No. 16-60616

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CARLOS E. MOORE,

Plaintiff - Appellant

v.

GOVERNOR DEWEY PHILLIP BRYANT,
In his Official Capacity,

Defendant - Appellee

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

APPELLANT'S REPLY BRIEF

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A. The Governor's Arguments About Threats Of Physical Violence Address A Contention Not Even At Issue In This Appeal

The Governor devotes page after page of his brief to refuting the idea that Plaintiff has standing because the Mississippi flag incites violence against African-Americans, causing Plaintiff to fear for his safety. (Appellee's Br. at 3, 12, 19-22, 41-43). While a state can indeed violate the Equal Protection Clause by encouraging or inducing racial animus or discrimination by private parties (Anderson v. Martin, 375 U.S. 399 (1964)) and while Plaintiff intends to prove at trial that the Confederate flag generally and the Mississippi flag specifically do serve to incite racial violence, Plaintiff has made it clear that he is "not challenging on appeal the conclusion below that the prospect of flag-inspired racial violence against himself or others is too speculative to create standing." (Appellant's Br. at 13 n.3). Whether the Governor simply failed to read that sentence or instead seeks to distract the Court by knocking down a straw-man, the above cited pages of his brief can be disregarded.[1]

[1] The Governor also presents a more abbreviated argument on Plaintiff's claim under the Thirteenth Amendment (Appellee's Br. at 2 n.1) but Appellant's Brief also made clear that he was not challenging on appeal the trial court's disposition of that claim. (Appellant's Br. at 13 n.3).

B. The Governor's View Of Equal Protection Standing Would Immunize Government Sponsored Verbal and Symbolic Hate Speech From Judicial Review

Governor Bryant asserts that this case presents a "straight forward application of Article III standing" (Appellee's Br. at ii), governed by "well-established precedent" (Id. at 6), with the Court "bound by prior Supreme Court and Fifth Circuit precedent." (Id. at 9). Yet the Governor, in his 70-page brief, does not cite a single case in which a person seeking to challenge racially motivated and demeaning government speech has been barred, on the basis of standing, from being heard in a federal court. There are no such cases.

While the Governor accuses Plaintiff of asking the Court to adopt unprecedented notions of standing, it is the Governor, in truth, who seeks to use the barrier of standing to immunize state and local governments from challenges to unconstitutional expressions of racial bias and hostility. Under the Governor's unprecedented and unprincipled view of Equal Protection standing, a state could never be sued for "merely" speaking, without further proof of the denial of some "tangible benefit." (Id. at 13). Under the Governor's view, for example, if a majority of the Mississippi legislature were to change the Mississippi flag to feature a swastika or an image of white hooded figures and a noose hanging from a tree -- instead of the Confederate flag -- neither Plaintiff nor anyone else would have standing to object. The Governor's view of standing would eviscerate the

principle that a government, when it decides to speak, symbolically or verbally, is constrained by constitutional limits on what it may say.

Mississippi's enshrinement of the Confederate Flag in its official state flag, flying above its state buildings, in its courtrooms, and above its schools is no different from the above examples.[2] It has been alleged, and will be proven at trial, to be an insidious and harmful endorsement of one group of citizens over another, with the message to African-Americans, more than a century and a half after the abolition of slavery, that they remain second-class citizens in the eyes of the state. The State's racially motivated decision to proclaim that message to children and adults throughout Mississippi should not be immune from judicial scrutiny on the basis of standing.

C. Standing To Challenge The Government's Symbolic Expression Of A Preference For One Group Of Citizens Over Another Is Well-Established And Clearly Satisfied In This Case

While the Governor has failed to cite a single case denying standing to a citizen challenging the government's expression of a preference for one group of citizens over another, Plaintiff has demonstrated that standing to constitutionally challenge such government speech has been consistently recognized by the Supreme Court and the Courts of Appeals, including this Court. (Appellant's Br.

