No. 01-1782

In the Supreme Court of the United States

PATRICK J. GRIFFIN, III, PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 38 C.F.R. 1.218(a)(14), the Department of Veterans Affairs (VA) regulates activities and demonstrations including the display of flags in national cemeteries and other property administered by the VA. The question presented is whether the court of appeals properly rejected petitioner's facial challenge to the constitutionality of Section 1.218(a)(14).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 288 F.3d 1309.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2002. The petition for a writ of certiorari was filed on May 31, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. National cemeteries are under the authority of the National Cemetery Administration (NCA) within

the Department of Veterans Affairs (VA). 38 U.S.C. 2400(b), 2403(c). NCA oversees 120 national cemeteries across America comprising more than 13,000 acres. The cemeteries are to be maintained as "national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). Consistent with that statutory mandate, Congress has authorized the Secretary of Veterans Affairs to "permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day." 38 U.S.C. 2403(c); see 4 U.S.C. 6.

The Secretary of Veterans Affairs is "authorized to make all rules and regulations which are necessary or appropriate" to administer national cemeteries and memorials under the VA's jurisdiction. 38 U.S.C. 2404(a). The Secretary has delegated this authority to the Under Secretary for Memorial Affairs, who heads NCA (formerly the Director of the National Cemetery System (NCS)). 38 C.F.R. 2.6(f); see 38 U.S.C. 512, 2400(a) (authority for delegation); National Cemeteries Act of 1973, Pub. L. No. 93-43, § 6(a)(1), 87 Stat. 81 (Director of NCS under prior law).

The VA's regulations include a general provision on "Security and law enforcement at VA facilities," which applies to "all property under the charge and control of VA," including national cemeteries and VA hospitals, clinics, and offices. 38 C.F.R. 1.218(a). Section 1.218(a)(14) provides in part:

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. * * *
>
> (ii) For the purpose of the prohibition expressed in this paragraph, unauthorized demonstrations or

> services shall be defined as, but not limited to * * * the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee * * * .

38 C.F.R. 1.218(a)(14).

In addition, the VA has issued directives on the display of flags in national cemeteries. In 1995, the VA issued a Directive and Handbook (Pet. App. C1-C12) providing interpretive guidance on Section 1.218(a)(14) with respect to the display of flags in national cemeteries. Among other things, that guidance authorized the display of the Confederate flag in national cemeteries where Confederate soldiers and sailors are interred on only two days a year, Memorial Day and, in States where it is observed, Confederate Memorial Day. See *id.* at C10-C11, C13. In April 2001, the VA issued a new directive on the display of flags which contains the same basic criteria concerning the display of Confederate flags in national cemeteries. *Id.* at B1-B14; see *id.* at B9-B12.

Individuals may request approval from the NCA to deviate from the policy expressed in its directive in particular cases. Pet. App. B4. Such requests must be approved or denied by the NCA's Deputy Under Secretary for Operations within five business days following their receipt by that official. *Ibid.*

2. Petitioner is a member of the organization Sons of Confederate Veterans and a descendant of a Confederate soldier imprisoned at Point Lookout Confederate Cemetery (Point Lookout), a national cemetery located in St. Mary's County, Maryland. During the Civil War, the federal government established a prisoner of war camp at Point Lookout for captured Confederate soldiers. Many prisoners died in captivity, and

approximately 3300 are buried in a mass grave at the site. Pet. App. A2-A3. Although the VA regulations discussed above restricting the display of flags applied to Point Lookout, a Confederate flag was flown on a daily basis from 1994 to May 1998 at Point Lookout based "on the unauthorized personal initiative of a VA employee." *Id.* at A3.

After the flag was removed in 1998, petitioner requested permission from the VA to erect a flagpole and display the Confederate flag on a daily basis at Point Lookout. That request was denied. Petitioner then filed suit against the VA in the District Court for the District of Maryland, claiming that 38 C.F.R. 1.218(a)(14) and the VA's directive on the display of flags are unconstitutional both on their face and as applied to him. In January 2001, the district court ruled that the VA's regulation is unconstitutional as applied, but held that the court lacked jurisdiction to consider petitioner's facial challenge. As the court explained, pursuant to 38 U.S.C. 502, the Federal Circuit has exclusive jurisdiction over such a facial claim. Pet. App. A5-A6; see *Griffin* v. *Department of Veterans Affairs*, 129 F. Supp. 2d 832 (D. Md.), rev'd, 274 F.3d 818 (4th Cir. 2001), petition for cert. pending, No. 01-1687 (filed May 13, 2002).

