IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

THOMAS L. SANDERSON, an individual, **Plaintiff-Appellee,** **vs.** **ANDREW BAILEY, in his official capacity as Attorney General of the State of Missouri; and JAMES HUDANICK, in his official capacity as Chief of Police of the city of Hazelwood, Missouri** **Defendants-Appellants.**	**Case No. 23-3394**

Plaintiff-Appellee Thomas L. Sandersons' Opposition to Defendant-Appellant Andrew Bailey, *et al.*'s Motion for Stay of Temporary Restraining Order

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OPPOSITION MEMORANDUM

I. Introduction

The claim underlying this appeal presents a straightforward First Amendment issue: *Can the government force persons to display signs at their private residences on Halloween warning people away based upon the government's belief that those persons currently threat to the public?*

The two courts to address Halloween signs found that the signs violate the First Amendment's ban on compelled speech. Last year, the Eleventh Circuit ruled that Halloween signs placed by a sheriffs' department "impermissibly burden [the] First Amendment right to be free from being forced to host a government message on [one's own] private property." *McClendon v. Long*, 22 F.4th at 1337, 1340 (11th Cir. 2022). And in 2012, the Central District of California enjoined a sign posting ordinance virtually identical to Missouri's on the ground that it

> poses a danger to sex offenders, their families and their property. . . . . [I]ts function and effect is likely to approximate that of Hawthorne's Scarlet Letter – . . . potentially subjecting them to dangerous mischief common on Halloween night and to community harassment in the weeks and months following[.]

Doe v. City of Simi Valley, 2012 WL 12507598, at *7-9 (C.D. Cal. Oct. 29, 2012).

In this matter, Plaintiff asked the District Court to likewise prevent him and his family from being forced to bear a "scarlet letter" on their home, by enjoining the sign posting mandate of Missouri Rev. Stat. § 589.426(1)(3) (the "Statute") before October 31, 2023. The District Court did so in a reasoned order that is consistent with longstanding First Amendment precedent. **Exh. A** hereto, Doc. 23.

The State of Missouri ("Missouri") has filed in this Court an emergency motion for stay of that ruling prior to October 31 ("Motion"). However, Missouri cannot overcome the Statute's "presumptive[] invalidity," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), because there is no evidence that the signs are the "least restrictive means" of protecting the public on Halloween. This is particularly true because *Missouri law already prevents Registrants from participating in any Halloween festivities, including trick-or-treating*. This factor alone dooms the Statute under strict scrutiny. *See, e.g.*, *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 794 (8th Cir. 2015) (provision of act restricting speech for purpose of protecting houses of worship failed strict scrutiny "since a different section of the Act criminalizes obstructing the entrance to a house of worship"). The

existence of these additional restrictions also belies Missouri's various assertions of "harm" from being obliged to comply with the First Amendment, because Registrants cannot have Halloween-related contact with minors even without the signs.

For these and the other reasons set forth below, the Motion should be denied.

II. Rule 8 Warrants Dismissal of this Motion Because Virtually All of the Requested Relief Was Not Sought in the District Court, and Seeking the Same Was Not "Impracticable"

This appeal should be dismissed for failure to comply with Federal Rule of Appellate Procedure 8(a)(1)(A). Specifically, Missouri made no attempt to seek a stay of the TRO in the District Court before proceeding to this Court, nor has Missouri explained why such an attempt is "impracticable," as FRAP 8 requires.

FRAP 8 provides that an appellant "must ordinarily move *first* in the district court for . . . a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A). Since Missouri did not, it "*must show that moving first in the district court would be impracticable*." *Id.*, subd. (a)(2)(A)(i).

Missouri's Motion does not even attempt to make this showing. Instead, Missouri baldly asserts that "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." Mot. at 4. This assertion is circular, and fails to address impracticability at all.

FRAP 8's exhaustion requirement is particularly relevant and applicable to Missouri's appeal of the District Court's decision to extend the TRO statewide (See Mot. at 17-23), because *Missouri did not contest the propriety of a statewide injunction in the District Corut***.** In fact, when arguing the merits of the injunction, Missouri effectively conceded that any injunction would apply statewide. See Doc. 17, at 28 ("Sanderson has requested a statewide injunction of §589.426.1(3), but the balance of the harms weighs in favor of Missouri, not Sanderson."). Critically, it was not until appearing in this Court that Missouri first contested the propriety of a statewide injunction as such, and in doing so has raised arguments that it never gave the District Court an opportunity to consider. These arguments include complicated factual issues concerning whether "the Attorney General was not a proper

party to enjoin enforcement of a misdemeanor statute," (Mot. at 18, 23), and "the scope of Sanderson's standing," (Mot. at 21), among others (Mot at 22.).

Missouri's failure to first raise these arguments in the District Court should be dispositive because virtually all of the relief requested in this appeal, as well as most of Missouri's equitable arguments about the supposed "harm" caused by the TRO, *would be eliminated* if the TRO had been modified by the District Court to apply only to Plaintiff, rather than across the state. Yet, Missouri never requested this modification, and does not explain why. This is precisely the type of situation to which FRAP 8 applies, because effectively all of Missouri's requested relief was never presented to the District Court. A party is not excused from seeking relief even from district court that ruled on the challenged injunction, "when the relief sought pending appeal is premised primarily on new evidence which the district court has not yet had a chance to consider." *Chemical Weapons Working Group v. Dept. of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996).

Further, it was not impracticable for Missouri to ask the District Court to modify *its own order* by limiting the injunction to Plaintiff

only. Indeed, the District Court responded with the greatest possible alacrity and conscientiousness to the TRO filing.

Specifically, Plaintiff filed his Motion for TRO in the District Court on October 11, 2023, while the case was assigned to a Magistrate Judge. Doc. 8. The very next morning, the Clerk reassigned the case to District Judge John A. Ross. Doc. 8. Within hours, Judge Ross ascertained that "the nature of Plaintiff's requested" warranted "an expedited briefing schedule." Doc. 9. The resulting scheduling order gave the parties until Friday, October 20, to brief the issues. Doc. 9. There is no reason to assume that the District Court would not have been similarly responsive if Missouri had sought a stay or reconsideration of the TRO on a jurisdictional issue that Missouri had neglected to raise. Indeed, that would have been a much simpler course of action than this appeal and emergency motion.

