

FILED

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Charles R. Fulbruge III
Clerk

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60737
Summary Calendar

JOHN ELLIS BRIGGS,

Plaintiff-Appellant,

versus

STATE OF MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Before GARWOOD, JOLLY and SMITH, Circuit Judges.

GARWOOD, Circuit Judge:

Appellant Briggs's pro se complaint, filed June 29, 2001, alleged that Mississippi violated the Establishment Clause of the First Amendment by using public property and funds to fly the state flag in 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 "a Miracle Muslim." The only defendant mentioned in the complaint is the

State of Mississippi. The relief requested was that "a just inquiry be made to determine whether a religious symbol, namely the St. Andrew's Cross, should be removed from display on public property" and that "the State of Mississippi . . . be made to compensate me by paying punitive damages not to exceed \$77.77 million (US)."

The State moved to dismiss on the basis of the Eleventh Amendment and because the complaint did not state a constitutional violation.

On November 14, 2001, Briggs, through counsel, filed a response to the motion to dismiss.

On December 19, 2001, Briggs, through counsel, filed a motion for leave to amend the complaint. The tendered amended complaint names as defendants only the State of Mississippi and "Ronnie Musgrove." The *only* allegation concerning Musgrove is that he "is the governor for the State of Mississippi." All other allegations are as to the state defendant, e.g., "Defendant, State of Mississippi, has willfully and maliciously used public property and public funds to display a religious symbol, namely, the St. Andrew's (or Southern Cross), long regarded by many to reflect a particular religious heritage." The amended complaint alleges that "the display of the St. Andrew's Cross in the canton of the Mississippi State flag is a violation of his [plaintiff's] Constitutional rights." The relief sought is "a declaratory judgment mandating that the religious symbol, namely the St.

Andrew's Cross, be removed from display in public places," "a declaratory judgment mandating that the Defendant, State of Mississippi, found to be in violation of the First Amendment," "compensatory damages in the amount not to exceed 77.77 Million Dollars," and reasonable attorney fees and costs.

On August 12, 2002, the district court entered its memorandum opinion and final judgment, granting the State's motion to dismiss, denying Briggs's motion for leave to amend, and dismissing the case.

Discussion

Briggs appeals, raising three issues.

Eleventh Amendment

Briggs first argues that the district court erred in determining that the Eleventh Amendment barred him from seeking damages and equitable relief against Mississippi. We reject that contention. *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 908-09 (1984). As we said in *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183 (5th Cir. 1986), the Eleventh Amendment bars suit against a state or "state entity, as opposed to a state official, regardless of whether money damages or injunctive relief is sought" and section 1983 does not override the Eleventh Amendment.

Establishment Clause

Second, Briggs argues that the district court erred in holding

that Mississippi's use of the St. Andrew's Cross on the state flag does not constitute a violation of the Establishment Clause.

The Mississippi state flag indisputably has the Confederate battle flag as its union or canton corner or square. *See, e.g., Mississippi Division of United Sons v. Ms. NAACP*, 774 So.2d 388, 390 (Miss. 2000) ("While the State Flag is not simply a Confederate Battle Flag, the part of the State Flag found objectionable by the NAACP and others is the depiction of such Confederate flag in the State Flag's canton corner"). The flag was adopted in 1894, when the Mississippi legislature approved the committee report which

" . . . recommend for the flag one with width two-thirds of its length; with the union square , in width two-thirds of the width of the flag; the ground of the union to be red and broad blue saltier¹ thereon, bordered with white and emblazoned with thirteen (13) [mulletts]² or five-pointed stars, corresponding with the number of the original States of the Union; the field to be divided into three bars of equal width, the upper one blue, the center one white and the lower one, extending the whole length of the flag, red-the national colors; the staff surmounted with a spear head and a battle-axe below; the flag to be fringed with gold and the staff gilded with gold." *Id.* at 391 (emphasis added).

However, in 1906 that 1894 legislation adopting the flag was

¹Webster's Third New International Dictionary (1981 Ed.) states that "saltier" is the archaic of "saltire" (*id.* at 2005). It defines the adjective "saltire" as "shaped like an X". *Id.* For the noun "saltire" the first two meanings given are: ". . . 1 **heraldry: an ordinary consisting of a cross formed by a bend dexter and a bend sinister crossing in the center of the field** 2: an X-shaped cross; **esp: SAINT ANDREW'S CROSS . . .**" *Id.*

²*See Daniels v. Harrison County Bd. of Supervisors*, 722 So.2d 136, 139 n.1 (Miss. 1998) (Banks, J., concurring).

(apparently inadvertently) repealed by the general repeal of all laws not included in the then enacted codification. *Id.* Nevertheless the 1894 flag continued to be flown as the state flag of Mississippi "by custom and usage." *Id.* at 391-92.

As reflected by, *inter alia*, the decisions in *Mississippi Div. of United Sons* and *Daniels v. Harrison County Bd. of Supervisors*, 722 So.2d 136 (Miss. 1998), the flying of the Confederate Battle Flag (alone or as incorporated in the canton square of what was assumed to be the official state flag) aroused heated controversy between those for whom it "commemorate[d] the sacrifice made in support of the cause of the Confederacy" and those for whom it was an offensive "symbol of white supremacy" or oppression. *Daniels* at 139 (Banks, J., concurring); see also *id.* at 141. Following the decision in *Mississippi Div. of United Sons* that there was no official state flag, the controversy became more active and public. In January 2001 the Mississippi Legislature enacted legislation providing that the state flag would be determined by an election to be held April 17, 2001, at which the voters would choose between two described flags, one being the identical 1894 flag and the other being a flag similar in all respects to that of 1894 except for its canton corner which would consist entirely of a blue ground (white bordered on its bottom and fly sides) with a circle of thirteen stars containing an inner circle of six stars with one

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