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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

In *Allen v. Wright*, 468 U.S. 737 (1984), this Court held that for purposes of the Equal Protection Clause, a "stigmatizing injury" accords a basis for standing only to those persons who are "personally denied equal treatment." *Id*. at 755. Here, Petitioner seeks certiorari review of a decision dismissing his equal protection claim for lack of standing based on allegations that the Mississippi state flag causes stigmatic harm, but does not otherwise deny him equal treatment.

Should this Court deny certiorari, where:

(1) The Fifth Circuit directly adhered to *Allen* to reach its decision that a plaintiff lacks standing to bring an equal protection claim based on stigma alone;

(2) No circuit conflict on the application of *Allen* is presented; and

(3) The undesirable "consequences" discussed in *Allen* of recognizing standing based solely on "stigmatic injury" make this case a poor candidate for certiorari review.

PARTIES TO THE PROCEEDINGS

Petitioner Carlos Moore was the plaintiff-appellant in the court below. Respondent Governor Phil Bryant, in his official capacity as the Governor of the State of Mississippi, was the defendant-appellee in the court below.

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BRIEF IN OPPOSITION

Respondent Governor Phil Bryant, in his official capacity as the Governor of the State of Mississippi ("Respondent"), respectfully submits this brief in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The March 31, 2017 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 853 F.3d 245 and reproduced at Pet.App.la-14a.[1] The September 8, 2016 Order of the District Court is reported at 205 F. Supp. 3d 834 and reproduced at Pet.App.15a-64a. The March 14, 2016 unpublished and unreported *sua sponte* Order of the District Court is produced at Resp.App.1a-7a.[2]

JURISDICTION

The Fifth Circuit rendered its decision on March 31, 2017. A timely petition for certiorari was filed on June 28, 2017, and docketed on June 30, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of the Mississippi Code are set forth in the Petition Appendix.

INTRODUCTION

The petition should be denied because it presents no legal question worthy of certiorari and no opportunity for an alternate disposition of the case. A three-judge panel, in a sensible opinion, held: (i) that alleged

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[1] "Pet. App." refers to the Petition Appendix.

[2] "Resp. App." refers to the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

stigma from the state flag, standing alone, was insufficient to convey Article III standing in Petitioner's equal protection litigation; and (ii) that Mississippi state statutes requiring students to be exposed to the flag in school did not facially violate the Constitution. That determination does not conflict with decisions from this Court or any other circuit courts of appeals.

To be sure, nothing in the Fifth Circuit's opinion strays from—let alone rejects—any decision of this Court, including *Allen v. Wright*, 468 U.S. 737 (1984). Quite differently, to reach its correct and predictable decision, the lower court only had to undertake a straightforward application of *Allen* to the alleged stigmatic injury before it.

Implicitly recognizing this, Petitioner resorts to misstating the Fifth Circuit's decision, and then attacking the misstated version. The Fifth Circuit, however, did not interpret *Allen* as a "one size fits all rule" that gives "free rein for state and local governments to demean their African-American citizens." *See* Pet.21, 13. Nor did the court "ignore" the principle that every standing inquiry must turn on the "particular claims" articulated by the "particular plaintiff." *See* Pet.9.

Instead, the Fifth Circuit found this particular plaintiff could not assert this particular equal protection claim. In its own words, the Fifth Circuit reasoned: "when plaintiffs ground their equal protection injuries in stigmatic harm, they only have standing if they also allege discriminatory treatment." *See* Pet.App.8a. Because Petitioner conceded that he had *not* been personally subjected to discriminatory treatment, he could not demonstrate stigmatic-injury standing.

That decision is not just compatible with *Allen*, but *Allen* dictates the result. Indeed, in that case, this

Court found that stigma alone was insufficient to satisfy the injury-in-fact requirement. *Allen*, 468 U.S. at 755 (concluding that "stigmatizing injury" "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct").

Sidestepping this point, Petitioner seeks to distort *Allen* by "cross-pollinat[ing] Equal Protection Clause standing jurisprudence with Establishment Clause cases." *See* Pet.App.6a. That is, Petitioner attempts to pluck standards from the defining context of the Establishment Clause and transport them to a more pliable setting, free of that defining context. To the Petitioner, the Establishment Clause and the Equal Protection Clause should have the same injury requirements because there is no "hierarchy of constitutional values." *See* Pet.19.

That contention, though, proves too much. The reason Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are very different. While the Establishment Clause prohibits the government from endorsing a religion, and thus directly regulates government speech if that speech endorses religion, the gravamen of an equal protection claim is differential governmental *treatment*.

In recognizing this, the Fifth Circuit did not manufacture a "sliding scale" of standing. Pet.19. The court simply acknowledged that standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). And, *a fortiori*, this Court in *Allen* recognized as much in clarifying that the same types of injuries that suffice in Establishment Clause cases are not the same types of injuries

to establish a basis for standing under the Equal Protection Clause. *See Allen*, 468 U.S. at 754-55.

Thus, this petition does not request certiorari review of any misapplication of governing precedent. Rather, Petitioner invites this Court to change the well-settled standing analysis for equal protection by raising the level of generality several notches for what constitutes an injury for equal protection purposes. This Court should decline that invitation—for the same reasons it did in *Allen*. *Id.* at 755. ("The consequences of recognizing respondents' standing on the basis of their first claim of injury illustrate why our cases plainly hold that such injury is not judicially cognizable.").

This case is also a bad candidate for certiorari because the circuit split in need of "reconciling" that Petitioner advances is a pure fiction. As the Fifth Circuit rightly noted, Petitioner cites to no cases that have engrafted Establishment Clause standing principles on to an equal protection claim. *See* Pet.App.6a; *Cf. Nat'l Ass'n for the Advancement of Colored People v. Horne*, 626 F. App'x 200, 201 (9th Cir. 2015).

