No. 17-23

In The
Supreme Court of the United States

CARLOS E. MOORE,

Petitioner,

v.

GOVERNOR DEWEY PHILLIP BRYANT,
In His Official Capacity,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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I. Introduction

The Court of Appeals decision and the Respondent's Opposition rely entirely on the notion that a "message" of disparagement is something different in kind from a disparity in "treatment." Two stories make clear that they are mistaken.

The first story is a parable from an imaginary Bible:

> A powerful king was given two sons. On the day of their birth the Lord appeared and said "Each of your sons shall be treated as equal to the other – you must never deny them equal protection." As the years passed, each was given the same food, the same clothing, the same accommodations, and the same share of the king's treasure. But every day the king told one of his sons that he was superior and that he was loved the most. The other son was told that he was inferior and that the king did not love him. The king shared these views with all his subjects.
>
> When the king was on his deathbed the Lord appeared again and asked "have you honored my command to treat your sons equally?"

The second story is one told by Yale Law School Professor James Forman about his experience as a high school student:

> It is the spring of 1984 in Atlanta, and the groundskeeper . . . is starting his morning routine. In my . . . homeroom . . . . [w]e are simply waiting for the bell to signal the start

> of the first class. . . . [M]y eyes return to the groundskeeper, who is carefully unfurling and raising a series of flags. First is the American flag, last is the Atlanta Public Schools flag, and . . . between the two is the Georgia State flag. I am drawn to this flag, particularly to its wholesale incorporation of Dixie. . . .
>
> I think of the incongruity of having black children, in a largely black city, watch a black man raise the symbol of the Confederacy for us all to honor. . . . My eyes close tightly, my fists clench, and I slowly force from my mind images of the flag, of the Ku Klux Klan, of Bull Conner and George Wallace – of black people in chains, hanging from trees, kept illiterate, denied the opportunity to vote.
>
> The bell has rung. My teacher is calling my name: "James, are you ok?" I look up, startled. "Yes, ma'am, I'm fine," I say, as I collect my books and head for class. "I'm fine," I repeat to myself. . . . I have forgotten; I have purged my mind; I am able to get up and walk out of the door. But overcoming the flag has taken a piece of me – a piece that I will not easily recover.

James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 526 (1991).

A state sponsored flag broadcasting an official endorsement of white supremacy is not simply harmless "messaging," and it is not a thing separate and apart from disparate "treatment." When the Court of

Appeals' false dichotomy between "messaging" and "treatment" is stripped away – as it must be – there is no legitimate basis for its pinched interpretation of the Equal Protection Clause or the application of its perverse twist on a "sliding scale" of standing.

II. The Fifth Circuit's Substantive Holding On The Applicability Of The Equal Protection Clause To Government Speech Conflicts In Principle With Decisions Of This Court

Respondent, in seeking to re-define the Questions Presented, ignores the linchpin of the Court of Appeals' decision. The only way the Fifth Circuit reached its conclusion on standing was to first hold, on the merits, as follows:

> The Establishment Clause prohibits the Government from endorsing a religion, and this directly regulates Government speech if that speech endorses religion. . . . The same is not true under the Equal Protection Clause: the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging.

Moore v. Bryant, 853 F.3d 245, 250 (5th Cir. 2017).

Nowhere in his Opposition does Respondent make any effort to defend this remarkable – and completely unprecedented – holding. Rather, Respondent simply parrots the Fifth Circuit's words (Opp. at 3) without citing any supporting case in the courts of appeals or this Court and without articulating any policy for why

a state's "differential messaging," i.e., government speech endorsing one race over another, is outside the reach of the Equal Protection Clause. There is no caselaw supporting the Court of Appeals' extraordinarily narrow view of Equal Protection and there is no policy or textual basis for the distinction the Court of Appeals draws between a racially based endorsement of one group of citizens versus a religiously based endorsement.

Respondent's effort to distinguish away *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Anderson v. Martin*, 375 U.S. 399 (1964), has no merit. *Brown* explicitly held that it was the state's insidious "messaging," delivered to school children, which was the gravamen of the Equal Protection violation. 347 U.S. at 494-95. Similarly, in *Anderson* there was no discriminatory "treatment," merely state dictated messaging. Respondent's assertion that the state law at issue in *Anderson* "impaired a person's ability to become a candidate for elective office because of that person's race" (Opp. at 15) is nonsense. It was stipulated that "Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot" and the gravamen of the Equal Protection violation was solely in the state's messaging. 375 U.S. at 402.

