**No. 16-60616**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**CARLOS E. MOORE,**
*Plaintiff-Appellant*

**VERSUS**

**GOVERNOR DEWEY PHILLIP BRYANT,**
**In his Official Capacity**
*Defendant-Appellee*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**NORTHERN DIVISION**

**CAUSE NO. 3:16-CV-00151-CWR-FKB**

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# APPELLEE'S BRIEF

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## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourse sentence of Rule 28.2.1 have an interest in the outcome of this csae. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Carlos E. Moore, Plaintiff-Appellant;

2. Michael T. Scott and the lawfirm of Reed Smith LLP;

3. Dewey Phillip Bryant in his official capacity as Governor of the State of Mississippi, Defendant-Appellee;

4. Harold E. Pizzetta III, Assistant Attorney General of the State of Mississippi;

5. Douglas T. Miracle, Special Assistant Attorney General of the State of Mississippi.

*/S/ Douglas T. Miracle*
Douglas T. Miracle

## STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the straightforward application of Article III standing in which the district court reached its thoroughly reasoned decision to dismiss the lawsuit due to lack of Article III standing. The Defendant-Appellee Dewey Phillip Bryant, in his official capacity as Governor of the State of Mississippi ("Governor Bryant"), therefore respectfully submits that oral argument is not necessary to aid this Court in evaluating the issues presented and that this appeal should be placed on the Court's summary calendar for disposition.

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## STATEMENT REGARDING JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the appeal from the district court's entry of Final Judgment on September 8, 2016 dismissing the case in its entirety. ROA.214. Plaintiff-Appellant, Carlos E. Moore ("Moore"), filed his Notice of Appeal on September 14, 2016. ROA.215-217. The Third Amended Complaint ("TAC") cites 28 U.S.C. § 1331 as the basis for jurisdiction. ROA.32

## STATEMENT OF THE ISSUES

(1) Did the district court correctly dismiss the TAC for lack of Article III standing in that Moore failed to show: (a) an injury-in-fact; (b) a causal connection between his alleged injuries and the public display of the Mississippi State flag ("state flag"); and (c) a likelihood that Moore's alleged injury would be redressed by a favorable judicial decision?

(2) Did the district court correctly deny Moore's motion for leave to file a Fourth Amended Complaint as futile?

## STATEMENT OF THE CASE

Moore, an African-American attorney and resident of the State of Mississippi ("State"), challenges the constitutionality of the Mississippi

statutes authorizing the display of the state flag on public property. ROA.182. According to Moore, the state flag "is tantamount to hateful government speech [which has] a discriminatory intent and disparate impact" on African Americans violating his rights under the Fourteenth Amendment. ROA.33.[1]

Moore points to the June 2015 killing of nine African-Americans at a church in South Carolina contending that similar violence could occur in Mississippi at any time. ROA.34-35. Moore also references a November 2015 incident in Tupelo, Mississippi involving what he termed "a confederate battle flag fanatic who ha[d] been photographed wrapping himself in a Mississippi state flag with the confederate battle flag emblem [who] recently bombed a Wal-Mart . . . for stopping the sale of confederate related merchandise." ROA.35.

[1] Moore also sued under the Thirteenth Amendment asserting that the state flag constitutes a "badge, incident relic of slavery." Moore's allegation is a complete misapplication of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones* the Supreme Court clarified whether Congress is authorized to enact legislation prohibiting racial discrimination by private individuals. *Id.* at 420. The Court concluded that Congress has such authority under Section 2 of the Thirteenth Amendment and held that the "[e]nabling [c]lause . . . clothed '*Congress with power to pass all laws* necessary and proper for abolishing all badges and incidents of slavery in the United States.'" *Id.* at 439 (emphasis supplied) (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)). Moore failed to allege how any Congressional enactment gives him standing to challenge the Confederate emblem. ROA.202. Moore's appellate brief does not address his Thirteenth Amendment claims.

Moore also points to a 2014 incident at the University of Mississippi involving several university students who draped a noose and the former Georgia state flag containing the Confederate battle emblem around the neck of the statute of James Meredith located on the campus.[2] ROA.35.

Moore says the public display of the state flag causes him to fear for his safety, denies him equal treatment and dignity and that he suffers high blood pressure, anxiety, sleep disturbances, and abnormal EKGs as a result. ROA.128. Moore seeks injunctive relief prohibiting the State from enforcing the statutes that adopt the state flag's design and mandate and/or allow the flag to be displayed on public property.

On March 14, 2016 and prior to Governor Bryant filing a responsive pleading to the TAC, the district court issued, *sue sponte*, an order directing the parties to brief: (1) whether Moore has Article III standing, and (2) whether the display of the state flag on public

[2] Moore references a 2015 incident involving an African-American man found hanging from a tree in Claiborne County, Mississippi as well as another case five years earlier where an African-American man was found hanging in Greenwood, Mississippi. ROA.35. In neither instance does Moore allege the Confederate battle emblem was involved.

property is a political question not suitable for judicial resolution. ROA.91.[3]

On April 12, 2016 the district court conducted a lengthy hearing during which Moore presented a combination of oral argument and provided fact-based testimony from the podium in support of his claim. ROA.218-339. The district court took the matter under advisement and on September 8, 2016, issued a comprehensive Memorandum Opinion and Order ("Opinion") dismissing the case for lack of subject matter jurisdiction. ROA.182-213,

In the opining portion of the Opinion, the district court chronicled the history of Mississippi's adoption of the state flag in 1894 brining that history forward to the 2001 referendum in which voters in the State elected to keep state flag in its current form. ROA.184-199. While the district court notably expressed the fact that to millions of people the "Confederate battle emblem is a symbol of Old Mississippi. . .," ROA.212, "offends more than just African-American . . .," ROA.212, and is "better left retired to history. . .," ROA.213, the court nonetheless

[3] Because the district court disposed of the case based on Moore's lack of Article III standing, it did not address the political question doctrine although dismissal would have been appropriate on that alternative ground. *See infra*, Section VII.

and correctly held that no matter however objectionable the state flag may be to Moore and others, he lacks Article III to challenge the flag's display on public property. ROA.212-213.

## SUMMARY OF THE ARGUMENT

Although Moore brought this case under the Fourteenth Amendment, his appellate brief masquerades instead as a First Amendment Establishment Clause challenge. In his TAC, Moore alleges that the public display of the state flag causes him "stigmatic injury" and denies him the "right to equal dignity" under the Fourteenth Amendment. Moore followed this with an affidavit stating that the state flag causes him physical injuries including anxiety, sleep disturbances, and abnormal EKG's. ROA.125. These are the claims upon which the district court rendered its decision.

What is clear is that Moore does not have standing under the well-established standing requirements for a "stigmatic injury" set forth in *Allen v. Wright*, 454 U.S. 737 (1984)[4] and its progeny—that a purely stigmatic injury is insufficient to confer standing. Moore virtually concedes that he does not have standing under equal protection

[4] *Abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014).

standing principles so instead he asks this Court to overrule the Supreme Court's equal protection standing doctrine and engraft Establishment Clause principles on to his equal protection challenge.

This is not the law as it exists based on well-established precedent nor should it be the law given the fundamental difference in the nature of the rights protected under the Establishment and Equal Protection Clauses. Moore claims, however, that his "stigmatic injury" is so severe that it causes him to suffer physical manifestations in the form of anxiety, sleeplessness and abnormal EKG's and that these physical symptoms are sufficient to confer standing under the Equal Protection Clause.

