

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**

**AMICI CURIAE BRIEF OF THE SOUTHERN
POVERTY LAW CENTER AND LAMBDA
LEGAL DEFENSE AND EDUCATION FUND,
INC. IN SUPPORT OF PETITIONER**

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<i>Barr v. Lafon</i> , 538 F.3d 554 (6th Cir. 2008).....	7
<i>Briggs v. Mississippi</i> , 331 F.3d 499 (5th Cir. 2003).....	2
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<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	17-18
<i>West v. Derby Unified Sch. Dist. No. 260</i> , 23 F. Supp. 1223 (D. Kan. 1998)	7
<i>West v. Derby Unified Sch. Dist. No. 260</i> , 206 F.3d 1358 (10th Cir. 2000).....	8

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<i>West Virginia Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	17
 CONSTITUTION	
U.S. Const. amend. XIV	2, 3, 18
 STATUTES	
Miss. Code Ann. § 3-3-15 (1984)	18
Miss. Code Ann. § 37-13-5 (2002)	18
Miss. Code Ann. § 37-13-7(2) (1962).....	18
 OTHER AUTHORITIES	
5 Cong. Rec. 1732 (1877)	4
<i>After 54 Years, Confederate Flag Comes Down in S.C.</i> , CBS NEWS (July 10, 2015), http://www.cbsnews.com/news/confederate- flag-south-carolina-statehouse-grounds-co- mes-down/	11
<i>All Things Considered: Confederate Flag Debate Symbolizes Rapid Change in the South</i> , NAT'L PUB. RADIO (June 23, 2015), http://www.npr.org/2015/06/23/416910342/ confederate-flag-debate-symbolizes-rapid-c hange-in-the-south	10

TABLE OF AUTHORITIES—Continued

	Page(s)
Amy B. Wang, <i>Lawmaker Apologizes After Saying Leaders ‘Should be LYNCHED’ for Removing Confederate Statues</i> , WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/22/lawmaker-says-louisiana-leaders-should-be-lynched-for-taking-down-confederate-statues/?utm_term=.bda986316b08	13
Arlette Saenz, <i>Here’s Where the 2016 Candidates Stand on the Confederate Flag Issue</i> , ABC NEWS (June 23, 2015), http://abcnews.go.com/Politics/2016-candidates-stand-confederate-flag-issue/story?id=31947516	12
Beth Reingold & Richard Wike, <i>Confederate Symbols, Southern Identity, and Racial Attitudes: The Case of the Georgia State Flag</i> , 79 SOC. SCI. Q. 568 (1998)	8
Byron D’Andra Orey, <i>White Racial Attitudes and Support for the Mississippi State Flag</i> , 3 FACULTY PUBL’N: POL. SCI. (2004).....	9
CENTERS FOR DISEASE CONTROL AND PREVENTION, <i>A Closer Look at African American Men and High Blood Pressure Control: A Review of Psychosocial Factors and Systems-Level Interventions</i> (2010)...	16
<i>Charleston Shootings: Dylann Roof Photos Found Online</i> , BBC NEWS (June 21, 2015), http://www.bbc.com/news/world-us-canada-33211192	10

TABLE OF AUTHORITIES—Continued

	Page(s)
David J. Lick, Laura E. Durso and Kerri L. Johnson, <i>Minority Stress and Physical Health Among Sexual Minorities</i> , 8 PERSP. ON PSYCHOL. SCI. 521 (2013)	17
David R. Williams, <i>Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination</i> , 896 ANNALS N.Y. ACAD. SCI. 173 (1999).....	14
David R. Williams and Selina A. Mohammed, <i>Discrimination and Racial Disparities in Health: Evidence and Needed Research</i> , 32 J. BEHAV. MED. 20 (2009).....	14, 15, 16
Ed Pilkington, <i>Black Lawyer Suing to Take Confederate Emblem off State Flag Faces Death Threats</i> , THE GUARDIAN (Mar. 9, 2016), https://www.theguardian.com/us-news/2016/mar/09/mississippi-black-lawyer-death-threats-confederate-emblem-state-flag	13
Eugene Scott, <i>Nikki Haley: Confederate Flag ‘Should Never Have Been There,’</i> CNN (July 10, 2015), http://www.cnn.com/2015/07/10/politics/nikki-haley-confederate-flag-removal/index.html	11
<i>Fast Facts About the SBC</i> , SOUTHERN BAPTIST CONVENTION, http://www.sbc.net/BecomingSouthernBaptist/FastFacts.asp (last visited July 27, 2017)	13