All in all, Petitioner alleges that he personally and deeply is offended by Mississippi's state flag—and the sincerity of those beliefs is *not* doubted. But *Allen*'s standing analysis is not satisfied without an attendant allegation of discriminatory treatment. And standing does not vacillate based on the perceived importance of the claims presented. *E.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").[3]

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[3] *See also Hein v. Freedom From Religion Fund, Inc.*, 551 U.S. 587, 597 (2007) ("The federal courts are not empowered to seek

In short, then, this case involves not a circuit split about abstract principles of Article III standing, but the application of the uniform rule applied by the court of appeals for determining whether a litigant has pled an injury in fact for purposes of equal protection. No other legal questions worthy of certiorari are presented.

COUNTERSTATEMENT OF THE CASE

Petitioner Carlos Moore is an African-American attorney and resident of the State of Mississippi. Petitioner filed a federal lawsuit seeking to challenge the constitutionality of the Mississippi statutes authorizing the display of the state flag on public property. Specifically, Petitioner claims that he is offended by the upper, left-hand corner of the Mississippi state flag, which depicts the confederate battle flag. Petitioner alleges that the state flag causes him stigmatic injury, and that it violates his rights under the Fourteenth Amendment. However, Petitioner does not allege any facts or incident where he was denied equal treatment due to the state flag or the message it communicates.

1. Petitioner filed suit in the Southern District of Mississippi on February 29, 2016. He then proceeded to amend his complaint three times without leave of court. After the third amended complaint was filed, the district court *sua sponte* entered an order requesting briefing on two procedural issues: (1) whether

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out and strike down any governmental act that they deem to be repugnant to the Constitution."); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[S]ometimes 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.").

the plaintiff has standing to bring this suit, and (2) whether the state flag issue is a political question not suitable for resolution by the judiciary. *See* Resp.App.5a; Pet.App.15a. The court ordered the parties to file simultaneous briefs totaling no more than 15 pages. *See* Resp.App.5a. Quickly placing reigns on the litigation, the court also instructed Petitioner that he "may not amend his complaint again without leave of Court." *See* Resp.App.5a.

In addition to *sua sponte* ordering the parties to file simultaneous briefs, the court expressly cautioned Petitioner and his counsel to "avoid further false or misleading public statements which may 'unfairly undermine public confidence in the administration of justice.'" *See* Resp.App.5a-6a. The order provided:

> For example, plaintiff's suggestion that African-Americans will be entitled to financial benefits from this lawsuit is simply wrong. This case has not been filed as a class action and money damages are not permitted in 42 U.S.C. § 1983 cases against the State. Additionally, plaintiff and his counsel are cautioned that the race, educational background, and judicial philosophy of the Judges and Justices (or the President who nominated them) who hear this case, whether in the Southern District of Mississippi, the Fifth Circuit, or the United States Supreme Court, will have no bearing on its outcome. It would be inappropriate to suggest that a white Judge would necessarily uphold the Mississippi flag, so it is equally inappropriate for plaintiff and his counsel to have suggested that an African-American Judge who attended an HBCU will necessarily find the flag uncon-

> stitutional. That is the very definition of prejudice. . . .[4]

See Resp.App. 5a-6a.

On March 21, 2016, the parties filed their briefs limited to the two issues in the court's order, and the Respondent simultaneously moved to dismiss the third amended complaint on the same grounds. Petitioner additionally submitted a sworn declaration in support of his standing. Petitioner contended 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. Pet.App.16a. He also alleged that this hate speech damages him personally along with all other African-American residents of Mississippi, causing him to suffer physical and emotional injuries, and "incit[ing] private citizens to commit acts of racial violence." Pet.App.16a. Further, Petitioner maintained that the confederate battle emblem is a vestige of slavery prohibited by the Thirteenth Amendment. Pet.App.16a-17a.

On March 25, 2016, Petitioner again moved to amend his complaint. Pet.App.59a-60a. This time around,

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[4] The order from the district court came shortly after a public rally where Petitioner said he believes the flag will come down because, "God has set it up in his own perfect plan" by having the U.S. elect its first black president in 2008 and by having President Barack Obama nominate the district court judge assigned to the case to the federal bench. It is reported that Petitioner also said that it was "part of a divine plan that Justice Antonin Scalia . . . had died." *See* Emily Wagster Pettus, "Judge: Is court proper place for Miss. Flag debate?", Associated Press, in USA Today, March 15, 2016, https://www.usatoday.com/story/news/2016/03/15/judge-court-proper-place-miss-flag-debate/81805076/ (last visited October 13, 2017).

Petitioner sought to file a fourth amended complaint asserting an equal protection claim on behalf of his daughter. Pet.App.59a-62a. On April 12, 2016, the district court held a hearing on the motion to dismiss. Pet.App.15a. At the hearing, the parties agreed that Petitioner could testify about his alleged injuries and that his testimony would be accepted as true for the purposes of the motion to dismiss. Pet.App.1a-2a.

On September 8, 2016, the district court entered its order dismissing Petitioner's third amended complaint for lack of standing and denying the motion to amend because any amendment would be "futile." *See* Pet.App.15a-64a. While the district court expressed that to millions of people the "Confederate battle emblem is a symbol of Old Mississippi . . ." and "offends more than just African-Americans . . .,"[5] the

[5] In the district court, Petitioner also alleged that he feared for his safety as a result of the confederate battle emblem. The district court rejected this theory, noting that any alleged injury was not imminent and "[b]ecause there [wa]s nothing showing that fear of racial violence is particular to [Petitioner]." *See* Pet.App.50a. Similarly, at the district court level, Petitioner alleged that he felt "great concern and anxiety when [he] enter[ed] public property adorned with the state flag," which "has probably contributed to or caused the exacerbation of medical ailments, including but not limited to hypertension, insomnia and abnormal EKGs." *See* Pet. App.53a-55a. Petitioner specifically argued he "experiences stress when he enters courtrooms that display the state flag." *See* Pet.App.53a-55a.