The Court of Appeals for the Fourth Circuit reversed. With respect to petitioner's as-applied claim, the court held that Point Lookout is a nonpublic forum, and that the VA's regulation of the display of the Confederate flag in that forum is permissible because it is both reasonable in light of the purpose of the forum—to honor the soldiers buried there as "Americans, not as Confederates"—and is viewpoint neutral. Pet. App. A7; see *Griffin*, 274 F.3d at 822-823. With respect to the facial claim, the court expressed skepticism that it

had jurisdiction to consider that claim under 38 U.S.C. 502, but concluded that the claim lacked merit in any event. *Id.* at 824. Petitioner filed a petition for a writ of certiorari (No. 01-1687) from that decision.[1]

3. After the district court's decision in the Maryland action, petitioner filed a petition for review of 38 C.F.R. 1.218(a)(14) in the Court of Appeals for the Federal Circuit, alleging that the regulation violates the First Amendment on its face. Pet. App. A1. Specifically, petitioner argued that Section 1.218(a)(14) is unconstitutional in all its applications because, he claimed, it vests too much discretion in the VA, lacks sufficient procedural safeguards, and is unduly vague. Pet. App. A1. The Federal Circuit concluded that it had jurisdiction to review that challenge to the regulation under 38 U.S.C. 502, and held that petitioner failed to meet the "'heavy burden' imposed on those seeking to invalidate a law on its face." *Id.* at A1-A2, A8, A30.

a. The court first rejected petitioner's argument that Section 1.218(a)(14) establishes "an unconstitutional standardless licensing scheme." Pet. App. A13. "To determine whether section 1.218(a)(14) violates the First Amendment as a standardless licensing scheme," the court looked to "whether the discretionary power granted to VA officials by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries." *Id.* at A21. National cemeteries, the court found, are nonpublic fora, in which government officials have traditionally enjoyed "greater latitude" in regulating speech than in public fora.

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[1] The lower court decisions in petitioner's initial action are discussed in more detail in the government's brief in opposition to petitioner's petition for certiorari in that case.

Ibid.; see *ibid.* (discussing *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

Moreover, the court continued, "the government has established national cemeteries to serve particular commemorative and expressive roles," *i.e.*, to serve as "national shrines" to those dead who have served in the Armed Forces. Pet. App. A23 (quoting 38 U.S.C. 2403(c)). At the same time, the court recognized, "[n]ational cemeteries also serve important expressive functions for the government," which "heightens the discretion to be afforded to facility administrators." *Id.* at A23-A24. The court emphasized that "[t]he nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern," and it concluded that "the discretion vested in VA administrators by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries." *Id.* at A25-A26.

The court rejected the notion that the discretion granted to VA officials creates "a real and substantial threat to expression" in national cemeteries. Pet. App. A26. Indeed, as the court explained, "at least since 1995, the discretion of VA administrators has been constrained (although not eliminated) by the VA's detailed Flag Manual," whereby the VA has established "a consistent VA policy on flag display." *Id.* at A27. Moreover, the court stated, "the record before us suggests that VA flag display policy has left little room for arbitrary or discriminatory enforcement by individual cemetery officials." *Id.* at A28.

The court "acknowledge[d] the theoretical possibility that the VA might exercise its power to grant exceptions in order to favor only those orations or demonstrations that are to the government's liking," but it refused to hold "that this possibility alone justifies the

drastic remedy of facial invalidation." Pet. App. A29. Instead, the court reasoned, drawing support from this Court's decision in *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775 (2002), "as-applied challenges to particular acts of [alleged] viewpoint discrimination are a more appropriate means to ensure that VA facility heads do not wield their power to grant exceptions arbitrarily or unreasonably." Pet. App. A29-A30.[2]

b. The court next rejected the argument that Section 1.218(a)(14) is unconstitutional for want of adequate procedural safeguards. Pet. App. A31. The court stated that it was aware of "no case demanding procedural safeguards as an independent requirement in a nonpublic forum." *Id.* at A31-A32. Instead, the court noted, the cases that have required added procedures have involved challenges to "an explicit censorship scheme—which by definition is not content-neutral." *Id.* at A31 (citing *Thomas*, 122 S. Ct. at 779-780). In any event, the court observed, the VA's directive on the display of flags in national cemeteries establishes time limits for administrative decisionmaking, and petitioner "has not shown that imposing additional procedural requirements on the VA's decision-making process would materially advance First Amendment interests." *Id.* at A32.

