, and to preserve a hegemony that accords one class of citizens a higher status than another." Capers, *Flags*, 48 How. L.J. 121, 164 (2004).[3]

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[2] *Available at* http://teachingamericanhistory.org/library/document/cornerstone-speech/.

[3] The flag is not the only symbol that state and local governments use to endorse and convey notions of the inferiority of black citizens. For example, the mayor of New Orleans recently remarked that monuments to the Confederacy in his city "were

That the Confederate battle flag remains a symbol of racism and division cannot reasonably be disputed. Just two years ago, for example, an avowed white supremacist murdered nine black people during a prayer service at a church in South Carolina. Afterward, photos were discovered on his website showing him waving and wrapped in Confederate battle flags. Bernstein et al., *Dylann Roof's racist manifesto: "I have no choice,"* Wash. Post.[4]

Tragedies like that have fortunately brought some change. Days after that massacre, for example, then-Alabama governor Robert Bentley ordered four Confederate flags outside that state's capitol removed. Blinder, *Momentum To Remove Confederate Symbols Slows or Stops*, N.Y. Times, Mar. 13, 2016.[5] And in South Carolina itself—where the Confederate battle flag flew at full mast on the grounds of the South Carolina capitol, while the American and state flags flew at half mast out of respect for the murdered—then-governor Nikki Haley called for the Confederate flag's removal from the capitol. *See* Moyer, *Why South Carolina's Confederate flag isn't at half-staff after church*

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erected purposefully to send a strong message to all who walked in their shadows about who was still in charge in this city." *Mitch Landrieu's Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. Times, May 23, 2017, *at* https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html.

[4] *At* https://www.washingtonpost.com/national/health-science/authorities-investigate-whether-racist-manifesto-was-written-by-sc-gunman/2015/06/20/f0bd3052-1762-11e5-9ddc-e3353542100c_story.html.

[5] *At* https://www.nytimes.com/2016/03/14/us/momentum-to-remove-confederate-symbols-slows-or-stops.html?_r=0.

shooting, Wash. Post, June 19, 2015;[6] *Transcript: Gov. Nikki Haley of South Carolina on Removing the Confederate Flag*, N.Y. Times, June 22, 2016 ("Haley Transcript").[7] Acknowledging that for many the flag "is a deeply offensive symbol of a brutally oppressive past," Haley said that although citizens were free to fly the flag "on their private property," "the statehouse is different." Haley Transcript.

One prominent supporter of Governor Haley's call was Jeb Bush, who as governor of Florida in 2001 had removed the Confederate flag from that state's capitol. Having explained at that time that he would have "no tolerance for racial hatred," Reinhard, *How Jeb Bush Handled Florida's Removal of Confederate Flag*, Wall St. J., June 22, 2015,[8] Bush said in response to the South Carolina church murders that the Confederate flag is a "racist" symbol, Bradner & Landers, *Jeb Bush: Confederate flag is "racist,"* CNN (June 30, 2015).[9]

Despite this progress, some state and local governments persist in endorsing and disseminating the Confederate battle emblem. Mississippi, of course, has incorporated the emblem into its state flag. Montgomery, Alabama, also uses Confederate symbols in its offi-

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[6] *At* https://www.washingtonpost.com/news/morning-mix/wp/2015/06/19/why-south-carolinas-confederate-flag-isnt-at-half-mast-after-church-shooting/.

[7] *At* https://www.nytimes.com/interactive/2015/06/22/us/Transcript-Gov-Nikki-R-Haley-of-South-Carolina-Addresses-Removing-the-Confederate-Battle-Flag.html.

[8] *At* https://www.wsj.com/articles/how-jeb-bush-handled-floridas-removal-of-confederate-flag-1434999121.

[9] *At* http://www.cnn.com/2015/06/29/politics/jeb-bush-confederate-flag-is-racist/index.html.

cial flag. *Montgomery considers removing Confederate symbols from seal, flag*, Associated Press (July 23, 2015).[10] And although this Court held (just days after the South Carolina church murders) that private citizens "cannot force [a state] to include a Confederate battle flag on its specialty license plates" because such plates "convey government speech," *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246, 2253 (2015), Mississippi and several other states willingly do so. *See* Chokshi, *At least nine other states offer the Confederate license plates the Supreme Court says Texas can deny*, Wash. Post, June 18, 2015.[11]

As this Court has recently observed, our nation "must continue to make strides to overcome race-based discrimination." *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 871 (2017). Government endorsement and dissemination of racist symbols like the Confederate battle flag are antithetical to such progress. They discourage the targeted group's participation in public life, and encourage public and private acts of discrimination against its members. Whether they are immune to challenge as a violation of the Equal Protection Clause is a question worthy of this Court's attention.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG AS A MATTER OF BOTH STANDING DOCTRINE AND EQUAL PROTECTION PRINCIPLES

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[10] *At* http://www.al.com/news/index.ssf/2015/07/montgomery_considers_removing.html.

