

No. 21-953

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IN THE  
**Supreme Court of the United States**

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RICHARD LEAKE, *et al.*,

*Petitioners,*

*v.*

JAMES T. DRINKARD, INDIVIDUALLY AND IN  
HIS OFFICIAL CAPACITY AS ASSISTANT CITY  
ADMINISTRATOR OF THE CITY OF  
ALPHARETTA, GA, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the Court should grant certiorari to determine if the Eleventh Circuit correctly concluded that the Old Soldiers Day Parade was the City of Alpharetta, Georgia's government speech where the City put on the parade for nearly seven decades; was the predominant financial supporter and organizer of the parade; provided the event space, public safety personnel, barricades, and vendors to service the parade; produced advertisements identifying the City as a "co-host" of the parade and stating that the parade's purpose was "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;" and decided, through an application process, who could participate in the Parade based upon the message the City wanted to convey as determined by the City's mayor and council.

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## SUMMARY OF THE REASONS FOR DENYING THE PETITION

The petition does not present a compelling basis for granting certiorari. Instead, the petition simply takes issue with the outcome of the Eleventh Circuit’s application of the relevant factors, cloaked in a broader application of a public forum analysis, which does not apply here.

Contrary to Petitioners’ argument, the Eleventh Circuit did not “utterly fail[] to consider” or apply the government speech factors. Instead, the Eleventh Circuit engaged in a fact-intensive, thorough analysis of those factors as applied to the record to conclude that the Parade was the City of Alpharetta’s government speech. The Eleventh Circuit correctly concluded that the City communicated an expressive message through the parade it has sponsored for nearly seven decades.

Nor does the involvement of the American Legion in the parade preclude this constituting government speech. Petitioners’ argument (already raised and rejected by the district court and the Eleventh Circuit) is contradicted by *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), which notes that a government “may exercise [the] same freedom to express its views [even] when it receives assistance from private sources for the purposes of delivering a government-controlled message.” 555 U.S. at 468.

The involvement of private parade participants does not preclude the City from expressing its own message separate from those of the parade participants: the City’s expressive conduct is found in the overall curation of the

parade as expressed in the selection of its participants. To engage in government speech, the City need not control every single aspect of the speech of every participant. The City effectively controlled the message conveyed by exercising final approval authority over the manner in which Parade participants could participate.

Petitioners' argument that the Court was required to engage in a forum analysis is misplaced (and not raised below, and therefore waived). Where government speech occurs, that speech "is not a form of expression to which forum analysis applies." *Summum*, 555 U.S. at 464. Through its application and selection process, the City controlled the messages sent by the parade participants, such that the City was engaging in government speech, not acting as a mere forum provider.

Finally, the Eleventh Circuit's decision does not impermissibly expand the government speech doctrine. The Eleventh Circuit's conclusion that the Parade was the City's government speech was not predicated on the "mere involvement" of the government in the parade, but rather on a careful and fact-intensive application of the government speech factors: the City's long history of sponsorship of the parade; the extent of that sponsorship; the City's public facing involvement in the parade; the City's specific determination of a message centered on "celebrat[ing] and honor[ing] all war veterans, especially those from Alpharetta, who have defended the rights and freedoms enjoyed by everyone in the United States of America;" and the control of that message through an application process and selection (or rejection) of participants consistent with that message. Participants' applications were not "perfunctory" (contrary to

Petitioner's mischaracterization of the record) but instead were evaluated by the City to determine whether the applicants would participate in the parade in a manner consistent with the message the City, through its Mayor and Council, had decided to express.

The Eleventh Circuit's decision was necessarily fact-specific and limited to the facts relevant to whether the parade was the City's government speech. The decision announced no "rigid and formulaic rule which definitionally hobbles and does severe damage to this Court's public forum doctrine," Pet. at 26, nor did it announce any broad "rule" at all. The import of the decision is necessarily confined to the facts of this case.

The danger in this case lies not in the Eleventh Circuit's decision being left to stand, but in the acceptance of Petitioners' logic that the First Amendment requires their forced inclusion in a City-sponsored and City-controlled parade in which Petitioners' message is antithetical to the message the City sought to convey. As the Eleventh Circuit noted: "by [Petitioner's] 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...The Constitution does not require such an absurdity." App. at 18.