Moore's theory, if correct, would eviscerate *Allen* and its subsequent judicial applications because a "stigmatic injury," even if severe enough to be accompanied by a physical component, must still be linked to the denial of a concrete benefit stemming from the imposition of a barrier for equal protection standing. Instead, Moore's view would turn the Equal Protection Clause into nothing more than the "right to not be offended" as long as the personal indignity rises to the level of an alleged physical manifestation. The district court was correct that

Moore fails to identify that part of the constitution that guarantees a legal right to be free of anxiety and alleging physical injuries gets Moore no closer to standing. ROA.207.

Further, if all that is required for standing in an equal protection challenge is to allege in a complaint or affidavit some physical manifestation untethered to the denial of equal treatment of a concrete benefit, then there would be nothing left to litigate as standing would effectively merge into to the merits of the claim itself. Such a theory defies every notion of the limited role of the federal judiciary articulated through Article III jurisprudence.

Because he cannot succeed on equal protection standing, Moore now says that his unwelcomed exposure to the state flag is no different than a person who objects to the display of a religious symbol on public property. Appellant's Br. at p. 19-20. Moore asserts that the public display of the state flag constitutes the government's "symbolic endorsement of one race over another" sufficient for standing. Appellant's Br. at p. 19. Moore claims that because courts, including this Court, have found allegations associated with the unwelcomed exposure to a religious symbol on public property a sufficient injury for

Establishment Clause standing, he too has standing although the state flag is indisputably a secular symbol.[5]

Not surprisingly, Moore cites no legal authority outside of the Establishment Clause context that his exposure to the state flag violates the Fourteenth Amendment.[6] Appellant's Br. at p. 17. In Moore's concession to the fact that he lacks standing for his Fourteenth Amendment claim, he simply argues that there *should be no difference* in standing analysis between one who objects to a secular symbol under the Fourteenth Amendment and one who challenges alleged government endorsement of religious through display of a religious symbol on public property.

Neither the Supreme Court nor this Court has ever adopted Moore's position that unwanted exposure to a purely secular symbol—such as a flag—constitutes an injury-in-fact for purposes of standing under the Equal Protection Clause. And as this Court has said, "[a]bsent a clear contrary statement from the Supreme Court or *en banc* reconsideration of the issue, we are bound by [our prior decision]." *Kelly*

[5] This Court in *Briggs v. Mississippi*, 331 F.3d 499, 505 (5th Cir. 2003) held that the display of the state flag on public property "is in no meaningful sense either a religious activity or coercive." *Id.*

[6] Moore cites three law review articles in support of his standing theory.

*v. Quarterman*, 296 Fed. Appx. 381, 382 (5th Cir. 2008) (citing *United States v. Stone,* 306 F.3d 241, 243 (5th Cir. 2002)). Thus, this Court is bound by prior Supreme Court and Fifth Circuit precedent with respect to equal protection standing.

The next obvious problem with Moore's application of Establishment Clause jurisprudence lies in the text of the First Amendment itself which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend I.[7] 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.

To advance his theory, Moore proclaims that display of the state flag constitutes government "endorsement of white supremacy" and that his standing should be assessed using the same tests in examining whether display of a religious symbol on public property constitutes an

[7] The First Amendment is applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"endorsement of religion" in violation of the Establishment Clause. Appellant's Br. at 12.

Moore's argument utterly fails to account for the fact that the rights he seeks to vindicate in the TAC (equal protection and dignity) arise, if at all, under the Fourteenth and not the First Amendment. Moore's argument further conflates the underlying and recognized principles adopted by the Supreme Court in Establishment and Equal Protection Clause standing jurisprudence.[8]

Despite Moore's clearly expressed personal disdain for the state flag, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006). This constitutional imperative emanates from the principle that "a proper case or controversy . . . assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Allen,* 468 U.S. at 750 (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)); *Raines v. Byrd,* 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's

[8] *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011) (standing in Establishment Clause cases may be shown in various ways).

proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

The Supreme Court's pronouncements addressing the limited role of the federal judiciary in a democratic society could not ring more true than in this case where Moore seeks to elevate his personal feelings into the constitutional domain. Moore's bid to hoist his antipathy towards the state flag is fundamentally inconsistent with the notion that Article III "[i]n its constitutional dimension . . . imports justiciability: whether [Moore] has made out a 'case or controversy' between himself and the defendant. . . ." *Flast v. Cohen* 392 U.S. 83, 98 (1968). The district court correctly held that Moore did not make out such a case or controversy because he failed to demonstrate the requisite elements of Article III standing.

The district court's decision is supported by the fact that the TAC is devoid of a single allegation that Moore has personally suffered a "concrete and particularized injury" instead of one that is "hypothetical or conjectural," or that he receives treatment different from those similarly situated resulting from the public display of the state flag.

For instance, Moore's averments—that the occurrence of future criminal acts of racial violence in Mississippi may occur because of the public display of the state flag—amount to "unadorned speculation." Moore fails to show that any future racial violence about which he speculates would be fairly traceable to the public display of the state flag, as opposed to acts committed by unknown third-parties committing criminal acts of racial violence without regard to the state flag.

Moore's request for injunctive relief is therefore predicated entirely on the unknowable—that a court order prohibiting the public display of the state flag—is *substantially likely* to safeguard him from unspecified acts of future racial violence committed by unknown actors. The same is true for Moore's claim that he suffers physical harm from the public display of the state flag.

Moore's assumption—that the removal of the state flag from public property would thereby safeguard him from future racial violence—is precisely the type of "unadorned speculation" the Supreme Court has found insufficient to confer standing. Moore's hypothesis also defies common sense because his presumed redressability of future

injury is solely dependent on altering the behavior of unknown individuals who may seek to commit acts of criminal violence.

Moore's claim that he is denied equal treatment and dignity because of the state flag fairs no better because he did not articulate a single act of discriminatory treatment denying him a tangible benefit as a result of the state flag. Moore's allegation that the state flag causes him physical injury, even if true, is likewise insufficient to confer Article III standing. As the district court concluded, Moore failed to identify any part of the Constitution which guarantees him a legal right to be free from anxiety from the display of the state flag. ROA.207. Therefore, Moore is left with an alleged stigmatic injury "untethered to a legal right. . . ."[9] ROA.207.

The district court appropriately cited Justice Kenney's concurring opinion regarding the burning of the American flag, that "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." ROA.213, n.168 (quoting *Texas v. Johnson*, 491 U.S. 397, 420 (1989)) (Kennedy, J.,

[9] *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) (standing asks whether the litigant is entitled to have the court decide merits)

concurring). The district court's decision was right because the Constitution compels the result and dismissal for lack of subject matter should be affirmed.

## ARGUMENT

### I. Standard of Review

The Court reviews a dismissal for lack of standing *de novo*. *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009). Moore alleges that the district court erred in dismissing and that his standing claims are questions to be resolved on summary judgment or at trial. Appellant's Br. at p. 12.

However in *Little,* this Court said "whether [plaintiff] suffered injury that is concrete and non-speculative presents a legal question." *Id.* at 540, n.2 (citing *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 37 (1976)) (vacating denial of motion to dismiss for lack of standing, and remanding with instructions to dismiss, because the alleged injury was insufficiently concrete and non-speculative).

Moreover, "[w]hen a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."

*Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977)) (per curiam).

The party asserting jurisdiction maintains the burden of proving that jurisdiction does exist. *Ramming*, 281 F.3d at 161 (per curiam). Second, where the issues raised are central both to subject matter jurisdiction and the claim on the merits, courts will address a Rule 12(b)(1) motion to dismiss as a motion for failure to state a claim under Rule 12(b)(6). *Montez v. Dept. of Navy,* 392 F.3d, 147, 149-50 (5th Cir. 2004); c*f. Byrum v. Winter*, 783 F. Supp.2d 117, 122 (D.D.C. 2011) (because plaintiff has the burden of establishing the Court's jurisdiction, a "court must give [a] plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim.") (citing *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003)).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).[10] Stated differently, the cases instruct that if a plaintiff fails to allege facts sufficient to "nudge [his or her] claims across the line from conceivable to plausible, [his or her] complaint must be dismissed." *Mitchell v. Johnson,* 2008 WL 3244283 at *2 (5th Cir. 2008) (citing *Twombly*, 550 U.S. at 570).