[11] *At* https://www.washingtonpost.com/blogs/govbeat/wp/2015/06/18/at-least-nine-other-states-offer-the-confederate-license-plates-the-supreme-court-says-texas-can-deny/.

Petitioner Carlos Moore alleges that Mississippi violated his constitutional right to equal protection of the laws by incorporating the Confederate battle emblem into its official flag and thereby declaring the inferior status of the state's black citizens. Pet. App. 4a. The court of appeals held that Mr. Moore lacked standing to press that claim because under *Allen* v. *Wright*, 468 U.S. 737 (1984), a plaintiff's alleged "exposure to a discriminatory [government] message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case." Pet. App. 6a. Although couched in terms of standing, this holding also addresses the scope of the protection afforded by the Equal Protection Clause. And on both scores, it is wrong. It misinterprets *Allen*, conflicts with this Court's other precedent, and fails to acknowledge the severe and often lasting harm that discriminatory government speech inflicts on the core dignitary interests protected by the Fourteenth Amendment.

A. Targets Of Discriminatory Government Speech Have Standing To Challenge That Speech Under The Equal Protection Clause

1. The Fifth Circuit's decision imposes on those seeking redress for racially discriminatory government messages the obligation to demonstrate that additional discriminatory treatment resulted from the objectionable speech. That requirement improperly minimizes the harm that Mississippi's message of white superiority inflicts on members of the targeted group. Put simply, the speech *is* the discriminatory treatment—and by itself it has a concrete deleterious effect on Mr. Moore and his family. This Court has long recognized that under similar circumstances, discriminatory government

messages give the plaintiff standing to press a viable equal protection claim.

For example, in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court held that laws placing black children into separate schools violated the Equal Protection Clause despite the fact that all "'tangible' factors" among the schools, such as "buildings, curricula, qualifications and salaries of teachers," had been "equalized," *id.* at 492. The Court explained that "segregation *with the sanction of law* … generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494 (emphasis added) (quotation marks omitted).

A decade later, in *Anderson* v. *Martin*, 375 U.S. 399 (1964), the Court again recognized that state-sanctioned, race-based messages inflict real, cognizable harm under the Equal Protection Clause, even without further disparate treatment. *Anderson* involved a challenge by political candidates to a law requiring election ballots to identify a candidate's race next to his or her name. *Id.* at 401. Although the law "impose[d] no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot," this Court struck it down, holding that merely informing voters of a candidate's race violated the Constitution. *Id.* at 402. With the racial ballot labeling, the Court explained, "the State furnishe[d] a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another." *Id.* Notably, the Court was unmoved by the argument that the racial ballot design might have favored a black candidate in certain districts. The vice of the system, the Court explained, "l[ay] *not in the resulting injury* but in the placing of

the power of the State behind a racial classification." *Id.* (emphasis added).

Similarly, in *Shaw* v. *Reno*, 509 U.S. 630 (1993), the Court found that racial gerrymandering of a voting district violated voters' rights under the Equal Protection Clause even where the plaintiffs failed to demonstrate that the policy had diluted their voting power, *see id.* at 649-650. That was because the harm, the Court explained, lay in the message sent by the legislature's narrow focus on the district's racial makeup, which "reinforce[d] racial stereotypes and … signal[ed] to elected officials that they represent[ed] a particular racial group rather than their constituency as a whole." *Id.* at 650; *see also Loving* v. *Virginia*, 388 U.S. 1, 9 (1967) ("[T]he fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."); *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) ("The assumption that no stigma or dishonor attaches [to disqualification as a juror] contravenes accepted equal protection principles," because "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

This Court's recognition, moreover, of the cognizable harm caused purely by a state's adoption of speech that expresses the inferiority of a protected class of people extends beyond the context of race. Two years ago, for example, the Court held that laws denying same-sex couples the opportunity to marry inflict harm by sanctioning a discriminatory message. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2608 (2015). Based on the Constitution's promise of "equal dignity" under the law, the Court held that same-sex marriage bans violate the Equal Protection Clause not only because they deny

same-sex couples the "specific public benefits" enjoyed by opposite-sex couples, *id.* at 2606, but also because such laws serve to "disrespect and subordinate" same-sex couples, *id.* at 2604; *see also United States* v. *Windsor*, 133 S. Ct. 2675, 2696 (2013) (The Defense of Marriage Act unconstitutionally "instructs … all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.").

