

App. 1

[PUBLISH]

**In the  
United States Court of Appeals  
For the Eleventh Circuit**

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No. 20-13868

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RICHARD LEAKE,  
MICHAEL DEAN,

Plaintiffs-Appellants,

*versus*

JAMES T. DRINKARD,  
In his personal capacity and official capacity as  
Assistant City Administrator  
of City of Alpharetta, Georgia,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. Docket No. 1:19-cv-03463-WMR

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(Filed Sep. 28, 2021)

Before WILLIAM PRYOR, Chief Judge, LAGOA, Circuit  
Judge, and SCHLESINGER,\* District Judge.

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\* Honorable Harvey Schlesinger, United States District  
Judge for the Middle District of Florida, sitting by designation.

WILLIAM PRYOR, Chief Judge:

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court clarified that, “[w]hen [the] government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” 576 U.S. 200, 207 (2015). Some of the Sons of Confederate Veterans did not get the message. A member, Richard Leake, applied to participate in the Old Soldiers Day Parade, a pro-American veterans parade funded and organized by the City of Alpharetta, Georgia. The City informed Leake that the Sons of Confederate Veterans would be allowed to participate, but only if it agreed not to fly the Confederate battle flag. Not content with this offer, Leake and Michael Dean, another Son, filed a civil-rights action against City officials, 42 U.S.C. § 1983, alleging that the City violated their constitutional rights to speak freely under the First and Fourteenth Amendments. The district court held that the Parade constituted government speech and entered summary judgment against the Sons. Because governments are not obliged under the First and Fourteenth Amendments to permit the presence of a rebellious army’s battle flag in the pro-veterans parades that they fund and organize, we affirm.

## I. BACKGROUND

The Old Soldiers Day Parade began after the Civil War in the City of Alpharetta to honor veterans of that war, but the Parade was discontinued after a few years.

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The City resumed the Parade in 1952 after a small group of residents wanted to recognize local war veterans. The City has sponsored the Parade every year since then.

The 67th Annual Old Soldiers Day Parade was held on August 3, 2019. On its website, the City promoted the Parade “as a way to celebrate and honor all war veterans, especially those from Alpharetta, who have defended the rights and freedoms enjoyed by everyone in the United States of America.” “The goal of this parade,” according to the City’s advertisement, “is to celebrate American war veterans and recognize their service to our country.” The City’s advertisement identified the “City of Alpharetta and American Legion Post 201” as “hosts [of] the Annual Old Soldiers Day Parade.” Although the Legion was involved, the City was the Parade’s primary financial sponsor and was responsible for almost all its costs (about \$28,400). By contrast, the Legion did not financially contribute any significant amount.

This controversy arose from the process for determining which private organizations would be permitted to participate in the Parade. That process began with an application. And the application identified the theme of the Parade: *“The American Legion—A Century of Service.”* The application form included logos of both the Legion and the City. It instructed applicants to mail or fax the application to the “Parade Marshal” at “American Legion Post 201 c/o City of Alpharetta Special Events” and listed government mailing and email addresses. The final decision about whether to

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permit an entity's participation in the Parade was made by the City based on the message the Mayor and City Council wanted the Parade to communicate. The Legion did not determine who participated in the Parade.

On the Monday after Independence Day in 2019, Richard Leake completed an application on behalf of the Roswell Mills Camp Sons of Confederate Veterans, of which he is a member. The application asked for a detailed description of the Sons of Confederate Veterans's float. Leake wrote that there would be a “[t]ruck pulling trailer with participants holding unit flags.” The application also asked applicants to “write a description of what you would like to say about your group or organization as you pass the Reviewing Stand.” Leake wrote that they would say that the Sons of Confederate Veterans is an “organization dedicated to preserving the memory of our ancestors who served in the War Between the States and ensuring that the Southern view of that conflict is preserved.” The application required that the Sons of Confederate Veterans agree to “abide by all rules and regulations set forth by the event organizers[, the City of Alpharetta and the American Legion Post 201,] in the Old Soldiers Day Parade.” Leake signed the application.

The following day, James Drinkard, the Assistant City Administrator, sent a letter to Leake in response to his application. The letter was sent “following approval from Mayor Gilvin.” In the letter, Drinkard reiterated that the purpose of the Parade is to “unite our community” to “celebrat[e] American war veterans,”

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and that, in the light of that purpose, “there is cause to question the appropriateness of participation by an organization devoted exclusively to commemorating and honoring Confederate soldiers.” (Internal quotation marks omitted.)

Drinkard’s letter stated “that the Confederate Battle Flag has become a divisive symbol that a large portion of our citizens see as symbolizing oppression and slavery.” In the City’s view, that divisiveness would draw “the spotlight away from the goals of the . . . Parade and the service of our *American* war veterans.” (Emphasis added.) The letter continued, “the City of Alpharetta will maintain its decision, supported unanimously by Mayor Gilvin and the City Council, to not allow the Confederate Battle Flag to be flown in the Old Soldiers Day Parade.”

The City offered to allow the Sons of Confederate Veterans to participate in the Parade “absent the Confederate Battle Flag.” The Sons of Confederate Veterans would also have to agree not to do anything “that would detract from the event goal of uniting our community for the purpose of celebrating American war veterans.” Drinkard informed Leake that “the City of Alpharetta [would] approve [his] application” if he were to agree to these conditions.