Nor can Missouri claim that its lack of resources rendered relief in the District Court impracticable. That is because Missouri timely and thoroughly briefed the issues per the District Court's scheduling order, and in fact exceeded the 15-page limit for briefs by 20 pages, never once opposing the District Court's authority to issue a statewide injunction.

Doc. 17. Missouri simultaneously spent additional resources briefing a 19-page Motion to Dismiss (Doc. 27), as well as its voluminous 47 pages of briefing in this appeal.

In sum, *effectively all* of the relief requested by Missouri in this appeal could have practicably been, but was not, "first sought in the District Court." Fed. R. App. P. 8(a)(1)(A). Because Missouri has not explained why doing so would have been impracticable, this appeal should be dismissed.

III. Standard of Review

Missouri's incomplete statement of the standard of review is fails to acknowledge the deference owed to the District Court's equitable and factual findings. The Eighth Circuit has long held that

> The district court has broad discretion when ruling on preliminary injunctions. [Citation.], This court reverses only for abuse of that discretion. An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions. [Citations.] When purely legal questions are presented, however, this court owes no special deference to the district court.

Lankford v. Sherman, 451 F.3d 496, 503-04 (8th Cir. 2006).

Thus, it is true that the four Dataphase factors, in general, govern the issuance of TROs, which are: (1) irreparable harm; (2) balance of

harms; (3) probability of success on the merits, and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). However, on appeal, this Court "will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of discretion." *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 782 (8th Cir. 2004).

The complete standard of review on appeal is especially important in this case because, while the District Court's legal rulings are subject to de novo review, the District Court's equitable findings are entitled to deference and can only be reversed if "clearly erroneous." The latter includes the District Court's finding that the Statute fails strict scrutiny because

> Defendants' interest in ensuring safety for children and protecting them from contact with sex offenders on Halloween is satisfied by the remaining restrictions in the Halloween Statute that disallows sex offenders from leaving their residences on Halloween evening, turning their outside lights on, and prohibiting all Halloween conduct with children.

Exh. A at 10, 12-13. Because these findings follow all available precedent, they are not "clearly erroneous" and should not be reversed.

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IV. Argument

A. Plaintiff's Allege Delay in Bringing Suit Does Not Negate his Irreparable Injury From the Sign Posting Mandate

Missouri first argues that the District Court erred by finding that Plaintiff's alleged "delay" in seeking a TRO is sufficient to deny him the protections of the First Amendment. Yet, Missouri presents no authority for the proposition that an injunction on First Amendment grounds can be denied solely because of a delay in seeking it. That is because diligence is not a factor when seeking an injunction. Instead, the District Court correctly framed the issue as whether an alleged delay in seeking injunctive relief negates the plaintiff's claim of *irreparable injury* from the defendant's conduct, which is a factor.

As to that factor, irreparable injury resulting from compelled speech in violation of the First Amendment cannot be contested, and Missouri nowhere contests this. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") Because the irreparable injury resulting from the sign posting mandate

will only occur on and "in the weeks and months following" October 31, *Simi Valley*, 2012 WL 12507598, at *7-9, any "delay" in bringing this Motion prior to October 31 does not diminish that harm. That is what the District Court meant when it correctly ruled that "Although it is true that Plaintiff is filing his request nearly a year since his arrest, the threat of the irreparable harm has not occurred since then and will not be at risk to happen until this Halloween." Exh. A at 12. In other words, an alleged delay in seeking equitable relief does not negate the irreparable harm Plaintiff will suffer if the sign posting mandate is imposed.

Further, this Court has ruled that delays of even several months will not defeat an injunction. In *Safety-Kleen Systems, Inc. v. Hennkens*, 301 F.3d 931 (8th Cir. 2002) this Court held that the plaintiff "***did not unduly delay***" in taking "seven months to learn of Hennkens's competitive activity, marshal its case for a preliminary injunction, and file this action prepared for an immediate preliminary injunction hearing." *Id*. at 936, emphasis added. Nor did that seven-month delay negate the plaintiffs "adequate showing of irreparable injury" on which the district court based the injunction. *Ibid*.

Missouri's reliance upon *Wildhawk Investments, LLC v. Brava I.P., LLC*, 27 F.4th 587, 587 (8th Cir. 2022) is inapposite because that case *did not consider irreparable harm from the infringement of First Amendment rights*, and because the plaintiff's decision to "wait[more than a year to bring this lawsuit despite knowing" of competitor's activity seeking relief *negated the irreparable injury it later claimed to suffer*.[1] In contrast, here, Plaintiff's Motion for TRO was timely because the irreparable harm had not yet occurred.

B. A Statewide Injunction of a "Plainly Unconstitutional," Blanket Law is Proper

As noted above, for the first time in this appeal, Missouri contests the statewide scope of the TRO, but provides no authority in support of its argument that a statewide injunction was improper. Assuming the Court does not dismiss this ground for appeal for lack of compliance

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[1] *Ramierz v. Collier* 595 U.S. 411, 434 (2022) and *Hill v. McDonough*, 547 U.S. 573, 576 (2006) are likewise inapposite as they speak to the "den[ial] of equitable relief *in capital cases*," which this is not. *Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology*, 999 F.2d 1212, 1215 (8th Cir. 1993) does not address the timeliness of injunctions at all, but merely the generic standard for review of orders granting injunctions.

with FRAP 8(a)(1)(A) (see above), Plaintiff argues that under current Eighth Circuit precedent, a state-wide injunction is warranted because the challenged aspect of the Statute is "plainly unconstitutional," the "public interest is best served by preventing governmental intrusions into the rights protected under the Federal Constitution," and the injunction "would cause no injury." *Rodgers v. Bryant*, 942 F.3d 451, 458-59 (8th Cir. 2019).

Here, the Statute's sign posting mandate is plainly and facially unconstitutional on First Amendment grounds in that it applies to all Registrants categorically. In addition, the injunction would cause no injury because it merely prevents the enforcement of an unlawful statute.

While Missouri cites to the concurring opinion in Rodgers, Missouri presents no authority for the proposition that a statewide injunction is improper on these facts. Instead, Missouri merely concludes that "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)." Mot. at 22. However, Missouri discusses neither precedent, presumably because

they are inapposite. *Balogh* is not about injunctions, but instead addresses the "fairly traceable" requirement for standing. *Digital Recognition Network* states that the Attorney General is an improper party when the challenged act "provides for enforcement only through a private actions for damages." 803 F.3d at 958. But here, the challenged statute is a criminal statute.