## **STATEMENT OF THE CASE**

### **I. Factual Background.**

The Old Soldiers Day Parade initially began within the City of Alpharetta, Georgia after the conclusion of the



Civil War to honor Civil War Veterans but was discontinued after several years. In 1952, the City resumed the parade at the request of a small group of citizens for the purpose of recognizing local war veterans. Thereafter, the City has been the sponsor of the Parade, including the 67<sup>th</sup> Annual Old Soldiers Day Parade that occurred on August 3, 2019. App. at 2-3.

The City advertised the parade on its website, which stated that the parade's purpose was "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 stated goal of the Parade was to "celebrate American war veterans and recognize their service to our country." *Id.* at 3.

The City's advertisement of the parade identified both the City and American Legion Post 201 as "hosts" of the annual Parade. *Id.* While the American Legion was involved in the parade, the City was the primary financial sponsor and responsible for nearly all of the parade's costs and expenses, which totaled about \$28,400. *Id.* The City provided the event space, public safety personnel, barricades, and vendors to service the parade, all at the City's expense. *Id.* at 24. The American Legion did not financially contribute to the parade in any significant amount. *Id.* at 3.

Those that wished to participate in the parade were required to apply. *Id.* While the parade application referenced the American Legion (and included the American Legion logo), it also included the City's logo; identified the "Parade Marshal" (to whom applications were to be directed) as the City of Alpharetta, Special

Events Department; and listed City government mailing and e-mail addresses. *Id.*

The parade application required applicants to identify and describe their organization, the number of attendees, and to describe in detail the float that they would have present in the parade. *Id.* at 4. The City decided who, or what entities, would be permitted to participate in the parade based upon the overall message the mayor and city council wanted the Parade to communicate. *Id.* at 3-4. If the City decided that a person or entity could not participate in the Parade, that person or entity did not participate, and the City's decision on that point was final. *Id.* The American Legion did not determine who participated in the parade. *Id.* at 4.

On Monday July 8, 2019, Petitioner Richard Leake applied on behalf of Roswell Mills Camp, Sons of Confederate Veterans, of which both Petitioners are members. The application required a detailed description of the float that the Sons of Confederate Veterans intended to include in the parade, which Leake's application described as a "[t]ruck pulling trailer with participants holding unit flags." The application also required Leake to identify what he intended to say about the Sons of Confederate Veterans as the float passed the reviewing stand, which Leake's application stated would be 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 the Sons of Confederate Veterans to agree to "abide by all rules and regulations set forth by the event organizers in the Old Soldiers Day Parade." *Id.*

On July 9, 2019, and subsequent to Leake's submittal, Assistant City Administrator James Drinkard sent a letter to Leake at the express approval of the City mayor. *Id.* In the letter, Drinkard informed Leake that the City would not permit the display of the Battle Flag during the parade but would allow the Sons of Confederate Veterans to otherwise participate without the Battle Flag. *Id.* at 4-5. The letter explained that the purpose of the parade was to "unite our community" and to "celebrat[e] American war veterans," and that there was "cause to question the appropriateness of participation by an organization devoted exclusively to commemorating and honoring Confederate soldiers." *Id.* Drinkard noted that the Battle Flag "has become a divisive symbol that a large portion of our citizens see as symbolizing oppression and slavery." *Id.* at 5. The City believed that this divisiveness would pull "the spotlight away from the goals of the . . . Parade and the service of our American war veterans." *Id.* The letter further stated that "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." *Id.*

The letter offered that the Sons of Confederate Veterans could participate in the parade "absent the Confederate Battle Flag" as long as the Sons of Confederate Veterans agreed not to do anything "that would detract from the event goal of uniting our community for the purpose of celebrating American war veterans." *Id.* The letter made clear that Drinkard would approve the application if the Sons of Confederate Veterans agreed to those conditions. *Id.* They did not agree to those conditions.

On December 9, 2019, the mayor and council adopted a formal resolution that Alpharetta would no longer sponsor or financially support the parade in the future. *Id.* at 6. As a result, if the parade is ever to occur again in future, it will need to so as a privately sponsored and permitted parade, without the financial support of the City.

