Nos. 24-3120, 24-3204
Civil

In the United States Court of Appeals
For the Eighth Circuit

THOMAS L. SANDERSON,
PLAINTIFF-APPELLEE

v.

ANDREW BAILEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSOURI, AND JAMES HUDANICK, IN HIS OFFICIAL CAPACITY AS THE POLICE CHIEF OF THE CITY OF HAZELWOOD, MISSOURI,
DEFENDANTS-APPELLANTS

Appeal from the U.S. District Court for the Eastern District of Missouri,
Hon. John A. Ross (4:23-cv-01242-JAR)

BRIEF OF APPELLEE THOMAS L. SANDERSON

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SUMMARY OF THE CASE

The state of Missouri believes that every registered sex offender threatens the safety of trick-or-treaters on Halloween, so Missouri state law prohibits them from "all Halloween-related contact with children." (Mo. Rev. Stat. § 589.426.1) The issue in this appeal is whether Missouri can *also* force registrants to publicly adopt and promote Missouri's belief by posting a public-facing sign on their own homes – signs that Missouri equates with "warning labels."

As the District Court below ruled, the answer must be "no." Because the signs are unquestionably "speech" protected by the First Amendment's compelled speech doctrine, Missouri's Sign Requirement is "presumptively invalid" and subject to strict scrutiny. The signs cannot survive strict scrutiny because they are not "necessary" or "narrowly tailored": the other provisions of Mo. Rev. Stat. § 589.426.1 preclude every conceivable form of participation in Halloween, and are thus less restrictive means of serving the state's interest in protecting the public on Halloween and after. Missouri's arguments on appeal cannot and do not overcome this dispositive fact. Appellee Thomas Sanderson requests 15 minutes for oral argument.

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INTRODUCTION

This Court has recognized "the special significance of the right to speak from one's own home." *Willson v. City of Bel-Nor*, 924 F.3d 995, 1004 (8th Cir. 2019). Yet, in this appeal, the State of Missouri seeks to establish that public-facing signage at private residences is not "speech" protected under to the First Amendment. Missouri maintains this position even while admitting that the signs are both communicative and self-denunciatory, in that they proclaim the government's "warning" that the occupant's home constitutes an "inherently dangerous condition." Missouri's Brief ("Mo. Br.") 55-56.

In the ruling on appeal, the District Court ruled that the Missouri Sign Requirement fails strict scrutiny for several reasons. App.2234-38, R.Doc.70, at 16-20. "Most significantly," the signs *cannot* be "narrowly tailored," or the "least restrictive means," of protecting children on Halloween, as strict scrutiny requires, because

> the other [statutory] restrictions . . . adequately address all of Defendants' interests . . . .[by] prevent[ing] sex offenders from being in contact with children outside trick-or-treating and also deter children from venturing onto the properties of sex offenders.

App.2236, R.Doc.70, at 18. This fact is fatal to the Sign Requirement as a matter of law, and none of Missouri's arguments on appeal overcome

this basic application of strict scrutiny in the compelled speech context. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 490-92 (2014) (provision of statute restricting speech failed scrutiny where statute "itself contains a separate provision . . . unchallenged by petitioners . . . that prohibits much of th[e same] conduct, as did other "generic criminal statutes"); *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").

STATEMENT OF CASE

I. SANDERSON'S BACKGROUND

Beginning in approximately 2002, Plaintiff Thomas Sanderson and his family hosted large outdoor Halloween displays at their home in Hazelwood, Missouri. Tr. 17:4-15. The displays were lavish, including numerous animated figures and creatures, lights, music, fog machines, and other décor. Tr. 17:16-18:1. Over time, the Sanderson family's display became a neighborhood tradition, with hundreds of neighbors visiting each Halloween. Tr. 20:4-10.

In 2006, Sanderson was convicted of felony sodomy, an offense requiring sex offender registration. App.0095, Tr. 15:21-25. The offense occurred more than four years earlier, before Sanderson's 2002 move to Hazelwood, when Sanderson digitally penetrated a 16-year-old family friend during a sleepover. App.0791-95; Tr. 16:4-6, 27:18-28:5. Sanderson did not "rape a minor," as Missouri repeatedly and falsely contends. Notably, Sanderson's offense had no connection to Halloween festivities, and Sanderson has never been accused of sexual misconduct in the 22 years since that offense.

II. UNCERTAINTY CONCERNING THE STATUTE'S APPLICATION TO SANDERSON

Two years after Sanderson's conviction, effective August 28, 2008, the State of Missouri enacted the Statute at issue in this case, which provides in full:

> 589.426. Halloween, restrictions on conduct — violations, penalty. —
>
> 1. Any person required to register as a sexual offender under sections 589.400 to 589.425 shall be required on October thirty-first of each year to:
>
> (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.

2. 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 (2022). In this brief, the entire statute shall be referred to as "the Statute," while the discrete provision requiring the posting of a sign, subd. 1(3), shall be referred to as the "Sign Requirement." The Sign Requirement is the only provision of the Statute challenged in this action. App.0023-28, R.Doc.1, at 11-34.

There was, and remains, confusion in Missouri regarding whether the Statute applies retroactively to persons convicted before its enactment, such as Sanderson. In 2010, the Missouri Supreme Court ruled that the Statute could not be applied retroactively. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 60, 66 (Mo. 2010) ("As applied to Raynor [a party convicted of a sex offense in 1990], the Halloween requirements of section 589.426 are unconstitutional.") However, this ruling was called into doubt three years later by *State v.*

Wade, 421 S.W.3d 429, 435 (Mo. 2013), and the issue appears to remain unsettled.

In light of this confusion, prior to Halloween 2008, Sanderson visited the St. Louis County Police Department, the agency at which he registers, and asked whether the Statute applied to him. Tr. 18:21-19:18. The registration official told Sanderson he "was grandfathered in" and not subject to it. *Ibid*. Sanderson testified that he confirmed the same with the Hazelwood Police Department, who "said that they will put in my file that I'm getting grandfathered in." Tr. 19:19-20:6.

With these assurances, Sanderson continued to decorate his residence and participate in Halloween between 2008 and 2022. Tr. 20:4-9. Sanderson never received, at any time, written or verbal notice that the Statute applied to him. Tr: 21:25-22:10.[1]

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[1] Missouri avers "Sanderson admitted at trial that he violated the Halloween statute for over a decade" (Mo. Br. 19), but that is not accurate. Missouri did not dispute Sanderson's assurances that he was "grandfathered in" due to being convicted prior to the Statute's enactment, which is consistent with the *F.R.* decision quoted above.

