**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**Northern Division**

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| BARBARA BEAVERS; MONICA CABLE; LAURA KNIGHT; and PAMELA MILLER, | |
| *Appellants*, | |
| vs. | Civil Action No.: 3:19-cv-00735-DPJ-FKB |
| CITY OF JACKSON, MISSISSIPPI, | ORAL ARGUMENT REQUESTED |
| *Appellee*. | |

**APPELLANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO REMAND**

COME NOW THE APPELLANTS, Barbara Beavers, Monica Cable, Laura Knight, and Pamela Miller, ("Sidewalk Advocates") through their undersigned counsel, and file this Memorandum in Support of their Motion to Remand. For the reasons set forth below, the Sidewalk Advocates' Notice of Appeal should be remanded back to the state court from which it was improperly removed, pursuant to 28 U.S.C. § 1447, and the Appellee, City of Jackson, Mississippi ("Jackson") should be required to pay the costs and expenses, including attorney's fees, incurred by the Sidewalk Advocates as a result of the improper removal, pursuant to 28 U.S.C. § 1447(c).

**INTRODUCTION**

The Sidewalk Advocates' Notice of Appeal ("App.") (ECF No. 1-1) clearly and expressly relies exclusively on state law. Moreover, contrary to Jackson's argument, states are free to provide greater protection of individual rights under their state constitutions than is required by the Federal Constitution, and doing so does not raise a Supremacy Clause issue. Jackson should be required to pay the costs and expenses incurred by the Sidewalk Advocates as a result of the improper removal, as all of Jackson's arguments for removal were objectively unreasonable.

## BACKGROUND

The Sidewalk Advocates are Mississippi residents trained in methods of "sidewalk advocacy," which involves actively encouraging persons patronizing abortion centers not to have an abortion. The Sidewalk Advocates regularly provide information about alternatives to abortion to individuals patronizing an abortion center located in Jackson, Mississippi.

On October 1, 2019, the Jackson City Council adopted an ordinance which restricts the Sidewalk Advocates' ability to engage in effective sidewalk advocacy. The Sidewalk Advocates timely filed a Notice of Appeal on October 11, 2019, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, pursuant to Miss. Code Ann. § 11-51-75, which authorizes appeals to circuit court from decisions of municipal authorities. The Notice of Appeal asserted only state constitutional and state law grounds for appeal, and did not allege any violations of the Federal Constitution or federal law. *See* App. ¶¶ 34-73.

On October 15, 2019, Jackson improperly removed this appeal to this court pursuant to Title 28 U.S.C. §§ 1331 and 1446. *See* Notice of Removal ("Remov.") (ECF No. 1). Jackson argues that the Notice of Appeal asserts claims that are "substantially founded in" and arise "under" the United States Constitution. *Id*. at ¶¶ 2-3. Jackson also argues that by asserting that a state created right is more expansive than a federal right, the Sidewalk Advocates raise a question under Article VI, Clause 2 of the United States Constitution ("Supremacy Clause"). *Id*. at ¶¶ 4-5.

## STANDARD

### I. Federal-Question

"The federal removal statute authorizes removal to federal court of a civil action filed in state court if the claim is one 'arising under' federal law. . . ." *Arana v. Ochsner Health Plan*, 338 F.3d 433, 437 (5th Cir. 2003) (en banc) (quoting 28 U.S.C. § 1441(b)). Courts typically ascertain

the existence of federal-question jurisdiction by applying the "well-pleaded complaint" rule, under which "a case will [generally] not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citations omitted).

The removing party bears the burden of proving that federal jurisdiction exists and that removal was proper. *Sampson v. Mississippi Valley Silica Co.*, 268 F. Supp. 3d 918, 920 (S.D. Miss. 2017) (citing *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 212 (5th Cir. 2013)). "When considering motions to remand, federal removal statutes are to be strictly construed against removal, and all ambiguities or doubts are resolved in favor of remand." *Id*. (citing *Wilkinson v. Jackson*, 294 F.Supp.2d 873, 877 (S.D. Miss. 2003); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988)). "In reviewing a district court's denial of a plaintiff's motion to remand a case from federal court to state court, the Court of Appeals applies a de novo standard of review." *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1117 (5th Cir. 1998) (citations omitted).