c. Finally, the court held that Section 1.218(a)(14) is not unconstitutionally vague. Pet. App. A36. The court

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[2] Similarly, the court emphasized that petitioner did not show that the regulation would substantially chill any speech *outside of* national cemeteries, to which the challenged regulation also applies. Pet. App. A27. Without evidence that the regulation impacted speech at other VA property, there was "little reason," the court noted, to find that the regulation "reached a substantial number of impermissible applications." *Ibid.* (quoting *New York* v. *Ferber*, 458 U.S. 747, 771 (1982)).

doubted petitioner's standing to bring his vagueness claim on the ground that he has not shown any injury from the allegedly vague parts of the regulation—*i.e.*, the terms "oration," "assembled groups of people," and "partisan activity." *Id.* at A33. In any event, even assuming such standing existed, the court held that petitioner failed to show that anyone has ever been penalized pursuant to these parts of the regulation, that the allegedly vague sections "significantly limit speech by third parties not before the court," or that a person of ordinary intelligence would not be able to determine what is regulated. *Id.* at A34-A35.

d. Judge Dyk concurred in part and dissented in part. Pet. App. A37-A43. He "agree[d] with the majority's well-reasoned rejection of [petitioner's] claim that section 1.218(a)(14) of the VA regulations is facially unconstitutional insofar as it regulates the flying of flags in VA cemeteries." *Id.* at A37. But he argued that there was no occasion for the court to consider petitioner's challenge to Section 1.218(a)(14) to the extent it applies to other property administered by the VA, because petitioner lacked standing to challenge any aspect of the regulations not "relating to the flying of flags in VA cemeteries." *Id.* at A42.

ARGUMENT

As this Court has emphasized, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)). The court of appeals in this case properly held that petitioner failed to meet the "heavy burden" (Pet. App. A30) necessary to show that 38 C.F.R. 1.218(a)(14) is unconstitutional on its face. Its

decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected the argument that the discretion left to VA officials by Section 1.218(a)(14) and the directive on the display of flags in national cemeteries requires facial invalidation of the VA's rule. Petitioner has not pointed to any authority calling for a different result.

a. As the court of appeals explained, the discretion granted to VA officials under the regulatory scheme at issue is scarcely unfettered. Pet. App. A27-A28. In particular, the VA's directive on flag displays in national cemeteries establishes both criteria governing the approval of flag display requests and time limits on the administrative review of such requests, and thus in fact leaves "little room" for viewpoint discrimination. *Id.* at A28; see *ibid.* ("[T]he current directive provides multiple examples that delineate what kinds of displays are permissible, and the directive requires, at least in theory, that any flag 'not promote any particular viewpoint or ideology.'"). The fact that the directive contains "[a] limited exception 'for special occasions' does not negate the constraining effect of the [VA's flag directive]." *Ibid.*

In any event, contrary to petitioner's suggestion (at 16), this Court has not held that a grant of broad discretion to government officials to regulate speech in nonpublic fora is unreasonable. Rather, the Court's "unbridled discretion" decisions have dealt with speech in *public* fora, where government officials traditionally enjoy much less discretion to regulate speech or expressive conduct than in nonpublic fora. See, *e.g.*, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969) (parades or demonstrations in streets and thorough-

fares); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-770 (1988) (newsracks along city streets and thoroughfares).

The contention that *Shuttlesworth* or *City of Lakewood* governs the regulation of expressive activity in national cemeteries ignores the baseline established by forum analysis. In *Cornelius*, for example, the Court upheld the content-based exclusion of the NAACP Legal Defense and Educational Fund from a federal employee charity drive—a nonpublic forum—explaining that the Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." 473 U.S. at 800. As the court of appeals recognized, the character of the forum is crucial in determining the degree of latitude that may be exercised by government officials in regulating speech. See Pet. App. A23.