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Fifteen Confederate ‘Flaggers’ Indicted for Terroristic Threats and Gang Activity in Georgia</i> , SOUTHERN POVERTY LAW CENTER (Oct. 12, 2015), https://www.splcenter.org/news/2015/10/12/fifteen-confederate-%E2%80%98flaggers%E2%80%99-indicted-terroristic-threats-and-gang-activity-georgia	11
Gilbert C. Gee and Chandra L. Ford, <i>Structural Racism and Health Inequities</i> , 8 DU BOIS REV. 115 (2011).....	14
Ilan H. Meyer, <i>Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence</i> , 129 PSYCHOL. BULL. 674 (2003)	16, 17
J. Michael Martinez and Robert M. Harris, <i>Graves, Worms, and Epitaphs: Confederate Monuments in the Southern Landscape</i> , in CONFEDERATE MONUMENTS IN THE CONTEMPORARY SOUTH (J. Michael Martinez et al., eds., 2000)	4
James Forman Jr., <i>Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols</i> , 101 YALE L.J. 505 (1991).....	6
John A. Clark, <i>Explaining Elite Attitudes on the Georgia Flag</i> , 25 AM. POL. Q. 482 (1997).....	8

TABLE OF AUTHORITIES—Continued

	Page(s)
John M. Coski, <i>THE CONFEDERATE BATTLE FLAG: AMERICA'S MOST EMBATTLED EMBLEM</i> (2005)	4, 5, 6
Joyce Ehrlinger et al., <i>How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama</i> , 32 <i>POL. PSYCHOL.</i> 131 (2010)	9
Mark Guarino, <i>Mississippi Cities Remove State Flag Bearing Confederate Symbol</i> , <i>THE GUARDIAN</i> (July 22, 2015), https://www.theguardian.com/us-news/2015/jul/22/mississippi-cities-remove-state-flag-confederate	12
Naa Oyo A. Kwate, PhD et al., <i>Experiences of Racist Events Are Associated with Negative Health Consequences for African American Women</i> , 95 <i>J. NAT'L MED. ASS'N</i> 450 (2003)	14, 15
Pamela J. Sawyer, PhD et al. <i>Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions</i> , 102 <i>AM. J. PUB. HEALTH</i> 1020 (2012)	15

TABLE OF AUTHORITIES—Continued

	Page(s)
Press Release, SOUTHERN BAPTIST CONVENTION, <i>Southern Baptist Convention Passed Resolution to Repudiate Confederate Battle Flag at Annual Meeting</i> (June 14, 2016), http://erlc.com/resource-library/press-releases/southern-baptist-convention-passed-resolution-to-repudiate-confederate-flag-at-annual-meeting	12, 13
Radhika Chalasani, <i>Selma’s “Bloody Sunday”: A Look Back</i> , CBS NEWS, http://www.cbsnews.com/pictures/selma-bloody-sunday-look-back/1/	6
Robert J. Bein, <i>Stained Flags: Public Symbols and Equal Protection</i> , 28 SETON HALL L. REV. 897 (1998)	17, 18
Robert Shanafelt, <i>The Nature of Flag Power</i> , 27 POL. AND THE LIFE SCI. 13 (2008).....	17
Samuel Noh and Violet Kaspar, <i>Perceived Discrimination and Depression: Moderating Effects of Coping, Acculturation, and Ethnic Support</i> , 93 AM. J. PUB. HEALTH 232 (2003).....	15
Tony N. Brown et al., <i>“Being Black and Feeling Blue”: The Mental Health Consequences of Racial Discrimination</i> , 2 RACE & SOC’Y 117 (2000)	15

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Transcript: Gov. Nikki Haley of South Carolina on Removing the Confederate Flag</i> , N.Y. TIMES (June 22, 2015), https://www.nytimes.com/interactive/2015/06/22/us/Transcript-Gov-Nikki-R-Haley-of-South-Carolina-Addresses-Removing-the-Confederate-Battle-Flag.html	11
<i>The Various Shady Lives of the Ku Klux Klan</i> , TIME, Vol. 85, No. 15, Apr. 9, 1965, http://time.com/vault/issue/1965-04-09/page/32/	6
<i>Weekend Read: The State of the Confederacy in 2017</i> , SOUTHERN POVERTY LAW CENTER (Apr. 28, 2017), https://www.splcenter.org/news/2017/04/28/weekend-read-state-confederacy-2017	10
<i>Whose Heritage? Public Symbols of the Confederacy</i> , SOUTHERN POVERTY LAW CENTER (Apr. 21, 2016), https://www.splcenter.org/20160421/whose-heritage-public-symbols-confederacy	7, 10

INTERESTS OF *AMICI CURIAE*¹

The Southern Poverty Law Center (“SPLC”) is a nonprofit civil rights organization dedicated to fighting hate and bigotry and seeking justice for the most vulnerable members of society. Since its founding in 1971, SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC’s lawsuits have toppled institutional racism in the South, bankrupted some of the nation’s most violent white supremacist groups, and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination. As part of its work, SPLC has filed multiple *amicus curiae* briefs in the Supreme Court of the United States and the United States Courts of Appeals.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization advocating for the advancement of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and people living with HIV, through impact litigation, education, and policy advocacy.