[2] As noted by a former Mississippi Supreme Court Justice, the Confederate flag takes "no back seat to the Nazi Swastika" as an emblem of "white supremacy, racism and oppression." Daniels v. Harrison Cnty. Bd. of Supervisors, 722 So. 2d 136, 140 (Miss. 1998) (Banks, J., concurring).

at 16-18, 21-24). The only thing the Governor has to say in response is that the government speech in most of those cases expressed a preference for one religious group over another, while this case involves a preference for one race over another. (Appellee's Br. at 47-49). But the Governor offers no rational explanation why that makes any difference with respect to standing.

As explained in Appellant's Brief, there is no logical or principled constitutional basis for the standing analysis in a racial preference case to be more stringent than that in a religious preference case. (Appellant's Br. at 18-20). The Governor's arguments to the contrary border on the frivolous. First he claims there is a "fundamental difference in the nature of the rights protected under the Establishment and Equal Protection Clauses." (Appellee's Br. at 6). This ignores the Supreme Court's holding that the "fundamental" nature of the Establishment Clause does not provide for a different or looser test for standing and that there is no "hierarchy of constitutional values" warranting a "sliding scale of standing." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982) (internal quotation marks omitted). Moreover, the Governor never articulates what the supposedly fundamental differences are or why they would dictate recognition of standing in an Establishment Clause case but denial of standing in an Equal Protection Clause case. As the Supreme Court has explained "the Establishment Clause mirrors the Equal Protection Clause,"

(Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 728 (1994)) and the Governor's claim that there are "fundamental differences" germane to the standing inquiry is empty rhetoric.

The Governor also suggests that the standing analysis should be easier to satisfy under the Establishment Clause than under the Equal Protection Clause because the First Amendment includes both the Establishment Clause, which forbids the government from expressing a preference for one religion over another, as well as the Free Exercise Clause, which forbids the government from prohibiting or impeding individuals from holding religious beliefs or engaging in worship. (Appellee's Br. at 9). This is, of course, true but the Governor offers no explanation as to why the existence of the Free Exercise Clause within the First Amendment has any bearing on the standing issue in this case. In terms of governmental endorsement of one group of citizens over another, the relevant portions of the First Amendment ("Congress shall make no law respecting an establishment of religion") and of the Fourteenth Amendment ("[n]o state shall deny to any person . . . the equal protection of the laws") are entirely congruent.

The Governor also argues, in attempting to distinguish Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese, 633 F.3d 424 (6th Cir.), *cert. denied*, 132 S. Ct. 368 (2011), that Moore is improperly attempting to "conjoin" injury under the Establishment Clause with injury under the Equal Protection Clause.

(Appellee's Br. at 36). But once again the Governor can offer no justification as to why unwelcome exposure to the benign call for moral behavior in the Ten Commandments is a judicially cognizable "injury-in-fact," but unwelcome exposure to a flag that was adopted for the completely malicious purpose of subjugating African-Americans is somehow incapable of being equally injurious.

The Governor also argues that "Establishment Clause Standing Does Not Apply" (Id. at 47-58) but Plaintiff, of course, is invoking standing under the Equal Protection Clause and not the Establishment Clause. (Appellant's Br. at 7-8). In attempting to justify a heightened standing barrier for Equal Protection cases compared to Establishment Clause cases, the Governor offers a potpourri of random thoughts, pointless observations, and non sequiturs. (Appellee's Br. at 47-58). He argues, for example, that courts are not "at sea in applying the law of standing." (Id. at 48). True, but to what point? He then quotes language concerning the purpose of the Free Exercise Clause (Id. at 49), with no explanation of why that is relevant. This is followed by a quote to the effect that the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." (Id.). Again, the Governor offers no hint why he thinks this is helpful to him and, in fact, it perfectly illustrates why claims under the Equal Protection Clause, which also "mandates government neutrality," cannot be subject to enhanced standing barriers.