The court also rejected this standing theory, reasoning: "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 'a lower standard of living because I only had certain cases in federal court.' ***

court nonetheless held that no matter how objectionable the state flag may be to Petitioner, he lacks Article III standing to challenge the flag's display on public property. *See* Pet.App.62a-64a.

In the opening portion of its opinion, the district court chronicled the history of Mississippi's adoption of the state flag in 1894, bringing that history forward to the 2001 referendum in which voters in the State elected to keep the state flag in its current form. *See* Pet.App.18a-36a. After providing a historical narrative on the state flag, the district court determined that Petitioner could not establish *any* of the three elements of Article III standing—injury, traceability, or redressability. *See* Pet.App.15a-64a.[6]

2. Petitioner thereafter appealed the district court's order to the Fifth Circuit Court of Appeals. While Petitioner had claimed in the district court a violation of the Thirteenth Amendment and had asserted that the Mississippi flag incited racial violence, Petitioner explicitly abandoned those claims on appeal. *See* Pet.App.2a. In the Fifth Circuit, Petitioner claimed that he is unavoidably exposed to the state flag and that the flag's message is "painful, threatening, and

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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. 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." *See* Pet.App.54a-55a.

[6] Because the district court found standing to be the "controlling question," the court did not reach the political question doctrine. Pet.App.44a.

offensive" to him, makes him "feel like a second-class citizen," and causes him both physical and emotional injuries." *See* Pet.App.4a.

In the main, then, Petitioner's sole injury theory on appeal to the Fifth Circuit was that the Mississippi state flag stigmatizes him. Petitioner conceded, though, that he was not claiming he was personally subjected to discriminatory treatment as a result of exposure to the flag. Petitioner further proffered that the district court erred in denying his fourth motion to amend his complaint to add a facial challenge to two Mississippi statutes arising out of the fact that his daughter would be exposed to the state flag *when* she was old enough to enter kindergarten.

On March 31, 2017, the Fifth Circuit affirmed the ruling of the district court. Pet.App.1a-14a. Citing *Allen v. Wright*, 468 U.S. 737 (1984), the Court of Appeals explained that stigmatic injury, for purposes of equal protection, "accords a basis for standing only to those persons who are personally denied equal treatment' by the challenged discriminatory conduct[.]" Pet.App.4a. Because Petitioner did not allege any discriminatory treatment, the Fifth Circuit reasoned that stigma alone was insufficient to satisfy the injury-in-fact requirement. *See* Pet.App.4a-9a.

The Fifth Circuit also rejected Petitioner's attempt to draw on Establishment Clause cases, which were *not* presented to the district court, to argue that exposure to unavoidable and deleterious government speech is sufficient to confer standing. The Court of Appeals explained that Establishment Clause case law, though vital for its purpose and settled as doctrine, is inapplicable. *See* Pet.App.5a. Lastly, the Fifth Circuit affirmed the district court's denial of Petitioner's fourth attempt to amend his complaint and add a claim that

his daughter is harmed by two Mississippi statutes. *See* Pet.App.11a-14a.[7]

After the Fifth Circuit's decision was handed down, this petition for a writ of certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioner does not and cannot identify any meaningful division of authority between the Fifth Circuit's decision and any decision of any other court. Nor has Petitioner identified any principle of law articulated by the court below that deviates from this Court's precedent. Instead, Petitioner merely disagrees with a Fifth Circuit decision that correctly identified and applied controlling legal precedent for Article III standing.

In a well-reasoned opinion, the Fifth Circuit reached the unremarkable conclusion that that stigma alone is insufficient to satisfy the injury-in-fact requirement in an equal protection claim. This case presents no compelling basis for this Court to disturb the eminently correct decision below. Further review is unwarranted.

I. THE FIFTH CIRCUIT DID NOT DISREGARD THIS COURT'S PRECEDENT.

Despite Petitioner's contrary contention, the lower court's decision is entirely faithful to this Court's precedent, including *Allen* and its progeny. In the Fifth Circuit, the Petitioner asserted standing based

[7] Because the Fifth Circuit found that Petitioner "failed to adequately plead injury in fact," the court did not reach causation, redressability, or the political question doctrine. Pet.App.13a-14a.

exclusively on a "stigmatic injury" arising from being exposed to the Mississippi state flag.

The Petitioner continues to press stigma as the sole injury now. The petition maintains that the Equal Protection Clause "reach[es]" the stigmatic injury because the flag makes African Americans feel like "second-class citizens." *See* Pet.13, 6. The petition acknowledges, however, that Petitioner has not been treated disparately on account of his race. *See* Pet.i, 9, 12. It is this stigmatic injury—entirely unaccompanied by any discriminatory treatment—that the Fifth Circuit rightfully rejected.

A. This Court's decision in *Allen* compelled the result reached by the Fifth Circuit. This is so because the obvious point of that decision is that stigma, standing alone, is insufficient to convey a cognizable injury-in-fact in equal protection litigation. *Allen* rebuffed stigmatic injuries as too abstract and generalized to meet Article III standing requirements in equal protection litigation. *E.g., Allen*, 468 U.S. at 755-756; *Valley Forge*, 454 U.S. at 485-86.

Like Petitioner, the *Allen* plaintiffs asserted an equal protection challenge premised on "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race." *Id.* at 755. And like here, a dismissal motion based on lack of standing was filed, which the district court granted. *Id.* at 748.

This Court affirmed the dismissal on standing grounds because stigma is not a judicially cognizable injury:

> [Plaintiffs have no] standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be

> no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient *in some circumstances* to support standing. Our cases make clear, however, that such injury accords a basis for standing *only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct*.

