

LEAKE V. DRINKARD: ELEVENTH CIRCUIT UPHOLDS CITY’S DENIAL OF
CONFEDERATE GROUP’S PARTICIPATION IN VETERANS PARADE AS
GOVERNMENT SPEECH

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In *Leake v. Drinkard*, the United States Court of Appeals for the Eleventh Circuit addressed whether the City of Alpharetta, Georgia violated the First and Fourteenth Amendments by conditioning a pro-Confederacy group’s participation in a city-sponsored parade on the grounds that the group not fly the Confederate Battle Flag in its float.¹ The plaintiffs-appellants, two members of the Roswell Mills Camp Sons of Confederate Veterans, filed a § 1983 action claiming that the City’s imposed condition violated their free speech rights under the First and Fourteenth Amendments.² The United States District Court for the Northern District of Georgia determined the parade constituted government speech and granted summary judgment in favor of the City.³ The Eleventh Circuit affirmed, stating that “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”⁴

The City of Alpharetta, Georgia (“City”) has hosted the annual Old Soldiers Day Parade (“Parade”) since 1952 as a way to honor local war veterans.⁵ Although the 2019 Parade was co-hosted by the City and the American Legion, the City retained full and total control over approving Parade participants and remained the primary financier.⁶ Groups and individuals who wished to participate in the Parade were instructed to send an application to “American Legion Post 201 c/o City of Alpharetta Special Events, and listed government mailing and email addresses.”⁷

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¹ *Leake v. Drinkard*, 14 F.4th 1242, 1245 (11th Cir. 2021).

² *Id.*

³ *Id.* at 1247.

⁴ *Id.* at 1245.

⁵ *Id.* The court noted that the City initially began this parade “after the Civil War . . . to honor veterans of that war, but the [p]arade was discontinued after a few years. The City resumed the [p]arade in 1952 after a small group of residents wanted to recognize local war veterans.” *Id.*

⁶ *Leake*, 14 F.4th at 1245. While the American Legion was also a host of the 2019 Parade, its role was limited to receiving applications for participation in the parade and it did not provide any significant funding. *Id.*

⁷ *Id.* at 1246.

Richard Leake, a member of the Roswell Mills Camp Sons of Confederate Veterans (“the Sons”), submitted an application for the Sons to participate in the Parade, describing their float as a “[t]ruck pulling trailer with participants holding unit flags.”⁸ In response to Leake’s application, the Assistant City Administrator sent a letter stating that, among other things, it was the unanimous position of the Mayor and City Council not to allow the Confederate Battle Flag at the Parade because it was the City’s view that it was a “divisive symbol.”⁹ The City would, however, allow the Sons to participate if they agreed to not fly the Confederate Battle Flag or do anything that would detract from “celebrating American War veterans.”¹⁰ Rather than accept this offer, Leake and another member of the Sons sued multiple city officials, including the Mayor and the Assistance City Administrator, for allegedly violating the group’s free speech rights and “sought monetary damages . . . 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 in the upcoming Parade and future ones.”¹¹ The Parade went ahead without the Sons’ float after the district court declined to issue an injunction.¹² The district court later granted summary judgment for the City “on the ground that the Parade constituted government speech,” and the Sons appealed.¹³

Reviewing the district court’s decision *de novo*, the Eleventh Circuit began its analysis by noting that “[f]or the Sons to prevail in this [§1983] action . . . they must show that they were ‘deprived of a federal right by a person acting under color of state law.’”¹⁴ The parties were not in dispute over whether the City acted under state law, but rather disputed whether the City’s prohibition of the Confederate Battle Flag in the Parade deprived the Sons of their constitutional right to free speech.¹⁵ While the Sons argued that City deprived them of their First Amendment rights, the City argued that “there was no deprivation because the Parade constituted the City’s speech”¹⁶ Thus, the court first had to determine “whose speech [was] at issue.”¹⁷

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Leake*, 14 F.4th at 1246–47.

¹² *Id.* at 1247.

¹³ *Id.*

¹⁴ *Id.* (citation omitted) (quoting *Griffen v. City of Opa-Locka*, 261 F.3d 1295, 1301 (11th Cir. 2001))

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *Leake*, 14 F.4th at 1247.

The court noted that while the First Amendment protects a private individual's speech, it does not act "as a sword to compel the government to speak for them."¹⁸ Stated differently, the First Amendment allows the government "to select the views that it wants to express."¹⁹ The Supreme Court has previously stated that, "[w]hen [the] government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."²⁰ The Supreme Court has also held that "[p]arades are . . . a form of expression[.]"²¹ Based on this precedent, the Eleventh Circuit reasoned that "if the Parade was the City's speech, the City was free to condition the Sons' participation on their not displaying the Confederate battle flag," and the Sons would lose.²²

With that in mind, the Eleventh Circuit then turned to the question of whether the Parade constituted government speech.²³ The court identified three factors that are used to determine whether certain speech constitutes government speech: history, endorsement, and control.²⁴ The court explained that all three factors are not necessary to support a finding of government speech, but when "all [factors] evidence government speech," it will "almost always result in a finding that the speech is of the government."²⁵ In this case, the court found that all three factors supported a finding that the Parade constituted government speech.²⁶

First, the history test "directs [the court] to ask whether the type of speech under scrutiny has traditionally 'communicated messages' on behalf of the government."²⁷ The court considered both the history of military parades and this particular Parade to support its conclusion that this Parade was government speech.²⁸ The court explained that throughout history, governments from the ancient Romans to present day have sponsored parades to celebrate war veterans.²⁹ Thus, the public traditionally associates military parades with the government.³⁰ Moreover, the court noted that this particular

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Pleasant Grove City v. Summun*, 555 U.S. 460, 467–68 (2009)).