The Governor's contention that an African-American asserting an Equal Protection claim must surmount a higher standing barrier than an atheist making an Establishment Clause claim turns the history and purpose of the two clauses upside down. It is doubtful that the founding fathers had any concern at all for the sensibilities of atheists in adopting the Establishment Clause. See, e.g., Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 99-100, 112, 138 (2005). On the other hand, the core purpose of adoption of the Equal Protection Clause was to protect African-Americans from the predations of Mississippi and other former slave holding states after they had unsuccessfully seceded and fought a war primarily for the purpose of preserving slavery:

> The institution of African slavery . . . culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government . . . . [W]hatever auxiliary causes may have contributed to [the Civil War], undoubtedly the overshadowing and efficient cause was African slavery
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> ***
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> Among the first [post Civil War] acts of legislation adopted by several of the States . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value . . . .
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> [T]he one pervading purpose . . . lying at the foundation of [the Thirteenth, Fourteenth, and Fifteenth Amendments is] the freedom of the slave race, the security and firm establishment of that freedom, and the

> protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.
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> [I]n any fair and just construction of any section or phrase of these amendments, it is necessary to look to the . . . pervading spirit of them all, the evil which they were designed to remedy . . . until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

Slaughter-House Cases, 83 U.S. 36, 68, 70-72 (1873).

It would be a perversion of justice to deny Plaintiff, an African-American descendent of slaves, the right to challenge, under the Equal Protection Clause, government speech which echoes loudly -- and serves to endorse -- Mississippi's long and sordid history of suppression of African-American's rights. The flag at issue here was indisputably created and adopted by the state as a banner of white supremacy and subjugation of African-Americans. (Third Am. Compl. ¶ 7, ROA.33); (Mem. Op. at 11-12, ROA.192-93). Its ratification by a majority of Mississippi voters at the beginning of the 21st Century does not erase its message of racial bigotry, but instead drives home the fact that the State's message is not merely an historic relic but is a modern-day affront to notions of equal rights, equal respect, and Equal Protection.[3] (Mem. Op. at 14, ROA.195).

[3] Even if there were evidence -- and there is not -- that the 2001 referendum was free of racial animus, the blatantly hostile and improper circumstances of the flag's 1894 design and adoption cannot be erased from history. See McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 866 (2005) (commenting"the world is not made brand new every morning" and courts

The Governor's attempt to explain why Briggs v. Mississippi, 331 F.3d 499 (5th Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004) supports his position is also devoid of merit. (Appellee's Br. at 8, 50-51, 59). Indeed, this may be the most perplexing of all the Governor's arguments. Briggs involved the very flag at issue in this case. The plaintiff in Briggs claimed that Mississippi's flag was an endorsement of one group of citizens over another, the very claim being made here, albeit in Briggs it was allegedly the endorsement of Christians over Muslims. The Court sub silentio recognized Briggs' standing to assert his constitutional challenge. The Court held, however, that the symbolic message of the Mississippi flag was not religious, but secular, and therefore affirmed judgment for the state on the merits. Id. at 507. The Governor argues that it therefore "defies logic" for Plaintiff to rely on Briggs, but he offers no explanation why Briggs -- who mistakenly thought the flag was expressing religious favoritism -- had standing, but Plaintiff -- who correctly perceives that the flag's message is secular and who alleges that it expresses racial favoritism -- should not have standing. It is the Governor's position which defies both logic and law.

It is also worth noting that the Governor completely ignores two federal court cases raising Equal Protection challenges to state-sponsored displays of the Confederate Flag. In both Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997), *cert.*

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cannot "turn a blind eye" to historical context (quoting Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)) (internal quotation marks omitted)).

denied, 523 U.S. 1101 (1998) and NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) the Eleventh Circuit adjudicated on the merits challenges to Georgia and Alabama's flying of the Confederate Flag without the states or the courts raising any question as to the plaintiffs' standing.[4]

The Governor oddly asserts that Plaintiff's arguments rest "on a faulty premise -- that the standing requirements are less stringent in Establishment Clause challenges." (Appellee's Br. at 52 (emphasis added)). But Plaintiff argues no such thing. To the contrary, Plaintiff's position is quite clearly that the standing requirements for an Establishment Clause challenge are not less stringent than the standards for an Equal Protection challenge; that they are in fact the same; and that the Establishment Clause cases involving symbolic expressions of religious preference therefore constitute controlling precedent in this case involving a symbolic expression of racial preference. (Appellant's Br. at 18).

