IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS SANDERSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Case No. 23-3394
	)	
ANDREW BAILEY, et al.,	)	
	)	
Defendants-Appellants,	)	

Emergency Motion for Stay of Temporary Restraining Order

Introduction

Just one business day before Halloween, the district court granted facial relief against a state law requiring sex offenders to post a sign on Halloween stating "No candy or treats at this residence."

This law is a portion of a criminal statute that prohibits sexual offenders from interacting with children on Halloween. Mo. Rev. Stat. § 589.426. This law is critical to protecting children. On Tuesday of next week, thousands of children across Missouri—many of them unaccompanied by parents—will place themselves on the literal doorsteps of strangers. The district court recognized that "it is common sense" that these children will be "vulnerable to child predators." R. Doc. 23 at 10. Missouri seeks to protect these children by making it less likely

they will ring the doorbells of known sex offenders. To this end, Missouri requires that sex offenders post this minimally intrusive sign.

Yet the district court enjoined this law. Worse, the district court enjoined this law statewide with respect to every sex offender—about 20,000 sex offenders, none of whom are party to this suit. And the district court did so just one business day before Halloween. That decision was deeply erroneous for several reasons.

First, the plaintiff delayed bringing this suit until just a few weeks before Halloween. Nearly one year ago, Thomas Sanderson was charged with violating this statute. He declined to raise this First Amendment claim as a defense (indeed, he pleaded guilty), nor did he make any attempt between November of last year and October 3rd of this year to file suit. Then he waited another week to seek a temporary restraining order. Had he sued earlier, the parties could have litigated this suit to a final judgment. Instead, the State was forced to provide a hurried response brief on 6 days of notice. His last-minute actions alone justify denying the TRO. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Second, the district court had no justification for granting classwide relief to 20,000 sex offenders. Sanderson has not purported to bring a

class action. And the district court offered no justification for its decision to grant classwide relief without a class action (other than its incorrect assertion that "such relief will not impose any additional burden on Defendants"). The trial court lacked jurisdiction to issue this relief. At the very least, this Court should limit the relief to Sanderson.

Third, Sanderson's argument on the merits is doubtful. Missouri's sign-posting requirement is not compelled speech under this Court's precedent. There is no First Amendment violation here because the Missouri statute at issue regulates conduct, (interacting with children on Halloween), so any burden on speech is merely incidental. In any event, even if this statute were subject to strict scrutiny, Missouri's statute survives strict scrutiny and a history-and-tradition analyses.

At the very least, Sanderson cannot establish entitlement "*by a clear showing*," that he is entitled to a TRO—the standard courts normally apply at this stage. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *see also L.W. v. Skrmetti*, 73 F.4th 408, 419 (6th Cir. 2023).

For these reasons, this Court should issue a stay of the TRO. Although the Court stylized its relief as a TRO, it is in effect a

preliminary injunction. Normally, a TRO and a preliminary injunction differ only in the amount of time relief is awarded. But here, this statute applies only on Halloween. Inability to enforce this critical public-safety statute with respect to 20,000 sex offenders on the one day a year when the statute applies imposes a clear and irreparable harm on the State.

This Court should grant a stay. F.R.A.P. 8.

Statement About Exhaustion

Ordinarily, an applicant seeking a stay must "move first in the district court." Rule 8(a)(1). But a stay motion may be raised if "moving first in the district court would be impracticable." Rule 8(a)(2). That is the case here. The district court issued the TRO with just one business day left before Halloween. Defendants must file in this Court immediately not only to give this Court time to rule, but also because expedited relief is needed so that there is time to notify the public of any relief. This case has already received widespread publicity. *See*, *e.g.*, Schneider, *Lawsuit Challenges Missouri's Sex Offender Halloween Sign Law*, Fox2Now (Oct. 27, 2023).[1] The TRO is likely to be reported over the

[1] https://fox2now.com/news/missouri/lawsuit-challenges-missouris-sex-offender-halloween-sign-law/

weekend, and Defendants will need time to provide the public notice if this Court stays the TRO.

Statement of Jurisdiction

This Court has authority under Rule 8 to stay a temporary restraining order. *E.g.*, *Quinn v. State of Missouri,* 839 F.2d 425, 426 (8th Cir. 1988); *Arkansas Peace Ctr. v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212, 1215 (8th Cir. 1993).

This Court also has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). An order granting a TRO is appealable when it has the effect of a preliminary injunction. *Sampson v. Murray,* 415 U.S. 61, 86–87, n.58 (1974); *Quinn v. State of Missouri,* 839 F.2d 425, 426 (8th Cir. 1988); *Eduata Corp. v. Scientific Computers, Inc.* 746 F.2d 429, 430 (8th Cir. 1984) (per curiam); *Waste Management, Inc. v. Deffenbaugh,* 534 F.2d 126, 129 (8th Cir. 1976). The district court's order purports to enjoin the State of Missouri from enforcing a portion of a criminal statute that prohibits sexual offenders from interacting with children on Halloween. R. Doc. 23 at 15; Mo. Rev. Stat. § 589.426.

Because the statute is only enforced on October 31 of each year, the district court's TRO has the exact same effect as a preliminary injunction;

the ordinary the fourteen-day limit for TROs is meaningless in this context. The district court has scheduled a preliminary injunction hearing for November 9, 2023, well after Halloween. Therefore, the district court's order has effectively enjoined the State from enforcing its laws for an entire year without the opportunity for a hearing. Missouri's sovereign interest in enforcing § 589.426.1(3) cannot be vindicated without immediate intervention.

