No. 21-600

In the
Supreme Court of the United States

WADE STEVEN GARDNER, ET AL.,
Petitioners,

v.

WILLIAM MUTZ, IN HIS CAPACITY AS MAYOR OF THE CITY OF LAKELAND, FL., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

BRIEF IN OPPOSITION

Respondents, William Mutz, in his official capacity as Mayor of the City of Lakeland, Anthony Delgado, in his official capacity as City Manager of the City of Lakeland, Don Selvage, individually and in his official capacity as City of Lakeland Commissioner, Justin Troller, individually and in his official capacity as a City of Lakeland Commissioner, Phillip Walker, individually and in his official capacity as a City of Lakeland Commissioner, and Antonio Padilla, individually and in his capacity as President of Energy Services & Products Corp. ("Respondents"), respectfully request that the Petition for Writ of Certiorari be denied.

INTRODUCTION

Petitioners, a group of individuals and associations with an expressed interest in promoting and preserving the history of the Confederacy, have challenged the Lakeland City Commission's decision to relocate a Confederate Monument from City-owned Munn Park to City-owned Veterans Park, both of which are situated within the corporate limits of the City of Lakeland. Petitioners sued the current Mayor and former and current City Commissioners who voted to relocate the Monument (as opposed to the entire City Commission), the City Manager who directed the relocation, and the contractor the City hired to move the Monument to Veterans Park.

Petitioners claim free speech rights in the Monument itself, including decisions regarding where it should be placed. In their brief, Petitioners

claim that because the Confederate Monument has been situated in Munn Park since 1909, it is a "legacy" monument and cannot be removed—or in this case, even relocated to another park—and must remain in Petitioners' preferred park in perpetuity. But this contention is entirely inconsistent with the government speech doctrine as set forth in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

This Court "sparingly exercise[s]" its power to grant certiorari, and this case does not present any basis for departing from the consistent application of this principle. *Camreta v. Greene*, 563 U.S. 692, 709 (2011). For the reasons discussed below, this Court should deny certiorari review. There is no conflict among the lower courts with respect to the application of the government speech doctrine in a case presenting these facts. And both the Middle District of Florida and the Eleventh Circuit appropriately applied this doctrine when they found further amendment would be futile because a permanent monument placed in a public park is not subject to the Free Speech Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

The subject of this dispute is a Confederate Monument originally installed in 1909 in Munn Park. Munn Park is centrally located in downtown Lakeland and situated within a nationally-registered historic district. (App. 24-25). The Lakeland City Commission voted to move the Confederate Monument from Munn Park to another city park, Veterans Park. Petitioners sued Respondents in

November 2018 following the Lakeland City Commission's decision and asserted that relocating the Monument violated their free speech rights under the First Amendment and their due process rights under the Fourteenth Amendment. (App. 25). Principal to this proceeding is Petitioners' contention that the City's relocation of the Monument to another city park violated their free speech rights because the Monument "communicated minority political speech in a public forum." (App. 25).

Only one Petitioner, Steven Gardner, claimed to be a citizen and taxpayer of the City of Lakeland. But all Petitioners alleged they had an interest in the Confederate Monument either because their ancestors were among the "Confederate Dead," or based upon their interest in preserving Southern history, educating the public regarding Southern history, and preserving monuments to members of the Confederacy. (App. 41-43).

Respondents moved to dismiss the original Complaint, both for lack of standing and for failure to state a cause of action. The District Court agreed. (App. 61). It dismissed the First Amendment claim with prejudice, finding Petitioners could not establish a violation of their First Amendment rights. (App. 61). The District Court also dismissed the due process claim, without prejudice, based on lack of standing. (App. 61).

On appeal, the Eleventh Circuit affirmed in part, and reversed in part. The Circuit Court agreed Petitioners lacked standing to assert a claim for violation of their due process rights and affirmed the

dismissal of the due process claim without prejudice. *Gardner v. Mutz*, 962 F. 3d 1329, 1343 (11th Cir. 2020). But the Circuit Court vacated the dismissal of the First Amendment claim with prejudice, finding the District Court erred in "bypassing standing to address the merits" and concluding Petitioners did not satisfy Article III standing. *Id.* at 1339, 1341-43, 1344. As such, it vacated the District Court's order and remanded for entry of an order dismissing Petitioners' First Amendment claim without prejudice. *Id.* at 1344.

On remand, after the District Court dismissed Petitioners' First Amendment claim without prejudice for lack of jurisdiction, Petitioners moved for leave to amend. In their proposed Amended Complaint, Petitioners alleged that the individual and associational Petitioners had gathered before the Confederate Monument in its then-current location in Munn Park to honor Confederate dead, to express their speech, and to "engage and educate the public." (App. 3-4). They also alleged that certain Petitioners publish literature about the Monument. (App. 4). Petitioners continued to assert that moving the Monument to another park diminished and suppressed their speech, thereby violating their free speech rights.