Id. at 755 (emphasis supplied). Petitioner here is in "the same position" as the plaintiffs in *Allen* because he does not allege "a stigmatic injury suffered as a direct result of having personally been denied equal treatment." *Id.*

Unable to dent the Fifth Circuit's application of this settled law, Petitioner overstates the court's holding. For example, Petitioner mischaracterizes the decision as "ignor[ing] the principle articulated in *Allen*" and "grossly distort[ing] [ ] and unreasonably enlarge[ing]" *Allen*'s holding. Pet.9, 20-21. The petition also claims that the Fifth Circuit interpreted *Allen* as a "one size fits all rule" that gives "free rein for state and local governments to demean their African-American citizens." Pet.21, 13. Worse still, Petitioner even offers *Allen* as directly undermining the Fifth Circuit's holding. *See* Pet.20-22.

None of this is true. The lower court did not hold that stigma is never cognizable or that government speech is altogether insulated from constitutional protections. Nor did the court give government a "free rein" to discriminate. Rather, the Fifth Circuit undertook a straightforward application of *Allen*, and reiterated its holding that stigma *alone* is insufficient to confer standing to pursue equal protection claims.

Although *Allen* plainly acknowledged the "serious consequences" of non-economic injury, the Court firmly affixed that point to the ultimate holding, which is that plaintiffs did not have standing to "litigate their claims based on the stigmatizing injury often caused by racial discrimination." *Id.* at 755. And while *Allen* plainly says that stigma "is sufficient in some circumstances" for standing, this Court defined those limited "circumstances" in the very next sentence: "such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct." *Id*.; *see also Nat'l Ass'n for Advancement of Colored People v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at *6 (D. Ariz. Oct. 3, 2013), *aff'd,* 626 F. App'x 200 (9th Cir. 2015) ("*Allen* summarizes the controlling principle: 'stigmatizing injury' 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'").

Thus, while all courts have recognized stigmatic harm, the question presented by Petitioner is whether the Constitution permits plaintiffs to pursue an equal protection challenge based exclusively on stigma without any actual denial of equal treatment. This Court has long said "no." *Allen*, 468 U.S. at 737.

The landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), emphasized by Petitioner, does not provide otherwise. That decision says nothing about Article III standing—and for good reason. In *Brown*, there was no question about the actual denial of equal treatment. Each plaintiff in *Brown* was *denied admission* into white schools, causing *real and concrete* harm. *Id.* at 488 ("In each instance, they have been denied admission to schools attended by white

children under laws requiring or permitting segregation according to race.").

Petitioner likewise is wrong to characterize *Anderson v. Martin*, 375 U.S. 399 (1964) as offering support for the theory advanced. *Anderson* invalidated an Alabama statute that required all ballots to state the race of the candidates for elective office. *Id*. at 400. The law at issue dealt specifically with the machinery of an election and contained an explicit racial classification that impaired a person's ability to become a candidate for elective office because of that person's race. *Id.*

The claimed violation of equal protection in *Anderson* thus was tied to the tangible, concrete context of a candidate seeking elective office. Each plaintiff was a candidate who sought election to a board during a primary election, and they brought suit specifically over the manner in which their names were listed on the ballot. The plaintiffs claimed a concrete injury particularized to them arising out of the compulsory designation of their race on the ballot.

Therefore, in *Anderson*, the denial of equal protection resulted from the imposition of a barrier by state law that "prescribe[d] the form and content of the official ballot used," and "require[d] or encourage[d] [ ] voters to discriminate on upon the grounds of race." *See id*. at 399 (noting that racial prejudice "operate[d] against one group because of race and for another"). *Anderson* is thus inapposite because Petitioner's allegations here are unmoored from any denial of equal treatment resulting from the imposition of any barrier.

Also contrary to Petitioner's contention, the Fifth Circuit's decision does not deviate from this Court's ruling in *Pleasant Grove City, Utah v. Summum*,

555 U.S. 460 (2009). In a Free Speech Clause case, this Court in *Summum* held that privately-donated monuments that a government accepts for permanent placement in a park are a form of government speech not subject to the strictures of the First Amendment.

The *Summum* Court found no constitutional violation, holding that the First Amendment "does not regulate government speech," and that a government entity is entitled to "select the views that it wants to express." *Id*. at 467-68. In so holding, however, the Court affirmed that "[w]hile government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Id.* at 469. The Court similarly reasoned that its decision "does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause." *Id*. at 468.

For his proposition that the Fifth Circuit's holding departs from *Summum*, Petitioner cites to the following sentence in Justice Stevens' concurring opinion: "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. But this statement just recaps what otherwise is obvious—that the First and Fourteenth Amendments restrain government speech and/or conduct in certain circumstances. Neither the majority opinion nor the concurrence in *Summum* exhaustively lists those circumstances—let alone did any opinion in *Summum* revisit *Allen*'s holding or altogether redefine what injuries are cognizable for purposes of demonstrating an equal protection claim.

Plus, the Fifth Circuit recognized a similar point to the one made by the concurrence in *Summum*. As the court of appeals noted, "in cases where the Government engages in discriminatory speech, that speech likely will be coupled with discriminatory treatment." Pet.App.9a. The court additionally reasoned that "discriminatory government speech would certainly be useful in proving a discriminatory treatment claim, because it loudly speaks to discriminatory purpose." Pet.App.9a. Nevertheless, the Fifth Circuit was correct in concluding that Petitioner could not state an injury-in-fact for equal protection purposes here by alleging stigma from the state flag unmoored from any allegation of discriminatory treatment.