²⁰ *Id.* at 1245 (quoting *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015)).

²¹ *Id.* at 1248 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995)).

²² *Leake*, 14 F.4th at 1248.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (quoting *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1232 (11th Cir. 2019)).

²⁸ *Leake*, 14 F.4th at 1248.

²⁹ *Id.* at 1248–49.

³⁰ *See id.* at 1249.

Parade has been sponsored by the City every year since its inception.³¹ Additionally, the purpose of this Parade was the same as the countless other military parades throughout history—to honor war veterans.³² Thus, the court viewed both the medium of parades generally and the message of this Parade as linking its history to government speech.³³

Second, the endorsement test asks whether “[o]bservers [would have] reasonably believe[d] that the government ha[d] endorsed the [Parade’s] message.”³⁴ The court explained that the City’s public advertisements of the Parade—specifically the advertisements on their website and that the City Band would open the Parade—constituted an endorsement of the Parade’s message.³⁵ Moreover, the court reasoned that the American Legion’s role as a co-host did not weaken the City’s endorsement of the Parade’s message since this partnership between the City and the Legion was publicly known.³⁶ The court likewise reasoned this partnership did not undermine its conclusion because the Legion “did not financially contribute to [the Parade] in any significant amount.”³⁷ The court concluded that the Parade’s message was government speech because since the City would not let a message it did not support be a part of the event it organized, it followed that observers would view the Parade’s message as being endorsed by the City.³⁸

Addressing final factor of control, the court “ask[ed] whether the relevant government unit ‘maintains direct control over the messages conveyed’ through the speech in question.”³⁹ The court viewed this factor as strongly favoring its finding that the Parade’s message constituted government speech.⁴⁰ Participation in the Parade hinged upon submitting an application that was at the sole discretion of the City to approve or deny.⁴¹ This application requested a detailed explanation of the potential participant’s intended message, which allowed the City to maintain control over the overall message of the Parade.⁴² The court further reasoned that the control factor was not invalidated by a group going against its promise to comply with the organizer’s rules and regulations since the government cannot “control every word or aspect of speech in order for the control factor to lean toward

³¹ *Id.*

³² *Id.*

³³ *Leake*, 14 F.4th at 1249.

³⁴ *Id.* (quoting *Mech v. Sch. Bd.*, 806 F.3d 1070, 1076 (11th Cir. 2015)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1250.

³⁹ *Leake*, 14 F.4th at 1250 (quoting *Cambridge*, 942 F.3d at 1234).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

government speech.”⁴³ To require otherwise would require a government to have omnipotence not required by the government-speech doctrine.⁴⁴ Rather, the court found adequate control was established either through the City’s determination of which groups participate “based on the consistency of the group’s characterizations of their intended speech . . . with the messages the City wanted to communicate through the Parade” or the City’s preconditions for participation.⁴⁵ Furthermore, the Sons unsuccessfully argued that City’s control was undermined by its promotion of “inconsistent messages” through allowing outside groups such as a local Democratic Party group to participate in the Parade.⁴⁶ Instead, the court explained that the City was freely able to bring together disparate groups unified in “honoring veterans” that “defended the rights and freedoms enjoyed by *everyone*”—a message inconsistent with the Confederate Battle Flag.⁴⁷

The Eleventh Circuit’s decision in *Leake v. Drinkard* clarifies that the Free Speech Clause does not bar the content of government speech nor requires the government to adopt messages it does not endorse.⁴⁸ In *Leake*, the Sons essentially demanded that their worldview in support of a rebellious, failed government be given the same platform as the other groups in an event honoring a local community’s veterans.⁴⁹ Acknowledging the divisiveness of the Confederate Battle Flag in our country and throughout history, the court explained that while the Sons have the right to hold the views it espouses under the Constitution, it cannot force the government to espouse those views.⁵⁰ As noted by the court, this flag has been used a symbol in defiance of civil rights progress, and nothing in the First Amendment compels the City to include that symbol with which it disagrees in its Parade honoring veterans.⁵¹

⁴³ *Id.* (quoting *Cambridge*, 942 F.3d at 1235–36).

⁴⁴ *Id.*

⁴⁵ *Leake*, 14 F.4th at 1250–51.

⁴⁶ *Id.* at 1251.

⁴⁷ *Id.* at 1251–52.

⁴⁸ *See id.* at 1254 (quoting *Walker*, 576 U.S. at 207).

⁴⁹ *Id.*

⁵⁰ *See id.* at 1253.

⁵¹ *Leake*, 14 F.4th at 1253.