The Governor also purports to find support for his position in W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) and he provides a lengthy quotation dealing with the Due Process Clause and the application of the Bill of Rights to the states. (Appellee's Br. at 55). But neither the decision, nor the language quoted, has anything to do with standing or the Equal Protection Clause. The only relevance Barnette has in the instant case is that it attests to the truth of Plaintiff's

[4] Plaintiff intends to develop a record at trial, based on facts and expert testimony, which will warrant a result on the merits different from the outcomes in both Coleman and NAACP.

allegation, on the merits, that flags are not just pieces of fabric but are a powerful method for a state to express its views and promote its orthodoxy:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations . . . seek to knit the loyalty of their followings to a flag or banner . . . .

Barnette, 319 U.S. at 632.[5] It is beyond dispute here that the "cause" for which the Mississippi flag stands is the suppression of the rights and dignity of African-Americans. (Mem. Op. at 4, ROA.185); (Miss. Decl. of Secession; Mem. Op. at 3-4, ROA.184-85).

Barnette is also instructive in explaining why precious constitutional rights, such as the right to Equal Protection, cannot be overridden by politics or majority vote.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[5] See also Robert Shanafelt, *The Nature of Flag Power: How Flags Entail Dominance, Subordination, and Social Solidarity*, 27 POL. & LIFE SCI. 2 (2009).

Barnette, 319 U.S. at 638. Why the Governor thinks Barnette supports his arguments is difficult to comprehend.

At bottom, the Governor's argument on standing depends almost entirely on one case, Allen v. Wright, 468 U.S. 737 (1984), which bears no resemblance to this case. In Allen, the plaintiffs, parents of public school children, claimed that the Internal Revenue Service had "not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." Allen, 468 U.S. at 739. But plaintiffs' children did not attend those private schools nor did they profess any desire to do so. Id. at 746. Rather, their "attenuated," twice-removed claim was that by doing a poor job of enforcing the tax laws the IRS was enabling certain "white" private schools to be more financially solvent, thereby somehow reducing the prospects of plaintiffs' children's public schools being effectively desegregated. Id. at 739-40.

The Court began its standing discussion by emphasizing that the question of standing is largely answered by the specific facts of each case:

> In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.
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> Typically . . . the standing inquiry requires careful judicial examination of a complainant's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Id. at 751-52. Thus, the Allen court's conclusion that plaintiffs were "not entitled to an adjudication" of the attenuated, indirect and speculative claims asserted, without proof that they themselves were "personally denied equal treatment" of some sort, provides no guidance on the standing inquiry in this case. Id. at 752, 755 (internal quotation marks omitted).

Here, Plaintiff is not alleging that the government has failed to adequately enforce its laws against remote third parties. Rather, the allegation here is that the State has itself acted with a discriminatory purpose in the design of its state flag, that Plaintiff is unavoidably, and frequently, and personally exposed to the state's demeaning and discriminatory message, and that it has impacted him personally in a variety of ways. Nothing in Allen or any other case suggests that these particular claims are not properly adjudicated in a federal court without Plaintiff also alleging the additional denial by the state of some tangible thing.

D. There Has Been No Applicable Waiver

In an effort to have the Court decide this case without considering the parallels, for purposes of standing, between a religious endorsement case and a racial endorsement case, the Governor claims that Plaintiff waived the right to refer to or rely upon the discussion of standing principles in Establishment Clause cases. But there has been no waiver.

Plaintiff's contention in the district court is precisely the same as his contention here. He did not argue below, and is not arguing here, that the state has violated the Establishment Clause or that he has "Establishment Clause Standing." (Appellee's Br. at 45). Rather his claim below was that the state is engaging in symbolic government speech which promotes white supremacy and labels him a second-class citizen, in violation of the Equal Protection Clause, and that he has standing to bring that claim. (Third Am. Compl. ¶ 7, ROA.33). His argument in this Court is precisely the same, based on the same facts and reasons. (Appellant's Br. at 3-7). No new cause of action is being asserted on appeal and no facts not before the district court are being relied upon. The waiver cases cited by the Governor are thus inapposite. See Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs, 217 F.3d 393 (5th Cir. 2000) (rejecting appellant's attempt to request a new form of relief for the first time on appeal); Leverette v. Louisville Ladder Co., 183 F.3d 339 (5th Cir. 1999) (rejecting appellant's attempt to add an additional products liability cause of action that he did not assert below); Theriot v. Parish of Jefferson, 185 F.3d 477 (5th Cir. 1999) (rejecting appellant's attempt to use new evidence and facts for the first time on appeal that were not before the district court at the time of the challenged ruling).