Factual Background

Plaintiff Thomas Sanderson is required to register as a sex offender because of his conviction for sexually assaulting a minor. In 2001, a minor girl, B.C., spent the night at her friend, A.P.'s, house. R. Doc. 18-2 at 4. A.P.'s mother (hereinafter "Sanderson's girlfriend") and Sanderson lived at the house with A.P. *Id*. B.C. forgot to bring pajamas, and went to A.P.'s closet to borrow clothes. *Id*. at 4–5. When B.C. came out of the closet, Sanderson "was waiting for her." *Id*. at 5. Sanderson told B.C. "that she needed to lay down" and that she "wasn't going to bed." *Id*. When B.C. tried to leave the room, Sanderson again told her to lay down. *Id*. Then B.C. sat down on the bed and Sanderson sat down beside her and started to tell B.C. about problems that Sanderson was having with his

girlfriend, A.P.'s mother. *Id.* After Sanderson again told B.C. to lay down, he pushed her down on the bed and B.C. became "extremely scared." *Id.* Despite being scared, B.C. told Sanderson to stop. *Id.* Instead of stopping, Sanderson tried to kiss B.C. and then got on top of B.C. and put his hands on B.C.'s thighs underneath B.C.'s t-shirt. *Id.* B.C. could smell alcohol on Sanderson's breath. *Id.*

B.C. again told Sanderson to stop. *Id.* Sanderson told B.C. "no" and then put his hand inside B.C.'s underwear. *Id.* Again, B.C. told Sanderson to stop. *Id.* at 5–6. Rather than stop, Sanderson smiled at B.C., and put his fingers inside B.C.'s vagina. *Id.* at 6. Eventually, Sanderson removed his fingers. *Id.*

B.C. later reported Sanderson's conduct to the police. When the police interviewed Sanderson, he "turned beet red. His lower lip started quivering. He started a gentle sob, [and] looked down . . . ." *Id.* at 7. Sanderson wrote "a letter of apology" where, among other things, he said that he "'apologized if he offended or hurt anyone in any way' and explained that his 'alcoholism turns him into a person he is not . . . .'" *Id.* (alterations omitted). Sanderson's statement also indicated that there "was a good chance that [the allegations] may have happ[en]ed." *Id.*

At trial, the jury convicted Sanderson, and he was sentenced to two years of imprisonment. The Missouri Court of Appeals affirmed his conviction. *Id.* at 12.

On October 31, 2022, the Hazelwood police department received many tips that a registered sex offender was decorating a residence and distributing candy to children. R. Doc. 18-3 at 1. As a result, the Hazelwood Police Department investigated Sanderson for potentially violating Missouri Revised Statute § 589.426. *Id.* That law requires that registered sex offenders,

1) Avoid all Halloween-related contact with children;
2) Remain inside his or her residence between the hours of 5 p.m. and 10:30 p.m. unless required to be elsewhere for just cause, including but not limited to employment or medical emergencies;
3) Post a sign at his or her residence stating, "No candy or treats at this residence"; and
4) Leave all outside residential lighting off during the evening hours after 5 p.m.

During the investigation, officers videotaped Sanderson's residence and its many Halloween decorations at approximately 3:30 p.m. on Halloween of last year. *Id.* at 2. Officers returned at 5:00 p.m. the same day and videotaped children coming to Sanderson's residence, and even videotaped Sanderson giving candy to children. *Id.* at 2–3. Below is a still

image, taken from police footage, showing Sanderson (in white) giving candy to children at his house on October 31, 2022:

R. Doc. 18-1. Other images of Sanderson's decorated house appear in the record below. *See, e.g.*, R. Doc. 18-4, 18-5, 18-6, and 18-7.

Having documented Sanderson's violation of Missouri law, officers approached the residence to make contact with Sanderson. R. Doc. 18-3 at 3; R. Doc. 18-12. Sanderson's girlfriend indicated that Sanderson was no longer at the residence, and officers informed Sanderson's girlfriend of § 589.426's provisions, warned that Sanderson must return to

compliance with Missouri law, and indicated that they would return later that night to verify that Sanderson had taken steps to comply. *Id.* at 3–4; R. Doc. 18-12. Lt. Burger covered each of the requirements of Missouri's law. R. Doc. 18-12 at 8:01. Lt. Burger specifically mentioned that a sign was required to be posted but there was no posted sign. *Id.* Lt. Burger also advised Sanderson's girlfriend that if Sanderson was outside when officers returned, then Sanderson would face consequences. *Id.* at 4:31; 6:35.

When officers returned later that night at approximately 8:23 p.m., they found that Sanderson had not taken any steps to comply with § 589.426's provisions. R. Doc. 18-3 at 9. Instead, Sanderson's residence was decorated and illuminated (in violation of the statutory requirements for a sex offender to have no external lights on during Halloween night), and no sign had been posted. *Id.*

Officers once again made contact with Sanderson's girlfriend, who continued to insist, incorrectly, that Sanderson was not present. R. Doc. 18-2 at 11. Before long, however, Sanderson appeared from inside the display, and was antagonistic with the officers. *Id.*; *See, e.g.*, R. Doc. 18-14 at 7:19. Among other things, Sanderson told the officers he was a

convicted sex offender because of a "bitch girl, little girlfriend of my daughters, that made some allegation" before telling officers "go away, go away, bye bye, get a warrant and come back fucker." R. Doc. 18-3. at 12; R. Doc. 18-13 at 5:55–6:06.

Officers convinced some of the adults present to turn off the exterior lighting—which is required by § 589.426—and then officers left. R. Doc. 18-3 at 12. Officers noted there was no sign indicating that there were no treats or candy at this residence. *Id.* at 12–13. Later, Sanderson was charged with violating Mo. Rev. Stat. § 589.426. *State v. Sanderson*, 22SL-CR07753. Sanderson, while represented by counsel, pleaded guilty on April 13, 2023. R. Doc. 18-8. He did not challenge the "no candy" sign requirement as unconstitutional.