Respondent's efforts to explain away the merit in Justice Stevens' observation in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009), that government speech can itself run afoul of the Equal Protection Clause, is also spurious. Characterizing Justice

Stevens' comment that "government speakers are bound by the . . . Establishment and Equal Protection Clauses" as "obvious" – which it is – Respondent says that this means only that "the First and Fourteenth Amendments restrain government speech and/or conduct in certain circumstances." Opp. at 16. Exactly. But what is such a circumstance if not one in which a state symbolically endorses white supremacy and communicates to its African-American citizens that they are inferior beings, "outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

Respondent denies that the Court of Appeals' decision gives "free rein for state and local governments to demean their African-American citizens." Opp. at 2. But it does. In addressing standing, plaintiff's well pled allegations must be taken as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Here the allegations are clear: Mississippi adopted its flag at the same time it vigorously reasserted white control of the state, the flag was intended to be an official endorsement of white supremacy, and by continuing to fly it Mississippi broadcasts that message on a daily basis. It is the equivalent of the state adopting "White Supremacy Forever" as its state motto. As one justice on the Mississippi Supreme Court has noted, as a symbol of "white supremacy, racism, and oppression" the Confederate flag "takes no back seat to the Nazi Swastika." *Daniels v. Harrison Cnty. Bd. of Supervisors*, 722 So. 2d 136, 140 (Miss. 1998). If Mississippi's conduct does not violate the

Equal Protection Clause, then it is undeniable that state and local governments are indeed free to officially demean and marginalize their black citizens, LGBT citizens, Hispanic citizens, Middle Eastern citizens, Asian citizens or any group which finds itself in a disfavored minority. Indeed, the Fifth Circuit has already extended its faulty Equal Protection analysis in this case to one alleging that Mississippi officially demeans and disparages its LGBT citizens. *Barber v. Bryant*, 860 F.3d 345, 356-57 (5th Cir. 2017), cert. pending No. 17-547.

In holding that mere governmental "messaging" – no matter how racially biased or how demeaning – cannot itself violate the Equal Protection Clause, the Court of Appeals made a grievous error, on a matter of fundamental importance to our society, and contrary to decisions of this Court. That is why the Petition for Certiorari should be granted. *See* SUP. CT. R. 10(c).

III. The Fifth Circuit's Imposition Of Heightened Standing Burdens For A Challenge To Racially Disparaging Government Speech Conflicts In Principle With Decisions Of This Court

Respondent repeatedly cites, and almost exclusively relies upon, *Allen v. Wright*, 468 U.S. 737 (1984), to argue that the Fifth Circuit's decision on standing is "sensible," "correct," and "predictable" and thus undeserving of this Court's time. But the Fifth Circuit's standing analysis and Respondent's arguments depend

completely on the court's dubious conclusion, discussed above, that "messaging" alone cannot violate the Equal Protection Clause and therefore there is no "injury-in-fact" suffered by a black man, woman, or child who is repeatedly confronted by the state's message of their inferiority. The entire "no standing" case depends on the nonsensical notion that while an atheist who passes by a manger scene may suffer an immediate and judicially cognizable injury-in-fact, black men, women, and children who must endure the state's evil message in their communities, workplaces, and schools suffer no comparable injury-in-fact. "Toughen up" or "move out of the state" is the message sent by the state of Mississippi to African-Americans who are rightfully offended by the state's demeaning and hostile speech.

Allen v. Wright does not dictate that the courthouse doors be closed to plaintiff and his daughter. It has nothing to do with standing to challenge racially hostile government speech. Plaintiffs in *Allen* were understandably characterized as "concerned bystanders," complaining about the government's failure to adequately enforce non-discrimination regulations against schools which plaintiffs neither attended nor wished to attend. The "stigma" allegedly flowed from discriminatory treatment suffered by *other* persons who happened to be of the same race as plaintiffs. Not surprisingly, the Court analogized the situation to "[a] black person in Hawaii . . . challeng[ing] the grant of a tax exemption to a racially discriminatory school in Maine." 468 U.S. at 756.

But Petitioner and his daughter are Mississippi citizens. They are personally and directly "treated" differently from Mississippi's white citizens every day in that their own state tells them – and tells the white citizens of Mississippi as well – that its white citizens are superior to, and more deserving than, its black citizens. *Allen v. Wright* tells us nothing about standing on those particular facts and it is *Allen* which teaches that the particular facts are what matter in assessing standing. 468 U.S. at 751-52.

Moreover, even if *Allen* were to be interpreted as meaning that "stigma," standing *alone*, can never be enough for standing, that would not be this case. Respondent's repeated assertion that the only injury alleged by Petitioner is stigma (Opp. at 5, 10, 12, 14) is plainly false. Petitioner not only alleged that the state's message "makes him feel like a second class citizen" and deprives him of his "dignity," but also that being confronted by the flag in his community and in courtrooms where he appears has caused him to suffer both emotionally and physically. As Petitioner declared, "[the flag] continues to fly, causing me to continually suffer stigmatic, physical, and emotional injuries." Declaration of Carlos E. Moore ¶ 10. The Court of Appeals nevertheless insisted on characterizing even these traditional sorts of injuries as merely "stigmatic" because Petitioner could cite no further action by the state. Pet. App. 9a-11a.

There are no cases in this Court or in the courts of appeals defining the standing requirements in a case alleging that a state has intentionally engaged in

racially hostile and demeaning government speech in violation of the Equal Protection Clause. The Petition should be granted to reconcile the conflict between the Fifth Circuit's heightened test for standing to challenge government speech favoring one race over another and the much less demanding test for standing to challenge government speech favoring one religion over another. Contrary to the Fifth Circuit's holding, there is no "hierarchy of constitutional values" and no "sliding scale" of standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). The test for standing should not turn on which constitutional prohibition government speech violates and that issue is of sufficient import that the Petition should be granted.