Finally, Missouri's arguments that "a statewide injunctive order imposes an extreme burden on Missouri's sovereignty" and on "our federalist system of government" are frivolous. It is the job of courts to declare what the law is, and to prevent violations of the Federal constitution by state governments. States are not "harmed" by being obliged to comply with the Constitution, consistently, across the state.

C. Likelihood of success on the merits

Plaintiff's probability of success on the merits is high because Halloween signs are "a classic example of compelled speech" that cannot withstand strict scrutiny under the First Amendment. *McClendon v. Long*, 22 F.4th 1330, 1337 (11th Cir. 2022).

"In order to make out a valid compelled-speech claim, a party must establish (1) speech; (2) to which he objects; that is (3) compelled

by some government action." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). It does not matter whether the speech at issue originated from a government actor (so-called "government speech"), because the government cannot require a private person to communicate a government message. *E.g.*, *Walker v. Texas Sons of Confederate Veterans*, 576 U.S. 200, 208 (2015).

In this matter, it is uncontestable that a sign posted on a person's residence is "speech" and, in this case, speech to which the person objects. *McClendon*, 22 F.4th at 1337 ("[Y]ard signs at one's own residence are a distinct and traditionally important medium of expression."). Therefore, the only dispute is whether the signs compel Registrants to speak. The answer is "yes."

In the seminal case of *Wooley v. Maynard*, the Supreme Court ruled that the First Amendment protects not only "the right to speak," but also "the right to refrain from speaking at all." 430 U.S. 705, 714 (1977). Later rulings clarify that the "right to refrain from speaking at all" encompasses both "compelled statements of opinion" and "compelled statements of 'fact'" because "either form of compulsion burdens protected speech." *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 797-

98 (1988). *Accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 & n.4 (10th Cir. 2004) (citing cases).

Relying upon *Wooley*, two courts have directly addressed sign posting mandates and ruled that they unconstitutionally compel speech. In *McClendon v. Long*, a local Sheriff's department placed signs on the front lawns of Registrants' homes that said "Stop – Warning! NO TRICK-OR-TREAT AT THIS ADDRESS! A COMMUNITY SAFETY MESSAGE FROM BUTTS COUNTY SHERIFF GARY LONG." *McClendon v. Long*, 22 F.4th 1330, 1333 (11th Cir. 2022). The Eleventh Circuit held that "this case is materially similar to *Wooley*" because the Sheriff's policy "required the use of private property as a stationary billboard for [the Sheriff's] own ideological message, 'for the express purpose that it be observed and read by the public.'" *Id*. at 1137, quoting *Wooley*, 430 U.S. at 713.

Likewise, in *Doe v. City of Simi Valley*, the United States District Court for the Central District of California enjoined an ordinance that, like the instant Statute, required Registrants to post a sign on their front doors declaring "No candy or treats at this residence." 2012 WL 12507598, at *1 (C.D. Cal. Oct. 29, 2012).

Here, Missouri's sign posting mandate should be enjoined for the same reason. That is because the Statute threatens all of the harms that the compelled speech doctrine exists to prevent, by compelling Plaintiff to communicate "at his residence," the following:

1. speech that identifies him as a Registrant, when he would rather remain silent;
2. speech that is otherwise false ("no candy or treats at this residence");
3. speech with which Plaintiff disagrees, and which forces him to take a position that he does not wish to take, that is, his non-participation in Halloween festivities;
4. speech that is against his interest;
5. speech that falsely implies that he and his residence pose a current threat to public safety; and
6. speech that invites a risk of harm to himself, his family, and his property.

Since Plaintiff and his family do not wish to communicate these messages "at their residence," as the Statute requires, the Statute's sign posting mandate violates the First Amendment.

Additional precedent in the Eighth Circuit supports Plaintiff. In *Gralike v. Cook*, a Missouri law directed that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" appear on ballots next to the names of candidates who did not adopt a particular position regarding term limits. *Gralike v. Cook*, 191 F.3d 911, 914 (8th Cir. 1999), *aff'd on other grounds Cook v. Gralike*, 531 U.S. 510 (2001). This Court ruled that this ballot label impermissibly compelled the candidates' speech by "forc[ing] candidates to speak in favor of term limits," and "did not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak." *Id.* at 917-18.

In addition, this Court ruled that ballot labels violated the First Amendment's proscription on compelling "factual" speech that impliedly advocates a government message or objective. That is, even if the candidates had, in fact, "disregarded voters' instruction on term limits," the ballot labels communicated "a negative impression" of the candidate and "impli[ed] that the candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress." *Id.* at 918. In affirming this Court's ruling on other

grounds, the Supreme Court agreed that the Missouri ballot label was a "Scarlet Letter." *Cook v. Gralike*, 531 U.S. at 525.

Likewise, in this matter, the purpose of the Halloween signs is to communicate to the public a "negative impression" about the occupants of the residence. That "impression" includes the factually false message that Registrants pose a current threat to children on Halloween. As in Gralike, the Statute accomplishes this purpose by forcing Registrants to "denunciate themselves" with a sign, on their own property.

D. Missouri Presents No Grounds for Staying the TRO

The District Court applied these precedents and issued a TRO in a reasoned opinion. Exh. A. Missouri makes three arguments in support of a stay, none of which are supported by precedent.

1. *The Compelled Speech Doctrine is Not Limited to Ideological Speech, nor is Plaintiff Seeking to Enjoin a Requirement to Report to the Government*

Missouri first attempts to argue that forcing persons to post government-prescribed warning signs on their private residences is not speech. This cannot be a serious argument, because it ignores voluminous precedent, and misrepresents the few cases on which it

relies. Furthermore, Missouri's argument, if adopted, would grievously restrict the First Amendment.

Citing *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995), Missouri argues that the compelled speech doctrine is limited to "the context of government compulsion to disseminate a particular political or ideological message." Mot. at 24. As explained above, that is not now nor has it ever been an accurate statement of the law. "[C]ases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-98. Further, "because '[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech,' laws that compel speech are normally considered 'content-based regulation[s] of speech' and therefore are subject to strict scrutiny.' *Riley*, 487 U.S. at 795."