Nearly six months later, on October 3, Sanderson filed a complaint alleging that Missouri's sign-posting requirement instructing registered sex offenders to post a sign that simply says "no candy or treats at this residence"—violates the First Amendment. R. Doc. 1. The lawsuit does not challenge any other aspect of § 589.426, including the no-contact requirement.

Days later, on October 11, Sanderson requested a TRO. R. Doc. 7. The district court gave the State six days to respond. R. Doc. 9. On October 27, just before noon, the district court granted a TRO. R. Doc. 23. A few hours later, Attorney General Bailey filed this emergency motion to vacate the TRO.

Standard of Review

In considering whether to grant a temporary restraining order or preliminary injunction, the Court employs the four-factor *Dataphase* test: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 113 (8th Cir. 1981) (en banc)); *accord Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 914 (8th Cir. 2015) (stating the *Dataphase* factors apply to the Court's consideration of a temporary restraining order). While no factor is independently dispositive, "the probability of success factor is the most significant[.]" *Home Instead*, 721 F.3d at 497. "A preliminary injunction is an

extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). And, the party seeking the preliminary injunction bears the burden of demonstrating the necessity of the preliminary injunction. *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009).

This Court has reiterated, that "a more rigorous standard" applies to challenges to state statutes. *Planned Parenthood MN, ND, SD v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). A party seeking injunctive relief in the implementation of a State's statute "must demonstrate more than just a 'fair chance' that it will succeed on the merits." *Id.* at 731–32. Indeed, this Court has "characterize[d] this more rigorous standard, drawn from the traditional test's requirement for showing a likelihood of success on the merits, as requiring a showing that the movant 'is likely to prevail on the merits.'" *Id.* at 732 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). This more rigorous standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Id.* (quoting *Able v. United States*, 44 F.3d 128, 131 (2d

Cir. 1995)). And even if the party seeking the injunctive relief makes a showing that it is likely to prevail on the merits, the Court must still consider the remaining *Dataphase* factors. *Benisek v. Lamone*, 138 S. Ct 1942, 1943–44 (2018) ("As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits.")

Further, a plaintiff seeking a preliminary injunction "must generally show reasonable diligence." *Id.* at 1944. Thus, a party's delay in seeking injunctive relief can, in itself, provide a basis for the Court to deny a motion requesting such relief.

Analysis

I. Sanderson's unreasonable delay was sufficient reason to deny a temporary restraining order.

The district court gravely erred when it granted a TRO despite finding that Sanderson had delayed bringing this suit and request for a TRO. R. Doc. 23 at 12. The district court, in justifying Sanderson's delay, noted that the alleged harm "has not occurred since [last Halloween] and will not be at risk to happen until this Halloween." R. Doc. 12. But that is precisely why Sanderson's nearly one-year delay is unreasonable. Sanderson had months in which to mount a challenge to § 589.426.

Sanderson could have, and should have, raised a First Amendment challenge in state court during his criminal proceedings. Instead, he pleaded guilty. R. Doc. 18-8. Outside his criminal case, he could have brought this case eleven months ago. Sanderson's delay deprived the State of an opportunity to prepare for and to defend against his First Amendment challenge under a reasonable time frame.

By holding his claim in reserve, Sanderson has created his own emergency.[2] Rather than give the parties enough time to litigate the matter, and give the district court enough time to enter final judgment, Sanderson waited until the last possible moment to file his pleadings. Now, he has forced the State to pursue emergency relief in this Court.

[2] One of Sanderson's attorneys (Attorney Fry) represented Sanderson both in the state criminal case and during the First Amendment challenge in the district court which sought the injunctive relief that brings us here. Though his rights as a criminal defendant are certainly different than his rights as a civil plaintiff seeking injunctive relief, the continuity of counsel between the two cases further underscores the manifestly unreasonable timing of his filing in the Eastern District of Missouri: Sanderson knew about this issue since at least last Halloween, when he was confronted by local police, he and his counsel were fully aware of the impact of the law by the time he pled guilty to violating it on April 13, 2023, and yet his counsel waited until October 3, 2023 to file a request for an injunction.

Though there is not a strict definition of a period of time that constitutes unreasonable delay, courts have found similar delays to be unreasonable. This Court has found that a plaintiff that waited a year to bring a claim could not demonstrate irreparable injury because of their unreasonable delay. *Wildhawk Inv., LLC v. Brava I.P., LLC*, 27 F.4th 587, 597 (8th Cir. 2022) (citing *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018)).

It was error for the district court to disregard Sanderson's extreme delay and grant the TRO. *Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212, 1215 (8th Cir. 1993). Recently, the Supreme Court reaffirmed that "late-breaking changes in position, last-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases" because "[t]hese well-worn principles of equity apply in capital cases just as in all others." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022). The facts at issue have been "long known" to Sanderson. Despite not raising a First Amendment challenge to the statue in April, he has executed a "late-breaking change[] in position" and claimed the sign-posting requirement is unconstitutional. This conduct

alone provides a sound basis for granting the emergency motion to stay the TRO. *See Hill*, 547 U.S. at 584.

II. Statewide injunctive relief was wrong under the facts, and violates Missouri's sovereign interest in enforcing its criminal laws.

At the very least, this Court must limit the sweeping, universal injunction[3] entered by the district court. *See Rodgers v. Bryant,* 942 F.3d 451, 460 (8th Cir. 2019) (Stras, J., concurring in part). The district court effectively entered a year-long injunction prohibiting Missouri from enforcing a state law designed to protect children from sex offenders. R. Doc. 23 at 15. Worse, the district court made that injunction statewide "without asking whether it could, or even should." *Rodgers,* 942 F.3d at 460. And on top of that, the district court granted relief on a facial challenge, where "the challenger must establish that *no set of circumstances* exists under which the Act would be valid." *United States. v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). The district court ignored the fact that Sanderson failed to do so.