## II. Article III Standing

Moore bears the burden of establishing each of the requisite elements for Article III standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The Supreme Court has said that the elements of standing are not simply "pleading requirements but rather an indispensable part of the plaintiff's case . . . [and] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . ." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

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[10] A claim has facial plausibility when the plaintiff pleads factual content allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

In *Lujan*, the Supreme Court articulated the requisite elements developed over a number of years each of which constitute a necessary predicate to confer Article III standing and that "the irreducible constitutional minimum of standing contains three elements." 504 U.S. at 560-561. A plaintiff first must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. "A 'concrete" injury must be '*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016). "When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.*

Second, there must be a causal connection between the injury and the conduct complained of that means that the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third-party not before the court. *Id.* Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.*

### A. Cognizable Injury Requirement

This Court has held that an "injury in fact is the invasion of a legally protected interest." *Pederson v. La. State Univ.*, 213 F.3d 858, 870–71 (5th Cir. 2000). Courts recognize that of the three required elements of constitutional standing, "the injury-in-fact element is often determinative." *Toll Bros., Inc. v. Twp. of Readington,* 555 F.3d 131, 138 (3d Cir. 2009). The alleged injury must be particularized in that it "must affect the plaintiff in a personal and individual way." *Id* (citing *Lujan,* 504 U.S. at 560, n.1). "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review himself be among the injured." *Id.* at 563 (citation omitted).

Moore contends that the public display of the state flag violates his Fourteenth Amendment rights because it: (1) causes him fear for his safety; (2) denies him equal treatment and dignity under the law; and (3) causes him high blood pressure, anxiety, sleep disturbances, and abnormal EKGs. ROA.201. The district court properly concluded that each of Moore's alleged injuries fail to confer Article III standing.

### 1. Fear for his safety

Moore argues that the state flag causes him to fear for his safety and for other African Americans because public display of the state flag incites racial violence. ROA.34. Moore fails to point to any facts actually causing him to imminently fear for his safety because of the state flag. And regardless of whether Moore holds this belief, such generalized fear of future injury is legally insufficient to confer Article III standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

The district court was correct in its conclusion. Moore's alleged fear of future racial violence is based on speculation that at some unknown time, unidentified individuals may be motivated to some unknown and unknowable degree to commit criminal acts of racial violence towards Moore because of the display of the state flag.

Moore seeks to support this claim pointing to the tragic 2015 mass shooting of nine African-Americans at a church in South Carolina arguing that similar violence could occur in Mississippi. ROA.34. But as the district court concluded, "[t]o demonstrate an actual or imminent injury, '[t]he plaintiff must show that he has sustained or is in

immediate danger of sustaining some direct injury as a result of the challenged official conduct.'" ROA.202. The district court held that "[t]hese incidents . . . cannot show that Moore is particularly at risk of harm as a result of the Confederate battle emblem. An act of racial or ethnic violence does not establish a constitutionally recognized injury for anyone who falls into the racial or ethnic group." ROA.203.

The district court pointed out that Moore did not "allege he was in the vicinity when any of the events [he cites] occurred; he likely heard about them from news coverage as did thousands of other citizens. Because there is nothing showing that fear of racial violence is particular to him, Moore lacks standing to make this claim." ROA.203 (citing *Spokeo*, 136 S. Ct. at 1550).

The district court's conclusion is fully in accord with the Supreme Court declination to extend standing where the claimed injury may occur at some unknown future point. In *Lyons* the Supreme Court held that "[a]bstract injury is not enough . . . [and] plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or

hypothetical." *Lyons,* 461 U.S. at 102-03 (internal quotation marks and citations omitted).

Moore's alleged fear for his future safety is precisely the type of speculation and conjecture the Supreme Court has rejected. In *Clapper v. Amnesty International USA,* 133 S.Ct. 1138, 1146 (2013), the Supreme Court stated that "we have repeatedly reiterated that injury must be certainly impending to constitute injury in fact, and that [a]llegations of possible future injury are not sufficient." *Clapper*, 133 S.Ct. at 1147.[11]

The *Clapper* Court also "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 1150. That is precisely the situation in this case as Moore's fear of future racial violence is based on speculation about decisions of third-party actors not before the court.

During the hearing before the district court, Moore did attempt to bolster his fear of violence claim stating that he had received death threats **after** he filed this lawsuit. ROA.332. In response to the court's

[11] *See also Whitmore v. Arkansas*, 495 U.S. 149 (1990) in which the Supreme Court reiterated that the injury must be "concrete in both a qualitative and temporal sense'" *Id.* at 155 (citations omitted).

questions, Moore said that some of the threats occurred after he filed the initial complaint but prior to the filing of the TAC. ROA.332. The district court noted that Moore did not include this allegation in the TAC. ROA.203.

Further sharpening this point, the Supreme Court has held that "Article III standing 'is not to be placed in the hands of concerned bystanders, who will use it simply as a 'vehicle for the vindication of value interests.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (further quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). "[N]o matter how deeply committed [plaintiff] may be . . . or how 'zealous [his] advocacy,' that is not a 'particularized' interest sufficient to create a case or controversy under Article III. *Id.* (citation omitted). As the district court concluded, "[t]o find an injury based on this [Moore's] fear for his safety would stretch the elasticity of imminence well beyond its purpose." ROA.204 (alteration supplied).

**2. Denial of Equal Treatment**

In his pleadings and arguments before the district court, Moore argued the public display of the state flag conveys to him that he is a

"second class citizen" and that the flag causes him to suffer a "stigmatic injury." ROA.125; ROA.128. Moore alleges that "the state flag silently mocks the Fourteenth Amendment's requirement that the state show [him] equality before the law." ROA.128.

Based on Moore's claims asserted in the TAC, his briefs, affidavit and arguments below, the district court correctly found that Moore failed to demonstrate a stigmatic injury under the Fourteenth Amendment. ROA.206 ("Without sufficient facts that Moore is treated differently because of the state flag, his argument that he feels like a second-class citizen does not give rise to a legal injury. Where there is no legal right being violated, an injury is not real—and thus cannot be deemed concrete."). *Id.*[12]

**a. "Stigmatic Injury"**

A "claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is not an "injury judicially cognizable." *Allen*, 468 U.S. at 754. Instead, "stigmatic injury . . . requires identification of some

[12] Moore clearly backs away from his stigmatic injury claim advanced before the district court in favor of his new-found First Amendment "endorsement of white supremacy."

concrete interest with respect to which [Moore] is personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine." *Id.* at 795 n.22.

The district court recognized that "[s]tigmatic injuries stemming from the discriminatory treatment is sufficient to satisfy standing's injury requirement **if** the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing." ROA.204 (citing *Campaign for Southern Equality v. Bryant*, 64 F. Supp.3d 906, 917 (S.D. Miss. 2014) (emphasis supplied), *affirmed* 791 F.3d 625 (5th Cir. 2015).

The court in *Campaign for Southern Equality* found plaintiffs had standing to challenge Mississippi's prohibition on same-sex marriage because state law denied plaintiffs *tangible benefits of marriage* afforded to heterosexual couples. *Id.* at 917. Conversely, Moore does not identify any discriminatory denial of any tangible governmental benefit as a result of the public display of the state flag which independently satisfies the requirements of standing.