Respondents opposed Petitioners' attempt to amend, maintaining they still had not demonstrated standing, and that even if they could, their state and federal claims failed as a matter of law. (App.13). Respondents therefore maintained amendment would be futile. (App. 13). The District Court agreed and denied leave to amend. (App. 18-19). The

District Court determined that even if Petitioners could establish standing, their free speech and due process claims would be subject to dismissal on the merits. (App. 18-19). First, because both the Confederate Monument and the decision to relocate it "are government speech—not Plaintiffs' speech . . . [the] First Amendment claim fails as a matter of law." (App. 18) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)). Second, and related to the first, because the Monument constitutes government speech, Petitioners could not establish "the deprivation of a constitutionally protected liberty or property interest" in the Monument to sustain a due process claim. (App. 19).

Petitioners again appealed to the Eleventh Circuit, which affirmed the District Court's order denying leave to amend. *Gardner v. Mutz*, 857 Fed. Appx. 633, 635–36 (11th Cir. 2021). While the Eleventh Circuit found Petitioners had standing to challenge the relocation of the Monument, it concluded the District Court "correctly concluded that they failed to state a claim, as to both their First and Fourteenth Amendment claims." *Id.* at 635. The Circuit Court explained that "Monuments in public parks, even when funded by private parties, constitute government speech," which "doesn't violate the Free Speech Clause of the First Amendment." *Id.* at 635. As such, it concluded "the City's relocation of the monument didn't violate the plaintiffs' rights . . .." *Id.* at 636. And because Petitioners "didn't allege that the City deprived them of any constitutionally protected liberty or property interest by relocating the monument," the Eleventh Circuit concluded that "on the facts alleged, the City didn't violate the Due

Process Clause of the Fourteenth Amendment." *Id.* This Petition followed.

REASONS TO DENY THE PETITION

I. The Eleventh Circuit properly concluded that the Confederate Monument, including the City Commission's Decisions with respect to its placement, constitute Government Speech.

Petitioners do not maintain the Eleventh Circuit's decision raises a federal question on which there is conflict among other United States courts of appeals or state courts of last resort. Nor do Petitioners maintain the Eleventh Circuit's decision conflicts with this Court's precedent. Rather, Petitioners appear to argue that this case raises an important federal question that this Court should settle.

But there is nothing to settle. The Eleventh Circuit decided this matter based on the government speech doctrine as set forth in *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009). Petitioners simply disagree both with the application of the government speech doctrine in this case and with *Summum* generally, wrongly characterizing it as a "departure" from this Court's First Amendment jurisprudence. Both positions are incorrect. The Confederate Monument, including the City Commission's decisions concerning its placement, squarely constitute government speech, and the Eleventh Circuit correctly concluded that Petitioners have no free speech rights in government speech.

A. *Pleasant Grove City v. Summum* controls the disposition of permanent monuments on public property.

In *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009) this Court clarified that while public parks are traditional public forums, the monuments that governments place in such spaces generally "are meant to convey and have the effect of conveying a government message, and thus they constitute government speech." 555 U.S. at 472. The plaintiffs in *Summum* alleged that Pleasant Grove City violated their free speech rights when it denied them a permit to construct their own monument in a city park that housed various monuments, including a donated Ten Commandments monument. *Id.* at 466. The plaintiffs complained that the city discriminated against them by permitting the construction of a Ten Commandments monument in the same public park where the plaintiffs were denied a permit to construct their own monument, thereby violating their free speech rights. *Id.*

The Tenth Circuit reversed the district court order denying the plaintiffs' request for a preliminary injunction, reasoning that a park is a traditional public forum and that the city "could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means." *Id.* But this Court vacated the Tenth Circuit's decision because "[t]he Free Speech Clause restricts government regulation of private speech...[but] does not regulate government speech. *Id.* at 467. As this Court explained, the government "has the right to 'speak

for itself'" and has long used monuments and statues to do so. *Id.*

The fact that a private group funded the Ten Commandments monument in Pleasant Grove's park did not alter the application of the government speech doctrine. It did not matter whether the government erected the monument itself or accepted a monument donated by a private party. "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.*

"Government decision makers select monuments that portray what they view as appropriate for the place in question....," and therefore they need not accept every privately funded monument offered. *Id.* at 472. This is so because the monuments the government chooses to erect "are meant to convey and have the effect of conveying a government message," and are thus government speech. *Id.* This Court rejected the *Summum* plaintiffs' contention "that a monument can convey only one 'message'—which is, presumably, the message intended by the donor." *Id.* at 474.