Second, the case law relied upon by Missouri is inapposite because it upheld mandates that individuals disclose information privately ***to*** *the Government*, whereas Plaintiff challenges a mandate that he personally disclose information *to the public*. Although Missouri baldly

asserts that the two are "no different" (Mot. at 25,) the two scenarios are entirely different because the latter distinction is precisely what the compelled speech doctrine exists to prevent.

For example, Sindel involved an attorney's challenge to an IRS summons that required him "to provide *the government* with information which his clients have given him voluntarily." 53 F.3d at 878. Sindel held that this was not compelled speech because the summons did "not [compel the attorney to] *disseminate publicly* a message with which he disagrees." Ibid. Thus, Sindel supports Plaintiff because Plaintiff is being forced to disseminate publicly a message with which he disagrees.

Next, citing the Fifth Circuit's decision in *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014), Missouri also notes that the compelled speech doctrine does not apply to "state or federally mandated offender registration schemes." Mot. at 25. Missouri then argues that the sign posting mandate is merely part of a registration scheme. But, again, Missouri compares two things that are not the same. Arnold held that a requirement to report information *to the government* is not compelled speech because it is part of "essential

operations *of government*." Yet, Plaintiff does not assert claims against the "registry requirement," or any requirement to report *to the government*. Rather, Plaintiff asserts a narrow claim against having to display a government mandated sign *to the public* on his residence, which is "a classic example of compelled speech." *McClendon*, 22 F.4th at 1337.[2]

Finally, Missouri's attempts to distinguish *McClendon v. Long* miss the heart of the "classic" First Amendment problems that sign posting mandates create. That is, Missouri argues that its signs are, in the state's view, "minimally intrusive" and otherwise different in appearance, do not state the reason for the sign, and are not "placed by government agents." Mot. at 28-29. These distinctions do not obviate the constitutional problem, which is that *Plaintiff does not wish to post any sign*.

Second, Missouri argues that the Halloween signs "do not bear the imprimatur of government," but this statement is false. Mot. at 27.

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[2] Missouri notes that "The district court was presented with these authorities [i.e., *Sindel* and *Arnold*] but never addressed them." Mot. at 25. That is likely because they are inapposite and do not mean what Missouri claims they mean.

The verbiage of the signs is drafted by and mandated by government, and its association with the registry has been widely publicized since its enactment in 2008. Regardless, the compelled speech doctrine is not limited to speech that "bears the imprimatur of government." *See, e.g.*, *Riley*, 487 U.S. at 797-98 (state could not compel charities to disclose proportion of donated funds diverted to operations in order to "dispel misperceptions" among donors about use of funds). And it would be a frightening precedent indeed if the government could force a person to carry its preferred message on the grounds that *the government* did not consider the message to be factually false, innocuous, or otherwise objectionable.

2. *Posting Signs is "Classic" Compelled Speech, not Incidental Speech*

Missouri next argues that the sign posting mandate only "incidentally" burdens speech because "Missouri's sign-posting requirement is part of a statutory scheme that regulates conduct: preventing 'Halloween-related contact with children.'" Mot. at 30-31. This legerdemain effectively negates the First Amendment. A requirement to post a sign does not "incidentally" burden speech – its

entire purpose and effect is to "compel[] sex offenders to speak" through the sign. *Simi Valley*, 2012 WL 12507598, at *7. Further, there is no authority for the proposition that the government may compel speech by simply burying the operative mandate within a larger statutory scheme that regulates conduct.

Contrary to the Missouri argument, the Supreme Court's opinion in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) does not support sign posting mandates. *Rumsfeld* addresses occasions on which speech can be *prohibited* incident to the lawful regulation of conduct. In fact, *Rumsfeld* supports Plaintiff by distinguishing such prohibition from true compelled speech.

Missouri is correct that, in *Rumsfeld*, "the Court remarked that Congress can prohibit employers from discriminating on the basis of race, and therefore, Congress can *prohibit* employers from displaying a sign that reads 'White Applicants Only,'" because this burden on speech is incidental to a regulation of unlawful discriminatory conduct. Mot. at 31, citing *Ibid.* Yet, in the next sentence, the Supreme Court clarified that this authority

> *is simply not the same* as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the

> motto 'Live Free or Die, and it trivializes the freedom protected in *Barnette* and Wooley to suggest that it is.

Rumsfeld, 547 U.S. at 62. In other words, the government's authority to prevent speech that advertises unlawful conduct "*is not the same*" as forcing a private person to speak against his or her will.

Here, Missouri is not *preventing* Registrants from speaking, or otherwise *preventing* speech that is incidental to a lawful regulation of conduct. Instead, Missouri is *forcing* Registrants to speak against their will, which the Eleventh Circuit found is akin to "forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *McClendon*, 22 F.4th at 1333, citing Wooley, 430 U.S. at 714. Thus, Missouri's posting mandate unequivocally compels speech.

3. *The Sign Posting Mandate Is Not Narrowly Tailored Because Other Restrictions Serve the Same Interest*

Finally, the District Court correctly found that the sign posting mandate fails strict scrutiny because it "is not narrowly drawn to accomplish [the statute's] ends," or the "least restrictive means to serve those interests." Exh. A at 9. Specifically, citing Eighth Circuit precedent, the District Found that

> *Defendants do not cite any evidence that the sign posting requirement furthers its stated interests nor do they show it is the least restrictive alternative to serve those interests*. See *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013) (reversing denial of motion for preliminary injunction because plaintiff was likely to succeed on the merits of his First Amendment claim because restriction not narrowly tailored and government "presented little evidence" that the restriction furthered stated interests); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (restriction not narrowly tailored because government "has not presented sufficient evidence" that the Ordinance is the least restrictive means to further stated interests and "no evidence that enforcement of these existing provisions is insufficient").

Exh. A at 9-10, emphasis added.