III. THE STATUTE'S ENFORCEMENT AGAINST SANDERSON 14 YEARS AFTER ITS ENACTMENT

Suddenly, on or about October 31, 2022, while his residence was decorated as it had been for approximately 20 Halloweens, five marked vehicles from the Hazelwood Police Department descended upon the Sanderson residence with sirens. Tr. 22:11-22. Several Hazelwood Police officers entered Sanderson's property from all sides. Officers declared Sanderson in violation of the Statute that he had twice before been told did not apply to him. App.0516, 0524-25. Sanderson was then charged with and convicted of one misdemeanor count of violating the Statute, including the Sign Requirement. App.0529-31.

IV. SANDERSON'S COMPELLED SPEECH CHALLENGE TO THE SIGN POSTING REQUIREMENT IN THE DISTRICT COURT

On October 3, 2023, Sanderson filed this action seeking a declaration that the Sign Requirement of the Statute unconstitutionally compels speech in violation of the First Amendment. App.0013, R.Doc.1. On October 27, 2023, the District Court issued a statewide Temporary Restraining Order against the Sign Requirement. App.0148, R.Doc.23. Missouri filed an emergency motion to stay the same, which this Court denied on October 30, 2023. App.0203, R.Doc.34.

This action came to bench trial on June 20, 2024. R.Doc.55; App.2220, R.Doc.70, at 2. Missouri did not contest that Sanderson met the elements of a compelled speech claim, which are "(1) speech; (2) to which [the Plaintiff] objects; that is (3) compelled by some government action." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). Instead, the primary issue at trial was whether Missouri met its burden to prove that the signs satisfy the "strict scrutiny test," *i.e.*, that "the law . . . advances a compelling state interest and is narrowly tailored to serve that interest." *Republican Party of Minn. V. White*, 416 F.3d 738, 749 (8th Cir. 2005). Further,

> A narrowly tailored regulation is one that actually advances the state's interest (*is necessary*), does not sweep too broadly (*is not overinclusive*), does not leave significant influences bearing on the interest unregulated (*is not underinclusive*), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (*is the least-restrictive alternative*).

Id. at 752, emphasis added. As to the evidence presented at trial on the issue of narrow tailoring, Missouri's Brief misrepresents the record in three significant respects, discussed immediately below:

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A. Missouri Own Law Enforcement Witnesses Admitted that the Signs are Unnecessary Because they are Redundant

First, Missouri repeatedly claims that the Sign Requirement "is necessary because it enables officers to ensure that an offender is in compliance with the entire Halloween statute." Mo. Br. 29. In particular, Missouri asserts that "the unrebutted testimony of Sergeant Jason Heffernan, Sergeant Penny Cole, and Captain Danielle Heil [] substantiated the unique and necessary role fulfilled by the sign-posting requirement." Mr. Br. 64. Conspicuously, Missouri never once quotes testimony from these individuals, because it was never offered.

As a preliminary matter, Missouri's argument makes no sense: The presence of a sign does not relieve officers of the need to confirm whether exterior lights are off, the décor is absent, and the registrant is inside. Notably, Missouri's above-named law enforcement witnesses admitted the same:

Sargent Penny Cole opined that the sign "makes it easy for us . . . . [because] [w]e are able to drive by, not get out of our vehicles, see that the light is off, there is a sign on the door, and we carry on[,] [a]s opposed to having in-person contact." Tr. 137:9-21 But Sargent Cole

agreed with the District Court that the signs are not "necessary" to ensure compliance with the Statute:

> THE COURT: . . . I'm at a little bit of a loss why, whether the Sign Posting is required or isn't required, necessitates you getting out of your car, the officers going by. I mean, you can drive by and see if the lights are on the house without getting out of the car. *The Sign Posting would just be one additional thing, but it doesn't – the fact that a sign isn't posted isn't going to make it more necessary for an officer to get out of their car; is that right?*
>
> THE WITNESS: That's correct, your Honor. The sign simply allows us to have that extra provision that we are checking the correct home.

Tr. 143:8-19.

Sargent Jason Heffernan went further by admitting "if you don't see it [the sign] from the driveway, that doesn't necessarily mean they are in violation of that Sign Posting requirement[.]" Tr. 116:21-25. That is because the signs can be "just a little itty-bitty like Post-it." Tr. 102:10-16. Sargent Heffernan volunteered that "the Statute kind of failed us, because it doesn't define what size a sign is," and officers must still *"[verify] everything else is done*." Tr. 102:4-9.

Finally, Captain Daniel Heil offered *no* testimony regarding the signs' necessity, saying only "in my opinion . . . it is just beneficial for

families, for parents, for them to have a clear understanding that there is a potential danger at that location." Tr. 207:23-208:3.

In short, Missouri failed to present evidence that the Sign Requirement "is necessary because it enables officers to ensure that an offender is in compliance with the entire Halloween statute."

B. The Signs Are Not The Least Restrictive Means of Deterring "Grooming Behavior" Because They Are Overbroad and the Threatened Harm is Speculative

Missouri's testifying expert, Paul Simpson, Ed.D., also attempted to introduce evidence that the signs served the purpose of protecting children from registrants on Halloween. However, Missouri fails to include Dr. Simpson's admissions that the signs are not narrowly tailored to serve that interest, because they are overbroad and not the least restrictive means.

Notably, the parties to this case agreed that, statistically, registrants present no unique risk to children on Halloween itself. In fact, *Missouri* admitted into evidence a 2019 statement by the Association for the Treatment of Sexual Abusers (ATSA) confirming: "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." App.0722. ATSA further confirms:

> 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.

App.0722. Missouri's testifying expert, Dr. Simpson, likewise agreed that the perceived threat of abuse on Halloween is a "myth" and "just not happening." Tr. 152:5-11, 153:4-6.

Instead, through Dr. Simpson, Missouri attempted to offer evidence that the signs have another purpose: preventing grooming behavior. According to Dr. Simpson, the signs prevent "Halloween contact" from "provid[ing] an opportunity to create a grooming relationship between a sex offender first time or repeat [*sic*] and into the future that can be acted on." Tr. 153:4-11. However, Dr. Simpson admitted that potential "grooming behaviors" could be "completely innocent behaviors as well," an admission of the Sign Requirement's gross overbreadth. Tr. 155:1-7, 155:17-156:7. Further, Dr. Simpson admitted the absence of evidence that Halloween signs are the least

restrictive means of deterring any grooming behavior that could commence on Halloween:

> Q: Your opinion does not encompass whether Halloween signs are more or less effective than any other legal restriction that's intended to deter grooming; is that correct?
>
> A. Your Honor, that would be correct. I'm not doing a comparison with other kinds of restrictions from sex offenders. So I'm at a loss.