Indeed, the only relief sought by the lead plaintiff in *Obergefell*—a government declaration of the validity of his marriage—stemmed from the harm caused by the message conveyed by the state's refusal to provide such a declaration. *See* 135 S. Ct at 2594-2595 (labeling this refusal "'hurtful for the rest of time'"). In acknowledging the plaintiff's right to seek the same statement of legitimacy provided to opposite-sex couples, the Court recognized the independent and concrete constitutional harm inflicted by discriminatory government messages.

2. Although the law designating Mississippi's official flag does not directly regulate Mr. Moore's conduct, the injury he alleges is no different from those recognized in *Brown*, *Anderson*, and the other cases just described. In each of those cases, the constitutional harm, as explained, arose not from the immediate tangible effects of government policies but from the message of inferiority conveyed by those government policies. In other words, as the Court recently reaffirmed, "intangible harm" may "constitute[] injury in fact." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised*, May 24, 2016.

Similarly here, Mr. Moore alleges that a government message has denied him "equal treatment and

dignity under the law." Pet. App. 47a. Citing the timing of and statements surrounding Mississippi's adoption of the Confederate flag, Mr. Moore alleges that the state's incorporation of the Confederate battle emblem into its current flag symbolizes the state's endorsement of the oppressive regime that enslaved and brutalized his ancestors, and more immediately, its endorsement and communication of the notion that Mr. Moore and his family hold an inferior status in society by virtue of their race. Pet. App. 48a. That official message discourages Mr. Moore and his family from pursuing full participation in society and encourages others to deny them such participation. *See* Third Am. Compl. ¶¶8, 11-12, 15-18; Pet. App. 47a-48a. Thus, the state's racial message deprives Mr. Moore and his family of equal dignity under the law and in society—a real and concrete injury that is cognizable under the Equal Protection Clause.[12]

The Fifth Circuit's contrary conclusion not only flies in the face of this Court's precedents but also is difficult to reconcile with decisions from other jurisdictions involving similar challenges to states' display of the Confederate battle emblem. For example, in *Coleman* v. *Miller*, 117 F.3d 527 (11th Cir. 1997), the district court had explicitly rejected Georgia's argument that

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[12] Moreover, Mr. Moore alleges that the state flag and the official racial message it sends increase the risk that he and his family will be the victim of racially motivated violence. *See* Third Am. Compl. ¶¶12, 15-18. Being subjected to that increased risk is itself a cognizable injury. *See, e.g.*, *Sierra Club* v. *EPA*, 774 F.3d 383, 392 (7th Cir. 2014) ("the increased probability of injury to Sierra Club members creates standing here" (citing *Natural Resources Defense Council* v. *EPA*, 643 F.3d 311, 318 (D.C. Cir. 2011))); *Spokeo*, 136 S. Ct. at 1550 (noting that standing may be established where defendant's conduct creates "material risk of harm").

the plaintiff lacked standing to challenge its incorporation of the Confederate battle emblem into its official flag, holding that the plaintiff had alleged "an actual or imminent injury" under the Equal Protection Clause. *Coleman* v. *Miller*, 885 F. Supp. 1561, 1568 (N.D. Ga. 1995). Although the Eleventh Circuit ultimately rejected the claim in *Coleman*, and a similar claim in *NAACP*. v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990), it did so on the merits. In *Coleman*, the court of appeals held that the plaintiff had "failed to produce sufficient factual evidence to maintain his claims" at the summary-judgment stage. 117 F.3d at 528. In *Hunt*, the court held that a challenge to Alabama's display of the Confederate flag failed because the fact that "all citizens [were] exposed to the flag" meant (erroneously in amici's view) that "there [was] no unequal application of the state policy." 891 F.2d at 1562. Unlike the Fifth Circuit, in neither *Hunt* nor *Coleman* did the Eleventh Circuit question the plaintiff's standing.