Three days before the Parade, Leake and Dean sued Drinkard and other City officials, including Mayor Gilvin, for violating their right to free speech under the First and Fourteenth Amendments. The Sons sought monetary damages for the violation of

their rights, as well as equitable relief in the form of a temporary restraining order, a preliminary injunction, and a permanent injunction, so that they could participate with the Confederate battle flag in the upcoming Parade and in future ones. *See 42 U.S.C. § 1983.* On the day before the Parade, the district court reserved ruling on the motion for a temporary restraining order and declined to issue an injunction. The Parade went ahead as planned, without the participation of the Sons of Confederate Veterans, whose sympathizers instead flew the Confederate battle flag along the side of the Parade route.

Later that year, the Mayor and City Council formally resolved “that the City of Alpharetta shall no longer sponsor or financially support future Old Soldiers Day Parades.” The City then moved for summary judgment, arguing that the Parade constituted government speech and that the claim for injunctive relief was now moot because of the City’s formal resolution to discontinue its sponsorship of the Parade in the future. The district court later granted summary judgment for the City on the ground that the Parade constituted government speech.

## **II. STANDARD OF REVIEW**

“We review a summary judgment *de novo.*” *Mech v. Sch. Bd.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (internal quotations marks omitted). Summary judgment is appropriate in this case if, after viewing the record in the light most favorable to the Sons, *id.*, “there is no

genuine dispute as to any material fact" such that the City "is entitled to judgment as a matter of law," FED. R. CIV. P. 56(a).

### III. DISCUSSION

For the Sons to prevail in this civil-rights action, 42 U.S.C. § 1983, they must show that they were "deprived of a federal right by a person acting under color of state law." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001). The City admits that it acted under color of state law when it prohibited the Sons from displaying the Confederate battle flag at the Parade. The parties dispute whether the City deprived the Sons of their right to speak freely under the First and Fourteenth Amendments. The City argues that there was no deprivation because the Parade constituted the City's speech; the Sons argue the contrary. We agree with the City.

The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This "personal" right is now protected against State abridgment by the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). But whether that personal right has been abridged depends crucially on whose speech is at issue.

The First Amendment works as a shield to protect *private* persons from "encroachment[s] by the government" on their right to speak freely, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557,

566 (1995), not as a sword to compel the government to speak for them. In other words, “[t]he Free Speech Clause of the First Amendment ‘restricts government regulation of private speech; it does not regulate government speech.’” *Mech*, 806 F.3d at 1074 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)). That is, “[a] government entity has the right to speak for itself,” which consists generally in the ability “to say what it wishes” and “to select the views that it wants to express.” *Summum*, 555 U.S. at 467–68 (internal quotation marks omitted).

When the government speaks, it may refuse to endorse or freely remove speech of which it disapproves. *Mech*, 806 F.3d at 1074. And “[p]arades are . . . a form of expression” that involve “marching to make a point.” *Hurley*, 515 U.S. at 568. It follows that, if the Parade was the City’s speech, the City was free to condition the Sons’ participation in the Parade on their not displaying the Confederate battle flag; the Sons’ “case could not [then] proceed under the Free Speech Clause.” *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n*, 942 F.3d 1215, 1230 (11th Cir. 2019). In a word, if the Parade was government speech, the Sons lose. *Mech*, 806 F.3d at 1074.

What makes speech *government* speech? Although we lack a “precise test,” *id.*, there are three factors we use to distinguish government speech from private speech: history, endorsement, and control, *Cambridge*, 942 F.3d at 1230. “The first factor—history—directs us to ask whether the type of speech under scrutiny has traditionally ‘communicated messages’ on behalf of the

government.” *Id.* at 1232 (quoting *Walker*, 576 U.S. at 211). The second factor—endorsement—asks whether “observers reasonably believe the government has endorsed the message.” *Mech*, 806 F.3d at 1076. “Finally, the control factor asks whether the relevant government unit ‘maintains direct control over the messages conveyed’ through the speech in question.” *Cambridge*, 942 F.3d at 1234 (quoting *Walker*, 576 U.S. at 213).

These factors are neither individually nor jointly necessary for speech to constitute government speech. *See Mech*, 806 F.3d at 1075–76. But a finding that *all* evidence government speech will almost always result in a finding that the speech is that of the government. *See, e.g.*, *Walker*, 576 U.S. at 210–14; *Dean v. Warren*, No. 19-14674, slip op. at 33–38 (11th Cir. 2021). And all three factors support the City’s position that the Parade constituted its speech.

#### A. *History*

The history of military parades in general, and this Parade in particular, weighs in favor of finding that the Parade was government speech. Just as “[g]overnments have long used monuments to speak to the public” and “commemorate military victories and sacrifices,” *Summum*, 555 U.S. at 470, so too governments of all kinds have from time immemorial used parades to communicate the same kinds of messages. Examples are legion. Take one: The Roman triumphs were “famous parades through the city of Rome that celebrated Rome’s greatest victories against its

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enemies.” MARY BEARD, THE ROMAN TRIUMPH 1 (2009). And they also involved celebrating war veterans. *Id.* (“To be awarded a triumph was the most outstanding honor a Roman general could hope for.”).