[3] The TRO is a universal injunction "in the sense that it prohibits enforcement of the law against anyone and everyone, whether they are parties or not. *Rodgers,* 942 F.3d at 460 n.5 (Stras, J., concurring in part); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1, (2018) (Thomas, J., concurring)

In his complaint below, Sanderson did not purport to represent a statewide class of sex offenders. R. Doc. 1. Nor did he plead any fact respecting the enforcement of § 589.426 against any other person. Sanderson did not sue any state law enforcement agency besides those that operate where he lives. R. Doc. 1. Though Sanderson did sue Missouri's Attorney General, the State's chief legal officer, the Attorney General does not supervise the Missouri Highway Patrol, the law enforcement agencies for Missouri's 114 counties plus the city of St. Louis, or the municipal law enforcement agencies. Missouri's Constitution vests the governor with "[t]he supreme executive power," and the governor is primarily responsible for ensuring "that the laws are distributed and faithfully executed." Mo. Const. art. IV §§ 1, 2.

The district court's statewide injunctive order imposes an extreme burden on Missouri's sovereignty. Our federalist system of government trusts Missouri with the "sovereign power to enforce 'societal norms through criminal law.'" *Shinn v. Ramirez,* 596 U.S. 366, 376 (2022) (quoting *Calderon v. Thompson,* 523 U.S. 538, 556 (1998)). With that power, Missouri passed § 589.426 to protect children from the threat of sex offenders during traditional Halloween festivities. Missourians

rightly expect that their laws will be enforced and "to unsettle these expectations is to inflict a profound injury" on the State and its people. *Id.* The United States Supreme Court has stressed that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox. Co.,* 434 U.S. 1345, 1351 (1977) (staying a statewide injunction).

Even if the district court could temporarily prevent Missouri from requiring Sanderson to follow the sign posting requirement of § 589.426, there is no basis for expanding that injunction to prohibit statewide enforcement of the sign posting requirement for 20,000 sex offenders this Halloween. As Judge Stras observed in *Rodgers,* universal injunctions prohibiting states from enforcing their laws are far outside the traditional equitable powers afforded to courts. 942 F.3d at 460–466. At common law, "courts of equity tailored injunctions to the particular harms that the moving party faced, whether during litigation or after." *Id.* at 461. The district court's TRO exceeded those equitable powers by linking Sanderson with "the diffuse class of [Missouri sex offenders] who could benefit from the universal injunction." *Id.* at 464.

This case proves the wisdom of the equitable limits on universal injunctions. The district court wrongly assumed that its universal injunction would "not impose any additional burden on Defendants." R. Doc. 23 at 14. Quite the contrary, any universal injunction of a state law is a "significant encroachment on [the State's] police powers" and "potentially injures [the State], its citizens, and the overall public interest." *Rodgers,* 942 F.3d at 466 (Stras, J., concurring in part). More importantly, the injunction prevents Defendants from ensuring that thousands of children this Halloween do not ring the doorbells of sex offenders.

Missouri's law enforcement agencies expect to be able to enforce Missouri's laws. Defendants do not supervise Missouri's various law enforcement agencies and have no practical way to inform them to refrain from enforcing duly enacted statutes. Likewise, Missouri's people expect that the law requires sex offenders to post signs that say "no candy, no treats" to discourage children from trick-or-treating at their residences. Defendants have no way to ensure that thousands of children do not wander, unsupervised, to a sex offender's home. The district court's order—issued just four calendar days and one business day before

Halloween—unsettles these expectations, inflicting a profound injury on the peace of mind that § 589.425 provides. *See Shinn,* 596 U.S. at 376.

The district court's expansive TRO may even exceed the scope of Sanderson's standing and violate Missouri's sovereign immunity. Because Sanderson raises a "pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Balogh v. Lombardi,* 816 F.3d 536, 543 (8th Cir. 2016) (internal quotations omitted). Here, there is no indication in the record that the named defendants have authority to enforce § 589.426 statewide.

Plainly, the Hazelwood chief of police does not enforce the law in all of Missouri's 114 counties plus the city of St. Louis. Sanderson named a law enforcement defendant in only one of those counties. Likewise, the Attorney General does not direct the law enforcement agencies in those counties and does not originate prosecutions at the local level. As the record here shows, when Sanderson violated § 589.426 last year, he was prosecuted by the St. Louis County Prosecutor, not the Attorney General R. Doc. 18-8 at 1–2. Sanderson has not sued any of the local prosecutors

responsible for originating charges across Missouri, including any prosecutor from the jurisdiction who brought charges against him last year.

On this record, this Court's precedents foreclose a statewide injunction. *Balogh,* 816 F.3d at 543; *Digital Recognition Network, Inc. v. Hutchinson,* 803 F.3d 952, 958–59 (8th Cir. 2015). Sanderson has not pled, and the record does not show, that the Attorney General is responsible for directing law enforcement agencies to investigate violations of § 589.426 or for charging criminal violations in those cases.

This Court's decision in *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon,* 428 F.3d 1139 (2005) found in a similar case that the Attorney General was not a proper party to enjoin enforcement of a misdemeanor statute. There, this Court agreed that the Missouri's Attorney General "has no power to initiate misdemeanor prosecutions, a task left to local prosecutors." *Id.* at 1145. Violating § 589.426 is a class A misdemeanor.[4] Consequently, the

[4] "Any person required to register as a sexual offender under sections 589.400 to 589.425 who violates the provisions of subsection 1 of this section shall be guilty of a class A misdemeanor." Mo. Rev. Stat. § 589.426.