Tr. 173:24-174:5. Of course, as discussed more fully below, the signs cannot be the least restrictive means of serving any state interest, since the other provisions of the Statute already prohibit all "Halloween contact" between registrants and children. Dr. Simpson eventually conceded this fact. Tr. 175:13-176:24.

C. Missouri's Conflicting Testimony Regarding Re-offense Rates for Registrants Does Not Establish that Signs are "Necessary"

Finally, Missouri suggests that the general rates of re-offense for registrants as a class justify the Sign Requirement, suggesting that danger exists any time children merely approach any registrant's home. Mo. Br. 59, 61-62. But Missouri offered conflicting testimony on re-offense rates that failed to establish this speculative premise.

Notably, Missouri repeatedly references Dr. Simpson's supposed confirmation that "'24 to 34 percent' of sex offenders are known to

recidivate, though the actual rate of re-offense is higher because many offenses go unreported." Mo. Br. 31-32, 61. That is not what Dr. Simpson testified. Instead, Dr. Simpson freely admitted that "you can't predict [re-offense risk] as to a particular individual." Tr. 167:16-25. When asked to characterize the re-offense risk for "sex offenders" as a class, Dr. Simpson described a *spectrum of rates* "*anywhere from . . . five percent within the first few years up to 24 to 34 percent over the span of years*." Tr. 186:5-15.

Further, Dr. Simpon's asserted figures were almost immediately contradicted by the detailed testimony of David Oldfield, the Missouri Department of Corrections' (MDOC) Director of Research and Evaluation. Tr. 192:19-23. Director Oldfield explained that, based upon the State of Missouri's own research, the aggregate re-offense rates for all registrants with convictions in Missouri state courts is, in his words, "*quite low*": between 3.5% and 4.0% for the total population. Tr. 199:5-19. For those who complete Missouri's sex offender treatment program, it is "about one or two precent." Tr. 119:16-18. Thus, well over 90% of Missouri registrants never re-offend. MDOC's own report on "Sex Offender Recidivism" dated February 27, 2024 confirms the

same, stating that "Compared to offenders serving other offenses sex offenders have relatively low recidivism." App.0748.[2]

V. THE TRIAL COURT'S ORDER ON APPEAL

After post-trial briefing, the District Court issued its Findings of Fact, Conclusions of Law, and Order declaring the Sign Requirement in violation of the First Amendment, and permanently enjoining its enforcement statewide. App.2219, R.Doc.70.

Preliminarily, the District Court confirmed that the Sign Requirement is subject to facial challenge because it imposes the same uniform requirement on all registrants: "the sign posting requirement compels the speech of *any* registered sex offender in Missouri, not just plaintiff." App.2233, R.Doc.70, at 15.

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[2] Missouri admitted other reports undermining its reliance upon re-offense rates to justify the signs. See, e.g., App.0689-90, ATSA, *Registration and Community Notification of Adults Convicted of a Sexual Crime: Recommendations for Evidence-Based Reform* (2020) ("Sexual recidivism rates are also significantly lower than the common public perception that almost three-quarters of individuals convicted of sexual crimes will sexually reoffend (Levenson et al., 2007). Contrary to this belief, the U.S. Department of Justice reports a 9-year re-arrest rate for sexual offenses of 7.7% among individuals who committed a sexual offense and were released from prison in 2005 (BJS, 2019). . . . [Yet, in another study,] the recidivism rates of low risk offenders were consistently low (1%-5%) for all time periods.").

The Court then applied longstanding First Amendment precedent, and referenced two federal court rulings that addressed similar Sign Requirements in other states, *McClendon v. Long*, 22 F.4th 1330, 1337 (11th Cir. 2022), and *Doe v. City of Simi Valley*, 12-CV-8377-PA, 2012 WL 12507598 (C.D. Cal. Oct. 29, 2012) ("Not for Publication"), discussed below. The District Court ruled that the Missouri Sign Requirement "compels him to speak a viewpoint in written words, directed to the public, that he does not adhere to, in violation of the First Amendment." App.2232-33, R.Doc.70, at 14-15. Consequently, the District Court subjected the Sign Requirement to strict scrutiny, which it failed "[b]ecause the sign posting requirement of the Halloween Statute is not narrowly tailored to achieve Defendants' interest in protecting children from sex offenders on Halloween, and there are other effective alternatives to achieve that interest." App.2237, R.Doc.70, at 19.

First, while acknowledging that the state "has established a compelling state interest in restricting *certain* conduct of sexual offenders on Halloween," App.2235, R.Doc.70, at 17, the Court ruled that the Sign Requirement on its face does not, in fact, serve that interest. For example, the sign is "a broad prophylactic" rule that "does

not even dictate the font size or location of the sign to ensure visibility to children or others." App.2235-36, R.Doc.70, at 17-18.

Second, and "more significantly," the Court ruled that the Sign Requirement cannot be the least restrictive means of serving any state interest, because "the other restrictions mandated in the Halloween Statute adequately address all of Defendants' interests." App.2236, R.Doc.70, at 18. Specifically, the Statute's "other restrictions . . . prevent sex offenders from being in contact with children outside trick-or-treating and also deter children from venturing onto the properties of sex offenders." *Ibid*. In addition, the sex offender registry itself alerts both the public and law enforcement to the presence of registrants, "further diminish[ing] the need to require registered sex offenders to disseminate the same information on signs on their private property." App.2237, R.Doc.70, at 19. In sum, the District Court ruled that:

> The evidence presented has not shown that the sign posting requirement adds any value to protect children from Plaintiff, or other registered sex offenders, on Halloween. . . . The Court does not discount the importance of the government's interest in protecting children from sex offenders on Halloween, but the evidence fails to show that the sign posting requirement is narrowly tailored to achieve that 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.

App.2237, R.Doc.70, at 19.

SUMMARY OF ARGUMENT

Three federal courts have addressed the constitutionality of Halloween sign mandates for registrants: the Eleventh Circuit, the Central District of California, and the Eastern District of Missouri, the latter being the ruling at issue in this appeal. *McClendon v. Long*, 22 F.4th 1330; *Doe v. City of Simi Valley*, 12-CV-8377-PA, 2012 WL 12507598 (C.D. Cal. Oct. 29, 2012) ("Not for Publication"); and *Sanderson v. Bailey*, _ F. Supp. 3d. _, 2024 WL 4368822 (E.D. Mo. 2024). All three Courts agree that Halloween signs are "classic" compelled speech that fail the strict scrutiny required by the First Amendment. *McClendon*, 22 F.4th at 1137.

