No. 21-953

In The Supreme Court of the United States

RICHARD LEAKE and MICHAEL DEAN,
Petitioners,

v.

JAMES T. DRINKARD, In his personal capacity and official capacity as Assistant City Administrator of the City of Alpharetta, Georgia; JIM GLIVIN, In his personal capacity and official capacity as Mayor of the City of Alpharetta; DONALD F. MITCHELL, In his personal capacity and official capacity as Mayor Pro Tem of the City of Alpharetta; JASON BINDER, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; BEN BURNETT, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; JOHN HIPES, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; DAN MERKEL, In his personal capacity and official capacity as a member of the City Council of the City of Alpharetta; KAREN RICHARD, In her personal capacity and official capacity as a member of the City Council of the City of Alpharetta; and THE CITY OF ALPHARETTA, GEORGIA, a municipal corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

H. EDWARD PHILLIPS III
Counsel of Record
219 Third Avenue North
Franklin, Tennessee 37604
(615) 599-1785, ext. 229
edward@phillipslawpractice.com

SCOTT D. HALL
374 Forks of the River Parkway
Sevierville, Tennessee 37862
(865) 428-9900
scott@scottdhallesq.com
Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF

Richard Leake and Michael Dean, Petitioners in this action, have heretofore filed their petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 28, 2021.

STATEMENT OF JURISDICTION

The judgment of the court of appeals, as set forth, was entered on September 28, 2021. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioners invoke the provisions of Rule 15.6 of the Rules of the Supreme Court of the United States as the basis for filing this Reply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case have been adequately set forth in the Petition for Writ of Certiorari.

SUMMARY OF THE REASONS FOR GRANTING THE PETITION

Contrary to the fallacious and misleading assertions of Respondents, the petition does present a compelling basis for granting certiorari.

Rule 11 of the Rules of the United States Supreme Court provides that review on a writ of certiorari is not a matter of right, but of judicial discretion and that a petition for a writ of certiorari will be granted only for compelling reasons. The Rule specifically states that one of the reasons for granting the writ is that "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." This consideration justifies the granting of certiorari in order to consider a petitioner's claim that a circuit court of appeals had misconceived the meaning of a Supreme Court decision which it found to be "controlling" with regard to the petitioner's case. *Wilkinson v. United States*, 365 U.S. 399 (1961).

Petitioner respectfully contends that the Eleventh Circuit failed to discern the meaning of relevant holdings of this court as articulated in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), by using a confused understanding of the government speech doctrine as justification for restricting the right of individuals and groups to use public forums as platforms for the articulation of views which may not be embraced by either the government or a majority of citizens. The danger posed by the

decision of the Eleventh Circuit is that it eviscerates the public forum doctrine in the course of utterly misapplying the government speech principle.

STATEMENT OF THE CASE

Petitioners submit that their Statement of the Case accurately describes the factual background of this proceeding. However, Petitioners respectfully submit that Respondents have misconstrued and misstated circumstances which are material and relevant to a proper understanding of the issues presented.

The Old Soldiers Day Parade of Alpharetta, Georgia initially began after the conclusion of the Civil War to honor veterans of that conflict, and it continued until around 1928. The parade resumed in 1952, and it has continued on the public streets of the municipality since then.

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." Given that the stated purpose of the event was to honor "all war veterans," it is incongruous for the Respondents to ignore the plain fact that the Congress of the United States has defined and granted the status and benefits of being a "Civil War Veteran" to any person "who served in the military or naval forces

of the Confederate States of America during the Civil War." *See* 38 U.S.C. §§ 1501 and 1532 (2018).

The parade application expressly referenced the American Legion as a sponsor, and it bore the emblem of the American Legion, in addition to that of the city. Despite the fact that the parade would be conducted upon the municipal streets of Alpharetta, the city decided for itself 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. In pretextually denying the application of the Petitioners on behalf of the Roswell Mills Camp, Sons of Confederate Veterans, the city refused to acknowledge 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." By submitting their application, Petitioners agreed to "abide by all rules and regulations set forth by the event organizers in the Old Soldiers Day Parade." The sole objection to Petitioners' application was their stated intent to display the Confederate Battle Flag, a recognized historical artifact. On this record, there is no evidence that Respondents circumscribed, limited, or censored the display of any participant, other than the Sons of Confederate Veterans, in the event whatsoever.