The Supreme Court has addressed the constitutional insufficiency of stigmatic injury in considering a challenge to government tax exemptions granted to schools which discriminated on the basis of race. *Allen*, 468 U.S. at 740-741. In affirming dismissal, the Supreme Court held that "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is not an injury for purposes of Article III standing. *Id*. at 754. The *Allen* Court further elaborated:

> [Plaintiffs lack] 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 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–740 (1984)) (emphasis supplied).

Moore rejects *Allen's* application arguing that "plaintiffs were not exposed to any discriminatory government action or speech; rather they were complaining that the government was failing to adequately enforce tax regulations against third parties, with whom plaintiffs had

no connection." Appellant's Br. at p. 16. Moore's argument equally ignores the fact that he does not identify the denial of any tangible governmental benefit as a result of the public display of the state flag. ROA.204. Moore is in the same position as were the *Allen* plaintiffs.

The *Allen* Court said it has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen*, 468 U.S at 754 (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)). Moore's argument is similar and tantamount to his demand that the government act in accordance with his view of the law.

*Allen*'s conclusion, that stigmatic injury alone is not sufficient, follows the well-established rule that standing is possessed by persons who are directly injured by the challenged government action and is not handed out *en gros* to anyone who shares the race or gender of others discriminated against.[13]

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[13] *Compare Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972) (no standing to challenge a club's racially discriminatory membership policies because plaintiff never applied for membership); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing to challenge racial discrimination in the administration of city's criminal justice system because plaintiffs did not allege they had been or would likely be subject to the challenged practices) *with Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982) (male plaintiff had standing to challenge admission policy of university because of gender).

Moore's allegations lack the identification of the concrete interest with respect to which he is personally subject to discriminatory treatment resulting from the public display of the state flag. Thus, his claim of stigmatic injury by itself is insufficient to confer standing. Moore must allege that he has been "personally subject to discriminatory treatment" which is "specific" and "concrete" and which is sufficient in itself to "independently satisfy" standing. He did not and therefore, he lacks the type of stigmatic injury required for standing.

In his district court brief, Moore relied on *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985).[14] ROA.120 ("Such 'stigmatic injury' establishes injury-in-fact for standing purposes, *Smith v. City of Cleveland Heights* . . . because the state flag "directly affects [Plaintiff's] interest in his own self-respect, dignity and individuality as a person in his own [State]." *Id.*).

Moore claimed that the state flag has the same effect on him as did the city policy in *Smith* which maintained a racial composition of 75% white and 25% African American residents. *Smith*, 760 F.2d at 721. In rejecting Moore's reliance on *Smith*, the district court stated:

[14] On appeal, Moore has apparently abandoned *Smith* and its rationale in support of standing under the Equal Protection Clause.

> 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. In other words, it was 'a stigmatic injury suffered as a direct result of having personally been denied equal treatment.'"
>
> In contrast, Moore has failed to allege any specific facts or incident where he was denied equal treatment due to the state flag or the message it communicates. Because the third amended complaint lacks such allegations, at oral argument, the Court asked [Moore] how he has been denied equal treatment. Moore was unable to provide an example of a deprivation of a legal right.

ROA.205.

In the end, Moore's claim of stigmatic injury does not comport with the principles articulated *Allen* and therefore provides him no vehicle through which Article III standing can be conferred.

**b. Equal Dignity**

Moore also contends that in light of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), he has a right to equal dignity which may be vindicated in federal court. ROA.283. As the district court noted, ROA.206, Moore also references the Supreme Court's decisions *Loving v. Virginia*, 388 U.S. 1 (1967) and *Brown v. Board of Education*, 347 U.S. 483 (1954) "as examples of when the federal courts had to intervene to protect individuals' Constitutional rights and dignity." ROA.206.

The district court, in rejecting Moore's analogy to *Obergefell*, *Loving* and *Brown*, stated that "[t]he Court is well-aware of those cases, but Moore's argument attempts to contort their holdings beyond recognition. All of those cases involved a legal right guaranteed by the Fourteenth Amendment—specifically the right to marry and the right to receive a public education free from racial discrimination." ROA.206. The district court concluded that in each of those instances, "the plaintiffs' rights had been infringed upon because they were *actually treated differently* than others. Moore alleges no analogous legal right. . . ." ROA.206 (emphasis supplied).

**c. Standing for Equal Protection Challenge**

Turning to Moore's standing as to his Fourteenth Amendment equal protection challenge (the basis of Moore's TAC), this Court has said the Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 139 (5th Cir. 2009) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

Unlike Establishment Clause challenges, the touchstone for standing in under the Equal Protection Clause focuses on the denial of equal treatment due to the imposition of a barrier. In *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) the Supreme 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 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); *see also Gratz v. Bollinger*, 539 U.S. 244, 245 (2003) (standing to challenge university's use of racial preferences in undergraduate admissions); *Turner v. Fouche*, 396 U.S. 346 (1970) (standing to challenge provisions by which board of education and grand jury selected); *Clements v. Fashing*, 457 U.S. 957 (1982) (standing to challenge automatic resignation provision of the Texas Constitution requiring immediate resignation of some (but not all) state officeholders upon their announcement of a candidacy for another office); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (standing to challenge

medical school's admissions program which reserved places in the entering class for minority applicants).

The common theme for standing to bring these equal protection challenges is that plaintiffs alleged the denial of equal treatment of a concrete benefit due to the imposition of a barrier. Moore fails to allege any similar denial.[15] As the district court concluded, Moore has not alleged that he received different treatment from similarly situated individuals and that the unequal treatment stemmed from discriminatory intent.[16] ROA.205 ("Moore has failed to allege any specific facts or incident where he was denied equal treatment due to the state flag or the message it communicates."). ROA.205.

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[15] This Court in *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 227 (5th Cir. 2012) held that "[t]o state a claim of racial discrimination under the Equal Protection Clause and section 1983, the plaintiff '*must allege* and prove that [he] received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'" *Id.* at 227 (emphasis supplied) (quoting *Priester v. Lowndes Cnty.,* 354 F.3d 414, 424 (5th Cir. 2004) ((further quoting *Taylor v. Johnson,* 257 F.3d 470, 473 (5th Cir. 2001) (per curiam)); *see also Village of Arlington Hts. v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 265 (1977).

[16] *See Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997). Although decided at the summary judgment stage, the court in *Coleman* rejected plaintiff's equal protection challenge to Georgia's state flag because he 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.

Moore cannot demonstrate standing because unlike the State's regulation of marriage licenses or other government benefit, the state flag in and of itself does not deny Moore equal treatment through the imposition of any barrier. Neither the TAC nor Moore's affidavit identify any concrete interest such as school admission, housing, or licensing with respect to which he has been personally subject to discriminatory treatment and which would independently satisfy Article III's standing requirement.

Regardless of a particular individuals' belief as to the meaning of the Confederate battle emblem contained in the state flag, **all** Mississippi citizens are exposed to the state flag regardless of race. Moore has not alleged a single instance in which he claims he has received different treatment from similarly situated individuals and that the unequal treatment stemmed from discriminatory intent stemming from the display of the state flag on public property. The district court properly concluded that Moore's alleged stigmatic injury does not confer standing.

### 3. Physical Injuries

Moore's final claim—that the flag "has probably contributed to or caused the exacerbation of medical ailments, including but not limited to hypertension, insomnia and abnormal EKGs," ROA.125—likewise does not confer standing on him for his equal protection claim.

Moore argues that because his stigmatic injury is so severe, *i.e.*, it causes him to suffer physical ailments, he has therefore demonstrated the requisite injury-in-fact for equal protection standing. Regardless of the alleged severity of the stigmatic injury, even if it results in a physical component, it nonetheless fails under *Allen* and its progeny. *Allen* made clear that "stigmatic injury" accords a basis for standing **only** to "those persons who are *personally denied equal treatment*" by the challenged discriminatory conduct. *Allen*, 468 U.S. at 755. That Moore's physical manifestations of stigmatic injury may occur still do not satisfy the independent requirement that he be denied equal treatment as a result of a barrier for purposes of an equal protection challenge.