Since then, governments, up to and including the United States, have used triumph parades to celebrate their militaries. For example, in 1899 “the victories of Admiral George Dewey in the Spanish-American War were celebrated with a triumphal parade in New York” and “a special triumphal arch was built . . . at Madison Square.” *Id.* at 2. So the particular medium of communication at issue here—a parade—is one that, since “ancient times,” *Summum*, 555 U.S. at 470, “has traditionally ‘communicated messages’ on behalf of the government,” *Cambridge*, 942 F.3d at 1232 (quoting *Walker*, 576 U.S. at 211). And the “kind of speech” conveyed through that medium—celebration of the military—is one that was “often closely identified in the public mind with the government.” *Id.* (internal quotation marks omitted).

The history of this Parade especially fits within the general history of government-sponsored parades. The City has sponsored the Parade every year since 1952. The Parade’s central purpose was to honor and celebrate American war veterans. The 2019 Parade’s purpose and message were the same. And the City remained its only significant financial sponsor. So history establishes both that the medium used here and the message conveyed through it are ones traditionally associated with governments. It follows that this factor favors the City. *See Mech*, 806 F.3d at 1075–76 (“A

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medium that has long communicated government messages is more likely to be government speech. . . .”).

### *B. Endorsement*

The City expressly “endorsed the [Parade’s] message,” which “strongly suggests that the [Parade] [is] government speech.” *Id.* at 1076. The City publicly advertised and promoted the 2019 Parade on its website, where it identified itself and the Legion as co-hosts. The City publicly identified the “goal of th[e] parade” as the celebration of “American war veterans” and the recognition of “their service to our country.” The City publicly endorsed the sentiment that “all war veterans, especially those from Alpharetta” should be “celebrate[d] and honor[ed].” And the City publicly advertised that the Parade would open with a performance by the City Band. “[O]bservers [would have] reasonably believe[d] the government ha[d] endorsed the [Parade’s] message” because the City expressly and publicly did so. *Mech*, 806 F.3d at 1076; *see also Dean*, No. 19-14674, slip op. at 35 (concluding that “there is no doubt that Kennesaw State University endorses the message conveyed by its cheerleading team” because of express statements on the athletics department’s website evidencing that cheerleaders “are expected to convey a message of which the university approves”).

The Legion’s involvement does not undermine this conclusion. To be sure, Drinkard asserted in an email that the Parade “is largely viewed as the Legion’s event.” But he admitted in the same sentence that “the

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event is put on as a *partnership* between the American Legion and the City.” (Emphasis added.) That partnership was a matter of public knowledge. And a partnership “suggests that the [Legion] has a close relationship with the [City]—*i.e.*, that the [Legion] is an ‘associate’ or is ‘engaged together in the same activity.’” *Mech.*, 806 F.3d at 1076 (quoting *Partner*, Oxford English Dictionary (online ed.)). So both the City and the Legion publicly came together to endorse the *same* message. Indeed, “partnership” is an understatement. Although the Legion was publicly identified as a *co*-host of the Parade, it did not financially contribute to it in any significant amount. The City, by contrast, covered almost all the Parade costs, including those associated with the event space, public safety personnel, barricades, and vendors to service the Parade.

The Sons contend that the Parade’s being “sponsored with both private and public money” is sufficient to make it private speech and that “the City is using its position as a majority-sponsor of the parade to regulate private speech.” But neither the Legion’s involvement nor the involvement of private organizations as participants in the Parade itself establishes that the City did not endorse the messages communicated by the Parade. “The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message,” *Walker*, 576 U.S. at 217, especially if, as here, the government is organizing and funding the event through which the message is communicated. Cities “typically do not” organize and fund events that contain

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“messages with which they do not wish to be associated.” *Id.* at 212 (alteration adopted) (internal quotation marks omitted). And “because [the speech] occurs at a government-organized event” in the form of the Parade, “we can safely assume that the organizers . . . generally would not allow . . . messages they did[ not] want to be associated with.” *Cambridge*, 942 F.3d at 1233. It is obvious, then, that observers would interpret a parade promoted, organized, and funded by the government “as conveying some message on [its] behalf.” *Walker*, 576 U.S. at 212 (internal quotation marks omitted).

### C. Control

The final factor—control—strongly supports that the Parade was the City’s speech. The evidence establishes that the City “maintains direct control over the messages conveyed” in the Parade. *Id.* at 213. Participation in the Parade depended on submission of an application to the City. The application expressly required applicants to describe the kinds of messages they intended to convey at the Parade. “[F]inal approval authority” over the application was exercised by the City based on the message the Mayor and City Council wanted the Parade to communicate. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561 (2005); *see also Mech*, 806 F.3d at 1078 (holding that the control factor “strongly suggests that the banners are government speech” because school principals were obliged to approve every banner before they were placed on

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school fences). The Legion, by contrast, did not determine who participated in the Parade.

All these facts establish that the control factor weighs in the City's favor. The City "effectively controlled the messages conveyed" by requiring applicants to describe the messages they intended to communicate and then by "exercising final approval authority over their selection" based on those descriptions. *Walker*, 576 U.S. at 213 (alterations adopted) (internal quotation marks omitted). When the City exercised this control as the Parade's organizer by excluding organizations with whose speech the City disagreed, the City was speaking. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006) ("[A] parade organizer's choice of parade contingents . . . is . . . inherently expressive.").