Nothing has changed: Missouri has provided no evidence that its sign posting mandate is "necessary." Instead of providing the "evidence" required to withstand strict scrutiny, Missouri makes arguments that are not responsive to the strict scrutiny standard.[3]

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[3] It is doubtful that such evidence could be found. Experts such as the Association for the Treatment of Sexual Abusers (ATSA) confirm that Halloween restrictions are grounded in "myth" and "do not make children safer." See Exh. B, ATSA, *Halloween and sexual abuse prevention: The mythical "Halloween effect"* (Oct. 4, 2019), at https://blog.atsa.com/2019/10/halloween-and-sexual-abuse-prevention.html

First, Missouri claims that "the statute gives considerable discretion to the sex offender to choose how the sign appears and is displayed." Mot. at 38. This supposed "discretion" does not speak to the relevant issue, which is whether a sign posting mandate that categorically applies to all Registrants is narrowly tailored. Of course, a law that applies in blanket fashion to every person in a group cannot be "narrowly tailored." *McClendon*, 22 F.4th at 1338.

Second, Missouri notes that the sign posting mandate is part of a broader regulatory statutory scheme, but does not explain how this makes the sign posting mandate narrowly tailored. Indeed, as the District Court correctly reasoned, the myriad of other restrictions on Registrants' conduct on Halloween ensures that the sign posting mandate is neither necessary nor the least restrictive means because those restrictions accomplish the same protective goal. This reasoning is not "preposterous," as Missouri contends (Exh. A at 40). Instead, it is basic first amendment analysis. *Survivors Network*, 779 F.3d at 794 (strict scrutiny not satisfied where other, content-neutral provisions of act advance purported purpose of speech regulation).

V. A "History and Tradition" of Enjoining Sign Posting Mandates is Not Required for a TRO

Finally, Missouri concludes with an appeal to "history and tradition" of duties to warn in tort law, but impliedly acknowledges that this is not part of or relevant to First Amendment strict scrutiny analysis. Mot. at 3. Missouri's argument is merely an attempt to sidestep the controlling strict scrutiny test that Missouri cannot satisfy.

VI. Conclusion

For all of these reasons, Plaintiff respectfully requests that the Court dismiss Missouri's Motion and allow the District Court's temporary restraining order against enforcement of MO Rev. Stat. § 589.426(1)(3) on October 31, 2023 to stand.

Dated: October 30, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that, Pursuant to Fed. R. App. P. 27(d)(2) because this document contains 5,128 words, excluding those parts exempted by Fed. R. App. P. 32(f).

Dated: October 30, 2023

/s/ *Janice M. Bellucci*
Attorney for Plaintiff-Appellee
Thomas L. Sanderson

PROOF OF SERVICE

Pursuant to Fed. R. App. P. 25(d), this document was filed on October 30, 2023, using the Court's CM/ECF system, and all counsel were served thereby.

Dated: October 30, 2023

/s/ *Janice M. Bellucci*
Attorney for Plaintiff-Appellee
Thomas L. Sanderson

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS L. SANDERSON, Plaintiff, v. ANDREW BAILEY, *in his official capacity as Attorney General of the State of Missouri, et al.,* Defendants.	)	Case No. 4:23CV1242 JAR

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for Temporary Restraining Order [ECF No. 7]. Defendants have filed their responses in opposition to the Motion. The parties have not requested a hearing, and the Court finds it unnecessary to hold one. The Court has thoroughly reviewed the pleadings, exhibits, and memoranda of law submitted by the respective parties, and concludes Plaintiff's Motion is well-taken. For the reasons set forth below, the Court will grant Plaintiff's Motion.

Background

On October 3, 2023, Plaintiff Thomas L. Sanderson brought this action for declaratory and injunctive relief against Defendants Andrew Bailey, Attorney General of the State of Missouri, and James Hudanick, Chief of Police of the City of Hazelwood, Missouri,[1] alleging that Missouri Revised Statute Section 589.426.1(3), which requires any person required to register as a sexual offender under Sections 589.400 to 589.425 to post a sign at his or her

[1] The allegations against the individual defendants are brought in their respective official capacity.

residence on October thirty-first of each year stating, "No candy or treats at this residence," compels him to speak in violation of the First Amendment to the United States Constitution.

Facts[2]

In 2006, Plaintiff was convicted of an offense requiring his registration as a sex offender with the chief law enforcement official in his county of residence under Missouri law. *See* Mo. Rev. Stat. § 589.400.2. Plaintiff is a resident of the City of Hazelwood, Missouri, which is located in St. Louis County, Missouri.

Effective August 28, 2008, the State of Missouri enacted Missouri Revised Statute Section 589.426 (the "Halloween Statute"), which imposes the following restrictions on conduct for any person required to register as a sexual offender under sections 589.400 to 589.425 on October thirty-first (Halloween) of each year:

> (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.

Mo. Rev. Stat. § 589.426.1.

The criminal penalty imposed for a violation of any of the Statute's provisions is a class A misdemeanor. *Id.* § 589.426.2.

[2] The Court draws the facts in this section from Plaintiff's Complaint, Plaintiff's Memorandum in support of the instant motion, and Defendants' Response in opposition. The merits of the events described between 2006 and 2022 are not at issue here and are summarized for background purposes only.

For background purposes only, at some time prior to October 31, 2008, Plaintiff alleges that he asked a registration official at the St. Louis County Police Department if the Halloween Statute applied to him. The registration official confirmed that the Statute did not apply to Plaintiff because he was convicted prior to its effective date. Plaintiff continued to participate in Halloween traditions, such as handing out candy to children outside, decorating his residence and keeping his lights on. In October 2012, Hazelwood Department Police Officers talked to Plaintiff at his residence about violating the Halloween Statute. Plaintiff told the officers that he confirmed the restrictions pursuant to the Halloween Statute did not apply to him, and he continued to participate in Halloween traditions without any law enforcement resistance until October 2022. On October 31, 2022, after receiving complaints about Plaintiff's residence,[3] Hazelwood Department Police Officers informed Plaintiff that he was in violation of the Halloween Statute for failing to comply with its restrictions for sex offenders. Plaintiff was later charged and pleaded guilty to violating the Halloween Statute.

On October 11, 2023, Plaintiff moved for a Temporary Restraining Order, pursuant to Federal Rule of Civil Procedure 65, to prevent Defendants from enforcing Section 589.426.1(3) of the Halloween Statute that requires him to post a sign at his residence stating, "No candy or treats at this residence." The Court will refer to this as the "sign posting requirement." Plaintiff requests this relief not just for himself, but for all sex offenders that the sign posting requirement applies to in Missouri. Plaintiff does not challenge the other restrictions in the Halloween Statute or request the Court to determine if the Halloween Statute should be retroactively applied to him because he was convicted prior to its effective date. For purposes of this Order, the Court

[3] It is unclear if Plaintiff owns this residence or just resides there. However, that is not at issue here.

assumes the Halloween Statute applies retroactively to Plaintiff since the parties have not raised that issue. Further, it is important to note that Plaintiff cannot collaterally attack his state conviction for violating the Halloween Statute in this Court.