Missouri Attorney General has no power to initiate prosecutions under it. Moreover, under Missouri law and practice, the Attorney General assists in local prosecutions only at the request of the Governor or a trial court. *Id.*

Sanderson has not pled or shown that the Governor or a trial court has directed the attorney general to assist in prosecuting him or any other sex offender under § 589.426. Sanderson has therefore failed to show a threat of irreparable harm from the Attorney General and the district courts TRO against the Attorney General "looks very much like the impermissible grant of federal court relief against the State of Missouri." *Id.* Without a party connected to the statewide enforcement of the challenged statute, Sanderson does not have standing to seek a statewide injunction and Missouri is immune from the district court's statewide injunction. *Id.*

Because the district court's TRO order exceeds the jurisdictional confines of standing under Article III, the Constitutional limits of the Eleventh Amendment, and the equitable powers of federal courts, this Court should stay the enforcement of the TRO in total or, at the very minimum, limit its scope to affect only the parties in this case.

III. Sanderson is not likely to prevail on the merits because Missouri's minimally invasive sign-posting requirement protects children and does not violate the First Amendment.

The district court erred for at least three reasons when it found Sanderson was likely to prevail on the merits of his claim. R. Doc. 23 at 5–11. *First*, Missouri's sign-posting requirement is not compelled speech under this Court's precedent. *Second*, there is no First Amendment violation here because the Missouri statute at issue regulates conduct, not speech, so any burden on speech is merely incidental. And *third*, Missouri's statute survives strict scrutiny and a history-and-tradition analysis in any event.

A. Missouri's "No candy or treats at this residence" sign is not compelled speech under this Court's precedent.

Requirements that sex offenders "speak" commonly fall outside the compelled-speech doctrine. That doctrine "has been found only in the context of governmental compulsion to disseminate a particular political or ideological message." *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995). "There is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court.'"

Id. at 878, (quoting concurrence in *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943)). That is why requiring sex offenders to register under state or federally mandated offender registration schemes is not compelled speech. *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014). Although registering one's address might literally be described as "speech," "[w]hen the government, to protect the public, requires sex offenders to register their residence, it conducts an 'essential operation of the government . . . .'" *Id.* (alterations omitted).

Requiring a "no candy" sign is no different. If ensuring that the public is aware of the addresses of sex offenders is part of the "essential operations of government," then so too is taking modest measures to ensure that unaccompanied children do not find themselves on the literal doorsteps of sex offenders. A simple "no candy" sign is minimally intrusive and is incidental to "essential operations of government [] for the preservation of an orderly society." *Sindel*, 53 F.3d at 878.

The district court was presented with these authorities but never addressed them. R. Doc. 23 at 5–8. The district court, like Sanderson, relied on *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781 (1988). But *Sindel* was decided years after *Riley*, and in *Sindel* this Court expressly

held that the "compelled speech" doctrine "has been found only in the context of governmental compulsion to disseminate a particular political or ideological message." *Sindel*, 53 F.3d at 878. *Sindel* is binding on panels of this Court, and on district courts, unless and until overruled by the Eighth Circuit en banc, and the district court's failure to follow *Sindel* is reversible error. *See, e.g., Xiong v. State of Minn.*, 195 F.3d 424, 426 (8th Cir. 1999) (holding that district courts must follow holdings of the Eighth Circuit until reversed by the Eighth Circuit, or the Supreme Court); *Arkansas Peace Center*, 999 F.2d at 1215 (error of law justifies reversing entry of TRO).

Instead of following this Court's precedent, the district court followed two non-binding, out of circuit precedents addressing factually distinct sign mandates. R. Doc. 23 at 6–7. The first case, *Doe v. City of Simi Valley*, 2:12-CV-8377-PA-VBK, 2012 WL 12507598 (C.D. Cal.), is an unreported district court case where the district court issued an apparently *ex parte* temporary restraining order. *Id.* at *1. The docket sheet reveals that the case was later dismissed with prejudice. Doc. 43, *Doe v. City of Simi Valley*, 2:12-CV-8377-PA-VBK (C.D. Cal. Jan. 31, 2013). *Doe v. City of Simi Valley* is of no precedential value.

The district court also relied on, *McClendon v. Long*, 22 F.4th 1330 (11th Cir. 2022), which included facts nowhere near the minimally intrusive sign required here. In *McLendon*, "the signs expressly bore the imprimatur of government, stating that they were 'a community safety message from Butts County Sheriff Gary Long.'" *McClendon*, 22 F.4th at 1136. Likewise, the signs were placed by government agents, and could only be removed by government agents. *Id.*

Missouri's sign requirement contains no such language—an important consideration even under the logic of *McClendon*, which had relied on *Mech v. Sch. Bd.,* 806 F.3d 1070, 1075 (11th Cir. 2015). In *Mech*, the Eleventh Circuit held that banners on school property were compelled speech because the banners bore: "the imprimatur of the schools and the schools exercise substantial control over the messages that they convey." *Mech*, 806 F.3d at 1075. And, unlike in the signs in *McClendon*, Missouri's signs are placed by sex offenders, bear no "imprimatur of government", and may be removed by the offenders immediately after Halloween. § 589.426.