Lambda Legal has participated as party counsel or *amicus curiae* in many cases before this Court that—like this one—involved government discrimination inflicting a range of harms on minority group members, including *Obergefell v. Hodges*, 135 S. Ct. 2584

¹ Under Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

(2015) (co-counsel for petitioners); *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (*amicus*); *Lawrence v. Texas*, 539 U.S. 558 (2003) (co-counsel for petitioners); and *Romer v. Evans*, 417 U.S. 620 (1996) (co-counsel for respondents). Based on Lambda Legal’s work serving constituencies that experience physical and emotional injuries as a result of government discrimination (including LGBT African-Americans and African-Americans living with HIV), Lambda Legal has developed expertise that bears directly on the harms inflicted on minorities by including a symbol of racism on a state flag.

SUMMARY OF ARGUMENT

This case presents the issue of whether government expression conveying a racial message—here, the Confederate battle flag as displayed on part of the state flag of Mississippi—can be challenged under the Equal Protection Clause. The court of appeals, answering in the negative, denied standing to Petitioner, an African-American, despite his allegation of direct injuries from his exposure to the Mississippi state flag. That flag is hung in, among other places, courtrooms where Petitioner appears regularly as a lawyer and city prosecutor.²

As this brief demonstrates, the Confederate battle flag is a symbol of racism, hate, and intolerance. Its

² In 1894, Mississippi adopted its current state flag, which includes the Confederate battle flag in the upper left-hand corner. *Briggs v. Mississippi*, 331 F.3d 499, 503 (5th Cir. 2003). In 2001, the Mississippi legislature held a referendum on the flag’s design and voters chose to keep the Confederate battle flag as part of their state flag. *Id.* at 504. As discussed in the Petition for Writ of Certiorari, the Mississippi state flag has conveyed a racial message since its adoption. Pet. Br. at 4.

display on an official state flag flown atop the state capitol, in all state office buildings, and at or near all public school property, is antithetical to the ideals and aspirations of American democracy and our cohesiveness as a nation and especially injurious, both emotionally and physically, to African-Americans and other minorities.

The court of appeals failed to recognize the distinctly damaging nature of government-promoted racial messaging. The harm to Petitioner was amplified because the racial message appeared on a state flag that carries great symbolic power. Ordinarily, such a flag stands for shared identity and common values. But instead, the Mississippi state flag delivers a message of exclusion and inferiority to African-Americans such as Petitioner, and to other minorities.

None of this Court's standing precedents relied on by the court of appeals involved this type of expression and injury. By denying standing to Petitioner in this case, the Fifth Circuit erected a needlessly high hurdle to judicial scrutiny under the Equal Protection Clause. This case therefore presents an issue of national importance meriting review by the Court.

ARGUMENT

I. THE CONFEDERATE BATTLE FLAG CONVEYS A MESSAGE OF RACISM, HATE, AND INTOLERANCE

A. The Origin and Post-Bellum Usage of the Confederate Battle Flag

The Confederate battle flag, a red flag with a blue diagonal cross dotted with stars, is the “the most recognized symbol of the Confederacy.” *Moore v. Bryant*, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016).

There is little serious historical dispute that the Confederacy was “so devoted to the subjugation of African-Americans that it sought to form a new nation predicated upon white supremacy.” *Id.* at 839.

The Confederate battle flag was originally “adopted primarily for use by Confederate armies during battle.” *Id.* In the following decades, the flag was associated both with anti-black racial violence and the nostalgic view in the South that the Civil War was a noble “Lost Cause” fought heroically against great odds.³ J. Michael Martinez and Robert M. Harris, *Graves, Worms, and Epitaphs: Confederate Monuments in the Southern Landscape*, in CONFEDERATE MONUMENTS IN THE CONTEMPORARY SOUTH 130, 135 (J. Michael Martinez et al., eds., 2000).

B. The Confederate Battle Flag in the Era of “Segregation Now, Segregation Tomorrow, Segregation Forever”

Whatever the legitimacy of the argument that the flag stood for southern heritage as opposed to racism, hate, and intolerance, the debate ended in the Civil Rights Era. As this Court observed, the “message’ conveyed by a monument may change over time.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 477 (2009). So, too, with the Confederate battle flag.