If Moore's alleged physical manifestation of a stigmatic injury were sufficient to confer standing for an equal protection challenge—not

tied to the denial of a concrete benefit due to the imposition of a barrier—then then Article III standing would be all but preordained and conclusive on the merits of the claim.[17]

Furthermore, Moore filed suit through 42 U.S.C. § 1983 which does not create any substantive rights, but instead was designed to provide a remedy for violations of statutory and constitutional rights. *Jackson v. City of Atlanta, Tex.,* 73 F.3d 60, 63 (5th Cir.), *cert. denied,* 519 U.S. 818 (1996); *Hobbs v. Hawkins,* 968 F.2d 471, 475 (5th Cir. 1992).

As the district noted, Moore failed to identify that part of the Constitution which guarantees him a legal right to be free from anxiety allegedly caused by the display of the state flag on public property. ROA.207. Thus, Moore is left with an alleged physical ailment "untethered to a legal right. . ." protected by the Constitution. ROA.207.

[17] Under Moore's theory anyone objecting to a secular symbol not implicating Establishment Clause principles who alleges that symbol causes stigmatic injury resulting in a physical ailment would have standing. In fact, the district court identified a number of "displays" that Mississippians encounter on a daily basis reflecting the history of the Confederacy. ROA.207, n.146. Again, under Moore's theory, what would stop any Mississippian who objects to those displays from claiming a physical injury?

The Supreme Court has repeatedly held that a claim based on the Fourteenth Amendment does not transform every tort committed by a state actor into a constitutional violation. Moore's reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976); *Martinez v. California*, 444 U.S. 277, 285 (1980); *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976). "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Hull v. City of Duncanville*, 678 F.2d 582, 585 (5th Cir. 1982) (quoting *Baker*, 443 U.S. at 137).

Moore contends that the district court, without authority, rejected his claim that the display of the flag on public property "has caused damage to his health." Appellant's Br. at p. 27. Moore asserts that the district court's "disregard for those averments is contrary to the most fundamental notions of 'injury.'" *Id.* at 26. However, Moore's problem

is not one of proof, but that he has failed to couple his alleged physical ailments to any constitutional right protected by the Constitution. No amount of proof at the summary judgment stage or trial will alter this conclusion.

Moore's reliance on *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011) similarly does not further his claims as there plaintiff brought an Establishment Clause challenge to a poster of the Ten Commandments displayed in a courtroom by a judge. *Id.* at 426. The court reaffirmed that "in suits bought under the Establishment Clause, 'direct and unwelcome' contact with the contested object demonstrates psychological injury in fact sufficient to confer standing. *Id.* at 429.[18] Thus, Moore's continued effort to conjoin an injury sufficient for standing under the Establishment Clause with an alleged equal protection injury has no constitutional support.

Moore also relies on this Court's decision in *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 163 (5th Cir. 2016) that physical harm

[18] Moore cites *Saladin*, 812 F.2d at 692 (Establishment Clause-city insignia bearing word Christianity); *Vasquez v. Los Angeles*, 487 F.3d 1246, 1253 (9th Cir. 2007) (Establishment Clause-Anti Christian Symbol); *Formaster v. City of St. George*, 882 F.2d 1485, 1490-81 (10th Cir. 1989) (Establishment Clause-municipal logo).

constitutes an injury standing. While true in the abstract, *Rideau* addressed whether parents of a severely disabled minor child who had been abused by his special education teacher had standing under the Americans with Disabilities Act ("ADA") to recover certain damages. *Id.* at 158.

The Court applied the common law rule—that that parents are responsible for a minor's medical expenses—to the claims under the ADA and found the parents had standing for certain expenses related to the minor's injuries. *Id.* at 161.[19] Moore's reliance on *Rideau* is misplaced in that unlike *Rideau* where the claims arose under the ADA, Act, Moore identifies no part of the constitution that guarantees a legal right to be free from the physical injuries he claims.

That Moore has alleged a physical injuries does not transform them into those protected by the Constitution. Section 1983 "creates a species of tort liability." *See Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). It does so, however, only for deprivations, under color of state law, of federal statutory or constitutional rights; not all state law torts

[19] The court found the parents lacked standing as to other expenses due to the existence of a trust for the disabled child.

are constitutional violations for which section 1983 provides a remedy. *Baker,* 443 U.S. at 145.

Moore also argues that if one has a right to sue under Title VII for exposure in the workplace to unwanted racial messages, then he also has standing as a result of his contact with the state flag when he goes into the courtroom. In support he cites several Title VII cases arguing that "[w]orkplace exposure to the Confederate flag and other racist messages has frequently been recognized as sufficient to confer standing to sue for imposition of a 'hostile work environment'. . . ." Appellant's Br. at p. 11; *see* Appellant's Br. at p. 25 (citing *Adams v. Austral, U.S.A., L.L.C.,* 754 F.3d 1240, 1253 (11th Cir. 2014), *Mack v. St. Mobile Aerospace Eng'r,* Inc., 195 F. App'x 829 (11th Cir. 2006), *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

Moore's argument is easily disposed of under the Supreme Court's decision in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011):

> We have described the "zone of interests" test as denying a right of review "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. We hold that the term aggrieved" in Title VII incorporates this test, enabling suit by any plaintiff with an interest "arguably [sought] to be protected by the statute, while excluding plaintiffs who

> might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII.

*Id.* at 178 (internal quotation marks and citations omitted). In each of the Title VII cases, plaintiffs had standing because they were current or former employees where the alleged racial harassment took place and hence within the "zone of interest" protected by the statute. *Id.* at 78.

By contrast, Moore is not employed by the State but encounters the state flag when he enters courtrooms in instances in which the flag is displayed. ROA.239. It is clear from *Thompson* that on the facts alleged, Moore would never have standing under Title VII.

### B. Injury Fairly Traceable to Conduct

Moore's claims also fail under the second *Lujan* prong which requires a "causal connection between the alleged injury and the conduct complained of—in other words the alleged injury must be traceable to the defendant and not the result of the independent action of a third party." *S. Christian Leadership Conference v. Supreme Court of State of La.,* 252 F.3d 781, 788 (5th Cir. 2001) (citation omitted).

Moreover, "the case or controversy limitation of Art[icle] III still requires that a federal court act only to redress injury that fairly can be

traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon,* 426 U.S. at 41-42.

This element looks to whether the line of causation between Moore's alleged injury and alleged the wrongdoing (display of a secular symbol) is "too attenuated." *Hanson v. Veterans Admin.,* 800 F.2d 1381, 1385 (5th Cir. 1986) (citation omitted). The mere "unadorned speculation" as to the existence of a relationship between the challenged government action and the third-party conduct "will not suffice to invoke the federal judicial power." *Simon,* 426 U.S. at 44.

Moore's brief pays scant attention to this standing prong summarily concluding that he "has clearly and specifically alleged that the state flag's message . . . has caused his [injuries]." Appellant's Br. at p. 28. As the district court stated, "Moore offers no plausible allegation that these physical injuries are directly attributable or even exacerbated by the state flag. . . . Thus it is impossible for the Court to see how Moore could establish those injuries as fairly traceable to a flag that has been in existence his entire life." ROA.209. Simply put, he could not and the district court was correct in so ruling.

### C. Redressability by Favorable Judicial Decision

If Moore's allegations fall short under the first two prongs of *Lujan*, they utterly collapse under the third. In *Simon*, the Supreme Court held that dismissal is proper if the complaint fails to allege facts which, if true, establish a "substantial likelihood that victory in this suit" would remedy the injury asserted by the plaintiff. *Simon,* 426 U.S. at 45-46. When a plaintiff's asserted injury arises from the government's regulation of a third party that is not before the court, it becomes "substantially more difficult" to establish standing. *Id.* "[U]nadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44.

