

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICK G. GRIFFIN, III, an
individual,
Plaintiff-Appellee,

v.

DEPARTMENT OF VETERANS AFFAIRS, a
Department of the United States
Government; ROGER R. RAPP, Acting
Under Secretary for Memorial
Affairs and Head of the National
Cemetery Administration; ROBIN
POHLMAN, Director, Point Lookout
Confederate Cemetery, an
individual, in her official capacity,
Defendants-Appellants.

No. 01-1450

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-00-2837-WMN)

Argued: October 30, 2001

Decided: December 17, 2001

Before WILKINS, LUTTIG, and GREGORY, Circuit Judges.

Reversed by published opinion. Judge Luttig wrote the opinion, in
which Judge Wilkins and Judge Gregory joined.

COUNSEL

ARGUED: John Samuel Koppel, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Michael F. Wright, CASE, KNOWLSON, JORDAN & WRIGHT, Los Angeles, California, for Appellee. **ON BRIEF:** Stuart E. Schiffer, Acting Assistant Attorney General, Stephen M. Schenning, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Steven D. Campen, Stephen S. Burgoon, CAMPEN & BURGOON, Frederick, Maryland, for Appellee.

OPINION

LUTTIG, Circuit Judge:

Patrick Griffin brought suit in federal district court to compel the Veterans Administration to permit him to fly the Confederate flag daily over Point Lookout Confederate Cemetery, a national cemetery administered by the Veterans Administration through the National Cemetery Administration. The district court concluded that Griffin's proposed flag display constituted private speech in a nonpublic forum, and held that the Veterans Administration's asserted reasons for excluding this speech were neither reasonable nor viewpoint neutral. Accordingly, the district court enjoined the Veterans Administration to permit Griffin to fly the Confederate flag at Point Lookout daily, on a flag pole to be erected and maintained by Griffin. Because we hold that the Veterans Administration's denial of Griffin's request is both reasonable and viewpoint neutral, we reverse.

I.

The National Cemetery Administration ("NCA"), part of the Veterans Administration ("VA"), operates 119 national cemeteries, including Point Lookout Confederate Cemetery, which the federal government acquired from the state of Maryland in 1910. Congress requires that all national cemeteries "shall be considered national

shrines as a tribute to our gallant dead," 38 U.S.C. § 2403(c), and has delegated to the Secretary of Veterans Affairs authority to make "all rules and regulations which are necessary or appropriate to carry out" this mandate, 38 U.S.C. § 2404(a).

A VA regulation, 38 C.F.R. § 1.218(a), broadly proscribes many forms of expression, absent specific authorization, on all VA property. It prohibits all "demonstration[s], except as authorized by the head of the facility." This includes the "display of any placards, banners, or foreign flags," and also "partisan activities." *Id.* The VA supplemented this general regulation with several more specific directives related to flag displays at national cemeteries. Of particular relevance to this case, the VA issued a formal directive, "Flags in VA National Cemeteries" ("Old Flag Manual"), in 1995. J.A. 165-72. A new directive ("New Flag Manual"), issued on April 30, 2001, after the district court decided the case now before us, superseded the Old Flag Manual.

Griffin requested permission to fly an historically accurate Confederate flag over Point Lookout on August 30, 2000, and daily thereafter. J.A. 95-96. The VA refused Griffin's requests, explaining that, although its rules (set forth in the Old Flag Manual) allowed for display of the Confederate flag two days a year, it did not "believe that additional displays of the Confederate flag at Point Lookout [were] in keeping with the NCA's mission." J.A. 97-98.

Dissatisfied, Griffin brought suit in district court, alleging that the VA's various flag restrictions were facially unconstitutional and unconstitutional as applied to his specific request. Griffin moved for a preliminary injunction, and the VA moved for summary judgment. *See Griffin v. Dep't of Veterans Affairs*, 129 F. Supp. 2d 832, 834 (D. Md. 2001). The district court proceeded directly to a trial on the merits, pursuant to Federal Rule of Civil Procedure 65. *Id.* at 837.