In this case, Petitioners assert the same argument the *Summum* plaintiffs pushed—that the Monument conveyed the message of the donors, principally the UDC, and by extension, the Petitioners. The Eleventh Circuit properly rejected this argument.

B. Petitioners have no free speech rights in the Confederate Monument or its location.

While Petitioners claim the City's relocation of the Monument violated their individual speech rights, their allegations demonstrate the decisions to construct, maintain, and ultimately relocate the Monument constitute government speech. For example, Petitioners allege City Commission meeting minutes reflect that the Commission approved the UDC's petition to construct the Monument in Munn Park in 1908. (App. 24-25). So according to Petitioners, the City controlled the selection of the Monument in 1908 through an official act of the City Commission, sanctioned the installation of the Confederate Monument in Munn Park, and—over a century after the Monument's installation—decided to move the Monument to Veterans Park after it received complaints from constituents. (App. 24-25). Both the Monument itself and the City's decisions regarding its placement constitute government speech, and thus, are not subject to the Free Speech Clause.

This conclusion is buttressed not only by *Summum*, but also this Court's decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015). In *Walker* the Sons of Confederate Veterans ("SCV") challenged the Texas Department of Motor Vehicles Board's rejection of their proposal for a specialty license plate featuring the Confederate battle flag, arguing the DMV's rejection violated their First Amendment right to freedom of speech. 135 S. Ct. at 2243-44. But this

Court rejected the SCV's challenge, concluding the state's specialty license plates constituted government speech and were not subject to the Free Speech Clause of the First Amendment. *Id.* at 2245-46.

The Court explained that license plates have long been used to "communicate[] messages from the States," such as "slogans to urge action, to promote tourism, and to tout local industries." *Id.* at 2248. Texas had "selected various messages to communicate through its license plate designs," and the license plate designs were "closely identified" with the State of Texas as each plate "is a government article serving the governmental purpose of vehicle registration and identification." *Id.* at 2248-49. The state also "maintain[ed] direct control over the messages conveyed on its specialty plates," including having sole control of "the design, typeface, color, and alphanumeric pattern for all license plates.'" *Id.* at 1249.

Summum and *Walker* controlled the Eleventh Circuit's decision here. The City spoke when its Commission approved, through a vote, the UDC's petition to install the Monument in 1908 and when the City unveiled the Monument in Munn Park in 1910. The City spoke again when it decided to move that Monument to Veterans Park in 2018. These official government acts, culminating in the construction and placement of the Monument itself, constitute the speech of the City, not Petitioners. Petitioners just happen to agree with some of those decisions, but the fact that they approved of the placement of the Monument in Munn Park does not

endow them with personal constitutional rights in the Monument, let alone the right to dictate its placement.

Petitioners have argued that the Confederate Monument constituted a limited public forum, erected to perpetuate the viewpoint of the UDC and likeminded citizens. Petitioners therefore have claimed that moving the Monument from one public park to another has rendered their speech ineffective because it eliminated their public podium. But in *Summum* this Court rejected the application of the public forum principles Petitioners attempt to invoke here with respect to the Monument. "[A]s a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property." 555 U.S. at 480.

And most importantly, Petitioners have made no allegation that the City prevented them from speaking at Munn Park, where the Confederate Monument was located, at Veterans Park, where it now sits, or at any other City park or public place. Instead, Petitioners' free speech and due process claims are premised upon their preference that the Monument remain in Munn Park. According to Petitioners, the Monument's relocation alone infringed upon their free speech rights.

But these allegations fail to articulate the deprivation of any constitutional right. Relocating the Monument does not prevent Petitioners from saying (nor does it compel Petitioners to say) anything. Petitioners may continue to exercise their speech rights at Munn Park, the same space they

allegedly used prior to the move. And they also may go to Veteran's Park where the Monument now sits—or any other park—to express their free speech rights. Moving the Monument did not hinder Petitioners' speech in any way.

Petitioners have suffered no injury to their free speech rights because the Monument, including decisions regarding its location, constitute government speech:

> When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is a democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Walker, 135 S.Ct. at 2245-2246 (internal quotation marks and citations omitted).

The same is true here. When the Monument was first installed in Munn Park, the City

Commission spoke in support of a memorial to dead Confederate soldiers at a time when, according to Petitioners' own allegations, many veterans of the Civil War were living in the Lakeland area. But the government speech doctrine gives the City the choice to determine the content of its speech, including the choice to change the content in response to the concerns of its constituents. That happened here in 2017 and 2018 when numerous citizens voiced their concern that the Monument served to glorify the cause of the Confederacy. Under the government speech doctrine, the City had the choice to determine it no longer wanted to display the Monument in the City's central public park.