In *Warth* the Supreme Court found that the plaintiff's relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had (defendants) acted otherwise, and might improve were the court to afford relief." 422 U.S. at 507. The same holds true here regarding Moore's allegations.

Moore's requested relief is based entirely on a proposition that is simply unknowable—that a court order removing the state flag is "substantially likely" to safeguard him from unspecified acts of racial

violence committed by unknown actors in the future. Moore's premise that removal of the flag will change the hearts and minds of those who act with hate and thereby safeguard him from racial violence is both "unadorned speculation" and defies common sense.

An illustration of why Moore's claims over fear of future violence fail under the redressability prong is such violence is already criminalized by a number of state and federal statutes.[20] Moore has not alleged facts which show that it is substantially likely that by removing the state flag will racial violence will be eradicated or even reduced given that what racial violence that does occur does so in the face of laws criminalizing the conduct and subjecting the perpetrator to lengthy criminal sentences.

In short, if a person willing to commit racial violence is not deterred by the existence of federal and state criminal laws, it cannot be said that it is "substantially likely" that the same person would be

[20] *See, e.g.*, 18 U.S.C. § 371 (conspiracy to commit a hate crime); 18 U.S.C. § 249 (hate crime involving actual or perceived race); Miss. Code. Ann. § 97-3-7 (simple and aggravated assault); Miss. Code. Ann. § 97-3-19 (murder and capital murder); Miss. Code Ann. § 97-3-85 (threatening letter or notice to another with intent to terrorize or to intimidate); Miss. Code Ann. § 97-3-87 (threats to abandon home or job); Miss. Code Ann. § 97-3-107 (stalking); Miss. Code Ann. § 97-3-109 (drive-by shootings and bombings); Miss. Code Ann. § 97-35-9 (disturbance by tumultuous or offensive conduct); Miss. Code Ann. § 97-35-15 (disturbing the peace).

dissuaded from the same criminal acts by removal of the current state flag by court order or other means.

Indeed, the specific allegations in the TAC show that it is unlikely that an order removing the flag from display of public property will redress racially motivated violence. The acts of violence alleged by Moore are unrelated to the state flag. Instead, the acts allegedly involved the confederate flag in general or have no alleged connection whatsoever to the flag (suspicious deaths).

Moore suggests that because national retail chains "have stopped selling the confederate battle flag . . . there may soon be an influx of hate filled individuals to Mississippi." ROA.35. However this merely points to the fact that, regardless of whether the state flag is displayed on public property, individuals will be able to purchase flags with the Confederate battle emblem from private retailers and ascribe to it the meaning of their own choosing. Moore's alleged injury cannot be redressed by court order.[21]

[21] The Court's decision in *Campaign for S. Equal* illustrates the lack of justiciability in this matter. Mississippians passionately disagreed over the issue of same-sex marriage and the relief issued by this Court did not change the opinions of those engaged in the public debate. However, the Court's order did directly and concretely redress the injury sustained by those plaintiffs by removing the legal

The same holds true for Moore's claim of physical injury. Moore himself stated during the hearing that his physical injuries associated with his stress began as early as 2002 when he began practicing law. ROA.334. The district court correctly held that Moore offers no plausible allegation that his physical injuries are attributable or exacerbated by the state flag.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. The district court correctly disposed of this issue stating that "[a]s the Court has discussed in detail, the injuries alleged by Moore are untethered to a legal right." ROA.210. Thus, the district court concluded that "[o]n the facts of this case, however, there is no legal right at issue which the Court can remedy." *Id*

Moore cites *Cnty. of Allegheny*, *Murray* and *Croft* in support of redressability. Appellant's Br. at p. 30. Again these cases involved Establishment Clause challenges and are inapposite for the reasons

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obstacle to marriage. Here, an order removing the state flag will neither change opinions nor will it directly and concretely redress Moore's alleged injuries. 64 F. Supp.3d at 914,

already addressed. Moore's reliance on *Feld v. Zale Corp.*, 562 F.3d 746 (5th Cir. 1989) likewise does not support his argument. In *Feld*, this Court rejected a standing challenge which was based on the argument that enjoined parties were not harmed. "[T]he fact that the injunction bars [the parties] in any way gives them standing to appeal it." *Id.* at 751, n.13. Unlike *Feld*, there is no similar nexus between the relief sought by Moore and the alleged injuries.

## III. Establishment Clause Standing

Moore argues for the first time on appeal that this Court should overrule well-established equal protection standing jurisprudence and hold that his unwelcomed exposure to the public display of the flag—and thus his standing to challenge such public display—should be examined through the lens of the First Amendment's Establishment Clause. Appellant's Br. at p. 21. This argument is without merit.

### A. Moore failed to raise the Argument in the District Court.

Moore waived his Establishment Clause standing theory because he did not raise the argument in the district court. This Court has consistently held that it will not address new legal theories raised for the first time on appeal. *See Leverette v. Louisville Ladder Co.*, 183

F.3d 339, 342 (5th Cir. 1999); *see also Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999).

This Court has said it will "[n]ormally . . . entertain legal issues raised for the first time on appeal only 'in extraordinary instances . . . to avoid a miscarriage of justice.'" *Doleac v. Michalson*, 264 F.3d 470, 492 (5th Cir. 2001) (quoting *Bayou Liberty Ass'n, Inc. v. United States Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir. 2000)); *see also Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 358, n.19 (5th Cir. 2000). This is clearly not a case where a "miscarriage of justice" would occur if the Court does not consider Moore's newly raised legal theory.

Moore filed four complaints in this action with a fifth, (the motion for leave to file a Fourth Amended Complaint, having been denied by the district court). ROA.7; ROA.16; ROA.25; ROA.32. Moore also filed a Brief Regarding Justiciability, ROA.119-123; a Declaration, ROA.124-125; a Memorandum of Law in Opposition to Defendants; Motion to Dismiss Third Amended Complaint, ROA.136-146; and a proposed Fourth Amended Complaint, ROA.173. In none of these pleadings did Moore raise the argument that his standing should be assessed using

concepts borrowed from First Amendment Establishment Clause jurisprudence.

Moore makes no attempt to explain why this Court should entertain a newly raised legal argument on appeal. Moore certainly failed to aver—much less demonstrate—why this Court's refusal to consider the newly raised standing theory would constitute a "miscarriage of justice." Regardless, Moore cannot demonstrate a miscarriage of justice if the Court does not consider his new arguments given that he seeks relief from this Court to apply the law in a manner inconsistent with established and binding Supreme Court precedent.

**B. Establishment Clause Standing does not apply.**

Beyond failure to raise the issue below, Moore's attempt to graft Establishment Clause concepts onto an equal protection claim is meritless. In his appellate brief, Moore espouses that the flag constitutes the "state's expression of a racial preference effectively labeling members of one race 'second-class citizens.'" Appellant's Br. at p. 20. Moore argues that "he is repeatedly and unavoidably exposed to the state flag (and therefore its racially motivated message of disparagement) as it is displayed throughout the state on school

property and other public buildings and in courtrooms where he must appear." Appellant's Br. at p.19

According to Moore, because standing has been conferred in instances of an individual's objection to unwanted exposure to a religious symbol on public property, it follows that he has standing to object to the public display of a non-religious symbol. In doing so, Moore asks this Court to depart from Supreme Court precedent and employ the Supreme Court's standing analysis in Establishment Clause jurisprudence. Moore argues as to what he believes the law **should be**—not what the law actually is as expressed through Supreme Court precedent.