The differences become even starker when the Court considers the appearance of the signs at issue. Below is a picture of the *McClendon* sign, the size of a typical political advocacy yard sign:

McClendon, 22 F.4th at 1133. In contrast, the following seven words on an 8" x 11" inch piece of paper or even a "post-it" note would satisfy Missouri's requirement:

No candy or
treats at this
residence

Missouri's statute imposes *no* requirements on the sign's design, origin, purpose, or even format; this allows registered sex offenders to post signs that do *not* bear "the imprimatur of government." *McClendon*, 22 F.4th at 1136. More importantly, this allows a sex offender's sign to blend into the milieu of other similar "no candy" signs which may be posted by

Missourians for any number of reasons – for example, that they are out of candy, are putting a baby to bed, or are having any other type of event where trick-or-treating children are not welcome. Missouri's law, unlike the challenged signs in *McClendon*, also provides substantial control to the registered sex offender over all aspects of the sign—including whether to add additional text. Missouri law requires only that the sign be posted and that it contain the language "No candy or treats at this residence." § 589.426.1(3). Such a sign would be no different from signs that might be posted by thousands of Missourians who do not wish to participate in Halloween for a variety of unrelated reasons.

Given these substantial differences, there are significant factual distinctions from the non-binding *McClendon* holding. And critically, Sanderson has expressly chosen *not* to challenge the constitutionality of any of the other provisions of § 589.426. R. Doc.1 at 3, ¶8; R. Doc. 7 at 7 ("The only provision relevant to this Motion is Section 589.426, subd. (1)(3) . . . ."). Sanderson did not challenge the requirements of the same statute preventing his contact with children on Halloween night, to include the requirement to turn off external lights, which would otherwise attract children to the residence for candy under the typical

conventions for Halloween night.[5] He only challenged the requirement to post seven words on his door to effectuate the same lack of contact which children which he knows is required. The district court's finding below that the sign qualifies as "compelled speech" was legally wrong and warrants reversal. *Arkansas Peace Center*, 999 F.2d at 1215 (error of law justifies reversing entry of TRO).

B. The First Amendment allows regulation of this speech, which is merely incidental to conduct.

Although the district court acknowledged that Attorney General Bailey had argued that the sign-posting requirement was merely speech incidental to conduct, R. Doc. 23 at 5, the district court did not address that argument. R. Doc. 23. That too was legal error because Missouri's sign-posting requirement is part of a statutory scheme that regulates conduct: preventing "Halloween-related contact with children" § 589.426.1(1) (by requiring them to keep their lights off, remain inside the residence between 5-10:30 pm unless required to be elsewhere for just

[5] "On Halloween, the unspoken rule of conduct is to turn on your porch light (or driveway light) if you do welcome trick-or-treaters — and turn it off if you're out of candy or don't want costumed kids knocking on your door." https://www.apartmenttherapy.com/the-halloween-porch-light-code-130687, updated Oct 16, 2023, accessed October 27, 2023.

cause, etc.). Sanderson does not challenge any of those requirements. And the sign-posting requirement is simply incidental to this required conduct. When a statute is designed to regulate conduct and that conduct "was in part initiated, evidenced, or carried out by means of language," then the impact on speech is incidental, and not a violation of the First Amendment. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949)).

In *Rumsfeld*, the Court remarked that Congress can prohibit employers from discriminating on the basis of race, and therefore, Congress can incidentally regulate the words posted by an employer, for example, prohibiting posting of a sign that reads "White Applicants Only." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992)). Missouri's Supreme Court has adopted the same rule when reviewing Missouri statutes requiring an affirmative duty to warn. *See, e.g., State v. S.F.*, 483 S.W.3d 385, 387–88 (Mo. 2016). In *S.F.*, a defendant challenged Missouri's statute that criminalized the failure of an HIV positive person to disclose that status before engaging in sexual contact. *Id.* at 386. Following *Rumsfeld* and *Sorrell*, the Missouri Supreme Court found that

the statute at issue governed conduct, not speech, and that any speech involved was incidental to the regulated conduct. *Id.* at 387–88.

These rationales apply to § 589.426's requirements. The statute prohibits "Halloween-related contact with children." § 589.426.1(1). To prevent contact with children, the statute *also* prohibits activities that would encourage children to approach a sex offender's residence. These prohibitions include allowing sex offenders to be outside their residence between 5 and 10:30 p.m., and requiring all outside residential lighting to be turned off after 5:00 p.m. *Id.* at (2), (4). In order to further effectuate the statute's regulation of sex offender conduct, it also requires sex offenders to post a sign indicating there are "no treats or candy at this residence" on Halloween. *Id.* at (3). The purpose of the sign-posting requirement is to prohibit "Halloween-related contact" between sex offenders and children. In this way, the statue governs conduct with only incidental impact on speech. Sanderson all but concedes as much given that he does not challenge the constitutionality of *any* of the other provisions of § 589.426.

So just like *Rumsfeld* remarked that the legislature can further nondiscrimination by *prohibiting* somebody from posting a sign, here the

legislature can *require* a sign to further effectuate the no-contact requirement.

Below, Sanderson argued that *Rumsfeld* and *Sorrell* do not apply. *See, e.g.,* R. Doc. 22 at 9–10. For instance, Sanderson asserted that Attorney General Bailey relied on Supreme Court dicta in *Rumsfeld*. R. Doc. 22 at 10. Even assuming it is dicta, this Court has expressly held that Supreme Court dicta all but binds district courts except in the rare and extraordinary case. *See In re Pre-Filled Propane Tank Antitrust Litigation*, 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc) ("Appellate courts should afford deference and respect to Supreme Court dicta, particularly where, as here, it is consistent with longstanding Supreme Court precedent.").

Sanderson then attempted to wave *Rumsfeld* away by suggesting that its holding depends on whether the government has *required* a statement to be posted (such as "Live Free or Die") or whether the government has *prevented* a statement from being posted (such as "White Applicants Only"). R. Doc. 22 at 9. Sanderson has missed the point.