## **II. Procedural Background.**

On July 31, 2020, three days prior to the parade, Petitioners filed suit against Drinkard<sup>1</sup> in the United States District Court for the Northern District of Georgia, Atlanta Division, alleging that the City's decision not to allow the Battle Flag in the City-sponsored parade violated Petitioners' free speech rights under the First and Fourteenth Amendments to the United States Constitution. *Id.* at 5; U.S. Const. amend. I; U.S. Const. amend XIV. Pursuant to 42 U.S.C. § 1983, the suit sought monetary damages and equitable relief, including a temporary restraining order and preliminary and permanent injunctions preventing the City from conditioning the Sons of Confederate Veterans' participation in the 2019 parade and any future parades. App. at 6.

On August 2, 2019, the day before the parade, the district court reserved ruling on the motion for temporary restraining order and declined to issue an injunction. *Id.* On August 3, 2019, the parade went forward as scheduled, without the Sons of Confederate Veterans. *Id.* Instead, supporters of the Sons of Confederate Veterans lined

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1. Petitioners subsequently amended the suit to name the other Respondents, which include the City, the Alpharetta mayor, and the members of the Alpharetta City Council, as defendants.

portions of the parade route and flew the Battle Flag. *Id.* As these supporters were on City property outside of the confines of the parade, the City did not disrupt their waiving of the Battle Flag, and the City has expressly recognized the First Amendment right of the Sons of Confederate Veterans and their supporters to engage in this activity.

The district court granted the City's motion for summary judgment, concluding that the parade was Alpharetta's government speech. *Id.* at 22-34. Petitioners appealed the grant of summary judgment.

The Eleventh Circuit affirmed, concluding that Petitioners' First and Fourteenth Amendment claims fail because the parade was the City's government speech. *Id.* at 1-21. The Eleventh Circuit analyzed the three factors this Court has announced for distinguishing government speech from private: history, endorsement, and control. *Id.* at 8-21. The Eleventh Circuit concluded that all three factors "support the City's position that the Parade constituted its speech," and 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." *Id.* at 9, 19. This petition followed.

## REASONS FOR DENYING THE PETITION

**I. The Eleventh Circuit’s decision below correctly and comprehensively applied the government speech factors and determined that the parade was government speech; Petitioners merely take issue with the decision’s application of fact to settled law.**

Both explicitly in their “Reasons for Granting the Writ”<sup>2</sup> and by omission, Petitioners demonstrate why the Court *should not* grant certiorari: Petitioners do not seek to advance a novel legal theory of constitutional interpretation; do not seek to repudiate established constitutional jurisdiction; do not allege a split amongst the United States circuit courts of appeal or state courts of last resort; and do not identify any legally viable argument that the Eleventh Circuit has decided a federal question in conflict with the decisions of the Court. Instead, Petitioners argue that the decision below “utterly failed to consider” the relevant factors and, having supposedly improperly concluded that government speech occurred, failed to apply a forum analysis applicable to Free Speech claims. Pet. at 10.

Petitioner’s argument that the decision below “utterly failed” to apply the relevant government speech factors (a decision which Petitioners also characterize as a “fallacious attempt to cast this proceeding as one which implicates the government speech doctrine,” Pet. at 13) is unfounded. And, while the petition does take exception with the Eleventh Circuit’s application of the record to the government speech factors (contradicting Petitioners’

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2. Pet. at 7.

assertion that the Eleventh Circuit utterly failed to apply those factors), Petitioners' arguments demonstrate the fundamental conceit of the petition: Petitioners simply believe that the Eleventh Circuit erred in applying the facts presented to the properly stated government speech factors. The Eleventh Circuit did not err. Nonetheless, such claim of error, standing alone, is insufficient to compel a grant of the Petition for Writ of Certiorari.

**a. The Eleventh Circuit correctly considered and applied the government speech factors.**

An even cursory review of the Eleventh Circuit's decision rebuts Petitioners' claim that the decision "utterly failed to consider" the factors applicable to government speech. The vast majority of the Eleventh Circuit's discussion is devoted to a fact-intensive analysis and application of the government speech factors described in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and further refined in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 203 (2015). App. at 8-21. While the Court has not announced a "precise test" for determining government speech, "history, endorsement, and control" are applied as non-exclusive factors in the calculus. *Cambridge Christian Sch., Inc. v. Florida High Sch. Ath. Ass'n*, 942 F.3d 1215, 1230 (11th Cir. 2019).