³ As early as 1875, near the end of Reconstruction, the Carolina Rifle Club, tasked with defending “the white race against negro aggression,” marched through Charleston, South Carolina under the Confederate battle flag. John M. Coski, *THE CONFEDERATE BATTLE FLAG: AMERICA’S MOST EMBATTLED EMBLEM* 49-50 (2005). The next year, the same club was involved in the “Cainhoy Massacre,” one of a series of violent clashes in Charleston leading up to the contentious presidential election of 1876. *See* 5 Cong. Rec. 1732, 1764 (1877).

Starting in the Civil Rights Era, the flag was primarily deployed to “energiz[e] the next generation of segregationists.” *Moore*, 205 F. Supp. 3d at 843. This is vividly illustrated by four of that era’s most well-known racist organizations, figures, and violent confrontations: the Dixiecrats, George Wallace, the Ku Klux Klan (“KKK”), and Selma, Alabama.⁴

In 1948, the so-called Dixiecrats, southern delegates to that year’s Democratic National Convention, broke away from the Democratic Party because of the Party’s support for civil rights. Kari Frederickson, *THE DIXIECRAT REVOLT AND THE END OF THE SOLID SOUTH, 1932-1968* 4 (2001). Delegates from Mississippi and Alabama walked out of the convention hall, carrying Confederate battle flags in protest. Coski, *supra* note 3, at 99. The Dixiecrats adopted a platform of white supremacy at their own convention while the audience waved Confederate battle flags and southern college students carried the flag into the convention hall. *Moore*, 205 F. Supp. 3d at 843.

Alabama Governor George Wallace used the Confederate battle flag extensively during his gubernatorial campaigns in 1958, which he lost, and 1962, which he won. The flag was “plastered on the windows of automobiles, along with his photograph or name;” “flapped from the cabs of sound trucks and from make-shift speakers’ platforms; and was waved by Wallace supporters at rallies and conventions.” Coski, *supra* note 3, at 151-52. He gave his infamous inauguration speech in 1963 proclaiming “segregation now . . . segregation tomorrow . . . segregation forever” while flanked by the Confederate battle flag. *Id.* at 133-34. During

⁴ “In the 1860s white supremacy meant slavery; in 1948 it meant legalized segregation.” Coski, *supra* note 3, at 98.

his tenure as governor, the flag was flown over the dome of the state capitol building,⁵ displayed “prominently behind his desk in the Governor’s Mansion,” and “appeared in many official portraits and photos of Wallace as he met with visitors.” *Id.* at 152. During Wallace’s brief 1964 presidential campaign, the battle flag was painted on the body of his campaign airplane. *Id.*

In 1965, a feature article about the KKK in *Time* magazine prominently displayed a photograph of a KKK Imperial Wizard holding a Confederate battle flag. *The Various Shady Lives of the Ku Klux Klan*, TIME, Vol. 85, No. 15, Apr. 9, 1965, at 32.⁶ That same year, Dr. Martin Luther King, Jr. led a civil rights march from Selma to Montgomery, Alabama. In Selma, the marchers were confronted by men carrying and wearing Confederate battle flags and symbols; in a historic confrontation on the Edmund Pettus Bridge, many of the marchers were viciously beaten. See Radhika Chalasani, *Selma’s “Bloody Sunday”: A Look Back*, CBS NEWS.⁷

With the civil rights struggle still in the balance, state government use of the battle flag and other confederate emblems reached a post-World War I peak. Georgia incorporated the battle flag in the redesign of

⁵ According to one historian, Wallace hoisted the flag above the capitol as an “act[] of defiance” in response to then-Attorney General Robert F. Kennedy’s visit to talk Wallace out of blocking two black students from their admission to the University of Alabama. James Forman Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L. J. 505, 506 (1991).

⁶ <http://time.com/vault/issue/1965-04-09/page/32/>.

⁷ <http://www.cbsnews.com/pictures/selma-bloody-sunday-look-back/1/>.

its state flag, and South Carolina placed the battle flag on top of its state capitol. *Moore*, 205 F. Supp. 3d at 843. More schools used Confederate symbols in the twenty-year period from 1948 to 1968 than ever before, including in the South. *Whose Heritage? Public Symbols of the Confederacy*, SOUTHERN POVERTY LAW CENTER (Apr. 21, 2016) [hereinafter *Whose Heritage?*].⁸

C. The Confederate Battle Flag Inspired Racism, Hate, and Intolerance in the Post-Civil Rights Era

Even after the Civil Rights era, the Confederate battle flag inspired racism, especially in schools. See, e.g., *A.M. ex rel McAllum v. Cash*, 585 F.3d 214, 218 (5th Cir. 2009) (a student in a Texas high school, among other racist incidents involving the Confederate battle flag, drew a picture of the flag in his notebook with the statement “[n]o niggers; subject to hanging.”); *Barr v. Lafon*, 538 F.3d 554, 559 (6th Cir. 2008) (graffiti in Tennessee high school had “Niggers ‘Hang em,’ written above a drawing of a noose next to the Confederate flag”).⁹

Courts, recognizing that Confederate battle flags cause substantial disruption in schools, including racial

⁸ <https://www.splcenter.org/20160421/whose-heritage-public-symbols-confederacy>.