Petitioner fails to account for the greater leeway that the First Amendment leaves to government officials with respect to nonpublic fora. As this Court has repeatedly recognized, restriction of speech in a nonpublic forum is valid as long as it is reasonable and viewpoint neutral. See, *e.g.*, *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677-678 (1998); *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion) (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); see also *id.* at 730 ("[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*") (quoting *Cornelius*, 473 U.S. at 808). Accordingly, in *Cornelius*, this Court differentiated nonpublic fora from those in which regulation is "merely ministerial." 473 U.S. at 804.

The court of appeals in this case thus correctly recognized that "[s]electivity and discretion are some of the defining characteristics of the nonpublic forum," and concluded that "the fact that discretionary access is a defining characteristic of the nonpublic forum should suggest that more official discretion is permissible" in the regulation of national cemeteries than in the regulation of public fora. Pet. App. A22. The undeniably *non*public nature of the forum in this case—national cemeteries that Congress has declared to be "national shrines as a tribute to our gallant [war] dead," 38 U.S.C. 2403(c)—makes this case a particularly unsuited vehicle for review of petitioner's generalized theories about the forum doctrine. And that is especially true in the context of petitioner's desire to engage in expressive conduct involving installation of a display that would be seen by others who visit Point Lookout even in his absence.

The Federal Circuit's reliance on the reasonableness standard applied by this Court itself in nonpublic forum cases such as *Cornelius* also is consistent with the case law in other circuits. See, *e.g.*, *Muller* v. *Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996), cert. denied, 520 U.S. 1156 (1997). In *Muller*, the court of appeals, applying a reasonableness standard, rejected the argument that a school district rule allowing educators to prohibit distribution of certain nonschool materials unconstitutionally granted excessive discretion to school officials. In so holding, the court was sensitive to the context in which the speech at issue took place. See *id.* at 1543.

b. The court of appeals also correctly held that the discretion that may be exercised by VA officials under 38 C.F.R. 1.218(a)(14) does not pose any real and substantial risk to protected speech. Pet. App. A26-A29.

That determination in no way conflicts with this Court's decision in *City of Lakewood*, where the Court held that such a threat was posed by an ordinance "vest[ing] the mayor with unbridled discretion over which publishers may place newsracks on public property and where." 486 U.S. at 753.

As the court of appeals recognized, any restriction of expression in the nonpublic forum at issue in this case "does not pose the same threats to expression identified by *City of Lakewood* in licensing schemes that restrict newspapers or other media in the public forum [in that case]." Pet. App. A22. In *City of Lakewood*, the challenged ordinance gave the mayor the virtually complete discretion to "decide who may speak and who may not based upon the content of the speech or viewpoint." *City of Lakewood*, 486 U.S. at 763. In contrast, the "record" in this case, the court below found, establishes that the regulation at issue "has left little room for arbitrary or discriminatory enforcement." Pet. App. A28.

This Court has stated that facial challenges to standardless licensing schemes may be necessary to prevent viewpoint discrimination, given the risk of self-censorship by those subject to such regimes. *City of Lakewood*, 486 U.S. at 757-758. But to bring such a challenge, *City of Lakewood* also requires a plaintiff to establish "a real and substantial threat" to the speech at issue. *Id.* at 759. As the court of appeals concluded, the challenged regulation in this case poses no such threat, see Pet. App. A26-A29, and the "theoretical possibility" of such a threat is insufficient to justify "the drastic remedy of facial invalidation." *Id.* at A29. As a result, "as-applied challenges to particular acts of viewpoint discrimination are a more appropriate means to ensure that VA facility heads do not wield their power

to grant exceptions arbitrarily or unreasonably." *Id.* at A29-A30.[3]

c. Nor does the decision below conflict with decisions from other courts reviewing licensing schemes in nonpublic fora. None of the cases relied upon by petitioner invalidated schemes in which administrative discretion was subjected to anything approaching the "constraining effect" (Pet. App. A28) of the VA's directive on the display of flags in national cemeteries. In *Atlanta Journal & Constitution USA* v. *City of Atlanta Department of Aviation*, 277 F.3d 1322, 1329, opinion vacated, 298 F.3d 1251 (11th Cir. 2002) (emphasis added), for example, the regulatory "plan permit[ted] the Department to cancel a publisher's [newsrack] license for *any reason whatsoever*, including unconstitutional reasons such as viewpoint discrimination." Likewise, in *Sentinel Communications Co.* v. *Watts*, 936 F.2d 1189, 1193 (11th Cir. 1991), the per-