**II. Costs and Fees Upon Remand**

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). A court may award attorney's fees and costs when the removing party lacked "objectively reasonable grounds to believe the removal was legally proper." *Valdes v. Wal–Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000). "A fee award is inappropriate if the removing party 'could conclude from [existing] case law that its position was not an unreasonable one.'" *Probasco v. Wal-Mart Stores Texas, L.L.C.*, 766 F. App'x 34, 37 (5th Cir. 2019), *reh'g denied* (Apr. 24, 2019). In determining whether an improper removal warrants an award of attorney's fees and costs, the court does not

consider the motive of the removing defendant, and "may award fees even if removal is made in subjective good faith." *Valdes*, 199 F.3d at 292. "The decision of the district court to award or not to award attorney's fees is reviewed for an abuse of discretion." *Id.*

## ARGUMENT

### I. This Appeal Should Be Remanded to State Court.

The Sidewalk Advocates' Notice of Appeal clearly and expressly relies exclusively on state law. The Notice of Appeal's single reference to the First Amendment to the Federal Constitution is a surplusage and does not raise a federal question. Additionally, the Notice of Appeal's reference to the fact that the Mississippi Constitution makes free speech worthy of "religious veneration" in no way asserts a federal claim. Moreover, contrary to Jackson's argument, states are free to provide greater protection of individual rights under their state constitutions than is required by the Federal Constitution, and doing so does not raise a Supremacy Clause issue.

#### A. The Notice of Appeal clearly and expressly relies exclusively on state law.

The Sidewalk Advocates' Notice of Appeal does not assert any federal law or federal constitutional provision as grounds for the appeal. *See* App. ¶¶ 34-73. Rather, the Notice of Appeal clearly and expressly relies exclusively on state constitutional provisions and state law. *Id.* Nevertheless, Jackson insists that the Sidewalk Advocates have asserted claims that are "substantially founded" in and arise "under" the First Amendment to the United States Constitution ("First Amendment"). *See* Remov. ¶¶ 2-3.

##### 1. The Notice of Appeal's single reference to the First Amendment to the Federal Constitution is a surplusage and does not raise a federal question.

Jackson appears to base its argument, in part, on the fact that the Notice of Appeal refers, in passing, to the First Amendment. *See* Remov. ¶ 2. However, the Notice of Appeal never alleged any violations of the First Amendment nor sought relief under the First Amendment. *See* App. ¶¶

34-47. Rather, the Notice of Appeal made a single, passing reference to the fact that Article 3, Section 11 of the Mississippi Constitution is more protective of the individual's right to freedom of speech than is the First Amendment. *See* App. ¶¶ 35.

This single reference, standing alone, is wholly insufficient to invoke federal-question jurisdiction. Indeed, the courts have long recognized that "references to the federal constitution and/or statutes in pleadings or 'other paper[s]' may be surplusage and/or may not be intended to and may not have the effect of advancing a federal cause of action." *Jackson v. Mississippi Farm Bureau Mut. Ins. Co.*, 947 F. Supp. 252, 255 (S.D. Miss. 1996) (citations omitted). *See also e.g. Hearn v. Reynolds*, 876 F. Supp. 2d 798, 800 (S.D. Miss. 2012) (no federal-question jurisdiction where complaint's allusion to federal law was, at most, "a fleeting observation rather than an attempt to state a claim" and plaintiffs' remand brief represented that plaintiffs were not alleging a cause of action based on federal law); *J.D. 1 ex rel. Dixon v. Mississippi High Sch. Activities Associations, Inc.*, 2012 WL 930930, at *1 (S.D. Miss. 2012) (no federal question jurisdiction where plaintiffs' complaint referred "briefly and indirectly" to federal law, and did not request relief based on federal law); *Mangia Bene, Inc*, 2008 WL 11506632, at *2 (S.D. Miss. 2008) (no federal question jurisdiction even though "Plaintiff's Complaint repeatedly cite[d] federal tax law" and "an interpretation of federal law [was] required" to support recovery under state law claim); *Ctr. for Wildlife Ethics, Inc. v. Clark*, 325 F. Supp. 3d 911, 915–16 (N.D. Ind. 2018) ("given the fact that the stray references to the U.S. Constitution in the amended complaint are brief and are obviously not the thrust of this case, and given the [plaintiff's] representations confirming that fact, it is clear that this case is not one which would invoke the original jurisdiction of this court."); *Pizzino v. Miller*, 2009 WL 347575, at *2 (S.D. Ohio 2009) ("Merely referring to a federal law does not establish federal jurisdiction. . . .") (citations omitted).