IV. This Case Is Not A "Poor Candidate" For Certiorari

The only new point made by Respondent in the final section of his Opposition is that there are "a number of symbols and displays that citizens encounter on a daily basis" (Opp. at 27) and "if Petitioner has standing here, virtually any litigant could challenge any government action, display, monument or speech he or she views as offensive or as unduly favorable to another. . . ." (Opp. at 28).

To be sure, our nation continues to be home to many hundreds of monuments or statues honoring the Confederacy or those who fought for it. The intensity of feelings about state sponsored homage to the

Confederacy has prompted both supporters and opponents to take to the streets in protest and has already led to violence and murder. Even where removal of such monuments and statues has been pursuant to legislative action, violence has been threatened and has occurred in New Orleans, Charlottesville, and elsewhere. Petitioner has received death threats for filing this case and for removing the Mississippi flag from the courtroom where he presides as a part-time municipal judge.[1] The removal of statues in New Orleans caused legislators in Mississippi to declare that those responsible for such acts in New Orleans and in "our state" should be lynched. Pet. at 5, n.2.

It is not unlikely that further actions to remove Confederate monuments or relegate them to museums will cause further threats and/or violence. Similarly, it is not improbable that in states like Mississippi, where support for the state flag has largely split along racial lines,[2] there may be violence if the legislature continues to preserve and venerate its Jim Crow banner while the courts continue to look the other way.

The existence of other "symbols and displays" throughout the country is not, however, as Respondent suggests, a basis for the Court to deny certiorari. To the

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[1] David Ferguson, '*You Need A Bullet in the Head': Racists Threaten Black Mississippi Judge for Removing Courtroom Flag*, RAW STORY (Aug. 25, 2017), https://www.rawstory.com/2017/08/you-need-a-bullet-in-the-head-racists-threaten-black-mississippi-judge-for-removing-courtroom-flag/.

[2] *See* Amicus Brief of The Southern Poverty Law Center at 8-9.

contrary, the alleged use of symbols by state and local governments to divide their people, endorsing some and demeaning others, is a matter of enormous public import. The compelling issues in this case cry out for consideration by this Court. This case presents the ideal vehicle for important and unresolved Equal Protection, government speech, and standing issues to be addressed.

Whatever ambiguity there might be in the message conveyed by a state or city in removing or declining to remove a solitary statue of a Confederate soldier, the message here is unambiguous and its impact is enormous by comparison. A government's flag is not just another monument. There is no symbolic tool available to a state more powerful than its flag. *See* Robert Shanafelt, *The Nature of Flag Power: How Flags Entail Dominance, Subordination, and Social Solidarity*, 27 POL. & LIFE SCI. 13, 14, 16 (2009) (flags are "modernized versions of the sacred emblems known . . . as totems" and "have long been intertwined with political hierarchy, with physical dominance and subordination"). As Mississippi declares, in its statutorily prescribed pledge of allegiance, the flag is intended to stand for the state itself. Miss. Code Ann. § 37-13-7.

Moreover, there is not just one Mississippi flag on a single flagpole, as, for example was the case when South Carolina, in the midst of a national furor over the murders of nine people in a Charleston church by a Confederate flag waving white supremacist, quickly removed its solitary Confederate flag from its capitol. Rather, Mississippi flies its flag in thousands

of locations throughout the state, including – by law – at or near its 1,000 public schools, in its office buildings, its courtrooms, above its capitol, and even above its Supreme Court. Only a blind Mississippian could avoid its demeaning and threatening presence.

While there is only one Petitioner here, seeking relief on behalf of himself and his daughter, there are over 1.1 million African-Americans in Mississippi.[3] More than 240,000 of them, including Petitioner's now first-grader, are children attending public schools[4] where state law mandates that they be confronted every day by the flag and requires that they be taught "proper respect" for its insidious message. Miss. Code Ann. § 37-13-5(3). "The fact that an injury may be suffered by a large number of people does not itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016). As the Court recently observed, that which "disparages a 'substantial' percentage of the members of a racial or ethnic group . . . necessarily disparages many [individual] 'persons,' namely members of that group." *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017).

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[3] *Quick Facts: Mississippi*, U.S. CENSUS BUREAU, https://census.gov/quickfacts/MS (as of July 1, 2016).

[4] *Public Education in Mississippi*, BALLOTPEDIA, https://ballotpedia.org/Public_Education_in_Mississippi (last visited Oct. 24, 2017).

The fact that Mississippi's messaging diminishes Petitioner's dignity as well as that of a million other people, including 240,000 children, makes this case of far greater significance to this nation and its values than many, if not most, which come before this Court. The importance of the issues to the fabric of American society and the daily impact on more than a million individuals fully warrant the granting of the Petition.

Respectfully submitted,

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