Thus, the only issue for this Court to determine is if a temporary restraining order is appropriate based on if the sign posting requirement under Section 589.426.1(3) of the Halloween Statute[4] that requires applicable sex offenders, like Plaintiff, to post a sign at their residence on October thirty-first of each year stating, "No candy or treats at this residence," compels them to speak in violation of the First Amendment to the United States Constitution.

Legal Standard

In deciding whether to grant or deny a motion for preliminary injunction, the Court must consider four factors: (1) the likelihood the moving party will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other parties; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981). The moving party bears the burden of establishing the need for a preliminary injunction. *Chlorine Institute, Inc. v. Soo Line R.R.,* 792 F.3d 903, 914 (8th Cir. 2015). The same factors govern a request for a temporary restraining order. *See Roberts v. Davis*, 2011 WL 6217937, at *1 (E.D. Mo. Dec. 14, 2011). “No one factor is dispositive of a request for injunction; the Court considers all the factors and decides whether ‘on balance, they weigh towards granting the injunction.’” *Braun v. Earls*, 2012 WL 4058073, at *1 (E.D. Mo. Sept. 14, 2012) (quoting *Baker Elec. Co-Op, Inc. v. Chaske*, 28 F.3d 1466, 1472

[4] The Court finds that the Halloween Statute comprises multiple, alternative versions of the crime, and is therefore “divisible.” *Descamps v. United States,* 570 U.S. 254, 262 (2013). The consideration of Section 589.426.1(3) does not affect the validity of other sections of the statute.

(8th Cir. 1994)). While "no single factor is determinative," *Dataphase,* 640 F.2d at 113, "the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (citation omitted). "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase,* 640 F.2d at 113.

Discussion

Likelihood of Success on the Merits

The Court will begin its analysis by addressing Plaintiff's likelihood of success on the merits of his compelled speech challenge.

Compelled Speech

Defendants argue that Plaintiff is not likely to prevail on the merits because the Halloween Statute's sign posting requirement is not compelled speech since it is not related to a political or ideological message, is required to preserve an orderly society, and is speech incidental to conduct of being a sex offender. Plaintiff contends that the sign posting requirement compels him speak a viewpoint in written words directed to the public that he does not adhere to in violation of the First Amendment.

First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977); *see also, Hurley v. Irish–American Gay, Lesbian, & Bisexual Grp.,* 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide

what not to say") (internal quotation marks omitted). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Wooley*, 430 U.S. at 714 (internal quotation marks omitted); *see also, W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). The compelled speech doctrine applies to ideological speech and purely factual, non-commercial speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–98 (1988); *Nat'l Inst. of Family and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372–73 (2018). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," laws that compel speech are normally considered "content-based regulation[s] of speech" and therefore are subject to strict scrutiny. *Riley,* 487 U.S. at 795.

Two courts in other circuits have addressed similar Halloween sign posting issues for sex offenders, and both have ruled that the signs unconstitutionally compel speech in violation of the First Amendment. A district court in California issued a temporary restraining order enjoining an ordinance that, like the Halloween Statute here, required sex offenders to post a sign on their front doors declaring "No candy or treats at this residence." *Doe v. City of Simi Valley*, 2012 WL 12507598, at *1 (C.D. Cal. Oct. 29, 2012). The District Court in *Doe* found Plaintiffs clearly showed that they were likely to succeed on the merits of their claim that "the sign requirement—a form of compelled speech—runs afoul of the free speech guarantee of the First Amendment." *Id.* at *8.

The Eleventh Circuit held in *McClendon v. Long*, that a local sheriff's department signs that law enforcement placed in the front of registered sex offenders' homes that said "Stop –

Warning! NO TRICK-OR-TREAT AT THIS ADDRESS! A COMMUNITY SAFETY MESSAGE FROM BUTTS COUNTY SHERIFF GARY LONG" were a "classic example of compelled speech." 22 F.4th 1330, 1337 (11th Cir. 2022). The *McClendon* Court, like Plaintiff does in this case, relied on the Supreme Court's holding in *Wooley*, where the Court invalidated the conviction of a New Hampshire couple who covered the state motto "Live Free or Die" on their license plate, concluding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714. "Since *Wooley,* the Supreme Court has reaffirmed the prohibition on compelled speech and refined it to apply to cases in which the government orders certain types of speech or speech about certain topics." *Gralike v. Cook*, 191 F.3d 911, 917 (8th Cir. 1999), *aff'd*, 531 U.S. 510 (2001). *See, e.g., Riley,* 487 U.S. at 797–98 (invalidating a requirement that professional fund-raisers disclose to potential donors the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity); *Hurley,* 515 U.S. at 573 (the "general rule[ ] that the speaker has the right to tailor the speech[ ] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact"); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n,* 475 U.S. 1, 14–16 (1986) ("[T]he State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold. . . . [T]he choice to speak includes within it the choice of what not to say.").

The Halloween Statute's sign posting requirement, like the State motto on the New Hampshire license plate in *Wooley*, is government speech. Defendants require the use of private property to reflect their own message "for the express purpose that it be observed and read by the public," restricting sex offenders of their freedom to speak in their own words, or choice to not

speak at all. *Wooley*, 430 U.S. at 713. The Court finds that the sign posting requirement of the Halloween Statute mandating that sex offenders post a sign that says "No candy or treats at this residence" on Halloween is compelled speech.

Application of Strict Scrutiny

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015). As a content-based restriction, the Halloween Statute's sign posting requirement must satisfy strict scrutiny. *See id*. "Content-based [speech] regulations are presumptively invalid." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). Defendants thus bear the burden of rebutting the presumption of invalidity. *United States v. Playboy Ent. Grp*., *Inc.,* 529 U.S. 803, 817 (2000). Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818. Defendants can, nonetheless, rebut the presumption if it is able to show that the ordinance is "narrowly tailored to promote a compelling Government interest," such that the ordinance is the "least restrictive alternative" to serve the government's purpose. *Id.* at 813; *see also, Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004). If the restriction is not narrowly tailored to achieve a compelling interest, it is an "unconstitutional restraint[ ] on free speech." *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1409 (8th Cir. 1995).