⁹ See also, e.g., *Defoe ex rel. Defoe v. Spiva*, 650 F. Supp. 2d 811, 815 (E.D. Tenn. 2009) (describing incidents including a group of students wearing Confederate battle flags on their shirts calling another student “the ‘n’ word” and using the flag to intimidate two new African-American students); *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 1223, 1226 (D. Kan. 1998) (noting instances of racial harassment at a Kansas middle school involving the Confederate battle flag).

threats and violence, have allowed school officials to ban displays of the flag. *See, e.g., Hardwick ex rel Hardwick v. Heyward*, 711 F.3d 426, 430 (4th Cir. 2013) (school may ban Confederate battle flags under its dress code where racial incidents at the schools led school officials to reasonably forecast that Confederate battle flag shirts would disrupt schoolwork); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009) (upholding school district’s ban on clothing depicting the Confederate battle flag based on concerns over racially motivated violence).¹⁰

Post-Civil Rights-era social science studies found that racial attitudes are a major factor in determining an individual’s support or opposition for the Confederate battle flag. Two studies by social scientists focusing on the Georgia state flag after Georgia’s governor advocated changing the flag in 1992 determined that racial attitudes were a strong predictor of opinion on the flag. Beth Reingold & Richard Wike, *Confederate Symbols, Southern Identity, and Racial Attitudes: The Case of the Georgia State Flag*, 79 SOC. SCI. Q. 568, 578-79 (1998) (“[R]acial attitudes [are] a very strong predictor of white Georgians’ positions on the flag issue . . . the predominant role of racial attitudes in the formation of white Georgians’ southern identity and opinion on the state flag cannot be denied.”); John A. Clark, *Explaining Elite Attitudes on the Georgia Flag*, 25 AM. POL. Q. 482, 488 (1997) (“Despite frequent protestations by supporters of the current flag

¹⁰ *See also, e.g., A.M. ex rel McAllum*, 585 F.3d at 223; *Defoe ex. rel. Defoe v. Spiva*, 625 F.3d 324, 335 (6th Cir. 2010); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (concluding that school officials “had reason to believe that a student’s display of the Confederate battle flag might cause disruption”).

that tradition overrides race, racial attitudes have the strongest effect on support for the flag when other variables are controlled,” and “racial attitudes emerge as the strongest predictor of views on the flag . . .”).

Similarly, a third study by social scientists at the University of Nebraska surveying college students in Mississippi a week before the 2001 Mississippi referendum, *see supra* note 2, concluded that racism was the strongest explanation for white support for Mississippi’s current flag. Byron D’Andra Orey, *White Racial Attitudes and Support for the Mississippi State Flag*, 3 FACULTY PUBL’N: POL. SCI. (2004).

A fourth study, in connection with the 2008 Presidential election, found that white participants shown the Confederate battle flag were less willing to vote for President Obama than those not shown the flag. Joyce Ehrlinger, et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 POL. PSYCHOL. 131 (2010). At the same time, exposure to the flag did not influence the study participants’ voting choices among three white candidates. *Id.* at 139-40. The study concluded that “exposure to [the Confederate battle flag] evokes responses that are prejudicial” and “[t]hus, displays of the Confederate flag may do more than inspire heated debate, they may actually provoke discrimination . . .” *Id.* at 144.

D. The Charleston Massacre Confirmed the Confederate Battle Flag’s Racial Message

Die-hard supporters claim that the Confederate battle flag is a legitimate symbol of southern heritage.

See *Whose Heritage?*, *supra* note 8. But a “watershed”¹¹ moment proved that heritage is simply a pretext, and confirmed the flag’s message of racism, hate, and intolerance. On June 17, 2015, Dylann Roof, a 21-year-old white man, attended a night prayer and bible study at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. Using a semiautomatic handgun, Roof murdered nine parishioners, all of them African-American. *Moore*, 205 F. Supp. 3d at 846. After the massacre, authorities found a manifesto on Roof’s website, in which he declared that America needed to be taken back from “stupid and violent” African-Americans. *Whose Heritage?*, *supra* note 8. The website also exhibited photographs of Roof with the Confederate battle flag. In one picture Roof proudly held the flag in one hand and a gun in the other. *Charleston shootings: Dylann Roof Photos Found Online*, BBC NEWS (June 21, 2015).¹²

The Charleston massacre caused widespread condemnation of Confederate symbols, especially the Confederate battle flag.¹³ On July 9, 2015, less than one month after the Charleston massacre, then-South Carolina Governor Nikki Haley signed a bill requiring

¹¹ *All Things Considered: Confederate Flag Debate Symbolizes Rapid Change in the South*, NAT’L PUB. RADIO (June 23, 2015), <http://www.npr.org/2015/06/23/416910342/confederate-flag-debate-symbolizes-rapid-change-in-the-south> (quoting William Ferris, associate director of the Center for the Study of the American South at the University of North Carolina at Chapel Hill).