The Supreme Court's early compelled speech cases Sanderson has relied upon, such as *Barnette* and *Wooley*, concern a particular *type* of

speech: government-forced creeds. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In *Wooley*, the Court described the motto requirement, which was posted on all state license plates at the time, as "a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* Missouri's sign-posting requirement is far different from "an instrument for fostering public adherence to an ideological point of view. . . ." *Id.* After all, all Missouri law requires is the posting of a sign that says "no treats or candy at this residence." § 589.426.1(3).

The seven-word sign requirement at issue here is far more akin to the Sex Offender Registration requirements which have been found not to violate the First Amendment than a motto on a license plate. In fact, the Fifth Circuit has specifically pointed out that the First Amendment "interests at stake" in the Sex Offender Registration context are "not of the same order" as the first amendment interests discussed in *Wooley* and *Barnette* (two of the cases Sanderson's and the district court's analysis turned heavily upon). *Arnold*, 740 F.3d at 1034, n.8 (5th Cir. 2014).

Moreover, Sanderson also ignores that the Supreme Court has upheld Sex Offender Registration schemes since their inception. *See*, *e.g.*, *Smith v. Doe*, 538 U.S. 84, 99 (2003) (holding Alaska's sex offender registration law not to violate the *Ex Post Facto* Clause of the Constitution[6] stating: "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme."). Elsewhere, Sanderson concedes that it is not a First Amendment violation to prevent speech that advertises unlawful conduct. R. Doc. 22 at 9. It is equally true that the First Amendment is not violated by incidentally requiring a few words that prevent unlawful conduct, in this case, Halloween-related contact with children.

Despite Sanderson's protestations below and the district court's failure to address the argument, Missouri's sign-positing requirement is merely incidental to the conduct based requirements of § 589.426, ensuring no Halloween related contact between sex offenders and

[6] U.S. Const., Art. I, § 10, cl. 1.

children.[7] That legal error justifies a stay of the TRO. *Arkansas Peace Center*, 999 F.2d at 1215 (error of law justifies reversing entry of TRO).

C. Missouri's sign posting requirement survives both strict scrutiny and a history-and-tradition analysis.

Even assuming, *arguendo*, that § 589.426's sign-posting requirement is compelled speech, the Missouri statute survives both strict scrutiny and a history-and-tradition analysis.

i. Missouri's statute survives strict scrutiny.

Assuming without conceding that the court applies a strict scrutiny analysis here, under the Supreme Court's strict scrutiny test, a State must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

---

[7] Sanderson has also complained that the message is "false." *See, e.g.*, R. Doc. 1 at 3. To the contrary, the message conveyed by the sign is clear: there are no treats or candy at the residence for children on Halloween. While that was certainly false on October 31, 2022 (R. Doc. 18–1), it was only false because Sanderson broke other parts of the law that he does not challenge. It was and remains unlawful for Sanderson to have Halloween related contact with children. That includes Sanderson giving candy or treats to children on Halloween. § 589.426.1(1).

Sanderson has already conceded that the State has a compelling interest in protecting children. R. Doc 7-1 at 17. The district court found that the State does have a compelling interest in protecting children from sex offenders. R. Doc. 23 at 9. The district court, likewise, correctly observed that "[s]ex offenders are a serious threat in this Nation." R. Doc. 23 at 8 (quoting *McKune v. Lile*, 536 U.S. 24, 32 (2002)).

But below, Attorney General Bailey offered another compelling state interest: its sovereign interests in maintaining our federalist system of government, and "the independent power of a State to articulate societal norms through criminal law. . . ." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998); *see also Engle v. Isaac*, 456 U.S. 107, 128 (1982) (holding that it is the States that "possess primary authority for defining and enforcing the criminal law.").

This interest is especially weighty on Halloween where hundreds of unaccompanied children might approach a residence on a single night. With a child already on a sex offender's literal doorstep, it would not be difficult to force or entice the child inside. Many parents, such as a neighbor depicted in the footage from Sanderson's interaction with police last Halloween, would be shocked to discover their child visited the house

of a convicted sex offender. R. Doc. 18-14 (Defendant's Exhibit 14) at 12:58–13:08 (Neighbor: "I've got daughters, my daughters are out right now, I live right around the corner. I just want to make sure everything's ok because I know I done sent my daughters over here." Police Officer: ". . . He's a registered sex offender." Neighbor: "Oh, hell!"). Despite this, the district court did not acknowledge Missouri's compelling interest in the enforcement of its sovereign criminal laws. R. Doc. 23.

Instead, the district court found that Missouri's sign-posting requirement was not narrowly tailored. R. Doc. 23 at 9–10. Missouri's sign-posting requirement is a minimally intrusive means to the end of separating sex offenders from children, and it along with the other provisions of § 589.426 are narrowly tailored to achieve that end. After all, Missouri law only requires seven words to be displayed for a few hours, and the statue gives considerable discretion to the sex offender to choose how the sign appears and is displayed. In fact, the sign does not even identify the resident as a convicted sex offender. Indeed, the required language on the sign—"no treats or candy at this residence"—is no different than language posted by millions of Americans who do not participate in Halloween activities, and who do not wish to be disturbed

on October 31st. Surprisingly, the district court found this to hurt Missouri's argument. R. Doc. 23 at 10. In effect, the district court penalized Missouri's law for not requiring sex offenders to post a *more* intrusive sign. It cannot be the law that a statue fails strict scrutiny for placing *too light* a burden on citizens.