Likewise, this case presents a straightforward application of the strict scrutiny test, which the signs must fail, because the remaining provisions of the Statute serve the state's interest in protecting children through less restrictive means, such as preventing registrants from opening their doors on Halloween. None of Missouri's five asserted grounds for reversal overcome this dispositive fact. While Missouri

attempts to present various rationales for compelling all registrants to display "prophylactic warning labels" on their homes, it cannot establish that such signage is a *narrowly tailored* remedy:

First, the Sign Requirement is properly subject to a facial challenge because its terms apply to all registrants equally, and the strict scrutiny analysis "raises the same First Amendment issues" as to all registrants as a class. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1116 (9th Cir. 2024).

Second, the Sign Requirement is not a regulation of conduct that "incidentally" burdens speech, because its entire purpose and effect is to "compel[] sex offenders to speak" to the public through the sign. *Simi Valley*, 2012 WL 12507598, at *7.

Third, the signs cannot satisfy strict scrutiny on the theory that they deter "grooming behavior" that may commence on Halloween, because the signs would also preclude vast amounts of "completely innocent behaviors" (Tr. 155:1-7, 155:17-156:7), rendering the Sign Requirement a fatally overbroad remedy.

Fourth, Missouri is not entitled to a new trial because the District Court excluded redundant and irrelevant "testimony about Sanderson

specifically," such as his victim's opinion about whether he should post a sign. Mo. Br. 69. "When reviewing a facial challenge, we do not look beyond the text of the statute, nor do we examine how the Act applies to a plaintiff's particular circumstances." *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1080 (8th Cir. 2024).

Fifth, a statewide injunction is warranted because the Sign Requirement is facially invalid and "plainly unconstitutional." *Rodgers v. Bryant*, 942 F.3d 451, 458-59 (8th Cir. 2019).

ARGUMENT

I. THE DISTRICT COURT'S ORDER CORRECTLY APPLIES LONGSTANDING COMPELLED SPEECH PRECEDENT

This Court has recognized "the special significance of the right to speak from one's own home." *Willson v. City of Bel-Nor*, 924 F.3d 995, 1004 (8th Cir. 2019). The District Court's ruling below correctly applies the Supreme Court's compelled speech precedent to protect this "especially significant" right from infringement by Missouri's Sign Requirement.

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). Therefore, the plaintiff could not be compelled to display the New Hampshire State motto "Live Free or Die" on his vehicle license plate, because a state cannot "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. Said another way, New Hampshire could not "in effect require[] that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715.

Later rulings clarify that this negative "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 this precedent, two courts have directly addressed Halloween sign requirements 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. Further, the Eleventh Circuit held that the Sheriff's signs "are not narrowly tailored" to "protect children" because "The Sheriff has not provided any record evidence that the registrants in Butts County actually pose a danger to trick-or-treating children or that these signs would serve to prevent such danger." *Id*. at 1338.

Likewise, in *Doe v. City of Simi Valley*, the United States District Court for the Central District of California issued a temporary restraining order enjoining 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." *Doe v. City of Simi Valley*, 12-CV-8377-PA, 2012 WL 12507598, at *1 (C.D. Cal. Oct. 29, 2012) ("Not for Publication"). The District Court reasoned,

> the sign requirement, heavily publicized in the Simi Valley area, poses a danger to sex offenders, their families and their property. Although the sign employs innocuous language, its function and effect is likely to approximate that of Hawthorne's Scarlet Letter—drawing immediate public attention to Plaintiffs and potentially subjecting them to the dangerous mischief common on Halloween night and to community harassment in the weeks and months following[.]

Id. at *8-9.

Here, the Sign Requirement threatens all of the harms that the compelled speech doctrine exists to prevent:

1. *speech based upon assumptions with which Sanderson disagrees, and which forces him to take a position that he does not wish to take, that is, his "dangerousness" and non-participation in Halloween festivities* (Tr. 32:19-33:4 [Sanderson: "I don't want to be forced to write something that I don't want to do. It is like scratching a nail down a chalkboard for me[.]"]);

2. *speech that is otherwise false* ("no candy or treats at this residence");

3. *speech that potentially identifies Sanderson as a registrant, when he would rather remain silent* (Tr. 37:21-38:8 [Sanderson: "I think a lot of people are aware that if there is a sign on Halloween on somebody's door that that's what it pertains to."]);

4. *speech that is against Sanderson's interest*;

5. *speech based upon and manifesting Missouri's belief that Sanderson and his residence threaten public safety*; and

6. *speech that invites a risk of harm to Sanderson, his family, and his property*.

Since Sanderson and his family do not wish to communicate these messages "at their residence," as the Statute requires, the Statute's Sign Requirement violates the First Amendment.

II. MISSOURI CANNOT PROVE THAT THE SIGNS SATISFY STRICT SCRUTINY, OR DESERVE A LESSER REMEDY THAN AWARDED BY THE DISTRICT COURT

Missouri asserts five grounds for reversal of the District Courts' ruling, addressed below. None overcome the "presumptive invalidity" of a law that compels speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

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A. The Court Properly Analyzed the Sign Requirement's Facial Unconstitutionality

Missouri first argues that the District Court failed to properly analyze Sanderson's facial First Amendment challenge to the Sign Requirement, per the requirements recently reiterated by the Supreme Court in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). Yet, the District Court's analysis meticulously applied *Moody* (see App.2229-34, R.Doc.70, at 11-16), and correctly ruled that the Sign Requirement had only one application that could not overcome strict scrutiny for reasons evident from the face of the Statute.

1. *Law Governing First Amendment Facial Challenges*

In the First Amendment context, the requirements for a facial challenge are "lowered": A law will be struck down as facially unconstitutional "if the law's unconstitutional applications substantially outweigh its constitutional ones." *Moody*, 603 U.S. at 723. *Moody* concerned the constitutionality of two laws that regulated "social media platforms." *Id.* at 719. The problem in *Moody* was that the lower courts considered only two of the platforms to which that "expansive" definition applied (Facebook's News Feed and Yahoo's homepage). *Id.* at 724. The lower courts had not considered other, distinct applications

of the statues, such as "direct messaging or events management," "email providers," "an online marketplace like Etsy," "payment service like Venmo," and "ride-sharing service like Uber." *Moody*, 603 U.S. at 724-25. By "confin[ing] their analysis" to two of the statute's many applications, the lower courts "did not address the full range of activities the laws cover, and measure the constitutional against the unconstitutional. In short, they treated these cases more like as-applied claims than like facial ones." *Id.* at 724.