¹² <http://www.bbc.com/news/world-us-canada-33211192>.

¹³ Since the Charleston massacre, “at least 60 publicly funded symbols of the Confederacy have been removed or renamed.” *Weekend Read: The State of the Confederacy in 2017*, SPLC (Apr. 28, 2017), <https://www.splcenter.org/news/2017/04/28/weekend-read-state-confederacy-2017>.

that the Confederate battle flag be removed from the South Carolina statehouse grounds. *After 54 Years, Confederate Flag Comes Down in S.C.*, CBS NEWS (July 10, 2015).¹⁴ In explaining the decision to remove the battle flag, Haley stated that “for many . . . in South Carolina, the flag is a deeply offensive symbol of a brutally oppressive past” and a “sign of hate” that does not belong at the statehouse. *Transcript: Gov. Nikki Haley of South Carolina on Removing the Confederate Flag*, N.Y. TIMES (June 22, 2015).¹⁵ She later commented that “[w]hat I realize[] now more than ever is people were driving by and felt hurt and pain.” Eugene Scott, *Nikki Haley: Confederate Flag ‘Should Never Have Been There,’* CNN (July 10, 2015).¹⁶

After the massacre, politicians from disparate regions of the country acknowledged that the flag is a symbol of racism and hate, and many called for its removal. Former Massachusetts Governor Mitt Romney tweeted,

¹⁴ <http://www.cbsnews.com/news/confederate-flag-south-carolina-statehouse-grounds-comes-down/>.

¹⁵ <https://www.nytimes.com/interactive/2015/06/22/us/Transcript-Gov-Nikki-R-Haley-of-South-Carolina-Addresses-Removing-the-Confederate-Battle-Flag.html>.

¹⁶ <http://www.cnn.com/2015/07/10/politics/nikki-haley-confederate-flag-removal/index.html>. Two weeks after Haley signed the bill, fifteen individuals associated with the “Respect the Flag” group, formed to protest the removal of the battle flag from public spaces, drove around Douglas County, Georgia displaying the Confederate battle flag and hurled racial slurs at attendees of a birthday party for an eight-year old African-American child. *Fifteen Confederate ‘Flaggers’ Indicted for Terroristic Threats and Gang Activity in Georgia*, SPLC (Oct. 12, 2015), <https://www.splcenter.org/news/2015/10/12/fifteen-confederate-%E2%80%99flaggers%E2%80%99-indicted-terroristic-threats-and-gang-activity-georgia>.

“Take down the #ConfederateFlag at the SC Capitol. To many, it is a symbol of racial hatred.” Kentucky Senator Rand Paul described the flag as a “symbol of slavery” for all African-Americans. New Jersey Governor Chris Christie stated that the flag is a “divisive symbol of racism” and a “symbol[] of hate.” South Carolina Senator Lindsey Graham called for the flag’s removal, commenting, “[a]fter the tragic, hate-filled shooting in Charleston, it is only appropriate that we deal once and for all with the issue of the flag.” Arlette Saenz, *Here’s Where the 2016 Candidates Stand on the Confederate Flag Issue*, ABC NEWS (June 23, 2015).¹⁷ Mississippi state and city politicians expressed similar sentiments, and multiple Mississippi cities removed the state flag. Mark Guarino, *Mississippi Cities Remove State Flag Bearing Confederate Symbol*, THE GUARDIAN (July 22, 2015).¹⁸

On June 14, 2016, the nation’s largest Protestant body, the Southern Baptist Convention (“SBC”), a network of more than 50,000 co-operating churches and church-type missions with 15 million members, passed a resolution repudiating the Confederate battle flag because it is “a symbol of horrific injustices against our African American brothers and sisters in Christ . . . and has been used as a threat of terrorism against them.” Press Release, Southern Baptist Convention, *Southern Baptist Convention Passed Resolution to Repudiate Confederate Battle Flag at Annual Meeting* (June 14, 2016). Significantly, the SBC had been

¹⁷ <http://abcnews.go.com/Politics/2016-candidates-stand-confederate-flag-issue/story?id=31947516>.