Here, as in the cases cited above, the sole reference in the Notice of Appeal to the Federal Constitution is a brief, fleeting observation. The reference is obviously not intended to state a claim, and this fact is confirmed by the Sidewalk Advocates' representations in this brief.

**2. The Notice of Appeal's reference that the Mississippi Constitution makes free speech worthy of "religious veneration" in no way asserts a federal claim.**

Jackson also argues that the Sidewalk Advocates have asserted a claim under the Establishment Clause and the Free Exercise Clause of the First Amendment because the Notice of Appeal asserts that "the Mississippi Constitution makes '…free speech worthy of religious veneration…'". (emphasis omitted). *See* Remov. ¶ 3. This reference to "religious veneration" is clearly not sufficient to assert a claim. Rather, the reference to "religious veneration" is a direct quote from Mississippi Supreme Court opinions indicating that the Mississippi Constitution appears more protective of free speech than is the United States Constitution. *See Gulf Pub. Co. v. Lee*, 434 So. 2d 687, 696 (Miss. 1983) ("We are of the opinion, without deciding, that Article 3, Section 13 [of the Mississippi Constitution] by modern-day standards, appears to be more protective of the individual's right to freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration.") (quoting *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 127 (Miss. 1976)).

**B. States are free to provide greater protection of individual rights under their state constitutions than is required by the Federal Constitution, and doing so does not raise a Supremacy Clause issue.**

In its Notice of Removal, Jackson also appears to argue that if a state created right is potentially more expansive than a similar federally created right, this creates a potential conflict between state and federal law, thus requiring a Supremacy Clause analysis. *See* Remov. at ¶ 5. Jackson's argument misunderstands a basic feature of American federalism: "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual

rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). *See also, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (each state has a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.") (citations omitted); *Gomez v. Texas Dep't of Mental Health & Mental Retardation*, 794 F.2d 1018, 1022 (5th Cir. 1986) ("[A] state may choose to provide broader rights under its own laws than those granted by the federal Constitution. . . .") (citations omitted); *Cherry v. Dir., State Bd. of Corr.*, 635 F.2d 414, 420 n. 8 (5th Cir. 1981) ("A state supreme court can impose more rigorous standards under its own constitution than the federal constitution demands. . . ."); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."). Indeed, as discussed above, the Mississippi Supreme Court has indicated that the Mississippi Constitution appears more protective of free speech than is the United States Constitution. *See e.g. Gulf Pub. Co.*, 434 So. 2d at 696.

The fact that a state constitutional provision accords greater protection to individual rights than does a similar provision of the United States Constitution does not violate the Supremacy Clause. The Supremacy Clause controls only when there is "an unavoidable conflict between the Federal and a State Constitution." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964); *see also Yalobusha Cty. v. Crawford*, 165 F.2d 867, 868 n. 1 (5th Cir. 1947). When a state created right is broader than a similar federally created right, there is no such unavoidable conflict. This is because the Federal Constitution simply provides the floor – or the minimum amount of protection of individual rights that each state must provide its citizens – and does not prevent the states from providing greater protection for individual rights or more restrictions on the exercise of state power

under their own state constitutions. *Mills v. Rogers*, 457 U.S. 291, 300 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.") (citations omitted); *Pope v. City of Atlanta*, 240 Ga. 177, 178 (1977) ("The Federal Constitution, which is of course binding on the states, thus provides a minimum standard, but the state may be more restrictive under its own constitution.") (citing *Oregon v. Hass*, 420 U.S. 714, 719, n. 4 (1975)); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 489 (2005) (states may place restrictions on their power that are "stricter than the federal baseline."). Rather, there is a Supremacy Clause issue *only* if provisions of a state constitution would *restrict* federally protected rights. *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1870222, at *7 (S.D. Miss. 2011), *aff'd*, 565 U.S. 972 (2011), and *aff'd sub nom. Mississippi State Conference of N.A.A.C.P. v. Bryant*, 569 U.S. 991 (2013) ("state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated.") (quoting *Reynolds*, 377 U.S. at 584).