In contrast, *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024), decided one month after *Moody*, exemplifies a proper facial analysis. In that case, the Ninth Circuit considered a compelled speech challenge to a law requiring creators of child-focused online products to create a "Data Protection Impact Assessment (DPIA)." *Id.* at 1109. The DPIA assessment required creators to self-report the risks that their products posed to children, with the creators' plans to mitigate the risks. *Id.* at 1116. The Ninth Circuit explained that a facial challenge was appropriate "because the DPIA report requirement, in every application to a covered business, raises the same First Amendment issues." *Ibid.* Further, "[w]hether the State can impose such a

requirement without running afoul of the First Amendment may be answered without speculation 'about 'hypothetical' or 'imaginary' cases" because "the record here is sufficiently developed to consider the scope of the DPIA provision and whether its unconstitutional applications substantially outweigh its constitutional ones." *Bonta*, 113 F.4th at 1116, quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

Similarly, in *Willson v. City of Bel-Nor*, 924 F.3d 995, 1004 (8th Cir. 2019), this Court upheld a facial overbreadth challenge to a city ordinance restricting residential yard signs. The plaintiff was not required to articulate *every* conceivable sign prohibited by the ordinance. See *id*. at 1002-03. Instead, the plaintiff offered "examples of expressive conduct [] prohibited by" "the Ordinance's expansive definition of a sign [and its] strict restrictions." *Ibid*. The plaintiff's "examples illustrate[d] that [the ordinance] creates a prohibition of alarming breadth" sufficient to show that "the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Id*. at 1003, citations omitted.

2. *The Sign Requirement is Facially Unconstitutional Because its Single Application Obviously Fails Strict Scrutiny as to Any Person*

This case is wholly dissimilar to *Moody*, because Missouri's Sign Requirement has only one single "application," that is, all persons required to register as a sex offender in Missouri must post the same sign. This single application is subject to facial challenge because it compels all registrants' speech in the same way and therefore "raises the same First Amendment issues." *Bonta*, 113 F.4th at 1116.

Critically, the Sign Requirement also fails strict scrutiny for reasons equally applicable to every registrant. For example, the other provisions of the Statute prohibit all registrants from participating in Halloween, meaning that the signs are not necessary to, or the least restrictive means of, protecting the public from the risk posted by any registrant. As in *Willson*, where the plaintiff's reasoned "examples" of the ordinance's unconstitutional applications sustained a facial challenge, this logical deduction about the Missouri Sign Requirement's single application is not "speculation."

Missouri argues that the District Court's facial analysis is incomplete because "Sanderson never presented evidence – or even

discussed – the application of [the Sign Requirement] to any offender other than himself." But "[w]hen reviewing a facial challenge, we do not look beyond the text of the statute." *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1080 (8th Cir. 2024). *See also Real v. City of Long Beach*, 852 F.3d 929, 933 (9th Cir. 2017) ("There is no requirement that a plaintiff present evidence of harm to third parties in order to bring a facial challenge pursuant to the First Amendment."). Furthermore, Missouri admits that it "called several [trial] witnesses who testified about the application of [the Statute] across Missouri." Mo. Br. 26. Missouri cannot explain why this record was not "sufficiently developed" to consider the plain text of a statute with one application.

3. *The District Court Did Not Need to Consider the Statute's Applications to SVPs and Law Enforcement Because the Statute Does Not Apply to Either Group*

Missouri next argues that the District Court "relied upon its own speculation" about the Sign Requirement's scope, and "did not consider the full range of 'activities' and 'actors' regulated by [the Sign Requirement]." Mo. Br. 43. Specifically, Missouri argues that the District Court did not consider the Sign Requirement's application to:

(1) "sexually violent predators who are even more dangerous than Sanderson;" and (2) "the varying needs of police departments" that enforce the Statute. Mo. Br. 44. Yet, these are not "different applications" of the Statute.

First, Missouri's reference to sexually violent predators (SVPs) is a red herring because SVPs do not participate in public Halloween rituals in the first place, nor are they subject to the Sign Requirement. That is because SVPs are, by definition, "confined in a secure facility" (*i.e.*, civilly committed). Mo. Rev. Stat. § 632.480(5). SVPs are only released into the community upon a finding "that the person is not likely to commit acts of sexual violence if released," *id.* § 632.505.1, at which point they no longer qualify as SVPs. *See Holtcamp v. State*, 259 S.W.3d 537, 540 (Mo. 2008) ("The sexually violent predators' confinement is for the purpose of holding the person until his mental abnormality no longer causes him to be a threat to others, and he is permitted to be released on a showing that he is no longer dangerous.")

Regardless, even if Missouri's argument was not contradicted by state law, it ignores the fact that a released, former SVP would only be subject to the Sign Requirement if he or she is currently required to

register as a sex offender. And such a person would, like Sanderson, be statutorily forbidden to participate in Halloween. In sum, Missouri offers no reason why the District Court's analysis of the Sign Requirement would differ as to released former SVPs.

Second, the alleged utility of the Sign Requirement to law enforcement is also not a different "application" of the statute, because the Statute does not apply to law enforcement. While the Sign Requirement's utility to law enforcement can be considered in the strict scrutiny analysis, as part of a compelling state interest (discussed below), the Court properly rejected that argument, based in part upon the testimony of Missouri's own "law enforcement witnesses." App.2236-37, R.Doc.70, at 18-19. In sum,

> [w]here, as here, a statute imposes a direct, content-based restriction on protected first amendment activity, and where the alleged defect in the Statute is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the Statute creates an unnecessary risk of chilling free speech, the Statute is properly subject to facial attack.

Sec'y of State v. Munson, 467 U.S. 947, 967–68 (1984).

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B. The District Court Properly Rejected Missouri's Characterization of a Public-facing Sign On One's Residence as Anything Other Than Constitutionally Protected Speech

On the merits, Missouri concedes that the signs are speech, but argues that they do not trigger First Amendment scrutiny because the signs: (1) provide "truthful, nonideological" information about the conduct that is required by the Statute; (2) regulate conduct, with only an "incidental" burden on speech; and (3) fall within a "history and tradition" of tort case law upholding duties to warn of inherently dangerous conditions. Mo. Br. 46-58. These arguments, however, ignore longstanding First Amendment precedent and are contradicted in Missouri's own brief, as discussed below.

1. *The First Amendment is Not Limited to "Political" or "Ideological" Speech, which Describe Missouri's Sign Requirement In Any Event*

Citing *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995), Missouri first argues that the Sign Requirement falls outside of the First Amendment's protection because "heightened scrutiny applies 'only in the context of government compulsion to disseminate a particular political or ideological message.'" Mo. Br. 48. No court has adopted such a cramped reading of the First Amendment.