To be sure, once an applicant is admitted, it may renege on its express promise on the application form to "abide by all rules and regulations set forth by the event organizers." But the government need not "control every word or aspect of speech in order for the control factor to lean toward government speech." *Cambridge*, 942 F.3d at 1235–36. If the reverse were true, any speech through private parties would involve yielding control. The government-speech doctrine does not require omnipotence. *See id.* ("[C]omplete control is not required."). And, as we have repeatedly stressed, the City was free "to express its views" by receiving "assistance from private sources for the purpose of delivering a government-controlled message." *Summum*, 555 U.S. at 468. The City decided which private groups

to admit or exclude based on the consistency of the groups' characterizations of their intended speech on the City's application form with the messages the City wanted to communicate through the Parade. And the City required that participants agree in advance to abide by "all rules and regulations" that the City imposed. Either exclusion or advance preconditions would be adequate control. Because all three factors point in the same direction, we conclude that the Parade was the City's speech.

*Matal v. Tam*, 137 S. Ct. 1744 (2017), is not to the contrary. In *Matal*, the Supreme Court held that the content of registered trademarks is not government speech in part because the government would then be "babbling prodigiously and incoherently," expressing at once "contradictory views." *Id.* at 1758. The Sons rely heavily on this reasoning. They argue that, if the Parade were the City's speech and the Sons participated even without displaying the Confederate battle flag, the City would be expressing contradictory views by "simultaneously endors[ing] opposing sides of the same wars, such as the Union and the Confederacy."

There is nothing to this argument. *Matal*'s reasoning about contradictory speech followed *other* considerations in the light of which the Court concluded that "it is far-fetched to suggest that the content of a registered mark is government speech." *Id.* The Court explained that the government "does not edit marks submitted for registration"; "an examiner may not reject a mark based on the viewpoint that it appears to express" (save the exception at issue in that case);

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“an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy”; if the mark meets viewpoint-neutral requirements, “registration is mandatory”; and the placement of the mark on the principal register is ordinarily not reviewed by any official higher than the examiner. *Id.* The opposite facts exist in this case: The City asked for a detailed description of the intended speech so that it could “edit” the speech. The City exercised the discretion to reject any organization based on whether the viewpoint it intended to express was consistent with the City’s views. And the ultimate decision was made by the highest City authorities. This appeal is not *Matal*.

In any event, “[e]ven if we agreed that the protection of the government-speech doctrine must be forfeited whenever there is inconsistency in the message, we would nonetheless accord the protection here” because the City’s message was consistent. *Johanns*, 544 U.S. at 561 n.5. The fallacy in the Sons’ argument is the implicit assumption that *all* views associated with *all* participants would be the City’s speech if the Parade were the City’s speech. But that assumption is false. “By accepting” a float, the City “does not necessarily endorse the specific meaning that any particular donor sees in” it. *Summum*, 555 U.S. at 476–77.

Consider an example on which the Sons rely: The City allowed the “Democrat Party of Fulton County [to] participate.” In the light of the Parade’s central message—honoring veterans—observers could reasonably infer from their participation not that the City

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endorsed everything for which the Democrats stand, but that the City has brought together diverse “private parties” to “propagat[e]” one common message with which all participating parties agreed. *Walker*, 576 U.S. at 217. And one could reasonably infer that there was nothing on the Democratic Party’s float that the City thought was incompatible with the values it was seeking to promote through the Parade. *See Hurley*, 515 U.S. at 574 (“Rather like a composer, the [organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the [organizer’s] eyes comports with what merits celebration on that day.”).

Far from communicating an inconsistent message, the City sought to keep its message *consistent* by excluding the Confederate battle flag. As Drinkard explained to Leake, the City’s view was that the Confederate battle flag symbolizes oppression and slavery, and its inclusion was inconsistent with its goal of uniting the community. The public purpose of the Parade was to celebrate the service of veterans who “defended the rights and freedoms enjoyed by *everyone*.” (Emphasis added.) The City was free to exercise its right to exclude the Confederate battle flag from its Parade on those bases or any others. *See Walker*, 576 U.S. at 206 (upholding Texas’s decision to exclude the Confederate battle flag from its license plates based on Texas’s determination that “a significant portion of the public associate the confederate flag with

organizations advocating expressions of hate” (internal quotation marks omitted)).

Finally, “[a]bsurd results would follow if the First Amendment protected” the Sons’ right to fly the Confederate battle flag in the City-organized Parade. *Dean*, No. 19-14674, slip op. at 37. By the Sons’ logic, anytime the government seeks to organize an event by bringing private parties together to communicate a message the government wants expressed, it must allow the participation of other parties that will express the *opposite* message. For example, if after ratification of the Bill of Rights the federal government funded and organized a parade commemorating our stunning victory over Great Britain, it would have had to allow participation of Union Jack-waving loyalists if it allowed participation of Gadsden flag-waving patriots. The Constitution does not require such an absurdity. *See Summum*, 555 U.S. at 480 (rejecting the proposition that “[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought”); *see also People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (“No one could plausibly argue that an Inauguration Parade has to have balance, or that the losing Presidential candidate must—if he requests—be allowed to have a float of his own.”). And with good reason: It “would lead almost inexorably to” the end of government-sponsored parades, a medium of communication governments have used from time immemorial. *Summum*, 555 U.S. at 480.