B. *Allen* v. *Wright* Did Not Address Whether A Plaintiff Has Standing To Challenge Racially Discriminatory Government Speech

The Fifth Circuit's reliance on *Allen* v. *Wright* was misplaced. The plaintiffs there argued that the federal government had violated the Equal Protection Clause by failing to deny tax benefits to private schools alleged to have racially discriminatory admissions practices. None of the plaintiffs alleged, however, that *they* had "been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge[d]." *Allen*, 468 U.S. at 746. Indeed, the plaintiffs attended public school, and had "not alleged" that they "have ever applied or would ever apply to any private school." *Id.* Thus, this Court considered whether "a claim of

stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is cognizable. *Id.* at 754.

Emphasizing that standing is not a "mechanical exercise" and that it must be "determin[ed]" in each "particular case," *Allen*, 468 U.S. at 751-752, the Court held that the plaintiffs lacked standing because they had not alleged that they had "personally been denied equal treatment," *id.* at 755. In reaching that conclusion, the Court drew on three cases that each involved plaintiffs who made "comparable" allegations of racial discrimination and thus were in "exactly the same position" as the *Allen* plaintiffs. *Id.* The salient feature of each of the three cases was that the plaintiffs claimed stigmatic injury based on discriminatory treatment directed toward *somebody else*, merely because the plaintiffs were the same race as the victim of the discriminatory treatment. *Id.* (discussing *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 92 (1972); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); and *Rizzo* v. *Goode*, 423 U.S. 362 (1976)).

In other words, the claimed stigmatic injury at issue in both *Allen* and the precedents on which it was based was entirely "abstract." *Allen*, 468 U.S. at 755. Recognizing a plaintiff's standing in those circumstances, the Court concluded, "would [have] transform[ed] the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'"—for example, a "black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.* at 756 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).

Unlike the plaintiffs in *Allen*, however, Mr. Moore is not merely a "concerned bystander" to the insidious government message conveyed by his state's flag. He

is a Mississippi citizen attempting to take equal part in public life in a state that has adopted as its official symbol a statement of his racial inferiority. Mr. Moore's claim arises not from a generalized theory of stigmatic injury resulting from discrimination against other members of Mr. Moore's minority group, but from the direct effect of the state's discriminatory speech on *him and his family*.

The court of appeals failed to recognize this crucial difference with *Allen*. That case established only that not every member of a racial group can challenge any policy that discriminates against that group simply because the member feels some abstract stigma as a result of the existence of the policy. It says nothing about whether a citizen, like Mr. Moore, suffers cognizable discriminatory treatment when his government subjects *him* to demeaning and exclusionary official speech based on his race.

* * *

Ending government endorsements of racism is essential to our nation's continued progress toward ending racism itself. This Court should grant certiorari to reaffirm the Constitution's protections against state-sponsored messages asserting the second-class status of a race.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX

LIST OF MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS WHO ARE AMICI CURIAE

Rep. Alma Adams

Rep. Karen Bass

Rep. Joyce Beatty

Rep. Sanford D. Bishop, Jr.

Sen. Cory Booker

Rep. Anthony Brown

Rep. G. K. Butterfield

Rep. André Carson

Rep. Yvette D. Clarke

Rep. William Lacy Clay, Jr.

Rep. Emanuel Cleaver II

Rep. James E. Clyburn

Rep. John Conyers, Jr.

Rep. Elijah E. Cummings

Rep. Danny K. Davis

Rep. Val Demings

Rep. Keith Ellison

Rep. Dwight Evans

Rep. Marcia L. Fudge

Rep. Al Green

Rep. Alcee L. Hastings

Sen. Kamala D. Harris

Rep. Sheila Jackson Lee

Rep. Hakeem Jeffries
Rep. Eddie Bernice Johnson
Rep. Hank Johnson
Rep. Robin Kelly
Rep. Brenda Lawrence
Rep. Al Lawson
Rep. Barbara Lee
Rep. John Lewis
Rep. Donald McEachin
Rep. Gregory W. Meeks
Rep. Gwen Moore
Del. Eleanor Holmes Norton
Rep. Donald M. Payne, Jr.
Del. Stacey Plaskett
Rep. Cedric Richmond
Rep. Lisa Blunt Rochester
Rep. Bobby L. Rush
Rep. David Scott
Rep. Robert C. "Bobby" Scott
Rep. Terri A. Sewell
Rep. Bennie Thompson
Rep. Marc Veasey
Rep. Maxine Waters
Rep. Bonnie Watson Coleman
Rep. Frederica Wilson