Defendants claim that they can satisfy this strict scrutiny standard, arguing that the sign posting requirement of the Halloween Statute is narrowly tailored to achieve a compelling government interest because it is part of Missouri's broader statutory scheme to protect children and other vulnerable victims from the recidivist predilections of sexual offenders.

It has been recognized that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile,* 536 U.S. 24, 32 (2002). Statistics show that when "convicted sex offenders reenter

society they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Id.* at 32–33. "[E]very. . .State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders." *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 4 (2003).

There is no doubt that protecting children is a compelling government interest. That is undisputed by the parties here. It is also undisputed that on Halloween evening, there is a well-known tradition in this country that children of all ages dress up in costumes going house-to-house saying "trick-or-treat" in the hopes of receiving candy from strangers. It is an equally well-known tradition that if a house does not have its exterior lights on, that means the owners are not handing out candy for the children trick-or-treating. Although Defendants do not provide any evidence that sexual offenders are more likely to be re-arrested for a sexual offense on Halloween, "it is common sense, however, that young 'trick-or-treaters' are indeed vulnerable to child predators on Halloween." *Doe*, 2012 WL 12507598, at *8. Because of these reasons, the Court fully recognizes that Defendants have a compelling interest in restricting *certain* conduct of sexual offenders on Halloween that satisfies the strict scrutiny standard.

However, Defendants proffered interests as it relates solely to the Halloween Statute's sign posting requirement cannot withstand strict scrutiny because it is not narrowly drawn to accomplish those ends. Defendants do not cite any evidence that the sign posting requirement furthers its stated interests nor do they show it is the least restrictive alternative to serve those interests. *See Johnson v. Minneapolis Park & Recreation Bd.,* 729 F.3d 1094, 1100 (8th Cir. 2013) (reversing denial of motion for preliminary injunction because plaintiff was likely to succeed on the merits of his First Amendment claim because restriction not narrowly tailored and government "presented little evidence" that the restriction furthered stated interests); *Whitton*, 54

F.3d at 1408 (restriction not narrowly tailored because government "has not presented sufficient evidence" that the Ordinance is the least restrictive means to further stated interests and "no evidence that enforcement of these existing provisions is insufficient").

First, a sign saying "No candy or treats at this residence" does not clarify the "danger" that the statute serves to mitigate. Defendants even admit this in their response, stating the sign is less likely to cause suspicion compared to the sign in *McClendon* because it does not make clear why the house does not have any candy. More significantly, the other restrictions mandated in the Halloween Statute serve to substantially further the aims of Defendants' stated interests. The first section of the restricted conduct under the Halloween Statute is that sex offenders must "[a]void all Halloween-related contact with children." Mo. Rev. Stat. § 589.426.1(1). The Halloween Statute goes on to require that sex offenders must "[r]emain 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." *Id.* § 589.426.1(2). 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. The Halloween Statute's restrictions do not end there. Sex offenders must also "[l]eave all outside residential lighting off during the evening hours after 5 p.m." *Id.* § 589.426.1(4). As mentioned above, it is well-known that when a residence does not have its lights on, that is a signal to children and other Halloween participants that the residents are not handing out candy. These three provisions of the Halloween Statute are powerful tools to not only prevent sex offenders from being in contact with children outside trick-or-treating, but also from the children going on the properties of sex offenders. Additionally, sexual offenders subject to this statute are required to register their status to law

enforcement, which is readily available to the public. If a citizen was concerned about which residences may have a sexual offender residing there, that information is readily available to the public.

Defendants raise concerning behaviors of this particular Plaintiff, but that is not at issue here. If Plaintiff continues that referenced conduct, he can be charged and prosecuted. The sign posting requirement adds nothing. The Court also does not discount the importance of Defendants' proffered purpose for protecting children from sex offenders, but again, is unconvinced that the sign posting requirement is narrowly tailored to achieve Defendants' compelling interest *in the least restrictive manner*. "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listener." *Riley,* 487 U.S. at 2675.

Because the sign posting requirement of the Halloween Statute is not narrowly tailored to achieve a compelling government interest, and there are other highly effective alternatives to achieve Defendants' interest in protecting children from sex offenders on Halloween, the Court finds it fails strict scrutiny. *See Reed*, 576 U.S. at 173 (invalidating law because Government "has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest").

Threat of Irreparable Harm

In cases implicating the First Amendment, courts normally assume irreparable injury because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713, 91 (1971)). The Eighth Circuit has adopted this approach. *See Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999).

Defendants argue that Plaintiff has unreasonably delayed in bringing this suit, which cuts against a threat of irreparable harm to him, and such delay is grounds enough for the Court to deny the instant Motion. Although it is true that Plaintiff is filing his request nearly a year since his arrest, the threat of the irreparable harm has not occurred since then and will not be at risk to happen until this Halloween.

As discussed above, Plaintiff has made a clear showing that he is likely to succeed on the merits of his claim that the sign posting requirement, a form of compelled speech, runs afoul of the free speech guarantee of the First Amendment. Therefore, the Court finds Plaintiff, and other individuals similarly situated to him, are likely to suffer irreparable harm this year on Halloween absent the issuance of a temporary restraining order.

Balance of Harm and Public Interest

Plaintiff must also establish that the threatened injury to him outweighs the harm a preliminary injunction may cause to Defendants, and that the public interest would be served by the injunction. *NTD I, LLC v. Alliant Asset Mgmt. Co., LLC*, 337 F. Supp. 3d 877, 889-90 (E.D. Mo. 2018); *Noodles Dev., LP v. Ninth St. Partners, LLP*, 507 F. Supp. 2d 1030, 1038 (E.D. Mo. 2007).