The case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), emphasized by the amici and by Petitioner in the lower court, is similarly far afield.[8] While no doubt a momentous decision, *Obergefell* involved a legal right guaranteed by the Fourteenth Amendment—specifically the right to marry. Thus, in *Obergefell*, a litigant's rights had been infringed upon because they were actually treated differently than others. Petitioner here has alleged no analogous legal right or discriminatory treatment. Because of this—and as the district court put it—Petitioner's argument seeks to "contort" *Obergefell* "beyond recognition." Pet.App.53a.

In a similar vein, Petitioner cannot bypass *Allen* by claiming that the State has itself acted with a discriminatory purpose in the design of its state flag. *See* Pet.16. ("Mississippi's state flag is alleged to be a

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[8] *See* Brief for Members of the Congressional Black Caucus and the Mississippi Legislative Black Caucus As Amici Curia in Support of Petitioner ("Congressional Black Caucus Amici") at 9-10.

state-sponsored endorsement of white supremacy. . . .”). Indeed, *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; *see also, 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.”).

Underscoring this point is *Heckler v. Matthews*, 465 U.S. 728 (1984)—an opinion referred to several times by this Court in *Allen*. The plaintiff in *Heckler* claimed that he was denied the same Social Security benefits that were afforded to similarly situated women, in violation of his equal protection rights. His injury at the hands of the Social Security Administration was concrete: “as a nondependent man, he receive[d] fewer benefits than he would if he were a similarly situated woman.” *Id.* at 738.

Thus, as *Allen* explained, *Heckler* is a case where standing was afforded “to those persons who [were] personally denied equal treatment by the challenged discriminatory conduct[.]” *Allen,* 468 U.S. at 754-56 (quotation marks and citation omitted). As discussed, Petitioner here claims no similar personal denial of equal treatment.

B. Because it is undeniable that the Fifth Circuit correctly applied controlling Supreme Court precedent, Petitioner's chief retort is to rely on "the legions of Establishment Clause cases recognizing standing based solely on religious stigma." Pet.21-22. But relying on decisions tethered only to the Establishment Clause shows Petitioner's avoidance of the equal protection issue, and demonstrates that Petitioner actually seeks for this Court to altogether refashion the test for what injuries are cognizable under the Equal Protection Clause.

Indeed, in the main, Petitioner's argument is that there *should be* no difference in the standing analysis between one who objects to a secular symbol under the Fourteenth Amendment and one who challenges alleged government endorsement of religion through display of a religious symbol on public property. Petitioner claims that "no rationale" exists for analyzing injuries under the Equal Protection Clause differently than injuries under the Establishment Clause. *See* Pet.8, 19. Still more, Petitioner actually goes so far to claim that the "distinction" between the two types of claims "does not [ ] exist." Pet.11.

These arguments, though, get the standing inquiry all wrong. The reason Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are not the same. In other words, there is not a constitutional injury more "favored" than any other—the differing Clauses simply provide protection for very different injuries. While Petitioner pays this point short shrift, the differences are not merely illusory.

On the one hand, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend I. The standing doctrine therefore necessarily reflects the First Amendment's specific prohibition that government neither establish nor interfere with the free exercise of one's religious beliefs. And, as the Fifth Circuit noted, a substantive injury under the Establishment Clause can occur when a person encounters the government endorsement of religion. *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) (collecting this Court's Establishment Clause cases).[9]

On the other hand, it cannot legitimately be disputed that the injury necessary for an equal protection challenge is different. For instance, in *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993), this Court held:

> 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

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[9] Petitioner also cites to *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). *See* Pet.4-5. In *Walker*, a nonprofit organization brought a § 1983 action alleging that the Texas Department of Motor Vehicles violated the organization's First Amendment right to free speech by denying its application for specialty license plate featuring Confederate battle flag. *Id*. at 2244-45. Any reliance on *Walker* is inapt, given the Supreme Court affirmed Texas's right not to permit the display of the Confederate flag on its licenses plates. *Walker* therefore stands for the uncontroversial proposition that government has the right to speak or not speak without running afoul of the First Amendment unless constrained by the Establishment Clause.

> 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.

Id. at 666 (emphasis supplied).

These differences do not create a "hierarchy" of constitutional values—they just embody that standing "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Because the claims asserted here arise under the Equal Protection Clause, Petitioner's argument that he feels like a second-class citizen does not give rise to a legal injury-in-fact, without facts that Petitioner is treated differently because of the state flag.

C. Equally unavailing for purposes of Article III standing is Petitioner's contention that an injury-in-fact is demonstrated because two Mississippi statutes cause Petitioner's daughter to be exposed to the Mississippi flag in school. Specifically, in an effort to demonstrate a cognizable injury, Petitioner points to Mississippi Code § 37–13–5(1), (3) and § 37–13–7(2).

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." *See* MISS. CODE ANN. § 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 [.]" *See* MISS. CODE ANN. § 37–13–7(2).

As the Fifth Circuit noted, Petitioner never alleged that either statute actually has violated his daughter's rights—as his daughter was not of school age at the time he filed his complaint. Instead, Petitioner's claim was that when his daughter begins school (specifically, when she reached an age old enough to enter kindergarten), she will "be forced to learn, adopt, utter or communicate speech which she finds objectionable" in violation of the First Amendment. Pet.App.11a-12a. The district court and the Fifth Circuit correctly rejected this standing theory.

Section 37-13-5 only requires public schools to provide a course of study about the American and Mississippi flags, as well as their history. And 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 ANN. § 37–13–7(2).

It is thus beyond cavil that neither statute requires anything more than that students be taught about the flag and the pledge. The Fifth Circuit, therefore, was correct in concluding that the statutes do not facially violate the Constitution. In fact, because neither statute compels the violation of Petitioner's daughter's rights, the alleged injury asserted by Petitioner is that Mississippi could, *but need not*, apply its law in an unconstitutional way. It is undeniable that such an assertion is too speculative to support standing, *see Henderson v. Stalder*, 287 F.3d 374, 380 (5th Cir. 2002), and there is otherwise nothing novel—let alone

certiorari worthy—about the Fifth Circuit's dismissal of a failed facial attack to two state statutes.