¹⁸ <https://www.theguardian.com/us-news/2015/jul/22/mississippi-cities-remove-state-flag-confederate>.

formed before the Civil War because of northern Baptists' opposition to slavery.¹⁹

Another indelible identification of the Confederate battle flag with racism and hate occurred in connection with this case. Since filing this lawsuit, Petitioner has received racially-motivated death threats, such as the following: “[t]o all the people in Mississippi, Carlos Moore is trying to change your state flag. He is black . . . If any of my bro’s out that way need my help to keep your flag the way it is I’m right here. Where is James Earl Ray when you need him.” Ed Pilkington, *Black Lawyer Suing to take Confederate Emblem off State Flag Faces Death Threats*, THE GUARDIAN (Mar. 9, 2016).²⁰

¹⁹ <http://erlc.com/resource-library/press-releases/southern-baptist-convention-passed-resolution-to-repudiate-confederate-flag-at-annual-meeting>; see also *Moore*, 205 F. Supp. 3d at 847-48 (stating “[t]o place the importance of [SBC’s] decision in context: the Southern Baptists formed in 1845 because of disagreements with the larger Baptist denomination regarding slavery”); *Fast Facts About the SBC*, SOUTHERN BAPTIST CONVENTION, <http://www.sbc.net/BecomingSouthernBaptist/FastFacts.asp> (last visited July 27, 2017).

²⁰ <https://www.theguardian.com/us-news/2016/mar/09/mississippi-black-lawyer-death-threats-confederate-emblem-state-flag>. Further, on May 20, 2017, Mississippi State Representative Karl Oliver posted on his Facebook page a message suggesting that those responsible for the removal of Confederate monuments in Louisiana “should be lynched.” Amy B. Wang, *Lawmaker Apologizes After Saying Leaders ‘Should be LYNCHED’ for Removing Confederate Statues*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/22/lawmaker-says-louisiana-leaders-should-be-lynched-for-taking-down-confederate-statues/?utm_term=.bd%20a986316b08.

II. A RACIAL MESSAGE ON A STATE FLAG HARMS MINORITIES

Petitioner’s physical and emotional injuries from the Mississippi flag—the basis for his standing argument—are well-supported by studies demonstrating that racism and discrimination damage the health of their victims.²¹ Here, the impact is magnified by the vehicle that conveyed the racial message—a state flag that should deliver a message of inclusion and equality but instead daily reminds the Petitioner and other African-Americans that they are excluded and considered inferior.

A. This Court and the Medical Community Have Recognized That Discrimination Causes Health-Related Injuries

The psychological harm caused by racism—“greater when it has the sanction of the law”—has been acknowledged by this Court for more than sixty years. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 494 (1954); *see, e.g.*, Gilbert C. Gee and Chandra L. Ford, *Structural Racism and Health Inequities*, 8 DU BOIS REV. 115, 116 (2011) (distinguishing structural racism from private racism and describing structural racism as “more dangerous and harder to eliminate.”).

²¹ *See generally* David R. Williams and Selina A. Mohammed, *Discrimination and racial disparities in health: evidence and needed research*, 32 J. BEHAV. MED. 20 (2009); Naa Oyo A. Kwate, PhD et al., *Experiences of Racist Events Are Associated with Negative Health Consequences for African American Women*, 95 J. NAT’L MED. ASS’N 450 (2003); David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, 896 ANNALS N.Y. ACAD. SCI. 173 (1999).

Contemporary studies demonstrate that African-Americans and other minorities are not only psychologically injured by the effects of both institutional and private racism, but also suffer physical injuries. Further, “wide-ranging literature reveals that African-Americans face denigrating images of themselves and their culture in the dominant society, are subjected to discrimination on institutional levels, and experience acts of prejudice . . . on an individual level.” Naa Oyo A. Kwate, PhD et al., *Experiences of Racist Events Are Associated with Negative Health Consequences for African American Women*, 95 J. NAT’L MED. ASS’N 450, 450-451 (2003).

Racial discrimination has been linked to reduced mental health, including increased rates of stress²² and depression,²³ and physical health. One study of African-American men by the Centers for Disease

²² Williams and Mohammed, *supra* note 21, at 21 (“[T]here are added factors linked to racial status that adversely affect the health of disadvantaged minority populations in the United States.”); Kwate, *supra* note 21, at 450.

²³ See Tony N. Brown et al., “*Being Black and Feeling Blue*”: *The Mental Health Consequences of Racial Discrimination*, 2 RACE & SOC’Y 117, 118 (2000) (“Racial discrimination is linked to adverse mental health outcomes among Black Americans . . .”) (internal citations omitted); Pamela J. Sawyer, PhD et al. *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020, 1024 (2012) (even mere anticipation of discrimination can be “as physically and psychologically meaningful as actually experiencing discrimination”); Samuel Noh and Violet Kaspar, *Perceived Discrimination and Depression: Moderating Effects of Coping, Acculturation, and Ethnic Support*, 93 AM. J. PUB. HEALTH 232, 235 (2003) (“[B]oth frequency of perceived discrimination and emotional reactions exhibited significant direct associations with depression . . .”).

