The Battle to Change the Mississippi State Flag

By Michael T. Scott

In the words of a former African American member of the Mississippi Supreme Court, the Confederate flag "takes no backseat to the Nazi swastika" as a symbol of "white supremacy, racism and oppression."

In 1894, at the same time it was adopting a new constitution mandating racial segregation and disenfranchising former slaves and their descendants, the Mississippi legislature adopted a new state flag incorporating the Confederate flag into the upper left corner, or canton, of the state banner. Unfortunately, 125 years later, the official Mississippi state flag continues to include that symbol of white supremacy. Furthermore, Mississippi law mandates that it fly above every public school and requires that every public-school student, 50% of whom are African American, be taught to respect it. In a 2001 referendum, 67% of Mississippians voted to preserve the 1894 flag.

All of this was unknown to me until June 2015, when a white supremacist, accustomed to wrapping himself in the Confederate flag, murdered nine African Americans in a church in Charleston, South Carolina. A national furor erupted over the fact that South Carolina had for many decades flown the Confederate flag over its state capitol on a daily basis. Within days, South Carolina did the right thing and barred the flying of the Confederate flag from all state property. Efforts were immediately launched to get the Mississippi legislature to change the Mississippi flag. However, Mississippi being Mississippi, those efforts failed with the bills never even getting out of committee.

The following year, during the 2016 Democratic Convention in Philadelphia, the city displayed the flags of all 50 states on poles along Broad Street. When members of the Mississippi delegation saw their flag on display, they asked the city to remove it, and the city promptly complied.

Shortly thereafter, having seen a Philadelphia newspaper report on the flag's removal, I joined forces with Carlos Moore, an African American Mississippi attorney and convention delegate, to challenge the Mississippi flag on Equal Protection grounds in federal court. Our argument was simple: just as the Establishment Clause of the First Amendment bars a state or other public entity from endorsing, or expressing the preferred status, of one religion over another, the Equal Protection Clause similarly should be interpreted to prevent a state from symbolically endorsing the superiority of one race over another.

The case, filed in the Southern District of Mississippi, with Moore as the plaintiff, was assigned to Judge Carlton Reeves. Judge Reeves, an African American, was appointed by President Obama and is a very well respected judge. Judge Reeves readily perceived the merit in the claim that government display of the Confederate flag was a state-sponsored endorsement of white supremacy. Quoting from Mississippi's Declaration of Succession, he noted that Mississippi's decision to secede was "thoroughly identified with the institution of slavery," that the Confederate flag was widely used by the KKK and others in the Jim Crow era as a symbol of suppression and hostility toward African Americans, and that the flag was embraced with renewed fervor throughout the South in "symbolic defiance" of the Civil Rights movement beginning in the 1950s, particularly in protest of the Supreme Court's call for school integration in *Brown v . Board of Education*, which was decided in 1954. He also recognized that Mississippi had adopted its flag as the banner under which its newly adopted constitutional policies of segregation and "exclusion of African-Americans from the electoral process" were to be

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implemented.

Notwithstanding all of the above, however, Judge Reeves refused to grant any relief. Instead, he held that Moore had not personally suffered any "cognizable legal injury" distinct from any other citizen, and therefore that he lacked the necessary "standing" to bring the suit. In layman's terms, we lost on a technicality, not on the merits.

We immediately appealed to the U.S. Court of Appeals for the Fifth Circuit. The court promptly scheduled arguments once the briefs were filed. When I appeared in New Orleans in March 2017 to argue before the three-judge panel, I was full of optimism. The court was, however, unwilling to grapple with Mississippi's official endorsement of white supremacy. Instead, it too evaded the merits by holding that Moore lacked standing. Acknowledging that Mississippi was engaging in symbolic speech—sending a "message"—through its state flag, the Fifth Circuit reached the remarkable, and unprecedented, conclusion that "the gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging." In other words, according to the Fifth Circuit, a city or county or state is perfectly free to directly or symbolically endorse white supremacy and declare its African American citizens to be second-class citizens—even if it thereby encourages and incites racially discriminatory treatment by private citizens—as long as the government itself is not the direct perpetrator of concrete, racially-based, disparate treatment.

Recognizing that the Supreme Court only hears and actually decides about 1% of the 8,000 cases that it is asked to hear every year, we were nonetheless confident that the court would not allow the Fifth Circuit's aberrant holding to stand. We filed our "cert. petition" in June 2017, and Mississippi informed the court that it would not bother filing a response unless the court asked it to do so. It did so because the court will almost never accept a case without first inviting the opponent to state its views, and most petitions are simply denied without the opponent needing to file anything.

While our petition was pending, events in Charlottesville, Virginia again dramatically drove home the grievous harm that can flow from the display of Confederate symbols. When Charlottesville decided to remove the government-sponsored statues of those who had led the South's war to preserve slavery, white supremacists and neo-Nazis descended upon the city, leading to violence and the murder of a counter-protestor. While the president saw fault in "both sides," America as a whole was sickened by the conduct and views of the pro-Confederate white supremacists. A few weeks later, the Supreme Court directed Mississippi to file a brief explaining why the court should not hear our case. Meanwhile, Moore was receiving death threats on a regular basis, including one from an online poster who asked "Where is James Earl Ray when you need him?" A Mississippi legislator even proclaimed on Facebook that those involved in removing Confederate symbols should be lynched.

The state filed its brief, and we then filed our reply brief. The Congressional Black Caucus and the Southern Poverty Law Center filed "friend of the court" briefs also urging the court to hear our case. The Black Caucus brief argued that the state's display of the flag served to "preserve a hegemony that accords one class of citizens a higher status than another." The SPLC brief nicely punctured the Fifth Circuit's pretense that "messaging" is somehow a thing apart from "treatment": "The symbolic power of a flag can trigger a sense either of belonging or of alienation…Unless a flag is inclusive, a flag does not treat all citizens underneath it equally."

Sadly, our hopes were dashed a few days after Thanksgiving 2017 when the Supreme Court announced that we were not one of the chosen 1% whose cases would be heard.

The battle to have the courts consign Mississippi's flag to the scrap heap of history has not yet succeeded. But we haven't given up, and we continue to look for new theories, new plaintiffs, and judges who are courageous enough to put an end to government-sponsored symbolic endorsements of white supremacy. ■

Michael T. Scott *is a senior trial and appellate lawyer at Reed Smith. He has tried dozens of cases before juries in the state and federal trial courts and has also argued many cases in state and federal appellate courts.*