What the Governor's "waiver" argument really amounts to is an assertion that an Appellant may not cite cases on appeal not cited in the district court and

may not draw analogies between one constitutional provision and another unless those same analogies had been drawn in the district court. The waiver cases cited by the Governor say no such thing and such a rule would be especially inappropriate in a case such as this one. The district court itself, in its Order directing briefing on standing, cited to Briggs, the Establishment Clause case challenging the Mississippi flag. (Order at 3, ROA.90). And the Governor relied upon at least one Establishment Clause case, Valley Forge, in which the Court held that there is no "sliding scale of standing" depending on which part of the Constitution is allegedly being violated. (Governor Phil Bryant's Mem. Supporting Mot. to Dismiss Third Am. Compl. for Lack of Subject Matter Jurisdiction or, in the Alternative, for Failure to State a Claim at 2, ROA.104). And, at oral argument, the Governor acknowledged that "there's a whole line of cases in the establishment clause context where spiritual injury can suffice" for standing, but he sought to distinguish them. (Tr. at 44, ROA.261).

It should be no surprise, with the luxury of almost two months to prepare an appellate brief -- compared to the 7-day briefing period allowed by the district court (Order at 4, ROA.91) -- that Plaintiff's arguments would be fleshed out and additional cases cited.[6] This case presents important constitutional issues to be heard and decided on a de novo basis. For this Court to decide the contours of

[6] Of the 111 cases cited in the Governor's 70-page brief only 35 had been cited in the Governor's brief in the district court.

Equal Protection standing in a government speech case without considering the full range of arguments and case law, would present the risk of an erroneous conclusion. Moreover, an affirmance based on a disregard of relevant case law and compelling constitutional analogies would accomplish little. Plaintiff, or someone else, could file a new challenge to the Mississippi flag the very next day and in defense of standing proffer all the arguments that have been made in this Court.

For all these reasons, the Governor's argument that the Court should turn a blind eye to the way standing has been analyzed in the Supreme Court and in this Court in cases alleging that a government's symbolic speech has unconstitutionally favored one group over another makes no sense. As the Supreme Court has said, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (alteration in original) (internal quotation marks omitted) (allowing party to present argument not discussed in lower courts but first raised after Supreme Court granted certiorari); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) (allowing party to present argument for first time in reply brief because "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). Even further, the

Supreme Court has commented that courts should "indulge every reasonable presumption against waiver." Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972) (internal quotation marks omitted).

E. Plaintiff's Workplace Exposure To The State Flag Provides An Independent And Adequate Basis For Standing

The Governor misstates the facts and miscomprehends the significance of Plaintiff's exposure to the Mississippi flag in courtrooms. (Appellee's Br. at 38). First, the Governor is wrong when he states that Plaintiff is not "employed by the State." (Id. at 39). He serves as a part-time prosecutor and is enrolled in Mississippi's public employee pension system. (Tr. at 50, ROA.267); (Tr. at 81, ROA.298). He is confronted by the state flag when he appears in court on behalf of private citizens as well as when he appears as a representative of the government. (Decl. of Carlos E. Moore ¶ 11, ROA.125). In any event, Plaintiff's point is not that he is bringing a Title VII action or even that he has standing to bring a Title VII action. (Appellant's Br. at 25). Rather, it is that unwelcome workplace exposure to the demeaning message inherent in the Confederate flag is a judicially cognizable injury -- sufficient for Article III standing -- "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive" without proof of anything more, even psychological injury. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

There is no principled basis to say that exposure to the Confederate flag in a private workplace is a sufficiently "actual" and "concrete" and "particularized" injury to open the Article III doors of the federal courthouse but that workplace exposure to that same symbolic message -- in a public workplace with the flag officially sponsored by the state -- is somehow not a real injury and not a sufficient basis to open those same Article III doors. If anything, exposure to a state-sponsored endorsement of white supremacy is far more hurtful and injurious than exposure to similar views expressed by private individuals.[7]

F. Plaintiff's Allegations Of Physical Injury Tied To His Forced Exposure To The State's Demeaning Message Provide An Independent And Adequate Basis For Standing

The Governor concedes -- as he must given the procedural status of this case -- that Plaintiff's alleged "physical manifestations" in reaction to the State's display of its flag "may occur." (Appellee's Br. at 33). But he nevertheless argues that even physical injury is not sufficient injury to confer standing. (Id. at 33-39). Not surprisingly, he cites no case holding a physical injury to be insufficient to confer standing. (Id.).