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The three-factor analysis establishes that, when governments organize and sponsor a parade to communicate a message, the parade is their speech from which they may include or exclude participants at will. “Since every participating unit affects the message conveyed by the . . . organizers” of a parade, neither the government nor private parties may compel them “to alter the expressive content of their parade.” *Hurley*, 515 U.S. at 572–73. This principle applies no matter whether the organizer is the government or a private party. A government cannot compel a private parade organizer to admit groups of whose views the private organizer disapproves. *Id.* at 574–75 (holding that the State could not compel a private parade organizer to admit a gay, lesbian, and bisexual advocacy group because the “parade’s organizers” had a right to choose not “to propound a particular point of view”). And we hold that a private organization cannot compel a government parade organizer to admit groups of whose views the government disapproves.

“To the [Sons of Confederate Veterans], [the Confederate battle flag] is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War.” *Walker*, 576 U.S. at 234 (Alito, J., dissenting). But to many others, “it symbolizes slavery, segregation, and hatred.” *Id.* That sentiment is not surprising.

Southern governments began prominently displaying the Confederate battle flag, not soon after their defeat by the United States in 1865, but in the 1950s and 1960s “in symbolic defiance of changing laws that

threatened” state-compelled racial segregation. *Moore v. Bryant*, 205 F. Supp. 3d 834, 843 (S.D. Miss. 2016). “In early 1948, as President Truman pressed for Civil Rights legislation, some Southern Democrats called for an anti-Truman, segregationist electoral bloc in the South.” Chris Springer, *The Troubled Resurgence of the Confederate Flag*, 43 HIST. TODAY, no. 6, June 1993, at 7, 8. Segregationist Democrats “appropriated the Confederate flag as their symbol” and “[f]or their political and racial revolt” against federal civil-rights legislation, “they mustered behind them all the iconography of the Confederacy.” *Id.* “In 1956, Georgia redesigned its flag to include the Confederate battle emblem,” and both South Carolina and Alabama raised the flag at their state capitols in 1962 and 1963, respectively, at the height of their attempts to preserve the institution of racial segregation. *Moore*, 205 F. Supp. 3d at 843–44. As a result, “the Dixiecrat campaign greatly strengthened the links between the flag and white supremacism.” Springer, *supra*, at 8.

The City recognized the obvious fact that the flag “has become a divisive symbol that a large portion of our citizens see as symbolizing oppression and slavery.” Although Southern governments once flew the flag to promote those unjust causes, they cannot now be *compelled* to do so by private parties when they have made the decision to promote just causes instead. We hold that the Parade was the City’s speech. It follows that the Sons of Confederate Veterans “cannot force [the City] to include a Confederate battle flag” in

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the veterans parades it funds and organizes. *Walker*, 576 U.S. at 219.

#### **IV. CONCLUSION**

We **AFFIRM** the judgment in favor of the City.

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

RICHARD LEAKE and  
MICHAEL DEAN,

Plaintiffs,

v.

JAMES T. DRINKARD,  
*in his personal capacity*  
*and official capacity as*  
*Assistant City Administrator*  
*of City of Alpharetta,*  
*Georgia, et al.*

Defendants.

CIVIL ACTION FILE NO.:  
1:19-cv-3463-WMR  
(Filed Jun. 26, 2020)

**ORDER**

For the past seventy years, the City of Alpharetta has honored war veterans each August with its annual Old Soldiers Day Parade (the “Parade”). The Parade began after the Civil War and originally honored Confederate soldiers. Upon the resurgence of the Parade in 1952 after World War II, the honorees of the Parade were extended beyond Civil War veterans to include veterans of other wars. Importantly, in addition to the expansion of the Parade’s honorees, society has evolved since the Parade’s formation and no longer holds the same degree of affinity for Confederate emblems and

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flags that previously existed.<sup>1</sup> Additionally, groups have used and continue to use Confederate flags to symbolize viewpoints and conduct that is otherwise considered offensive today.

With this historical context in mind, the present dispute concerns the City of Alpharetta's decision to refuse to allow the Sons of Confederate Veterans (the "SCV") to march in the 2019 Parade while carrying and otherwise displaying the Confederate flag. The City did not want to embrace any negative messages that the Confederate flag conveys to those who find the use of the flag to be offensive. The City was also concerned about the prospect of violence that could result if the SCV carried the Confederate flag in the Parade, particularly in light of recent incidents in other parts of the country.

The parties agree that if the Parade constitutes government speech, the City was within its right to refuse the SCV's use of the Confederate flag. The parties disagree, however, as to whether the Parade was in fact government speech due to the City's role as a co-sponsor of the Parade and its lack of "exclusive" province over the event. For the reasons discussed in more detail below, this Court finds the Parade is government speech and, thus, concludes that Plaintiffs cannot prevail on the merits of their claims in this action. As such, upon due consideration of the arguments presented by

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<sup>1</sup> This point is clearly demonstrated by the move of state and local governments in recent weeks to remove Confederate monuments from public property.

counsel at the hearing on May 28, 2020, all applicable law, and the record, the Court hereby **GRANTS** Defendants' Motion for Summary Judgment [Doc. 39].

## **I. FACTUAL BACKGROUND**

The Parade was originally created to honor local Civil War veterans, but was discontinued after a few years. [Doc. 1 at ¶ 9; Doc. 30 at ¶ 9]. A group of men from Alpharetta re-established the Parade in 1952 after World War II to recognize all local war veterans. [Id.]. Today, the Parade is held annually in Alpharetta, Georgia, on the first Saturday of August. [Id.]. The City advertised the Parade on its government website as “a way to celebrate and honor all war veterans, especially those from Alpharetta, who have defended the rights and freedoms enjoyed by everyone in the United States of America.” [Id.].