As an initial matter, Sanderson contends that the signs *do* embody the government's non-factual and ideological message about his and other registrants' risk to the public on Halloween. The District Court agreed, acknowledging that "the sign posting requirement compels him to speak a viewpoint in written words, directed to the public, that he does not adhere to[.]" App.2233, R.Doc.70, at 15. Missouri itself characterizes the signs as "warning labels," which is premised on an assumption of occupants' "dangerousness." Mo. Br. 47, 56. This premise is certainly debatable and is hardly "purely factual," "innocuous," or "nonideological."

Furthermore, this Court and many others have disregarded Missouri's attempt to limit the compelled speech doctrine to "ideological" speech. In *Gralike v. Cook*, this Court considered a Missouri law requiring 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 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." *Gralike*, 191 F.3d 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.

Similarly, in this matter, the purpose of the signs is to communicate to the public a "negative impression" about the occupants of the residence. Other courts have agreed that forcing private parties to adopt, carry, or be associated with speech harmful to their interests is unconstitutional compelled speech. *E.g.*, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 2016-17 (D.C. Cir. 2012) *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (Forcing cigarette makers to post graphic warning labels on packaging "cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion . . . and to

browbeat consumers into quitting."); *Nat'l Assn. of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (requiring manufacturers to disclose that their products include controversial "conflict minerals" was compelled speech in part because it was intended by the government to influence consumer choices); *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 797-98 (1988) (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); *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (affirming issuance of preliminary injunction where purpose and effect of law compelling physicians to display ultrasound images before abortions was to advance state's pro-life objectives).

Finally, even if the signs did not embody a "political or ideological message," the quote from *Sindell* upon which Missouri relies (Mo. Br. at 48) does not purport to be a comprehensive summary of the compelled speech doctrine, nor could it be. That is because "cases 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 (1988). That is because the First Amendment "includes . . . the right

to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705 (1977).

Hence, in *Gralike v. Cook*, this Court ruled that a ballot label impermissibly compelled the candidates' speech by "forc[ing] candidates to speak in favor of term limits," even though the speech was government speech appearing on a government document. *Gralike*, 191 F.3d at 917-18. Moreover, "the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits." *Ibid.* This Court ruled that the ballot label violated the First Amendment because it "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." *Ibid.*

Likewise, in this case, Sanderson intends to comply with the Statute's restrictions on his Halloween conduct. He simply wishes to remain silent about it, and to avoid posting – on his own home – Missouri's "official denunciation" of himself and his participation in Halloween.

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2. *A Mandate to Post a Public-facing Sign is Not a Regulation of Non-speech Conduct*

Missouri next argues that the Sign Requirement falls outside the ambit of the First Amendment because its regulation of speech is "incidental" to the Statute's other provisions regulating registrants' Halloween conduct. Mo. Br. 54. This legerdemain effectively negates the First Amendment.

An "incidental" burden on speech is one that occurs in the course of complying with a law that, by its terms, regulates *only conduct*, *not speech*. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 60 (2006) ("*FAIR*"), the statute at issue, the Solomon Amendment, deprived law schools of certain federal funding if they refused to host military recruiters on campus – a "regulation of conduct." Unlike the Sign Requirement at issue in this case, "the Solomon Amendment neither limits what law schools may say *nor requires them to say anything*." *Ibid*, emphasis added. Nevertheless, the law schools argued that giving military recruiters access would require the schools to "provide some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Ibid*. However, the Supreme Court ruled that the "compelled speech to

which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct." *FAIR*, 547 U.S. at 60.

In contrast, the Sign Requirement at issue here is a "divisible" component of the Statute that imposes its own affirmative mandate to speak. App.2230 n.8, R.Doc.70, at 12 n.8. Its burden on speech is not an "incidental" result of complying with the Statute's separate, negative restrictions on conduct. Said another way, the Statute's restrictions on conduct have no expressive component, but the entire purpose and effect of the Sign Requirement is to "compel[] sex offenders to speak" through the sign. *Simi Valley*, 2012 WL 12507598, at *7.

None of the cases cited by Missouri support the proposition that the government may compel speech by simply burying the operative mandate within a larger statutory scheme that regulates conduct. In fact, the primary case cited by Missouri, *FAIR*, supports Sanderson by explaining why such incidental speech burdens are not true compelled speech. The Supreme Court said:

> [the fact that a law] prohibit[ing] employers from discriminating in hiring on the basis of race . . . . will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.

FAIR, 547 U.S. at 62. Yet, in the next sentence, the Supreme Court explained that incidentally burdening speech

> 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.

Ibid. In other words, a restriction on conduct that incidentally *prevents* discriminatory conduct and discriminatory speech "is not the same" as affirmatively *requiring* a private person to speak against his or her will. For this reason, Missouri is wrong when it argues that

> just as the way to comply with a law prohibiting employment discrimination is to *take down* the "White's [*sic*] only" sign, *Sorrell*, 546 U.S. at 567, the way to comply with a law prohibiting Halloween-related contact with children is to *put up* a 'no candy' sign.

Mo. Br. 54, emphasis in original. Missouri's reasoning, if adopted, would vitiate the compelled speech doctrine, since Missouri is in fact 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 Sign Requirement unequivocally compels speech.

Missouri also cites this Court's decision in *Arkansas Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc), in which this Court considered a law that "prohibits state entities from contracting with private companies unless the contract includes a certification that the company 'is not currently engaged in . . . a boycott of Israel.'" *Id.* at. 1390 This Court rejected a compelled speech challenge to that certification requirement because it "does not require them to publicly endorse or disseminate a message. Instead, the certification targets the noncommunicative aspect of the contractors' conduct—unexpressive commercial choices." *Id.* at 1394. In contrast, the Sign Requirement in this case intentionally and exclusively requires registrants to publicly endorse and disseminate the government's message.

Finally, citing the Fifth Circuit's decision in *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014), Missouri compares the Sign Requirement to sex offender registration, which is not unlawful compelled speech. Yet, Missouri again 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." *Ibid.* Yet, Sanderson does not challenge any

requirement to report *to the government*, or any disclosure *by government*. Rather, Sanderson challenges a mandate to personally display a government-prescribed sign to the public on his residence, which is a "classic" example of compelled speech. *McClendon*, 22 F.4th at 1337.

This Court's decision in *United States v. Sindel*, which Missouri cites, acknowledges the critical difference between compelled disclosure to the government, and compelled disclosure to the public. *Sindel*, 53 F.3d 874 (8th Cir. 1995). 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." *Id*. at 878. *Sindel* holds that the summons did not compel speech because the summons did "not [compel the attorney to] disseminate publicly a message with which he disagrees." *Id*. at 878. Thus, *Sindel* supports Sanderson because Sanderson, unlike Sindel, is being forced to "disseminate publicly a message with which he disagrees."