ARGUMENT

THE ELEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY APPLIED THE GOVERNMENT SPEECH DOCTRINE AS ENUNCIATED IN *WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.*, AND IT DID SO IN A MANNER WHICH IMPERMISSIBLY RESTRICTED THE FIRST AMENDMENT PROTECTIONS EXTENDED TO PUBLIC FORUMS.

The First Amendment is intended 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. While the Free Speech Clause of the First Amendment "restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("[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."). Nonetheless, the government may not favor one speaker over another in exercising its right to speak or not to speak. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). To that end, the courts should exercise care in applying the government speech label to actions undertaken by the government. *Walker, supra* at 221 (2015) (Alito, J., dissenting) ("The Court's decision passes off private speech as government speech, and, in doing so, establishes a precedent for threatening private speech that the government finds displeasing.").

While this court concluded in *Walker* that the specialty license plates for motor vehicles in Texas constituted government speech, it did not lay down a rote formula to be followed in resolving questions such as those posed by the present case, which implicates the public forum doctrine. The present case is not about government speech; instead, it is a case which requires application and understanding of the public forum doctrine. For Respondents to argue otherwise is to engage in wholesale misreading and misapplication of the facts of this case and the controlling authorities.

From the resumption of the Old Soldiers Parade in 1952 until 2017, the SCV had participated in the parade in a manner that allowed its members to appear in uniform and to display the Confederate Battle Flag. Yet, in 2018, and again in 2019 Respondents consciously and purposefully undertook to change the rules for participation in the event in order to block the expression of speech by the SCV and its members. The simple act of final approval by the city government cannot be allowed to determine whether the government speech doctrine applies. If that were the case, the government itself would be empowered to bestow, as well as withhold, approval of messages to be articulated by private individuals and entities. The end result would be to empower the government to suppress private speech for its own benefit and to exclude the possibility of dissent from accepted viewpoints.

Walker cannot be applied in a formulaic manner. Instead, it must be understood as setting forth factors

which are to be considered in determining whether a certain articulation constitutes government speech. While *Walker* does direct that attention be paid to matters such as history, endorsement, and control, Respondents fails to address the reasons articulated by Petitioners that the parade does not constitute government speech. First, the history of the Alpharetta parade tends to establish that it was never intended or understood as communicating a specific message from the city; ***the parade originated and resumed as a direct result of actions and decisions undertaken by the citizens of Alpharetta, including then-living Confederate veterans at the time of the parade's inception, not as a consequence of a decision made by the municipal government***. Second, there is no basis for concluding that an observer of the parade would understand that the city approved any message being conveyed by its numerous participants, who were free to portray themselves and communicate in the manner which they chose, with the sole exception being Petitioners on the ground that their participation in the event would be offensive to one or more individuals and groups. Third, other than choosing to exclude Petitioners from the parade, the record does not tend to show that the city retained any direct control over the messages conveyed in the parade.

Despite their protestations to the contrary, Respondents have failed to establish that the factors articulated in *Walker*, in light of the factual context of this specific case, cause the parade to constitute government speech and to warrant the betrayal of

fundamental First Amendment protections which are inherent in the public forum doctrine.

The streets of Alpharetta, Georgia constitute a public forum, a parade conducted upon such streets is a protected exercise of freedom of speech guaranteed by the First Amendment; and the city cannot discriminate among speakers based upon the content of their expression. Respondents have willfully chosen to ignore that the government may not regulate speech based on its substantive content or the message it conveys, *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), and that "government officials may not exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express." *Wood v. Moss*, 572 U.S. 744 (2014).

"The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478. The forum doctrine requires a court to identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-01 (1985). Thereupon, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

While *Summum* is a comprehensive exposition of the public forum doctrine, it is very fact specific in that it involved a public park and green-space which the municipality sought to preserve against the intrusion of monuments articulating countervailing positions in a permanent manner. In the present case, the public forum involved were the streets and sidewalks of Alpharetta, and the use to which they were to be put was necessarily of a transient nature.