II. *American Legion* did not create free speech rights in public monuments.

Petitioners argue that because the Confederate Monument was installed in 1909, it is a "legacy" monument and thus, that the City should be forced to maintain it in perpetuity. Not only is that contrary to the government speech doctrine, but the case Petitioners rely upon, *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019), provides no support for this position.

American Legion concerned an Establishment Clause challenge to the maintenance of a cross on public property. Petitioners acknowledge as much, but completely ignore the significant distinction between the legal challenge in that case and the claims Petitioners promote here. In *American Legion* the plaintiffs sought *the removal* of a large cross erected on public property as a monument to area

soldiers who lost their lives during World War I. 139 S. Ct. at 2074. The plaintiffs asserted the cross's presence on public land and the use of public funds to maintain it violated the Establishment Clause. *Id.*

The *American Legion* plaintiffs challenged the city's *authority to maintain* a religious symbol on public property as unconstitutionally "respecting an establishment of religion." Petitioners, however, challenge the City Commission's decision to relocate the Confederate Monument to Veterans Park as a violation of their free speech rights. These challenges not only concern different clauses of the First Amendment, but different limitations on government action.

The Establishment Clause acts as a limitation on government speech. "By its terms that Clause applies only to the words and acts of *government*." *Capitol Square Review & Advisory Board v. Pinette*, 115 S. Ct. 2440, 2447-48, 2449 (1995) (plurality opinion) (observing that where the Court has "tested for endorsement of religion, the subject of the test was either expression *by the government itself*, . . . or else government action alleged to *discriminate in favor* of private religious expression or activity.")(emphasis in original). The Free Speech Clause, on the other hand, "restricts government regulation of private speech." *Summum*, 555 U.S. at 467.

Petitioners do not claim that the City's decision to relocate the Monument constitutes an establishment of religion, nor could they. Besides, as the Eleventh Circuit observed, in Establishment

Clause cases, the plaintiffs typically are requesting the removal of an offending display, and here, Petitioners sought to enjoin the City from moving the Monument on the ground that doing so violated their free speech rights.

Throughout their Petition, Petitioners conflate the Free Speech Clause and the Establishment Clause, twisting *American Legion* into a mandate that would require the City not only to maintain the Monument, but to locate it in Petitioners' preferred park (Munn Park) in perpetuity. But nothing in *American Legion* requires a municipality to maintain any monument in perpetuity, let alone prevent a city from moving the statue from one public park to another. *American Legion* does not require or even hint at the outcome Petitioners propose here, nor does *American Legion* conflict with *Summum* or *Walker*, or compel this Court to reconsider these cases.

At the core of Petitioners' argument in their brief is a misunderstanding of the Establishment Clause, which is a limitation on government speech. *American Legion*, as Petitioners note, provides that with established monuments "[t]he passage of time gives rise to a strong presumption of constitutionality." 139 S. Ct. at 2085. But *American Legion* did not create an individual right under the Free Speech Clause to compel governments to maintain monuments on public lands simply because some constituents support a meaning they ascribe to these structures.

Petitioners' position is simply untenable as this Court recognized in both *Summum* and *Walker*. In *Summum*, the Court explained that requiring the government, under public forum principles, to erect monuments on "both sides" of an issue simply is not workable. 555 U.S. at 480. "The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations." *Id.*

And as government speech, it is permissible for governments, such as the City Commission here, to promote a message it believes important to its constituents:

> Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? It is not easy to imagine how government could function if it lacked the freedom to select the messages it wishes to convey.

Walker, 135 S.Ct. at 2245-2246 (internal quotation marks and citations omitted); *see also Johanns v.*

Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005)(noting that "some government programs involve, or entirely consist of, advocating a position").

"[W]hen the State is the speaker, . . .it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). But the mere fact that the Free Speech Clause does not limit the government's speech does not leave dissenting citizens without recourse. Government officials are "accountable to the electorate and the political process for its advocacy." *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000). So "[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* That is what happened here. Citizens spoke in 1908 and the City acted by erecting the Monument in Munn Park. More than a century later, the citizens of Lakeland spoke again on the subject Monument, and the City acted accordingly by relocating the Monument in response to citizen concerns. The government speech doctrine grants the City the flexibility to change its messaging without implicating the Free Speech Clause. Recourse against government messaging lies at the ballot box, not the courts.

CONCLUSION

Petitioners want to dictate what the government says through its monuments, and while such speech is limited in some instances by the Establishment Clause, the Free Speech Clause does not compel the government to convey Petitioners'

preferred message, which is the very relief Petitioners seek in their Petition. For these reasons, the Petition should be denied.

Respectfully submitted,

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