In its decision, the Eleventh Circuit examined each factor as applied to the record, and addressed (and rejected) the Petitioners' arguments as to why those factors do not weigh in favor of government speech. App. at 8-21. The Eleventh Circuit thoroughly considered the government speech factors and concluded that the parade

was the City's government speech. There is no basis to Petitioner's argument that the Eleventh Circuit "utterly failed" to consider those factors.

**b. Petitioners' arguments as to why the government speech doctrine does not apply simply reinforce that they seek to relitigate the Eleventh Circuit's application of the government speech factors to the record.**

Contrary to Petitioner's argument that the citizen-driven origins of the parade compel a conclusion that "it was never intended or understood as communicating a specific message from the City," Pet. at 13-14, the record establishes that the City was the primary sponsor—financial and otherwise—of the parade since 1952. The parade was imbued with the City's name, promotion, provision of City-branded equipment (such as public safety vehicles), and involvement of City officials and employees in the parade's logistics. The City was, for all intents and purposes, a face of the parade and, as the Eleventh Circuit concluded, "[i]t is obvious, then, that observers would interpret a parade promoted, organized, and funded by the government 'as conveying some message on [its] behalf.'" App. at 13 (*quoting Walker*, 576 U.S. at 208).

Nonetheless, Petitioners assert, without any explanation or elaboration, that the parade's citizen-driven origins during the Eisenhower administration somehow *necessarily* precludes members of the public from viewing the City as endorsing the parade nearly seven decades later. Pet. at 13-14. This is a conclusion in search of a basis.



Nor does the involvement of the American Legion in the parade preclude the City's endorsement of it. This is an argument that Petitioners have twice advanced (in the district court and in the Eleventh Circuit), and which has twice been rejected. App. at 11-12; 32-33. A government "may exercise [the] same freedom to express its views [even] when it receives assistance from private sources for the purposes of delivering a government-controlled message." *Summum*, 555 U.S. at 468. *Accord Johannis v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (noting that where the government dictates the message "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."). The involvement of the American Legion, which the Eleventh Circuit noted was financially insignificant, does not preclude a finding of government speech. As the Eleventh Circuit correctly concluded, "[t]he City expressly endorsed the Parade's message." App. at 13 (internal quotations omitted).

Finally, Petitioners' argument that "there is no basis for concluding that an observer of the parade would understand that the city approved any message being conveyed by the participants," Pet. at 14, is particularly curious, as Petitioners made the *opposite* argument below. Petitioners argued that if the parade were the City's government speech, then the City would simultaneously be endorsing the message of *every* individual parade participant, such that its message would lose all coherence. App. at 16. The Eleventh Circuit rejected that argument. *Id.* at 16-18.

Regardless, Petitioners' argument misses the point. The City's expressive conduct is in the overall curation of the parade as expressed in the selection of all of the parade participants; it does not necessarily endorse the message of any particular parade participant, nor does it need to do so to convey a message. *Summum*, 555 U.S. at 462. The City likewise does not need to "control every word or aspect of [the parade participants'] speech" to exercise the requisite control sufficient to demonstrate government speech: the City effectively controlled the messages conveyed by "exercising final approval authority over their selection." *Walker*, 576 U.S. at 201. Petitioners' misrepresentation of the record that that they were the "sole" parade participant that was not "free to portray themselves and communicate in the manner which they chose," Pet. at 15, ignores entirely the application process to which all parade participants were subject. The Eleventh Circuit's decision correctly concluded that the parade conveyed a message on the City's behalf.

**II. Forum analysis is inapplicable where the speech in question is government speech, even if it occurs on public streets.**

Petitioners argue for the first time that the Eleventh Circuit should have conducted a free speech analysis specific to traditional public fora, and that any restriction on the speech of the Sons of Confederate Veterans is subject to strict scrutiny. Pet. at 16-25. Petitioners did not make this argument below, the lower courts did not rule on it, and the Court should not consider it at this stage. See, e.g., *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Sprietsma v.*

*Mercury Marine*, 537 U.S. 51, 70 n.4 (2002) (“Because this argument was not raised below, it is waived.”).