Instead, the Governor declares that Plaintiff "has failed to couple his alleged physical ailments to any constitutional right protected by the Constitution." (Id. at

[7] To be clear, Plaintiff does not seek to ban private displays of the Confederate flag. The Equal Protection Clause does not restrict the activities of private citizens and freedom of speech can shield even the expression of the most odious and offensive personal views.

36). That is wrong. The "constitutional right" which Plaintiff alleges the State has violated is his entitlement to Equal Protection, to be free of the State's endorsement of white supremacy. The allegation -- which Plaintiff intends to prove at trial -- is that the state flag labels him a second-class citizen, and thereby denies him Equal Protection. (Appellant's Br. at 7-8). He further alleges that the State's denial of Equal Protection has directly and concretely impacted him -- personally -- so severely that he has suffered measurable and adverse physical consequences. (Id. at 26). The causative link between exposure to Mississippi's demeaning message and Plaintiff's physical injury has been clearly pled, and supported by an affidavit. (Id. at 28-29); (Decl. of Carlos E. Moore ¶¶ 11-12, ROA.125). Those allegations may be contested on summary judgment or at trial but they must be accepted as true at this stage of the case. Even if something more than state-sponsored "stigma" were necessary for standing, physical injury flowing directly from a constitutional violation would be more than enough.

G. When It Engages In Government Speech The State Is Constrained By More Than The Establishment Clause And The Will Of The Majority

The Governor correctly summarizes Plaintiff's position when he says that Plaintiff suggests that "display of the state flag could be prohibited as unconstitutional government speech." (Appellee's Br. at 58). But, contrary to the Governor's apparent belief, that position is not a "detour[]." (Id.). It is what this

case is all about. The Governor is equally confused when he suggests that the government's right to speak is somehow founded on the First Amendment's free speech provisions. (Id. at 58-59). The State has no free speech rights under the First Amendment. The Governor is also wrong when he asserts that the only constraints on government speech are the Establishment Clause and the will of the majority. (Id. at 60-61). When it chooses to speak, the state must comply with all provisions of the Constitution. It may not, simply because it is merely engaging in "speech," disregard any portion of the Bill of Rights or the Due Process or Equal Protection Clauses, or any other constitutional strictures on state conduct.

In Pleasant Grove City, Utah v. Summum, an Establishment Clause case, the court noted that "for example, government speech must comport with the Establishment Clause." Summum, 555 U.S. 460, 468 (2009) (emphasis added). The court did not suggest that the Establishment Clause was the sole constitutional limit on what a government may say. And in Sutliffe v. Epping Sch. Dist., the court observed that the Equal Protection Clause may also be a constraint on government speech. Sutliffe, 584 F.3d 314, 331 n.9 (1st Cir. 2009).

The Governor cites nothing to support his implausible assertion that only the Establishment Clause and the will of the majority provide limits on what a government may say. Here, the allegation is that Mississippi's symbolic speech

violates the Equal Protection Clause and Plaintiff should be allowed to prove his case at trial.

H. Plaintiff's Daughter's Exposure To The Flag While Being Taught, Pursuant To The State Law, To "Respect" It Is An Independent And Adequate Basis For Standing

For all the reasons discussed above, Plaintiff's daughter -- and Plaintiff as her parent and natural guardian -- have standing and the Fourth Amended Complaint should have been allowed. But there are even further reasons why Plaintiff has standing on behalf of his daughter.