All told, Petitioner no doubt may personally and deeply be offended by Mississippi's state flag. But those feelings, however sincere, do not establish Article III standing for purposes of the Equal Protection Clause, absent allegations of discriminatory treatment. In embracing this logic, the Fifth Circuit got the Article III standing analysis exactly right—as any other holding effectively would have overruled *Allen*. This case is thus an unpromising candidate for this Court's review.

II. THERE IS NO CIRCUIT SPLIT.

Petitioner does not cite a single decision—in over thirty years since *Allen* was decided—that has interpreted *Allen* as he urges this Court to interpret it. Instead, since *Allen*, courts have found that plaintiffs lack standing to bring equal protection claims based on stigma alone.

A. While Petitioner claims certiorari review is necessary to "reconcile the conflict between the court of appeals," the only equal protection case cited to in support of the purported conflict is *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985). According to Petitioner, *Smith* "illustrates well the appropriate limits on *Allen*" and stands for the proposition that a stigmatic injury is "sufficient for standing." *See* Pet.21-22, n.5. Not so.

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. Stated differently, it was "'a stigmatic injury suffered as a direct result of having personally been denied equal treatment.'" *Id*. at 723 (quoting *Allen*). That is not what

Petitioner has alleged here. Petitioner asserts a stigmatic injury void of any specific facts or incident where he was denied equal treatment due to the state flag or the message it communicates.

Next, the Eleventh Circuit's decision in *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997) is cited by the amici as evidence of a circuit split, but that case also establishes no such thing.[10] Although decided at the summary judgment stage, the court in *Coleman* rejected plaintiff's equal protection challenge to Georgia's state flag. While neither the defendant on appeal nor the appellate court in *Coleman* addressed "injury" for purposes of standing, any purported circuit split urged by the amici is false.

This is so because the Eleventh Circuit found *no injury* for equal protection purposes because the plaintiff did not demonstrate the flag "presently imposes on African-Americans as a group a measurable burden or denies them an identifiable benefit." *Id*. at 530. The fact that the Eleventh Circuit found no cognizable injury for purposes of the merits is of little significance. In this context, the merits and standing are intertwined, and both the Fifth Circuit and *Coleman* reached the exact same result—that stigma alone is not a sufficient or cognizable injury in equal protection cases. Instead, as the Fifth and Eleventh Circuits concluded, a plaintiff must also show that he or she personally has been denied equal treatment for purposes of the Equal Protection Clause. Therefore, the Fifth Circuit's decision does not conflict with *Coleman* at all.

B. An obvious corollary to this point is that Petitioner cannot manufacture a false circuit split by importing Establishment Clause harms to the Equal

[10] *See* Brief for Congressional Black Caucus Amici at 11-12.

Protection Clause analysis. Neither this Court nor any other court has ever done as much—or otherwise adopted the position that unwanted exposure to a purely secular symbol, such as a state flag, constitutes an injury for purposes of equal protection. *Cf. Horne*, 626 F. App'x at 201 (rejecting an argument that Establishment Clause cases were relevant to show standing in equal protection litigation and straightforwardly applying *Allen*).[11]

In fact, Petitioner's attempt to construct a circuit split in this regard entirely misses the mark in light of Petitioner's concessions in the Fifth Circuit. For instance, during oral argument, Petitioner was asked whether he could cite to a "single equal protection violation case based ever on government speech." *See* Oral Arg. Rec. 2:53-3:01.[12] Petitioner very candidly answered that question in the negative. *See* Oral Arg. Rec. 2:53-3:01. Petitioner also was asked if he knew of "any equal protection case that finds standing based on stigma without an attendant finding of unequal treatment." *See* Oral Arg. Rec. 3:27-3:37. Petitioner's response was, "I don't think so, Your Honor." *See* Oral Arg. Rec. 3:27-3:37.

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[11] *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). The Ninth Circuit, without citation to the cited Establishment Clause cases, straightforwardly applied *Allen*.

[12] "Oral Arg. Rec." refers to the audio recording for the March 7, 2017 oral argument available on the Fifth Circuit's website. Citations indicate the minute and second of the audio file where statements occur. *Available at* http://www.ca5.uscourts.gov/OralArgRecordings/16/16-60616_3-7-2017.mp3.

Petitioner is thus wrong to now label the Fifth Circuit's decision as "anomalous" and attempt to cordon off the decision from others that have interpreted *Allen*. *See* Pet.16. Plainly put, the Fifth Circuit's opinion goes hand in hand with this Court's precedent, and the purported conflict in need of "reconcile[ing]" is in reality no conflict at all.

III. THIS CASE OTHERWISE PRESENTS A POOR CANDIDATE FOR CERTIORARI REVIEW.

In addition to the reasons already discussed, this petition presents a less than ideal canvas for granting certiorari review of a case dismissed based on lack of Article III standing. At least three reasons immediately inform why.

One: Petitioner exhaustively tries to pigeonhole the injury-in-fact asserted here into the type of injury cognizable for purposes of the Establishment Clause. As explained, though, this is not an Establishment Clause case. And stigmatic injury does not suffice for purposes of equal protection and *Allen.* In other words, Petitioner simply "fail[s] to identify any personal injury suffered by [him] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge,* 454 U.S. at 485 (emphasis in original).

Two: Petitioner effectively asks this Court to create a new mold for the type of injuries cognizable under the Equal Protection Clause. That request is doubly problematic. Not only would it eviscerate *Allen* and its subsequent judicial applications, but there is no limiting principle to the types of proposed injuries advanced.