Petitioners’ new argument presumes the conclusion: that the parade was not the City’s government speech. The parade was the City’s government speech, and where government speech occurs in what is otherwise a traditional public forum, that government speech “is not a form of expression to which forum analysis applies.” *Summum*, 555 U.S. at 464. The Eleventh Circuit properly concluded that the parade was government speech. Accordingly, a traditional public forum analysis does not apply, and that government speech is “not subject to scrutiny under the Free Speech Clause.” *Id.*

While Petitioners’ argument is not entirely clear, it appears that they may also be asserting that a forum analysis is required *even if* the speech in question is government speech. Pet. at 17 (stating “[w]hen the government excludes from its own property private speech protected by the First Amendment, this Court’s precedents require a forum analysis for assessing the constitutionality of the speech restriction.”) In other words, when the speech occurs in a traditional public forum, that speech cannot be government speech. Notably, the case upon which Petitioners rely for this proposition is not a case involving government speech. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

Petitioner’s argument is plainly contradicted by *Summum*, which squarely addresses the application of the government speech doctrine in the context of traditional or limited public fora. Government speech is not categorically precluded even when it may occur in such public fora. *Summum*, 555 U.S. at 470.

Admittedly, and as the Court expressly notes, “[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech....” *Id.* But this difficulty is resolved by application of the relevant government speech factors. In concluding in *Summum* that the placement of monuments constituted government speech, the Court noted Pleasant Grove’s selectivity as to the monuments placed in the public park. *Summum*, 555 U.S. at 472-73. Pleasant Grove did not open up the park “for the placement of whatever permanent monuments might be offered by private donors.” *Id.* at 473. Instead, Pleasant Grove “‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.” *Id.* (quoting *Johanns*, 544 U.S. at 560-61)

Just like Pleasant Grove, the City in this case did not open up the City-sponsored parade to any would-be parade participant; it exercised selectivity and controlled the message being sent through the application process. Petitioners may disagree with the message the City chose to convey, but the City’s control over the process and participants demonstrates that the parade *was* government speech, and a forum analysis is inapplicable.

### **III. The Eleventh Circuit’s decision does not impermissibly expand the government speech doctrine.**

Relying heavily on their arguments that the government speech doctrine does not apply in this case and that any government-sponsored parade occurred on City streets is subject to a forum analysis, Petitioners

argue that “mere involvement of the government in providing a forum does not constitute sufficient control to make the message government speech.” Pet. at 31. The Eleventh Circuit’s decision demonstrates that it was not the “mere involvement” of the City, or even the mere fact of the existence of the parade, which compelled the Eleventh Circuit’s conclusion of government speech. App. at 8-21.

Instead, it was the careful application of the government speech factors: the City’s long history of sponsorship of the Parade, the extent of that sponsorship, the City’s public facing involvement in the Parade; the City’s specific determination of a message centered on “celebrat[ing] and honor[ing] all war veterans, especially those from Alpharetta, who have defended the rights and freedoms enjoyed by everyone in the United States of America;” and the control of that message through an application process and selection (or rejection) of participants consistent with that message. *Id.* Contrary to Petitioner’s misstatement of the record, the parade applications were not “perfunctory,” Pet. at 25, but were evaluated by the City as to whether the applicants would participate in the parade in a manner consistent with the message the City, through its mayor and council, decided to express. App. at 13-14.

The Eleventh Circuit’s decision was necessarily fact-specific, and the decision’s import is limited to the facts that establish that this parade was the City’s government speech. The decision announced no “rigid and formulaic rule which definitionally hobbles and does severe damage to this Court’s public forum doctrine,” as Petitioners claim. Pet. at 26. In fact, it announced no broadly applicable “rule” at all, but rather applied the specific facts of this case to the Court’s established precedent.

This case is not about Petitioners' *exclusion* from the parade. Pet. at 29. This case is about Petitioners' attempt to force their *inclusion* in a City-sponsored and controlled parade for which Petitioners' proposed participation was antithetical to the message the City sought to convey. As the Eleventh Circuit astutely noted in its decision, "by [Petitioner's] 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...The Constitution does not require such an absurdity." App. at 18.

The danger does not lie in letting stand the Eleventh Circuit's limited, fact-intensive application of the Court's precedent, but in the adoption of Petitioners' argument, which "would lead almost inexorably to the end of government-sponsored parades, a medium of communication governments have used from time immemorial." *Id.* (quoting *Summum*, 555 U.S. at 480). The Eleventh Circuit's decision did not impermissibly expand the government speech doctrine.

**CONCLUSION**

For the foregoing reasons, Petitioners fail to set forth any valid basis for the Court to grant the petition. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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