The court concluded that it lacked jurisdiction to hear Griffin's facial attack on 38 C.F.R. § 1.218(a)(14). *Griffin*, 129 F. Supp. 2d at 837 (citing 38 U.S.C. § 502, which allows for judicial review of VA rulemaking, but only in the Federal Circuit). It concluded, however, that it did have jurisdiction over Griffin's challenge to the regulation as applied to his request through the Old Flag Manual. *Id.* at 838.

The district court thereafter held that Point Lookout is a nonpublic forum, *id.* at 839, and that the VA's restrictions were neither reasonable in light of the purpose of the forum nor viewpoint neutral, *id.* at 841-44. Accordingly, the district court entered a permanent injunction, ordering the VA to permit Griffin to fly the Confederate flag daily, using his own equipment and labor. *Id.* at 839 n.9. This appeal followed.

II.

The district court concluded, *Griffin*, 129 F. Supp. 2d at 840, and the parties agree, that Point Lookout is a nonpublic forum. Restrictions on speech in such a forum must be both reasonable in light of the purpose of the forum and viewpoint neutral. *See, e.g., Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). As noted, the district court held that the VA's restrictions meet neither requirement. We address each in turn.¹

A.

In order to assess the reasonableness of the Secretary's restrictions, we must first determine the purpose of Point Lookout, the relevant forum. We agree with the VA that that purpose is to honor, as Americans, in tranquil and nonpartisan surroundings, those who have given

¹Preliminarily, we note that the district court decided this case under the Old Flag Manual. The parties agree, as do we, however, that the appeal is not mooted by the adoption of the New Flag Manual. Griffin claims a constitutional right to his requested display. The New Flag Manual, like its predecessor, provides no mechanism by which Griffin could seek such blanket approval. And the fact that the VA persists in litigating this case confirms that it has no intention of acceding to Griffin's request. Moreover, Griffin's claim, at least before this court, is that 38 C.F.R. § 1.218(a)(14) is unconstitutional *as applied* to him through the Flag Manual, old or new. Because that regulation remains in effect and the VA continues to deny his request, the appeal is not moot. *See Northern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("There is no mere risk that [the VA] will repeat its allegedly wrongful conduct; it has already done so."); *cf. Valero Terrestrial Corp. v. Paige*, 211 F.3d 112 (4th Cir. 2000) (holding that *substantial* statutory revisions mooted case).

their lives to the Nation. We also conclude that the Secretary's restrictions are reasonable both as a means of ensuring the integrity of the VA's own message (which, in this case, coincides with the purpose) and, relatedly, as an effort to maintain the nature of the forum.

1.

The VA contends that the purpose of Point Lookout is to pay "tribute to [the Confederate soldiers] as citizens of the United States," Appellant's Reply Br. at 7. In confirmation of this purpose, the VA directs us to 38 U.S.C. § 2403(c), in which Congress provided that

[a]ll national [cemeteries] shall be considered *national shrines* as a tribute to *our* gallant dead and, *notwithstanding the provision of any other law*, the Secretary is hereby authorized to permit appropriate officials to fly *the flag of the United States of America* at such cemeteries twenty-four hours each day.

(Emphasis added). Congress' evident concern that such cemeteries "shall be considered *national shrines*" and its focus on "*our* gallant dead," combined with its emphasis on the flying of the "flag of the *United States of America*," all but inexorably lead to the conclusion that Congress did, as the VA maintains, intend national cemeteries to be places in which we honor "our gallant dead" *as Americans*.

Further, to implement and effectuate this statutory mandate, the VA has promulgated various regulations designed to preserve these cemeteries as quiet places in which to honor the American dead, free from controversy and partisan conflict. *See, e.g.*, New Flag Manual (stating that "flags may not be displayed on NCA property as a means of political activity or similar conduct that promotes any particular viewpoint or ideology other than to commemorate military service"); 38 C.F.R. § 1.218(a)(14) (limiting most forms of expression on VA property).

Griffin, not surprisingly, argues that the purpose of Point Lookout is to honor the Confederates buried at the Cemetery *as Confederates* and that the district court made factual findings to that effect, which

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.