Indeed, as stated above, sex offenders, like Plaintiff, will be compelled to speak in violation of the First Amendment on Halloween and have demonstrated irreparable harm. Furthermore, Defendants have not shown that the Halloween Statute's sign posting requirement has or will increase public safety. The balance of harm weighs in favor of Plaintiff. Defendants' interest in ensuring safety for children and protecting them from contact with sex offenders on Halloween is satisfied by the remaining restrictions in the Halloween Statute that disallows sex offenders from leaving their residences on Halloween evening, turning their outside lights on,

and prohibiting all Halloween conduct with children. Thus, the Court finds the considerations of balance between harm and injury and of the public interests favors Plaintiff such that the Court must intervene to preserve the status quo until it can determine the merits. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (finding that "it is always in the public interest to protect constitutional rights" and "[t]he balance of equities . . . generally favors the constitutionally-protected freedom of expression").

Bond

Plaintiff requests that no should be required because Defendants will not suffer any damages from the issues of a temporary restraining order. Defendants do not respond to the issue of bond in their response.

When issuing a preliminary injunction, the Court must require the moving party to provide a bond or security. Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction ... only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."). A district court has "much discretion" in establishing a bond but must not "abuse[ ] that discretion due to some improper purpose," must "require an adequate bond," and must "make the necessary findings in support of its determinations." *Hill v. Xyquad,* Inc., 939 F.2d 627, 632 (8th Cir. 1991). "Courts in this circuit have almost always required a bond before issuing a preliminary injunction, but exceptions have been made where the defendant has not objected to the failure to require a bond or where the damages resulting from a wrongful issuance of an injunction have not been shown." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Engineers*, 826 F.3d 1030, 1043 (8th Cir. 2016).

The Court will waive the bond requirement here because Defendants have not objected to Plaintiff's request that no bond is required based on the circumstances here, and Defendants as law enforcement agencies will suffer no monetary damages in complying with this Order based on the public interest in preserving guarantee under the First Amendment to the United States Constitution. *See id.*; *see also, Brooks v. Francis Howell School District,* 599 F.Supp.3d 795, 806 (E.D. Mo. April 21, 2022) ("Based on the Court's evaluation of the public interest, the potential chilling effect of requiring a bond, and the fact that Defendants have not shown that the wrongful issuance of an injunction would result in damages, the Court waives the bond requirement."); *ARC of Iowa v. Reynolds,* 559 F.Supp.3d 861, 881 (S.D. Iowa, Sept. 13, 2021) (waiving bond requirement under Rule 65(c) because no monetary harm to the defendant).

Conclusion

For these reasons, the Court concludes that Plaintiff has met his burden of establishing that a Temporary Restraining Order is warranted. Further, because the Court has found a likelihood of success on the merits that Missouri Revised Statute Section 589.426.1(3) is unconstitutional, this Order applies to any person affected, not just Plaintiff, and such relief will not impose any additional burden on Defendants. *See, e.g., Ashcroft,* 542 U.S. at 671 (finding broad preliminary relief is often appropriate under current law where, as here, a Plaintiff brings a First Amendment challenge).

Lastly, the Court will set a preliminary injunction hearing because this temporary restraining order is effective for fourteen days after this Order's time of entry pursuant to Federal Rule of Civil Procedure 65(b)(2). The temporary restraining order may resolve the issue for this Halloween, but does not for those thereafter.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Thomas L. Sanderson's Motion for Temporary Restraining Order [ECF No. 7] is **GRANTED**, and the State of Missouri, by and through, Defendant Andrew Bailey, Attorney General of the State of Missouri, and James Hudanick, Chief of Police of the City of Hazelwood, Missouri, as well as their officers, agents, employees, and attorneys, are temporarily enjoined from enforcing Missouri Revised Statute Section 589.426.1(3), requiring any person required to register as a sexual offender under sections 589.400 to 589.425 to post a sign at his or her residence stating, "No candy or treats at this residence" on October thirty-first of this year. This Temporary Restraining Order only relates to the enforcement of Section 589.426.1(3) of the Halloween Statute and does not affect the validity of its other sections.

IT IS FURTHER ORDERED that a telephone status conference is set for **November 3, 2023, at 11:00 A.M.** Counsel are directed to call the conference line toll free at **1-877-810-9415**. The access code to enter the telephone conference is: **7519116**.

IT IS FURTHER ORDERED that a preliminary injunction hearing is set for **November 9, 2023, at 10:30 A.M. in Courtroom 12N.**

Dated this 27th day of October, 2023.

JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

EXHIBIT B

Friday, October 4, 2019

Halloween and sexual abuse prevention: The mythical “Halloween effect”

A statement from the Association for the Treatment of Sexual Abusers.

As October arrives and families begin preparing for Halloween, it is always a priority to ensure children’s safety during this holiday. It is important to learn the facts and know the risks to your child during this festive time. A heightened risk of being sexually abused is NOT one of the dangers children face at Halloween.

The simple fact is that there are no significant increases in sex crimes on or around Halloween. There is no “Halloween effect.” There is no change in the rate of sexual crimes by non-family members during Halloween. That was true both before and after communities enacted laws to restrict the activities of registrants during Halloween.

The crimes that do increase around Halloween are vandalism and property destruction, as well as theft, assault, and burglary. In addition, according to the Centers for Disease Control, children are four times more likely to be killed by a pedestrian/motor-vehicle accident on Halloween than on any other day of the year.

Fully 93% of sexual assaults on children are perpetrated by someone known to, and trusted by, the child and the child’s family. But due to the myths regarding child sexual abuse that focus on “stranger danger,” communities and lawmakers often endorse policies that do little to prevent sexual abuse and instead unnecessarily stretch limited law enforcement resources.

Jurisdictions that ban individuals on sex offender registries from participating in any Halloween activities, require registrants to post signs in their yards during Halloween, or round up registrants for the duration of trick-or-treating do not make children safer. Instead, these approaches create a false sense of safety while using law enforcement resources that could be better spent protecting children against the higher risk they do face during Halloween – injury or death from motor vehicles.

Child sexual abuse is a serious public health issue that faces all communities. Although the prevalence of child sexual abuse can be difficult to determine due to under-reporting, researchers estimate that one in four girls and one in six boys will be victims of sexual abuse before age 18.

For concerned parents, the best way to protect children from sexual abuse is to know the facts about sexual offending and take precautions based on facts, not fears. Parents can visit www.atsa.com to learn more about sexual abuse and prevention.

For more research and analysis on this topic please see a previous blog by Jill Levenson called “Halloween & Sex Crime: Myth vs. Reality” – Kieran

SAJRT Blog at 5:46 AM

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