Streets and parks have long been recognized as public forums held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983). It necessarily follows that government may not engage in viewpoint discrimination among private speakers exercising their free speech rights in a public forum. *Mosley*, 408 U.S. at 756-57.

Courts cannot engage in overly expansive interpretations of the government speech doctrine in order to justify fundamental First Amendment principles forbidding viewpoint discrimination in public forums. *See Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017). The discriminatory intent of Respondents is established by the strict scrutiny applied to Petitioners' application and the specific demand that the Confederate Battle Flag not be displayed by the SCV. No other group or participant in the parade was subject to any specific limitation on their conduct or participation. *See Gerlich*, 861 F.3d at 705-06. The private speech of citizens

does not become the public speech of the government merely because the government provides the forum in which the private speech is expressed. *Cornelius*, 473 U.S. at 811-13 (a charity drive organized by government was nonpublic forum for private speakers to solicit donations, and therefore that viewpoint discrimination was prohibited); *Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 468-69 (2d Cir. 1999) (holding that a police department's refusal to permit police affinity group to march in parades was not a form of government speech); *compare Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018) ("The record contains no basis for thinking that Lunch Program vendors' names, any more than the names of other organizations that receive permits to use public lands for special events, are closely identified with the government 'in the public mind.' ").

The record shows the city's acceptance of all applications to participate in the parade *except* that of Petitioners. It is nonsensical to argue that the Respondents' curation of the parade did not implicate First Amendment concerns, particularly since the record is clear that only Petitioners were excluded from participation and that such exclusion was based solely on the ground that some would find the Confederate Battle Flag to be offensive. The design of the application process, as well as the manner in which it was administered, establish beyond any doubt that Respondents acted with actual discriminatory intent based upon their desire to foreclose speech based solely upon its content and the perceived reaction of

third-parties to it: in other words, first the Confederate Battle Flag; the next time, another Confederate symbol or any other flag or symbol deemed unacceptable to the city, an individual, or group, with no end in sight; perhaps even a pre-Civil War American flag, none of which have been abrogated by Congress, or a legacy state flag. The city's restriction of Petitioners' speech was content-based because they intended to display the Confederate Battle Flag and regimental standards of Georgia Confederate units, while individuals wore uniforms replicating those used in the conflict. "Content-based laws – those that target speech on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

While Respondents contend that Petitioners have waived any argument implicating the public forum doctrine, that argument fails for three specific reasons.

First, the distinction between government speech and private speech, as well as the public forum doctrine, necessarily implicate the First Amendment and its reach. Strict scrutiny of restrictions upon free expression requires that any such restriction survive under all conceivable First Amendment theories, of which the public forum doctrine is but one. As Petitioners have made clear, the concept of government speech cannot be applied in a manner which is consistent with the First Amendment if the government speech itself implicates the public forum doctrine.

Second, *Summum* itself addresses two competing doctrines: that of government speech and that of the public forum. Neither doctrine is exclusive of the other in the realm of the First Amendment. In fact, *Summum* stands for the proposition that the government speech doctrine cannot be applied without addressing First Amendment concerns, which are implicit in the notion of public forums.

Third, the record is clear that the parties, as well as both lower courts, addressed the reach of *Summum* in earlier proceedings. While neither of the lower courts specifically addressed the public forum doctrine in their decisions, the notion of government speech cannot be invoked as a shield to prevent the application of strict scrutiny to attempts on the part of government to regulate speech with which it disagrees or which is disapproved by some constituents of the government.

CONCLUSION

Petitioners respectfully pray that this court would issue its writ of certiorari to the United States Court of Appeals for the Eleventh Circuit so that the issues presented herein might be considered in argument.

Respectfully submitted, this 14th day of March 2022.

H. EDWARD PHILLIPS III
Counsel of Record
219 Third Avenue North
Franklin, Tennessee 37604
(615) 599-1785, ext. 229
edward@phillipslawpractice.com

SCOTT D. HALL
374 Forks of the River Parkway
Sevierville, Tennessee 37862
(865) 428-9900
scott@scottdhallesq.com

Attorneys for Petitioners