The City previously sponsored the Parade, including the 2019 Parade. [Doc. 39-3 at ¶ 3 (hereinafter “Drinkard Decl.”)]. The City was the primary financial sponsor of the Parade and provided, at its own expense, the event space, public safety personnel, barricades, and vendors. [Id. at ¶¶ 11-12]. Additionally, the City decided what entities could participate in the Parade based on “the Mayor and the City Council's decision of what message the City would like the Parade to communicate.”<sup>2</sup> [Id. at ¶¶ 4-5].

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<sup>2</sup> Plaintiffs have put forth no contrary evidence to rebut the facts’ that the City was the primary financier of the Parade and that the City decided who could participate in the Parade. As

On July 8, 2019, Plaintiff Richard Leake submitted an application to register the SCV for the 2019 Parade, such application which described the SCV's float as a "truck pulling trailer: with participants holding unit flags." [Doc. 1-1]. The application form included the City's logo. [Id.] On July 9, 2019, Defendant James Drinkard, the Assistant City Administrator, sent a letter to Mr. Leake in response to the SCV's application, informing him that the City would not permit the use of the Confederate flag during the 2019 Parade. [Doc. 1-2 at 1].

The City explained that the Confederate flag had become a "divisive symbol that a large portion of [its] citizens see as symbolizing oppression and slavery" and that it was concerned the use of the flag would detract from "the goals of the Old Soldiers Day Parade and the service of our American war veterans." [Id.]. The letter further informed Mr. Leake that the City would allow the SCV to participate in the 2019 Parade and use the SCV's logo, even though it includes other (smaller) symbols of the Confederacy, but would not allow the use of the Confederate flag. [Id. at 1-2]. The City's decision was reiterated in a letter from its attorney to Plaintiffs' attorney on July 25, 2019, which stated that the use of the Confederate flag would not be permitted, but that the SCV would be able to display its logo and wear its regalia, which incorporates traditional Confederate symbols. [Doc. 1-3 at 1].

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such, this Court finds these facts to be undisputed for purposes of its analysis on summary judgment.

On July 31, 2019, Mr. Leake and Michael Dean (together, the “Plaintiffs”) filed their Complaint against Defendant Drinkard, in his personal and official capacity as Assistant City Administrator, asserting violations of Plaintiffs’ rights of free speech under the First and Fourteenth Amendments and requesting temporary, interlocutory and permanent injunctive relief. [Doc. 1]. Plaintiffs also filed a Motion for Emergency Temporary Restraining Order to prohibit Defendant from banning the use of the Confederate flag during the 2019 Parade [Doc. 2]. Plaintiffs amended the Complaint on August 1, 2019, to include the presently named Defendants. [Doc. 9].

On August 2, 2019, this Court reserved ruling on Plaintiffs’ Motion for Emergency Temporary Restraining Order. [Doe 13 at 6]. On August 3, 2019, the Parade occurred without the participation of the SCV, [Drinkard Decl. at ¶¶ 19-20]. On December 9, 2019, this Court denied Plaintiffs’ Motion for an Emergency Temporary Restraining Order, reserved ruling on the permanent injunction and monetary judgment requests, and ordered the parties to proceed with discovery. [Doc. 29 at 2].

Also, on December 9, 2019, the Mayor and City Council adopted a Resolution stating the City would no longer sponsor or financially support the Parade and that if the Parade was to be continued, it would be under the sponsorship and funding of private entities, [Drinkard Decl. at Exhibit 4]. On March 21, 2020, Defendants filed the present Motion for Summary Judgment, arguing (1) that Plaintiffs’ claim for injunctive

relief is constitutionally moot because the City will no longer sponsor the Parade and (2) that Plaintiff's claims for relief under 42 U.S.C. § 1983 fail on the merits because the 2019 Parade constituted government speech and was therefore outside the scope of the Free Speech Clause of the First Amendment [Doc. 39].

## **II. SUMMARY JUDGMENT STANDARD**

When the parties' pleadings, affidavits, and other discovery materials establish that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law, summary judgment should be granted, Fed. R. Civ. P. 56(a). The moving party bears the burden of showing the absence of a genuine issue of material fact when viewing the evidence in the light most favorable to the nonmovant. *Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). After a motion for summary judgment has been properly supported, the nonmovant must present affirmative evidence "from which a reasonable jury might return a verdict in his favor" and that demonstrates the presence of "a genuine issue of fact that requires a trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

## **III. DISCUSSION**

Defendants argue they are entitled to summary judgment because (1) Plaintiffs' § 1983 claim fails because the City was engaging, in government speech

and within its right to prohibit the use of the Confederate flag at the 2019 Parade, and (2) Plaintiffs' request for injunctive relief is now constitutionally moot because the City will no longer Sponsor the Parade in the future. [Doc. 39-1 at 7]. Plaintiffs disagree, arguing that (1) the City was not engaging in government speech because it was not the exclusive sponsor of the Parade, or at the very least, a dispute of material fact exists as to the extent of the City's sponsorship of the event, and (2) the City's decision to discontinue its sponsorship of future Parades does not constitutionally moot their request for injunctive relief.