While Moore says there should be no difference in the way standing is analyzed in the establishment and equal protection context, there are in fact a number of reasons. As a starting point, the Supreme Court in applying standing in various contexts has recognized that "the absence of precise definitions, however, as this Court's extensive body of case law on standing illustrates . . . hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing

concepts have gained considerable definition from developing case law. *Allen*, 468 U.S. at 751

Moore's argument that his equal protection standing should be viewed through the prism of the Establishment Clause runs headlong into the text of the First Amendment which the Supreme Court has said "was adopted to curtail the power of government to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). This Court in *Comer v. Scott*, 610 F.3d 929, 933 (5th Cir. 2010) stated:

> Accordingly, the First Amendment's Establishment Clause dictates that:
>
> > Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. *The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.*

*Id.* at 933 (emphasis supplied) (quoting *Epperson v. State of Ark.,* 393 U.S. 97, 103–04 (1968)).

Further undercutting Moore's attempt to entangle the Establishment Clause in his equal protection claim is this Court's decision in *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003). In *Briggs*, the plaintiff alleged that the flag violated the Establishment Clause by using public property and funds to display flag. *Id.* at 502. The plaintiff stated that the flag's union or canton square is the Confederate battle flag which displays "*the St. Andrew's Cross (or Southern Cross), long regarded by many to reflect a particular religious heritage*, and this was offensive to Briggs as he was Muslim." *Id.*

The Court held that "mere display on public property of the state flag, or the use of public funds for that purpose, is in no meaningful sense either a religious activity or coercive." *Id.* at 505. Thus based on the teachings in *Briggs* that the state flag is secular symbol, testing Moore's standing under Establishment Clause principles defies logic.

Moore argues that *Briggs* is supportive of his standing claim stating "this Court—entertained without any expressed concerns about standing or its jurisdiction—a constitutional challenge to the very flag at issue in this case and decided the case on the merits. Appellant's Br. at p. 15. Even assuming that this Court approved—*sub silentio*—the

plaintiff's standing in *Briggs*, it would have done so under the analytical framework of Establishment Clause jurisprudence.

Moore goes on to argue that his unwelcomed exposure to the flag is no different than those who object to the display of religious symbols on public property. Moore argues the district court in applying *Allen*, *Lujan, Lyons* and *Valley Forge*, "ignored more instructive and relevant case law on standing in a challenge to allegedly unconstitutional government speech." Appellant's Br. at pp. 16-17.[22]

Not surprisingly, Moore cites no authority outside of the Establishment Clause context that unwelcomed exposure to a non-religious symbol (such as a flag) is sufficient to confer Article III standing. Moore cites two decisions from this Court, *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) and *Croft v. Governor of Texas*, 562 F.3d 735 (5th Cir. 2009). However, both cases were Establishment Clause challenges.[23]

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[22] Moore cites *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), *Cnty of Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573 (1983) and *Lynch v. Donnelley*, 465 U.S. 668 (1984), Each of these cases involved challenges under the Establishment Clause.

[23] Notably, in *Murray*, the Court began its standing analysis noting that "'the concept of injury for standing purposes is *particularly elusive in* Establishment

Moore argues that "[t]here is no legitimate basis for imposing more stringent standing requirements" in this case, "than are applied in a constitutional challenge to the state's endorsement of one religion over another." Appellant's Br. at p. 10. Moore's argument rests on a faulty premise—that the standing requirements are less stringent in Establishment Clause challenges—they are not.

Moore relies on the Supreme Court's statement in *Valley Forge* that "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States." *Valley Forge*, 454 U.S. at 484; Appellant's Br. at p. 19.

Moore's reliance on *Valley Forge* that he is somehow being held to a more "stringent standing standard" turns the decision on its head as the Supreme Court, in fact, rejected the court of appeal's lenient approach to Establishment Clause standing cases:

> The Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing. It appears to have done so out of the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege "'distinct and palpable

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Clause cases. . . ." *Id.* at 151 (emphasis supplied) (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 692–93 (11th Cir. 1987)).

> injury to himself,' . . . that is likely to be redressed if the requested relief is granted.

*Id.* at 488 (internal citations omitted). Instead, the Court concluded that the plaintiffs failed to identify any injury suffered as a consequence of the alleged constitutional error, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge*, 454 U.S. at 765.

Although repudiating the notion of a hierarchy of constitutional values, the *Valley Forge* Court nonetheless held that even in Establishment Clause challenges, a plaintiff must still "allege distinct and palpable injury to himself, . . . that is likely to be redressed if the requested relief is granted." *Valley Forge*, 454 U.S. at 488. As the district court correctly found, Moore has not alleged such a distinct and palpable injury to himself tied to a constitutionally protected interest. Moore's reliance on *Valley Forge* therefore offers him no refuge.

Despite *Valley Forge's* cautionary tone concerning a hierarchy of constitutional values, it does not follow that the nature and source of a claim is not relevant to standing considerations. *See, e.g., McCreary*

*Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 883 (2005) (O'Connor J. concurring) ("When we enforce [First Amendment] restrictions, we do so for the same reason that guided the Framers—respect for religion's special role in society."); *West Virginia Bd. of Ed.*, 319 U.S. at 638 ("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"); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny); *Braunfeld v. Brown*, 366 U.S. 599, 603 ("Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation.").

Indeed the Supreme Court has held that "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, *it often turns on the nature and source of the claim asserted. Warth,* 422 U.S. at 500 (emphasis supplied). Here, the nature and source of Moore's claim is the Fourteenth—not the First Amendment.

Moore's argument that there should be no distinction when it comes to testing standing under the First and Fourteenth Amendment simply cannot survive scrutiny and is contrary to established principles of constitutional interpretation. In *West Virginia State Bd. of Educ. v. Barnette* the Supreme Court juxtaposed those instances in which a statute implicates **only** the Fourteenth Amendment against statutes that entangle **both** the First and Fourteenth Amendments:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. *The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved*. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.
>
> It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

*Id.* at 639 (emphasis supplied). While Moore contends that standing to challenge the flag should be no different than someone who challenges a religious symbol displayed on public property, he ignores both *Barnette's* teachings along with the tests the Supreme Court has adopted to assess standing in each context.[24]

The Supreme Court has found that standing in Establishment Clause challenges can be demonstrated in various ways. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129–30 (2011). For instance, a plaintiff may demonstrate standing based on the direct harm of what is claimed to be an *establishment of religion*, such as a mandatory prayer in a public school classroom. *Id.* at 129 (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224, n.9 (1963).

Moreover, Establishment Clause standing can be grounded in the notion that a plaintiff has incurred a cost or been denied a benefit on account of their religion. *Id.* at 130 (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality opinion). In *Flast*, the Court

[24] Moore suggest that because the First Amendment is only "applicable to the state by virtue of the Fourteenth Amendment it is all the more implausible that there would be fundamentally different tests for federal courts to enforce their respective provisions." Appellant's Br. at p. 19. Moore's argument ignores the Supreme Court's articulation in *Barnette* as well as the standing considerations utilized in equal protection and Establishment Clause challenges.

recognized a narrow exception to the general rule against federal taxpayer standing. Under the *Flast* construct, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause. However in *Hein v. Freedom From Religion Found., Inc.,* 551 U.S. 587 (2007) the Supreme Court refused to extend the narrow exception to constitutional prohibition on taxpayer standing that was carved out in *Flast*. Thus, standing under the Establishment Clause has been meted out in very specific and limited circumstances.

Standing in an equal protection challenge presents an entirely different analysis predicated on the constitutional interest protected under the Fourteenth Amendment. As the Supreme Court in *N.E. Florida Chapter of Associated Gen. Contractors of Am*. held, [t]he "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.