The Supreme Court in *Allen* identified this very point in rejecting the plaintiff's "stigmatic injury" theory for purposes of equal protection. Specifically, this Court recognized the myriad of undesirable "consequences of recognizing respondents' standing," and concluded that those consequences "illustrate why our cases plainly hold that such injury is not judicially cognizable." *Allen*, 468 U.S. 755-56.

Petitioner's stigma and denigration theory here is as generalized and abstract as the injuries held insufficient for constitutional standing by the Supreme Court in *Allen*. Indeed, under Petitioner's theory, anyone objecting to any secular symbol not implicating Establishment Clause principles, who also alleges that the symbol causes stigmatic injury, would have standing.

For instance, the district court identified a number of symbols and displays that citizens encounter on a daily basis. *See* Pet.App.55a. But "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). This Court identified similar points in *Summum*:

> Respondent seems to think that a monument can convey only one "message". . . Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.
>
> . . .
>
> [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the

> effect of monuments that do not contain text is likely to be even more variable.
>
> . . .
>
> Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure . . . The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes."

Summum, 555 U.S. at 477-78.

Recognizing these important points, if Petitioner has standing here, virtually any litigant could challenge any government action, display, monument, or speech he or she views as offensive or as unduly favorable to another, by simply alleging what cannot be disproved—namely, that he or she suffers denigration, stigma, or like form of discomfiture. Equal protection would go from being a prohibition on the denial of equal treatment to an embargo on being offended. Yet federal courts do not have the constitutional authority to adjudicate metaphysical injuries, and allegations of "psychological" discomfiture at government action are insufficient to demonstrate standing—even if "phrased in constitutional terms." *Valley Forge*, 454 U.S. at 485-86.

Three: Petitioner couches his request for certiorari review as one asking this Court only to agree that "racial stigma" is no "less injurious" than stigma based on "religion." While conceptually true enough, the upshot of Petitioner's legal theory would be to generate a reduced constitutional standing threshold for

equal protection cases. Therefore, what Petitioner actually seeks is an alternative to *Allen*—one that raises the level of generality several notches for what constitutes an injury-in-fact for equal protection purposes.

But if all that is required for equal protection standing is to claim stigma—or even stigma that has caused some physical manifestation—without allegations also fastened to the denial of equal treatment or a concrete benefit, then there would be nothing left to litigate after the standing inquiry. The injury for standing effectively would merge into to the merits of the equal protection claim itself.

Such an alternative to *Allen* offered by Petitioner—*i.e.*, a repurposed test for standing untethered to the nature and source of the claim asserted—did not present a close question in the lower court. And it does not present a certworty one here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 18, 2017

APPENDIX

APPENDIX

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

[Filed 03/14/16]

Cause No. 3:16-CV-151-CWR-FKB

CARLOS E. MOORE

Plaintiff

v.

GOVERNOR PHIL BRYANT, *in his Official Capacity*

Defendant

ORDER

Plaintiff Carlos E. Moore, an attorney, contends that his constitutional rights are violated by the presence of the Confederate battle flag within Mississippi's state flag. He wants the judiciary to remove the Confederate emblem from Mississippi's banner. He joins a long list of citizens and associations who have already tried, without success, to achieve this goal through the courts. Those courts uniformly concluded that the judiciary was not the proper branch of government to remove the Confederate battle flag.

The Judges who heard those cases have eloquently described the indisputable truth at the heart of the plaintiffs' grievances: the Confederate battle flag is offensive to millions of Americans.

One of the finest explanations of the pain, divisiveness, anguish, and violence associated with the flag came in 1998 from Mississippi Supreme Court Justice Fred L. Banks, Jr. "Since the defeat of the Confederate States of America," he wrote, "the Confederate battle flag has been used throughout history, not only to commemorate the sacrifices made in support of the cause of the Confederacy, but—most prominently—as a symbol of white supremacy." *Daniels v. Harrison Cnty. Bd. of Sup'rs*, 722 So. 2d 136, 139 (Miss. 1998) (Banks, J., concurring). After describing some of that white supremacy, segregation, and discrimination, Justice Banks found it "understandable to say the least that there is a large segment of Mississippi's citizenry which finds the state flag offensive and objectionable." *Id*. at 140. "One can only wonder," he lamented, "what role such divisiveness plays in the problems which continue to plague our state." *Id*. at 141.

Other courts have agreed. In a case challenging Alabama's display of the Confederate battle flag, the United States Court of Appeals for the Eleventh Circuit found it "unfortunate that the State of Alabama chooses to utilize its property in a manner that offends a large proportion of its population." *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990). Later, in a case about Georgia's (former) state flag, that court opined that "the Confederate battle . . . 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." *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997).[1]

[1] Other courts have simply noted the ongoing debate as to whether the Confederate battle flag symbolizes racial oppression

A number of other governmental and private organizations have come to the same conclusion. The Texas Department of Motor Vehicles Board, the entity which approves specialty license plates in that state, has found that "a significant portion of the public associate the confederate [battle] flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (quotation marks and citation omitted). Because of the Confederate battle flag, the National Collegiate Athletic Association continues to ban Mississippi from hosting pre-determined NCAA postseason events. Michael Bonner, *Mississippi the Lone State Under NCAA's Postseason Ban*, The Clarion-Ledger, July 9, 2015. It would be impossible to compile a complete list of the harms the flag continues to impose on Mississippi's identity and economy.