To prevail on a § 1983 claim, "a plaintiff must show that he or she was deprived of a federal right by a person acting under color of state law." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001). Plaintiffs claim that their First and Fourteenth Amendment rights of free speech were violated by the City's prohibition on the use of the Confederate flag during the 2019 Parade. [Doc. 1 at ¶ 19]. The parties do not dispute that Plaintiffs have a generalized right of free speech nor that Defendants were acting under the color of state law in prohibiting the use of the Confederate flag during the 2019 Parade. [Doc. 39-1 at 13; Doc. 41 at 7]. The parties disagree, however, as to whether the City was engaging in government speech, which exists outside the application of the Free Speech Clause. [Doc. 39-1 at 13; Doc. 41 at 7].

"[T]he Government's own speech . . . is exempt from First Amendment scrutiny." *Pleasant Grove City v. Summon*, 555 U.S. 460, 467 (2009) (alteration in

original) (quoting *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005)). The City, through its own speech, “is not barred by the *Free Speech Clause* from determining the content of what it says.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). “This freedom includes ‘choosing not to speak’ and ‘speaking through the . . . removal’ of speech that the government disapproves.” *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (quoting *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000)).

The Supreme Court has previously held that both specialty license plates and monuments in public parks can constitute government speech. *See Walker*, 576 U.S. at 211-213, 219 (holding that Texas specialty license plate designs were government speech because license plates have historically communicated messages from the States, license plates are “often closely identified in the public mind with the [State],” and Texas held final approval authority over the designs); *Summon*, 555 U.S. at 464, 471-473 (2009) (holding that permanent monuments in a city park were government speech because the city exercised final approval authority over the monuments displayed on government land for the purpose of projecting the intended image of the city and that observers would appreciate the government as the speaker).

In deciding these cases, the Supreme Court established a non-exhaustive, context-based, three-factor test to determine whether the government is engaging in its own speech. *See Walker*, 576 U.S. at 209-210. The

first factor analyzes the context of the speech historically to determine whether the government “wishes to convey some thought or instill some feeling.” *Id.* at 209. The second factor determines whether an observer would ordinarily “appreciate the identity of the speaker” as the government. *Id.* at 210. Finally, the third factor determines whether the City “‘effectively controlled’ the messages.” *Id.*

The Parade meets the first factor, whether the government wishes to convey some thought or instill some feeling, as the City has historically used the Parade to convey its appreciation of American war veterans to the public. [Doc. 1 at 3]. Parades are a form of expression in which the participants convey a message to the public through the “inherent expressiveness of marching.” *See Hurley v. Irish-Am. Gay*, 515 U.S. 557, 568 (1995) (“[W]e use the word ‘parade’ to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way”). For over seventy years collectively, the City has sponsored the Parade to celebrate American war veterans and to communicate its goals with the public. *See Mech*, 806 F.3d at 1075-76 (“A medium that has long communicated government messages is more likely to be government speech”). The goal of the Parade is to instill a feeling of appreciation in the public for American war veterans, and the Parade has the effect of conveying this message. *See Summon* 555 U.S. at 472 (“The monuments . . . are meant to convey and have the effect of conveying a government Message, and they thus constitute government speech”).

The second factor, that an observer would ordinarily “appreciate the identity of the speaker” as the government, is also met. Parades, like monuments, are a “means of expression,” and as a government-sponsored and government-financed event, the public would likely identify the City as the Parade’s speaker. *See id.* 470-71 (“A monument, by definition, is a structure that is designed as a means of expression. . . . In this context, there is little chance that observers will fail to appreciate the identity of the speaker.”). Like in *Walker*, where the Supreme Court concluded that the public would closely identify Texas license plates with the State in part because the State places the State’s name on every license plate and the plates are ‘issued by the State; the Parade applications bear the City’s logo; and the event is advertised on a government website as being hosted by the City. *Walker*, 576 U.S. at 212; [Docs. 1 at ¶ 9; 1-1]

Even though the Parade is not a government-issued ID as in *Walker*, the City is closely associated with the Parade. It takes place on City streets, so it is likely that a Parade observer would reasonably conclude that the City MS endorsing the use of the Confederate flag if flown during the Parade. *See Mech*, 806 F.3d at 1076. And, the use of the Confederate flag during the Parade would, or at the very least could, be viewed as an endorsement by the City because flags used during wars would be related to the City’s goal of celebrating war veterans. *Id.* at 1078 (“[O]bservers, would view [the banners] as government-sponsored

advertisements because tutoring services are related to the schools' educational mission.”).

Finally, the third factor, that the City “effectively controlled” the message, is met because the City maintained control over the messages conveyed through the Parade by having the final approval over who participates and in what capacity. *See Walker*, 576 U.S. at 213 (“Texas ‘has effectively controlled’ the messages [conveyed] by exercising ‘final approval authority’ over their selection.” (alteration in original)). The City determines who can participate in the Parade based on the “Mayor and City Council’s decision of what message the City would like the Parade to communicate.” [Drinkard Decl. at ¶¶ 4-5]. Plaintiffs do not dispute that it was Defendant Drinkard, the Assistant City Administrator, who first notified Mr. Leake about the City’s decision to prohibit the SCV from using the flag during the 2019 Parade. [Doc. 42-2 at ¶ 6].