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3. *Missouri's Appeals to a "History and Tradition" of Duty-to-Warn Requirements Merely Underscore Why the Signs are Compelled Speech*

Next, Missouri analogizes the Sign Requirement to tort case law upholding "the long history and tradition of requiring individuals to warn others of inherently dangerous conditions." Mo. Br. 56. Yet, this argument assists Sanderson by underscoring why the Sign Requirement is unlawful compelled speech. The government's belief that a front porch represents an "inherently dangerous condition" because the occupant will molest visitors is precisely the type of "Scarlet Letter" that the Constitution does not allow the government to compel that person to advertise on his own porch.

Finally, Missouri's reliance upon tort duty-to-warn analogies undercuts its attempt to distinguish the Eleventh Circuit's ruling on Halloween signs in *McClendon v. Long*. Mo. Br. 65-58. As discussed above, in *McClendon*, the Eleventh Circuit struck down a local sheriff's policy of posting yard signs saying "Stop – Warning! NO TRICK-OR-TREAT AT THIS ADDRESS! A COMMUNITY SAFETY MESSAGE FROM BUTTS COUNTY SHERIFF GARY LONG." Missouri argues that *McClendon* is "distinguishable" because, "In contrast to Missouri

law, sex offenders are allowed to participate in Halloween under Georgia law." Mo. Br. 56-57. Yet, Missouri agrees that "The *McClendon* sign forced individuals to deliver a statement that expressly conveyed the government's false message." Mo. Br. 58. The underlying "message" of the signs in *McClendon* was the same assumptions of risk on which Missouri relies in this case, which the Eleventh Circuit called "classic" compelled speech. That other, separate provisions of the Missouri Statute prohibit Halloween participation does not alter the fact that mandatory signage declaring one's involuntary non-participation in Halloween is compelled speech.

C. Missouri Cannot Overcome Strict Scrutiny Because the Statute Already Serves the State's Interest Through Less Restrictive Means

Missouri next argues that the District Court improperly applied strict scrutiny to the Sign Requirement, but Missouri's arguments are internally inconsistent, contradict the record, and lack support in case law.

Strict Scrutiny requires Missouri to prove that the Sign Requirement is "narrowly tailored to promote a compelling Government interest," such that the signs are the "least restrictive alternative" to

achieve that interest. *United States v. Playboy Entm't Group. Inc.*, 529 U.S. 803, 813 (2000). "[I]t is the rare case in which . . . a law survives strict scrutiny." *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005), quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

In this matter, the District Court recognized a "compelling interest in restricting *certain* conduct of sexual offenders on Halloween." App.2235, R.Doc.70, at 17. However, the District Court correctly ruled that the signs do not "actually advance" that interest, and certainly do not represent narrowly tailored or least restrictive means of doing so. *White*, 416 F.3d at 749. Most significantly, the District Court ruled that the Sign Requirement cannot survive strict scrutiny because a registrant's compliance with the remaining provisions of the Statute fully serves the Statute's purpose (protecting children), rendering the signs unnecessary. App.2236, R.Doc.70, at 18. This dispositive fact is fatal to the Sign Requirement.

For example, in *McCullen v. Coakley*, 573 U.S. 464, 490-92 (2014), the Supreme Court held that a Massachusetts law creating "buffer zones" around abortion clinics for the purpose of preventing obstruction and harassment was not narrowly tailored to survive even *intermediate*

scrutiny, because the challenged law "itself contains a separate provision . . . unchallenged by petitioners . . . that prohibits much of this conduct." *McCullen*, 573 U.S. at 490-92. The Supreme Court further found that "public safety risks created when protestors obstruct driveways leading to the clinics . . . . can readily be addressed through existing local ordinances," as well as "available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Ibid.* Notably, the Supreme Court opined that the state's reliance upon interests already served by other laws is "an example of [the state's] failure to look to less intrusive means of addressing its concerns." *Ibid.*

Accordingly, courts routinely find that laws infringing the Freedom of Speech fail constitutional scrutiny when "the government presented no evidence that enforcement of these existing provisions is insufficient to alleviate its interests[.]" See, e.g., *Whitton v. City of Gladstone*, 54 F.3d 1400, 1407-09 (8th Cir. 1995) (Missouri ordinance restricting political signs for purpose of "traffic safety and preserving aesthetic beauty" in city failed strict scrutiny because city "already has in place measures, applicable to all signs, which adequately address

these issues"); *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").

1. *The Signs Are Irrelevant to Enforcing the Statute's Remaining Restrictions*

In this appeal, Missouri argues that the District Court failed to consider whether the signs serve an alternative purpose as a "necessary" tool for law enforcement to "ensure compliance" with the Statute's other requirements. Yet, this argument is illogical: law enforcement must physically observe residences to ensure that a registrant has extinguished exterior lights, eschewed decorations, and remained indoors, regardless of whether or not a sign is posted. Missouri's witness, Sargent Penny Cole, admitted the same at trial. Tr. 143:8-19. Sargent Daniel Heffernan also admitted that the Sign Requirement "failed us" because it allows *compliant* signs to be practically invisible, saving law enforcement no work at all. Tr. 102:4-9, 116:21-25. This testimony fails to establish that the signs are "necessary."

2. *Missouri's Incoherent Arguments Regarding Re-offense Rates Do Not Establish that Signs are Necessary*

Next, in various ways, Missouri attempts to establish that the re-offense statistics for registrants render the signs "necessary" to protect children, but its arguments succeed only in contradicting itself and the record.

For example, Missouri asserts that the Sign Requirement "applies only to those uniquely disposed to reoffend" (Mo. Br. 60), an assertion belied by the fact that the Sign Requirement applies in blanket fashion to all registrants in Missouri regardless of their respective risk to re-offend. Missouri then contradicts itself by arguing that the signs are "necessary given the inherent difficulties in identifying which sex offenders will reoffend." Mo. Br. 61. Relying upon the admitted dissimilarities in re-offense rates, Missouri then asserts an inherently contradictory conclusion: "Missouri's Halloween statute is therefore narrowly tailored even though it applies to all sex offenders." Mo. Br. 62.

As illustrated by these quotations from its own brief, Missouri's arguments about re-offense rates are incoherent and fail to establish Halloween signs as "necessary" to protect children. Under strict

scrutiny, the government must "present evidence" to "show a real need" for the regulation in question: "ambiguous averments" are insufficient. *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013).