If this were a Court of facts and facts alone, therefore, it is difficult to see how the Confederate battle flag could remain in Mississippi's state flag. It represents a constitution that affirmed the right to own slaves, *see* Confederate Const. art. I, § 9, cl. 4, and symbolized racial subjugation, oppression, and inferiority. *See id.* at art. IV, § 3, cl. 3 ("the institution of negro slavery, as it now exists in the Confederate

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or the valor of Confederate troops. *See Briggs v. Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003); *Barrett v. Khayat*, No. 3:97-CV-211, 1999 WL 33537194, at *3 (N.D. Miss. Nov. 12, 1999) ("for some it has to do with racial superiority, as when it is displayed by the Ku Klux Klan or other racially motivated groups; yet others insist that when waved at football games, the confederate flag is meant to convey a message of school spirit and courage").

States, shall be recognized and protected by Congress").[2] It flew as the banner of an armed insurrection against the United States of America, the nation to which Mississippi remains bound by law, geography, and affection. To many people, the values of the Confederate battle flag are anathema to American values.

But this is both a Court of facts *and* law. And the law suggests that the presence of the Confederate battle flag in Mississippi's state flag does not violate the United States Constitution. *See Briggs v. Mississippi*, 331 F.3d 499, 503 (5th Cir. 2003) (concluding that the Mississippi state flag does not violate the Establishment Clause of the First Amendment); *Mississippi Div. of United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches*, 774 So. 2d 388, 389 (Miss. 2000) ("Without question, the State Flag that contains within it the Confederate Battle Flag may be flown by the State without violation of the Mississippi or United States Constitutions."); *Daniels*, 722 So. 2d at 139 ("the record in the present case contains no indication that the flying of the single Confederate Flag at Eight Flags serves to deprive any citizens of this State of any constitutionally protected right"); *Hunt*, 891 F.2d at 1559 (concluding that Alabama's decision to fly the Confederate battle flag on its capitol dome did not violate the First, Thirteenth, or Fourteenth Amendments); *Coleman*, 117 F.3d at 530 (concluding that Georgia's inclusion of the Confederate battle flag in its (former) state flag did not violate the First or Fourteenth Amendments).

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[2] Of course, the United States Constitution permitted slavery for its first 75 years, too.

Despite the unanimity of these decisions, very recent events in South Carolina and Alabama reignited the flag debate in Mississippi. In those states, elected officials within the executive and legislative branches decided to remove the Confederate battle flag from their state capitols. The difference here is that the plaintiff is asking the third branch of government – the judiciary – to step in and act. It is simply not clear whether the judiciary should take such an action. *See United Sons of Confederate Veterans*, 774 So. 2d at 389 ("The decision to fly or adopt a state flag rests entirely with the political branches."); *Daniels*, 722 So. 2d at 141 ("[T]he judiciary is not the avenue to effectuate the removal of the Confederate battle flag from public property. . . . [Those who seek change] should look to the legislature because the legislature is the primary expositor of this state's public policy.") (Banks, J., concurring).

Before reaching the merits, the Court must resolve two procedural issues. The parties are hereby directed to brief: (1) whether the plaintiff has standing to bring this suit, and (2) whether the state flag issue is a political question not suitable for resolution by the judiciary. Simultaneous briefs totaling no more than 15 pages are due by 5:00 P.M. on March 21, 2016. The State's deadline to answer or otherwise respond to the Third Amended Complaint is hereby stayed. The plaintiff may not amend his complaint again without leave of Court. A hearing may or may not be scheduled for a later date.[3]

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[3] Plaintiff and his counsel are specifically cautioned to avoid further false or misleading public statements which may "unfairly undermine public confidence in the administration of justice." Miss. R. Prof. Conduct 8.2 cmt. For example, plaintiff's suggestion that African-Americans will be entitled to financial benefits

As this case moves forward, the parties, their attorneys, their fellow Mississippians, and citizens of other states are encouraged to discuss the flag and related issues with civility and respect for one another.

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from this lawsuit is simply wrong. This case has not been filed as a class action and money damages are not permitted in 42 U.S.C. § 1983 cases against the State. Additionally, plaintiff and his counsel are cautioned that the race, educational background, and judicial philosophy of the Judges and Justices (or the President who nominated them) who hear this case, whether in the Southern District of Mississippi, the Fifth Circuit, or the United States Supreme Court, will have no bearing on its outcome. It would be inappropriate to suggest that a white Judge would necessarily uphold the Mississippi flag, so it is equally inappropriate for plaintiff and his counsel to have suggested that an African-American Judge who attended an HBCU will necessarily find the flag unconstitutional. That is the very definition of prejudice. If the defendant or his counsel were to argue that the outcome of this case was to be determined because of this judge's race or educational background, or because of President Obama's philosophy, the undersigned is confident that the plaintiff would make a thunderous objection. To that end, such statements, especially from an attorney, cannot continue, since they impugn the independence and fairness of the judiciary. *See* Code of Conduct for United States Judges, Canon 3(B)(5) ("A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct."); *see also In re City of Houston*, 745 F.2d 925, 930 (5th Cir. 1984); *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1125-26 (N.D. Cal. 2011); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975); *Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Engineers*, 388 F. Supp. 155 (E.D. Pa. 1974). Litigants in this Court are entitled to a fair and impartial judge. These parties will get nothing less. *See Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 1017, 1021 (S.D. Tex. 1981). Any future public statements by counsel suggesting otherwise could lead to sanctions. *See MacDraw, Inc. v. CIT Grp. Equip. Financing*, 138 F.3d 33, 36 (2d Cir. 1998).

Whatever your disagreements as Mississippians, do not forget,

> The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism more than any appellation derived from local [differences]. . . . You have in a common cause fought and triumphed together. The independence and liberty you possess are the work of joint councils and joint efforts – of common dangers, sufferings, and successes.

George Washington, Farewell Address (1796).[4]

SO ORDERED, this the 14th day of March, 2016.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

[4] After consulting the Oxford English Dictionary, the Court has substituted "differences" for "discriminations," finding that the former more accurately reflects the contextual meaning of President Washington's farewell address.