Plaintiffs argue that the Parade is not government speech because American Legion co-sponsored the event and the City did not have exclusive control over the Parade’s message. [Doc. 42 at 10]. Plaintiffs rely on evidence showing the city mimed to itself on various occasions as a “co-sponsor” of the Parade, [Doc. 42-1 at 40-41, 42-44, 45-46], Plaintiffs’ argument fails, however, because it is well-settled that the participation of private actors does not necessarily create private speech. *See Walker*, 576 U.S. at 217 (“The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role

into that of a mere forum-provider”), Furthermore, the City was not simply an inconsequential co-sponsor in name only, but rather, primarily funded the Parade, provided the necessary means by which the Parade occurred, and held final approval over participants. [Drinkard Decl. ¶¶ 4, 11-12].

In sum, the Court concludes that the City was engaging in government speech through the Parade. The City has historically utilized the Parade to convey their public message of appreciation to American war veterans. The City’s presence in the application process, advertising, and in the Parade itself leads an observer to identify the speaker as the City. The City’s financial and administrative control over the Parade establishes that the City had direct control over the message disseminated to the public. The voice of the Parade was that of the government, and the City was within its right to restrict the SCV’s use of the Confederate flag so as to portray what the City thought to be appropriate for their message. Thus, upon this Court’s review of the record and applicable law, the Court finds that there are no genuine disputes of material fact and that the City is entitled to summary judgment on Plaintiffs’ § 1983 claim.

As Plaintiffs cannot prevail on the merits on their § 1983 claim because the Court finds that the City was engaging in government speech, this Court need not determine the merits of Defendants’ mootness defense, which is relevant only to Plaintiffs’ request for a permanent injunction. “[T]o obtain a permanent injunction, a party must show: (1) that he has prevailed in

establishing the violation of the right asserted in his complaint; (2) that there is no adequate remedy at law for the violation of this right; and (3) that irreparable harm will result if the court does not order injunctive relief.” *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005) (citing *Newman v. State of Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982)). As Plaintiffs cannot prevail in establishing that Defendants violated their rights of free speech, it follows that they cannot establish the requirements to succeed on their request for injunctive relief. As such, Defendants’ success on the merits of their claims ends the inquiry, and the Court declines to address Plaintiffs’ mootness argument.

#### **IV. CONCLUSION**

Based on the foregoing, Defendants’ Motion for Summary Judgment [Doc. 39] is hereby **GRANTED**.

**IT IS SO ORDERED**, this 25th day of June, 2020.

/s/ William M. Ray, II  
WILLIAM M. RAY, II  
UNITED STATES  
DISTRICT JUDGE

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

RICHARD LEAKE and  
MICHAEL DEAN,  
Plaintiffs,

v.

JAMES T. DRINKARD,  
*in his personal capacity*  
*and official capacity as*  
*Assistant City Administrator*  
*of the City of Alpharetta,*  
*Georgia, and JIM GILVIN,*  
*in his personal capacity*  
*and official capacity as*  
*Mayor of the City of*  
*Alpharetta, Georgia; et al.,*

Defendants.

CIVIL ACTION FILE NO.:  
1:19-CV-3463-WMR

**ORDER**

This matter comes before the Court on Plaintiffs' Motion for Reconsideration [Doc. 54-1] of the Order granting summary judgment in favor of Defendants. [Doc. 48]. After reviewing the Motion, the response thereto, and all appropriate matters of record, it is hereby ORDERED that Plaintiffs' Motion is **DENIED**.

Even if the new argument Plaintiffs raise is properly before this Court,<sup>1</sup> it does not affect the analysis set forth in the Order granting summary judgment. Plaintiffs urge this Court to utilize a forum-based analysis, as opposed to analyzing the City of Alpharetta's acts of expression as government speech. Although it may be true that a traditional forum-based analysis should be used when the government is burdening the free speech of others through its content-based regulations,<sup>2</sup> that test does not apply when the government itself is the one in fact doing the speaking. The City of Alpharetta, in maintaining sponsoring, and selecting its Parade participants, was engaged in government speech and expression that is protected under the Free Speech Clause of the First Amendment. Consequently, it is not encumbered by the same content-based restrictions that apply when

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<sup>1</sup> This Court questions whether it should even consider the new argument Plaintiffs raise, as it was available but not argued in their response to the Motion for Summary Judgment. *See Lopez v. City of West Miami* 662 F. App'x 733, 737–38 (11th Cir. 2016) (“A ‘Motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment. This prohibition includes new arguments that were previously available, but not pressed.’”) (quoting *Wilchcombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009)) (internal quotation marks and citations omitted). *But see Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883 (11th Cir. 2017) (“Parties can most assuredly waive positions and issues on appeal, but not individual arguments—let alone authorities . . . Offering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable.”).

<sup>2</sup> *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,45 (1983).

analyzing regulations under the traditional public forum-based analysis that Plaintiffs recognize.<sup>3</sup> See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 200 (2015) (“When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”). The mere fact that the government’s speech occurred in a traditional public forum does not render it non-governmental. Therefore, the forum-based inquiry simply does not apply here, and the City of Alpharetta was free to determine the message it wanted to communicate in the Parade.

Because the City of Alpharetta was engaged in government speech, this Court’s analysis in its Order granting summary judgment should not be disturbed. The Motion for Reconsideration is thereby **DENIED**. [Doc. 54-1].

**IT IS SO ORDERED**, this 8th day of October, 2020.

/s/ William M. Ray, II  
WILLIAM M. RAY, II  
UNITED STATES  
DISTRICT JUDGE

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<sup>3</sup> Had the City of Alpharetta sought to prevent the Plaintiffs from displaying the Confederate Battle Flag as spectators to the parade (which it did not), then perhaps the results herein would have been different.

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