Control and Prevention even found that “[p]erceived racism . . . contribute[d] to stress and low self-esteem, which can ultimately negatively affect blood pressure levels.” CENTERS FOR DISEASE CONTROL, *A Closer Look at African American Men and High Blood Pressure Control: A Review of Psychosocial Factors and Systems-Level Interventions* 10 (2010).²⁴

Another study researched the link between racial discrimination and minority health disparities, and found that, even when controlling for socioeconomic status factors, “African Americans (or blacks) have higher death rates than whites” for “most of the 15 leading causes of death including heart disease, cancer, stroke, diabetes, kidney disease, hypertension, liver cirrhosis and homicide.” David R. Williams and Selina A. Mohammed, *Discrimination and racial disparities in health: evidence and needed research*, 32 J. BEHAV. MED. 20, 20 (2009).

African-Americans are not the only minority group that suffer harmful health conditions due to institutional and private discrimination. For example, research has shown that lesbian, gay, and bisexual (“LGB”) individuals experience both psychological and physiological health issues as a result of stress caused in part by discrimination. See Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 679-682 (2003) [hereinafter “*Prejudice, Social Stress, and Mental*”

²⁴ African-American men, like Petitioner, are more likely than white men and men of other minority groups to have high blood pressure. *Id.* at 16. A thorough review of nineteen studies on the impact of racism on high blood pressure “found that self-reported racism was associated with increased blood pressure or hypertension.” *Id.* at 27.

Health”].²⁵ Indeed “[s]imilar to research with African Americans and other ethnic minority groups . . . researchers have described antigay violence and discrimination as core stressors affecting gay and lesbian populations.” *Id.* at 680 (discussing institutionalized forms of prejudice). Such minority stress, a term which refers to the “excess stress to which individuals from stigmatized social categories are exposed as a result of their social, often a minority, position,” has been associated with health issues including mental disorders, acute conditions like headaches or back pain and chronic conditions like diabetes or asthma in LGB individuals. *See id.* at 684-690; *Minority Stress and Physical Health*, *supra* note 25, at 527-30.

B. Government Racial Messaging is Especially Devastating When the Message is Expressed in a State Flag

Flags convey powerful messages. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632-63 (1943); Robert Shanafelt, *The Nature of Flag Power*, 27 POL. AND THE LIFE SCI. 13, 16 (2008) (explaining that “[n]ot only does the display of a flag suggest social solidarity, it simultaneously demands political deference”). The national flag serves as “common ground in the formation of a sense of identity and citizenship.” Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 912 (1998) [hereinafter *Stained Flags*]. “No other American symbol has been as universally honored as the flag.” *Texas*

²⁵ *See also* David J. Lick, Laura E. Durso and Kerri L. Johnson, *Minority Stress and Physical Health Among Sexual Minorities*, 8 PERSP. ON PSYCHOL. SCI. 521, 530-33 (2013) [hereinafter “*Minority Stress and Physical Health*”].

v. Johnson, 491 U.S. 397, 427 (1989) (Rehnquist, C.J., dissenting).

In a federal system, state flags play the same role at the local level that the American flag plays at the national level. Mississippi, recognizing the symbolic power of a state flag, goes to great lengths to give its flag special prominence. The State's statutes establish both how and when the flag should be displayed, require a pledge of allegiance to the state flag, and mandate study of the history of the state flag in public schools and that students be taught "proper respect" for the flag. *See* MISS. Code Ann. §§ 3-3-15 (1984); 37-13-7(2) (1962); 37-13-5 (2002).

The symbolic power of a flag can trigger a sense either of belonging or of alienation. Bein, *Stained Flags*, at 911-13, 921. Individuals who feel alienated are not afforded full participation in public life: "without [a sense of belonging], an individual will be left in a state of rootless anxiety." *Id.* at 911. Alienation from the flag results in alienation from the national (or state) identity. Unless a flag is inclusive, a flag does not treat all citizens underneath it equally. *Id.* at 914-15.

Thus, an already destructive message of racism, hate, and intolerance is amplified when embedded in a state flag. In considering whether Petitioner has standing, the court below failed to recognize the distinctive harm to African-Americans and other minorities caused by such a state-endorsed message of racism. The question of whether Petitioner has standing under these circumstances to challenge the Mississippi state flag under the Equal Protection Clause is an important one that should be reviewed by the Court.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the petition for a writ of certiorari.

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