The sign-posting requirement is part of Missouri's broader regulatory scheme governing the conduct of registered sex offenders. *See* § 589.400–§ 589.426; *see also* § 566.147 (governing how close certain sex offenders may live to schools, etc.). That statutory regime includes a mechanism by which offenders are categorized by tier and then obligated to adhere to registration conditions. § 589.400; § 589.404; § 589.407; § 589.414; § 589.425. The law establishes a felony criminal offense for an offender's failure to register in accordance with statutory provisions and a misdemeanor criminal offense for an offender's failure to adhere to the specific provisions of § 589.426.1. This broader statutory scheme allows for sexual offenders to petition to be removed from the sexual offender registry and to therefore no longer be subject to, among other things, the Halloween-related restrictions contained in § 589.426.1. *See* § 589.426.2; *see also* § 589.401.17.

But the district court did not address that argument. R. Doc. 23. Instead, the district court found the sign-posting requirement was not narrowly tailored to the compelling interest of protecting children from the "serious threat" of sex offenders "in this Nation" because the other provisions of § 589.426 *also* protect children. R. Doc. 10–11. The narrow-tailoring test should not be understood to prevent a State or the Government from taking multiple approaches to protect children.

For instance, the district court found that the statute's requirement that sex offender's must remain inside and avoid all Halloween related contact with children rendered the sign-posting requirement surplusage. R. Doc. 23 at 10. The flaw in the district court's analysis becomes apparent in the following sentence: "*If both of these restrictions are followed by sex offenders*, it would be nearly impossible for them to have contact with children trick-or-treating outside, thus very effectively serving the stated government interest to protect those children." R. Doc. 23 at 10. Such logic is preposterous: a requirement for a sex offender to stay within his home would be meaningless if he were allowed to interact over his threshold with children who come to his door.

Moreover, the record in this case conclusively shows that the district court's assumption cannot be sustained. Sanderson has engaged in Halloween related contact with children:

R. Doc. 18-1. Last year, Sanderson had a well-lit Halloween display, despite the statute's clear command:

R. Doc. 18-6.

R. Doc. 18-7.

And Sanderson also refused to remain inside his house. And when, later, after he had hid from officers before finally revealing himself to the them, he cursed at them and described his prior minor victim as a "bitch girl,

little girlfriend of my daughters, that made some allegation." R. Doc. 18-3. at 12; R. Doc. 18-13 at 5:55–6:06.

In other words, the record in this case demonstrates the wisdom of Missouri's multi-pronged approach to protecting children from sex offenders such as Sanderson. That should not, and does not, mean Missouri's sign-posting requirement violates strict scrutiny.

ii. Missouri's statute also survives a history-and-tradition analysis.

In *Bruen*, the Supreme Court formalized its use of history and tradition when reviewing a statute challenged under the Second Amendment. *New York State Pistol & Rifle v. Bruen*, 142 S. Ct. 2111, 2130 (2022). If the court were to extend such an analysis to the First Amendment context here, Missouri's statute similarly survives Sanderson's challenge. Sanderson cannot argue that the history and tradition of the framing era lacked a concept of a duty to warn, particularly when it comes to children. Traditionally, our nation has recognized that children are unable to make decisions for themselves and often require additional supervision to avoid dangerous circumstances or

potentially life-altering decisions. To that end, our tradition recognizes a greater duty of care when children are involved. [8]

Moreover, the Missouri statute at issue—§ 589.426—establishes a criminal act and sets forth a criminal penalty as part of a comprehensive scheme designed to protect children from contact with sex offenders.[9] Although Sanderson only challenges the sign-posting requirement, the text and structure of Missouri's statute must be considered as a whole. *See, e.g., Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) ("The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.").

---

[8] Briefed more fully in the earlier filed suggestions in opposition to Sanderson's request for a temporary restraining order, R. Doc. 17 at 22–27.

[9] The statute prohibits sex offenders from having "Halloween-related contact with children." § 589.426.1(1). It requires sex offenders to remain inside his or her residence between 5:00 p.m. and 10:30 p.m. on Halloween. *Id.* at (2). It requires sex offenders "to post a sign at his or her residence stating, 'No candy or treats at this residence.'" *Id.* at (3). And it requires sex offenders to leave "all outside residential lighting off during the evening hours after 5:00 p.m." *Id.* at (4).

In light of our nation's long-standing recognition of affirmative duties to speak or warn which are not antithetical to the First Amendment, Missouri's statute survives the history-and-tradition test.

Conclusion

Wherefore, for the forgoing reasons, the Court should grant this motion to stay the district court's temporary restraining order preventing Missouri from enforcing its criminal law in order to protect children from sex offenders.

Respectfully submitted,

ANDREW BAILEY
Missouri Attorney General

Joshua M. Divine #69875
Solicitor General

/s/ Gregory M. Goodwin
Gregory M. Goodwin #65929
Chief Counsel, Public Safety Section
Andrew J. Crane #68017
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Tel: (573) 751-7017
Josh.Divine@ago.mo.gov
Gregory.Goodwin@ago.mo.gov
Andrew.Crane@ago.mo.gov

Counsel for Defendant-Appellee
Attorney General Bailey

REICHARDT NOCE, AND YOUNG LLC
By: */s/ Timothy J. Reichardt*
Timothy J. Reichardt #57684 MO
tjr@reichardtnoce.com
12444 Powerscourt Drive, Suite 160
St. Louis, MO 63131
314/789-1199
314/754-9795–Facsimile

Counsel for Appellant Hudanick

Certificates of Compliance and Service

I hereby certify:

1. This document complies the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 8,498 words, and because Appellant has sought permission to file an overlength document.

2. This document complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in Century Schoolbook 14.

3. This document was electronically filed through the CM/ECF system on 27 day of October, 2023, and all counsel were served thereby.

/s/ Gregory M. Goodwin
Gregory M. Goodwin #65929
Chief Counsel, Public Safety Section