[3] Petitioner claims that the mere fact that criminal penalties are potentially available under the regulatory scheme at issue in itself makes the threat to speech substantial. This Court has stated that "a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389, 1398 (2002). But it has not allowed the mere possibility of such penalties to substitute for the requirement of a substantial threat to protected speech. The Court in *Free Speech Coalition* still required that "a substantial amount of protected speech [be] prohibited or chilled in the process" for a child pornography statute to be facially unconstitutional for overbreadth. *Id.* at 1395. Nothing in the record in this case suggests that criminal sanctions pose a real or substantial threat to protected speech; indeed, as the court of appeals noted, there is "no indication * * * that the VA has ever penalized a speaker for unauthorized orations or partisan activity on VA property." Pet. App. A34.

mitting official stated that he did not follow any written guidelines in granting permission to install a newsrack.

In *Lewis* v. *Wilson*, 253 F.3d 1077 (8th Cir. 2001), cert. denied, 122 S. Ct. 1536 (2002), the "statute simply authorize[d] the [Missouri Department of Revenue] to reject license plates bearing messages that are 'contrary to public policy,' language that gives the DOR nearly unfettered discretion in choosing what license plates should be rejected and in deciding what alleged 'public policy' supports its decision." *Id.* at 1080. Furthermore, the revenue officials applied the statute in an inconsistent manner, changing the reasoning behind their refusal to allow the word "Aryan" on a license plate. *Ibid.* And, in *DeBoer* v. *Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001), the provision at issue, which governed access to a local meeting hall, "provide[d] no concrete standards or guideposts by which Village officials can gauge whether an event satisfies this precondition to the exercise of First Amendment rights."

In this case, by contrast, there are clear written guidelines governing the display of flags in national cemeteries, and the record confirms that those guidelines have protected against "arbitrary or discriminatory enforcement by [government] officials." Pet. App. A28; see *City of Lakewood*, 486 U.S. at 770 (binding administrative construction, or a well-understood and uniformly applied practice, may set limits on official discretion that are otherwise not apparent from the face of a challenged regulation); *United States* v. *Kalb*, 234 F.3d 827, 835 (3d Cir. 2000) (same), cert. denied, 122 S. Ct. 918 (2002); *United States* v. *Linick*, 195 F.3d 538, 542 (9th Cir. 1999) (same). The sole exception pointed to by petitioner involves the prior *unauthorized* display of the Confederate flag at Point Lookout.

2. The court of appeals' conclusion that the regulatory scheme at issue contains sufficient procedural safeguards to withstand a facial challenge to its constitutionality also does not merit further review. As the court of appeals recognized, the VA's directive is not without procedural safeguards; it "requires the [VA] to approve or deny exceptions to the flag policy within five business days." Pet. App. A32. Moreover, this Court has ruled that even in the absence of established procedures, it is constitutional to exclude speakers from nonpublic fora on reasonable and viewpoint neutral grounds. See, *e.g.*, *Forbes*, 523 U.S. at 682.

The Court has primarily required procedural safeguards "when a State undertakes to shield the public from certain kinds of expression it has labeled as offensive." *M.I.C., Ltd.* v. *Bedford Township*, 463 U.S. 1341, 1343 (1983); see *Thomas*, 122 S. Ct. at 779. The cases that petitioner cites involve censorship in public fora. See *Bedford Township*, *supra* (censorship of motels classified as sexually oriented businesses without procedural safeguards was unconstitutional); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (censorship of motion pictures without procedural safeguards was unconstitutional). In contrast, this case involves the content-neutral regulation of speech in what all agree is a nonpublic forum—national cemeteries created by Congress for the limited and honorable objective of honoring "our gallant [war] dead" as Americans. 38 U.S.C. 2403(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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