And though *Allen* recognized standing for non-economic injuries such as a stigmatic injury, it cautioned that "[o]ur cases make clear . . . that such injury accords a basis for standing only to "those persons who

are personally denied equal treatment by the challenged discriminatory conduct[.]" *Allen*, 468 U.S. at 755.[25]

In this case, the constitutional source of the right Moore seeks to vindicate emanates from the Fourteenth Amendment alone. Thus, his failure to allege the concrete denial of equal treatment from the imposition of a barrier from the public display of the flag is dispositive as to his lack of standing and the district court dismissed accordingly.

## IV. Government Speech

Moore detours into the concept of First Amendment government speech as if to suggest the display of the state flag could be prohibited as *unconstitutional* government speech. Appellant's Br. at p. 14. Moore seemingly argues that if the state flag constitutes government speech, and because government speech must conform to the Establishment Clause, he necessarily has standing. This argument is pure nonsense.

[25] *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing to challenge racial discrimination in the administration of their city's criminal justice system); *Rizzo v. Goode*, 423 U.S. 362 (1976) (same). In those cases, plaintiffs alleged official racial discrimination but standing was denied because the plaintiffs were not personally subject to the challenged discrimination. *Allen* 737 U.S. at 755.

First, the Supreme Court has made clear that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).[26] The *Summum* Court noted that "[t]his does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause." *Id.* at 468.[27]

Second, this Court in *Briggs* rejected an Establishment Clause challenge to the flag because it is a secular symbol. *Briggs*, 331 F.3d at 507 ("It is clear to us that, as a matter of law, . . . the objective meaning in the community of Mississippi's display of its flag is not the State's endorsement of religion or any particular religion, and that any

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[26] *Accord Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *National Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (SCALIA, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

[27] The State has already pointed out *supra* that this Court in *Briggs* rejected an Establishment Clause challenge to the state flag.

endorsement of or benefit to religion from that display is at most indirect, remote and incidental."). Thus, any recognized limitation on government speech in light of *Summum* is clearly not applicable in this case to a secular symbol such as the state flag.

Moore cites *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015). Appellant's Br. at p. 14. 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.

Moore's citation to *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.[28] This clearly was not the basis for the Court's

[28] The excerpted quotation used by Moore from the *Walker* opinion is also misleading in that Moore suggests the Supreme Court affirmed Texas's decision to not allow the flag on license plates "**because** of its association with 'expressions of hate directed toward people or groups that is demeaning to those people.'" Appellant's Br. at p. 14 (emphasis supplied). The full quotation reads:

holding: "[o]ur analysis in *Summum* leads us to the conclusion that . . . government speech is at issue." *Walker*, 135 S. Ct. at 2248.

In the end and even assuming the state flag constitutes government speech, Moore cites no legal authority for the proposition that a secular symbol runs afoul of the Supreme Court's holding in the government speech arena. "The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately accountable to the electorate and the political process for its advocacy. "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Summum*, 555 U.S. at 468-469.

## V. Prudential Standing

While not addressed by the district court, Moore's claims not only fail to satisfy Article III's requirements for standing but also fail under prudential standing considerations. Prudential standing embodies

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The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." App. 64. The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

"judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citation omitted); *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 474 (5th Cir. 2013).

The Court in *Hollingsworth* opined that "such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing. A litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" 133 S. Ct. at 2652 (citing *Lujan* at 573–574; *Lance v. Coffman,* 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.").

"The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle]. III's requirements." *Hollingsworth*, 133 S. Ct. at 2661. Moore has alleged nothing other than a generalized grievance against the government and seeks relief—

removal of the current state flag on public property—that no more directly and tangibly benefits him than the public at large.

## VI. The Proposed Fourth Amended Complaint.

The district court correctly denied Moore's proposed Fourth Amended Complaint as futile. ROA.211. Moore alleges that Mississippi Code Annotated § 37-13-5—which provides that public schools shall have a course of study concerning the American and Mississippi flag—violates his minor daughter's First Amendment rights. ROA.177-78.

Moore objects to the requirement in Section 37-13-7 which states, in part, that "[t]he pledge of allegiance to the Mississippi flag shall be taught in the public schools of this state, along with the pledge of allegiance to the United States flag." *Id.* Such exposure to the flag in an educational setting simply does not trigger First Amendment protections.

The district court correctly denied Moore's motion finding that the proposed fourth amended complaint does not cure standing and allowing Moore to amend would be futile. ROA.212. The district court is correct that 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. ROA.211. The district court found that "[o]n its face, a statute requiring children to be taught about the history of the Mississippi flag does not encroach upon a constitutional right." ROA.212.

The district cited *West Virginia Bd. of Education* in concluding Section 37-13-7 "does not require any student to recite the Mississippi pledge. . . ." ROA.212. Moore's claim that the district court erred in denying his motion for leave to amend is without merit.

## VII. Political Question

The political question doctrine shares one of the principles of prudential standing—the admonition that courts not adjudicate matters of generalized grievances more appropriately addressed in the representative branches. "[D]eclination of jurisdiction under the doctrine presupposes that another branch of government is both capable of and better suited for resolving the political question." *Lane v. Halliburton*, 529 F.3d 549, 557 (5th Cir. 2008) (citations omitted).

The Mississippi Supreme Court has more than once weighed in on the political nature of the state flag stating "[t]he decision to fly or

adopt a state flag rests entirely with the political branches." *Mississippi Div. of United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches*, 774 So. 2d 388 (Miss. 2000).

In *Daniels v. Harrison County Bd. of Supervisors,* 722 So.2d 136 (Miss. 1998), the Court stated that the decision "to fly the Confederate Battle Flag is a 'political matter,' the remedy for which lies within the democratic process. . . ." *Id.* at 138 (citation omitted). The Court concluded that "[t]he judiciary is not empowered to make decisions based on social sensitivity." *Id.* at 138.

In both cases this state's highest court expressed that the issue is one of public policy best suited for resolution through the political process. Justice Banks, in his concurrence in *Daniels,* counseled that "[Plaintiff] and others like him who are compelled to voice their objection to the battle flag should look to the legislature because the legislature is the primary expositor of this state's public policy." *Daniels*, 722 So. 2d at 141 (Banks, J., concurring).

In *Lane,* the court identified formulations articulated by the Supreme Court regarding the political question doctrine, 529 F.3d at 557-58, and the presence of one or more of the factors will render the

case non-justiciable. *See Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978).

Here, two of those factors are implicated: (1) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; and (2) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. *Lane*, 529 F.3d at 558.

For this Court to weigh-in would require an independent *policy* determination—one that the Mississippi Supreme Court has said is properly committed to the democratic process. Moreover, and as discussed in the context of redressability under *Lujan*, what is at issue is not a legal barrier which can be removed through court order to vindicate concrete rights, but instead about a continuing debate among the state's citizenry and elected officials which this Court should declare to be a "matter . . . inappropriate for judicial resolution." *Baker v. Carr*, 396 U.S. 186, 198 (1962).

## CONCLUSION

For the reasons set forth, Governor Bryant respectfully requests that this Court affirm the district court's Final Judgment dismissing

Moore's Third Amended Complaint and affirming the denial for leave to file the Fourth Amended Complaint as futile.

This the 5th day of December, 2016.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

Undersigned counsel certifies that this brief has been filed via the Court's CM/ECF System and thereby served on counsel of record registered to receive electronic notification of filings, and also served on the following persons via US Mail, properly addressed and postage prepaid:

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## CERFICATE OF ELECTRONIC COMPLIANCE

Undersigned counsel certifies that this brief has been transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system. Counsel further certifies that the required privacy redactions have been made, Fifth Cir. R. 25.2.13, the electronic submission is an exact copy of the paper document, Fifth Cir. R. 25.2.1, and the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

This the 5th day of December, 2016.

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