Moreover, the mere fact that a state created right may be broader than a federally created right does not mean that federal law must be analyzed in order to interpret or enforce the state created right. *See Mills*, 457 U.S. at 300 (where state created rights are broader than federal rights, "the broader state protections would define the actual substantive rights possessed by a person living within that State.") (citations omitted). In other words, where a state constitutional right is broader than federal constitutional rights, "the minimal requirements of the Federal Constitution would not be controlling, and would *not need to be identified* in order to determine the legal rights and duties of persons within that State." *Id*. (emphasis supplied). Thus, the mere fact that a state created right may be more expansive than a similar federally created right provides no basis for

federal-question jurisdiction. *See e.g. Gully v. First Nat. Bank*, 299 U.S. 109, 114 (1936) (no federal-question jurisdiction where claim is enforceable "without reference to a federal law.").

## II. Jackson Should Be Required to Pay the Costs and Expenses Incurred by the Sidewalk Advocates as a Result of the Improper Removal.

Jackson should be required to pay the just costs and actual expenses, including attorney's fees, incurred by the Sidewalk Advocates as a result of Jackson's improper removal, as all of the arguments asserted in Jackson's Notice of Removal were objectively unreasonable.

### A. Jackson's reliance on the Notice of Appeal's reference to the First Amendment was an objectively unreasonable basis to believe removal was legally proper.

Jackson claims in its Notice of Removal that the Sidewalk Advocates assert "claims that are substantially founded and in (*sic*) the First Amendment of the United States Constitution." *See* Remov. ¶ 2. However, even a cursory review of the relevant portion of the Notice of Appeal (Count 1) reveals this argument to be objectively unreasonable. Count 1 of the Notice of Appeal never alleged any violations of the First Amendment; did not seek any relief under the First Amendment; and obviously did not state a claim under the First Amendment. *See* App. ¶¶ 34-47. Rather, Count 1 of the Notice of Appeal made clear that the grounds for appeal were based on Article 3, Section 11 of the Mississippi Constitution, and *not* on the First Amendment. *Id.* Jackson had no objectively reasonable grounds to believe that removal was legally proper on this basis.

### B. Jackson's reliance on the Notice of Appeal's reference to the fact that the Mississippi Constitution makes free speech worthy of "religious veneration" was an objectively unreasonable basis to believe removal was legally proper.

Jackson argues in its Notice of Removal that the Sidewalk Advocates have asserted a claim under the Establishment Clause and the Free Exercise Clause of the First Amendment because the Notice of Appeal asserts that "the Mississippi Constitution makes '…free speech worthy of religious veneration…'". (emphasis omitted). *See* Remov. ¶ 3. This argument is objectively

unreasonable. As discussed above, the Notice of Appeal's reference to "religious veneration" is a direct quote from Mississippi Supreme Court opinions indicating that the Mississippi Constitution appears more protective of free speech than is the United States Constitution. *See Gulf Pub. Co.*, 434 So. 2d at 696; *ABC Interstate Theatres, Inc.*, 325 So. 2d at 127. This reference has nothing whatsoever to do with the Free Exercise Clause or the Establishment Clause. Even if this reference were not a direct quote from relevant Mississippi Supreme Court opinions, it is patently absurd to suggest that this reference, standing alone, is sufficient to assert a First Amendment claim.