In purporting to quote the relevant statutory language governing schoolhouse display of the flag and the instruction that the State mandates, (Appellee's Br. at 63) the Governor somehow manages to overlook the most critical language. Not only does the State mandate that the flag be flown outside every school and that all students be taught the words of the pledge of allegiance to that flag but state law also dictates that all schoolchildren must be taught that they should "respect" that flag and its insulting and demeaning message:

> In all public schools there shall be given a course of study concerning the . . . flag of the State of Mississippi. The course of study shall include the history of [the] flag and what [it] represent[s] and the proper respect therefor.

Miss. Code Ann. § 37-13-5 (emphasis added). The State thus requires far more than simply teaching children "about the history of the Mississippi flag."

(Appellee's Br. at 64). Under Mississippi law they must be taught what they should think about it, i.e., that they should respect it, no matter its origins, no matter the malicious intent of the State in adopting it, and no matter the destructive and demoralizing impact on young minds.

Plaintiff's daughter is in kindergarten but that is not too young for the State to begin conveying its mandatory messages. (Fourth Am. Compl. ¶ 23, ROA.178). The Mississippi Department of Education's statewide curriculum guide specifies that kindergarten students are to be taught to identify the state flag and to learn that "ideas are represented by symbols."[8] If parents seeking to protect their children from expressions or symbols of religion have standing to be heard, then so must a parent seeking to shield his daughter from a state flag which serves to glorify white supremacy and an "education" which tells her to "respect" that flag and "the ideas [that] are represented" by it.

I. Plaintiff's Fourteenth Amendment Claim Does Not Present a Political Question

The Governor cites no cases for his novel proposition that a federal court, presented with an Equal Protection challenge to racially discriminatory action by a state government, should defer to the political judgment of the state. There are, of

[8] MISS. DEP'T OF EDUC., 2011 MISSISSIPPI SOCIAL STUDIES FRAMEWORK 15 (2010), *available at* www.mde.k12.ms.us/docs/...and.../2011-mississsippi-social-studies-framework.pdf.

course, no such cases. It is the duty of federal courts to decide, not shy away from, such cases.

The Governor's reliance on state cases, in which the Mississippi state courts elected to defer to the judgment of the Mississippi state legislature is completely misplaced. (Appellee's Br. at 65). Whatever may be the limits on the authority of Mississippi state courts, they have nothing to do with the duties and authority of federal courts. Here, the Governor seeks to use the political question doctrine as an impenetrable shield, contending that all decisions involving the Mississippi state flag should be immune from judicial review, state or federal. (Appellee's Brief at 66). The political question doctrine is not a mechanism for avoiding difficult cases -- courts have time and again decided politically sensitive and challenging Fourteenth Amendment issues.

In Loving v. Virginia and Brown v. Board of Education, for example, the Supreme Court adjudicated disputes on matters which had long been viewed as being within the purview of state legislatures. See Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954). Before Loving, Virginia was one of fifteen states which prohibited and punished marriages on the basis of racial classification. Loving, 388 U.S. at 6 n.5. Prior to Brown, individual states had the power to decide whether their public schools would be racially segregated. In each of these cases, the Supreme Court heard the case because "insulation [from judicial

review] is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

Here, the Governor summarily concludes Plaintiff's claim is nonjusticiable based on state case law and incorrectly argues that the issue must be left in the hands of the state legislature or voters. (Appellee's Br. at 64-66). This ignores the need for federal courts to resolve issues traditionally left to state voters and state legislatures when Fourteenth Amendment rights are at issue.

For over 200 years, federal courts have recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is the very essence of judicial duty." Marbury v. Madison, 5 U.S. 137, 177-78 (1803). This duty does not disappear merely because issues are complex or politically charged. The fact that the issue before the Court arises in a somewhat politically charged context does not convert a Fourteenth Amendment claim into a nonjusticiable political question.

J. Conclusion

For the reasons stated above and in Appellant's Opening Brief, the judgment entered by the district court dismissing this case should be reversed. The case

should be remanded to allow for the development of a full factual record, the submission of expert reports, and a decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 19, 2016, the foregoing Brief was filed electronically using the Court's ECF system, which will give notice of the filing to counsel for the Appellee. In addition, a copy of the Brief was served on counsel for the Appellee by First-Class Mail, addressed as follows:

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,023 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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