**C. Jackson's argument that a Supremacy Clause analysis is necessary in this appeal was an objectively unreasonable basis to believe removal was legally proper.**

Jackson argues in its Notice of Removal that the Sidewalk Advocates are "asking the Circuit Court to make a determination under the Supremacy Clause" by referencing the fact that the Mississippi Constitution is more protective of free speech than is the Federal Constitution. *See* Remov. ¶ 5.[1] As discussed above, states are free to provide greater protection of individual rights under their state constitutions than is required by the Federal Constitution, and doing so does not raise a Supremacy Clause issue. This is an axiomatic and elementary aspect of American constitutional law. *See e.g. Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 210 (Minn. Ct. App. 2008) ("'It is *axiomatic* that a state court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution.'") (emphasis supplied) (quoting *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985)); *California v. Ramos*, 463 U.S. 992, 1013–14, (1983) ("It is *elementary* that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.") (emphasis supplied). Seminal U.S. Supreme Court cases have discussed this concept for nearly a century. *See e.g. Michigan v.*

[1] Contrary to Jackson's claims, the Sidewalk Advocates have not, at this stage, asserted that the Mississippi Constitution is more protective than the U.S. Constitution of due process and equal protection rights.

*Long*, 463 U.S. 1032, 1041 (1983); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). A highly influential U.S. Supreme Court Justice, William Brennan, even devoted a law review article to the topic. *See* Brennan, *supra* at 7. It was one of the most widely read law review articles in American legal history. Jeffrey S. Sutton, FIFTY-ONE IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW, 9 (2018).

As illustrated above, a minimal amount of research by Jackson's counsel would have revealed that federal-question jurisdiction did not exist.[2] Thus an award of just costs and expenses, including attorney's fees, is warranted in this case. *See e.g. Trawick v. Asbury MS Gray-Daniels, LLC*, 244 F. Supp. 2d 697 (S.D. Miss. 2003) (attorney's fee award was warranted where minimal amount of research by defense counsel would have revealed that federal-question jurisdiction did not exist); *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692, 694-98 (5th Cir. 2017) (attorney's fee award appropriate when precedent was clear, rather than unsettled, that federal-question jurisdiction did not exist); *Lamar Co., LLC v. Harrison Cty. Sch. Dist.*, 2017 WL 11318991, at *5 (S.D. Miss. 2017) (awarding costs and fees where defendants' basis for removal was barred by "settled law"); *Hines v. Plane Paint, Inc.*, 430 F. Supp. 2d 598, 600–01 (S.D. Miss. 2005) (awarding fees where the facts of the case did not support any of the defendant's arguments that removal was proper, which should have been apparent to defendant's counsel); *Gannett River States Pub. Corp. v. Mississippi State Univ.*, 945 F. Supp. 128 (S.D. Miss. 1996) (Plaintiff awarded attorney's fees even though there was no finding of bad faith or harassment, simply on the ground that plaintiff should not have to bear the expenses of defendants' improvident removal).

[2] The Notice of Appeal was delivered to Jackson on October 11, 2019. *See* Remov. ¶ 1. Jackson removed this appeal only four days later, on October 15, 2019. *See* Remov. 4. Removal would have been timely at any time within thirty (30) days of receipt of the Notice of Appeal. *See* Title 28 U.S.C. § 1446(b). Thus, Jackson's counsel discarded ample additional time to research the relevant law.

## CONCLUSION

This Court does not have federal-question jurisdiction over this appeal. Therefore, Appellants respectfully request that this Court enter an order granting Appellants' motion to remand, and requiring Jackson to pay the just costs and actual expenses, including attorney's fees, incurred by the Sidewalk Advocates as a result of the improper removal.

RESPECTFULLY SUBMITTED, this the 14th day of November, 2019.

/s/ *Aaron R. Rice*
Aaron R. Rice
MS Bar No. 103892
MISSISSIPPI JUSTICE INSTITUTE
520 George St.
Jackson, MS 39202
Tel: (601) 969-1300
Email: aaron.rice@msjustice.org

Steven J. Griffin
DANIEL COKER HORTON & BELL, P.A.
MS Bar No. 103218
4400 Old Canton Road, Suite 400
Jackson, MS 39215
Tel: (601) 914-5252
Fax: (601) 969-1116
Email: sgriffin@danielcoker.com

*Counsel for Appellants*

## CERTIFICATE OF SERVICE

I, Aaron R. Rice, counsel for Appellants, hereby certify that the foregoing document has been filed using the Court's ECF filing system and thereby served on all counsel of record who have entered their appearance in this action to date.

This the 14th day of November, 2019.

/s/ *Aaron R. Rice*
Aaron R. Rice