This is why the Eleventh Circuit ruled in *McClendon v. Long* that the sheriff's Halloween lawn signs were not narrowly tailored: The sheriff

> admitted . . . he never had an issue with a registrant having unauthorized contact or reoffending with a minor on Halloween or at any other time . . . [and] has not provided any record evidence that the registrants in Butts County actually pose a danger to trick-or-treating children or that these signs would serve to prevent such danger.

McClendon, 22 F.4th 1330, 1338 (11th Cir. 2022).

Likewise, here, Missouri's "ambiguous" statistics regarding aggregate rates of re-offense show only speculative possibilities, and not a "real need" to require *every* registrant in Missouri to post a sign at his or her residence. As in *McClendon*, Missouri could not provide one example of registrants harming trick-or-treaters, including from Sanderson despite the two decades in which he hosted his displays without incident.

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3. *The Risk of "Grooming Behavior" on Halloween is Speculative and the Signs Are a Grossly Overbroad Remedy for This Risk*

Not surprisingly, Missouri's' testifying expert, Dr. Simpson, did not rely upon aggregate re-offense rates to justify the Sign Requirement. Dr. Simpson even acknowledged that the threat to minors from registrants on Halloween night is a "myth" and "just not happening." Tr. 152:5-11, 153:4-6.

Instead, Dr. Simpson offered a different rationale to justify the signs: Preventing "Halloween contact" from "provid[ing] an opportunity to create a grooming relationship between a sex offender first time or repeat [*sic*] and into the future that can be acted on." Tr. 153:4-11. However, even if deterring grooming behavior is a purpose of the Statute, the Sign Requirement cannot be the least restrictive means of serving that interest, because it is grossly overbroad. Dr. Simpson admits that what constitutes "grooming behavior" could be "completely innocent behaviors as well." Tr. 155:1-7, 155:17-156:7. Further, Dr. Simpson admitted that grooming is "*the first stage* of initiating a sexual assault," such that "grooming relationship involves *repeated ongoing points of contact*. . . . very often those interactions can be online as well."

Tr. 154:11-23, 178:5-8. Yet, because the signs would not be present during the "repeated ongoing points of contact" after Halloween that are necessary for the grooming to result in abuse, the signs would not actually prevent abuse.

Additionally, the risk of abuse resulting from any grooming that commences on Halloween is speculative. Dr. Simpson "did not perform any studies to confirm that there is a correlation between contact on Halloween and grooming behavior," and is "not aware of any statistical research that establishes a correlation between contact on Halloween and grooming behavior." Tr. 178:14-25, 169:16-22. Dr. Simpson is also "not personally aware of any incidents where a Registrant used contact on Halloween to commence grooming behavior that led to abuse." Tr. 178:14-17.

Accordingly, the Sign Requirement is overbroad and therefore not the least restrictive means even under the rationale proposed by Missouri's expert witness.

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4. *Even if Preventing All Contact Between Registrants and Children on Halloween is a Compelling State Interest, the Signs Are Unnecessary*

Missouri next argues that "the law's function is narrowly tailored because it serves the interest of separating sex offenders from children using only seven words." Mo. Br. 61. In fact, Missouri's entire brief seems premised on the assumption that any conceivable interaction between registrants and children is harmful. Of course, that cannot be true, which disqualifies this premise from serving as a "compelling state interest." Regardless, even if "separating sex offenders from children" is a compelling state interest, the rest of the Statute's provisions achieve that interest without the need for a sign, rendering the sign unnecessary.

Relatedly, Missouri argues that "the District Court's analysis ignores that prophylactic laws are perfectly acceptable" (Mo. Br. 63), and compares the signs to "mandatory exclusion zones" "requiring sex offenders to avoid locations with children" (Mo. Br. 60, 62), and sex offender registration requirements. Mo. Br. 66. Yet, unlike the signs, these prophylactic laws do not compel public speech, and therefore do not need to satisfy strict scrutiny, so the comparison is inapt.

5. *Missouri Mischaracterizes the District Court's Ruling that the Signs Do Not Actually Serve the Government's Interest*

Finally, Missouri claims that the District Court erred in "fault[ing] the sign-posting requirement for not being *more* intrusive." Mo. Br. 66. That is not a fair reading of the District Court's reasoning. The District Court said:

> a sign stating "No candy or treats at this residence" does not clarify the danger that the statute serves to mitigate. The sign contains no warning that there is a convicted sex offender or other dangerous person at that residence. The sign posting requirement does not even dictate the font size or location of the sign to ensure visibility to children or others. The Halloween Statute requires only that the registered offender must "[p]ost a sign at his or her residence stating, 'No candy or treats at this residence.'" Mo. Rev. Stat. § 589.426.1(3). Defense witnesses conceded that the phrase could be written in the smallest possible font, and a sign placed at the back door, or even inside the residence, would still be compliant with the Statute.

App.2236, R.Doc.70, at 18. This reasoning confirms that the Sign Requirement, on its face, does not "actually advance[] the state's interest" in protecting children because its terms can be satisfied through obviously ineffective means. *Republican Party of Minn. V. White*, 416 F.3d 738, 749 (8th Cir. 2005). Although Missouri claims that the District Court's "unorthodox interpretation" of the Sign Requirement "has never been interpreted that way" (Mo. Br. 67, fn. 4),

Missouri again reveals ignorance of its own record, such as the testimony of Sargent Heffernan, who confirmed that his department interprets the Sign Requirement just as the District Court does. Tr. 102:10-19 ("[Compliant signs include] just a little itty-bitty like Post-it. . . . As long as it has the correct verbiage, and it is on their house and everything else is done, we move along per our prosecutor.")

D. THE DISTRICT COURT'S EXCLUSION OF IRRELEVANT AND REDUNDANT TESTIMONY DOES NOT ENTITLE MISSOURI TO A NEW TRIAL

Missouri next seeks a new trial because the District Court excluded "significant evidence about Sanderson specifically," such as his victim's opinion regarding Sanderson's participation in Halloween, and Dr. Simpson's opinion about Sanderson's own risk of re-offense. Mo Br. 68. Respectfully, this argument is frivolous. "When reviewing a facial challenge, we do not look beyond the text of the statute, nor do we examine how the Act applies to a plaintiff's particular circumstances." *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1080 (8th Cir. 2024). Missouri knows this. At trial, its counsel explained

> we are trying to provide the Court information on the risk of offenders generally to society. And as your Honor has correctly pointed out, this is a facial challenge. *And so we are not looking at the risk of Thomas Sanderson*.

Tr. 162:25-163.

As discussed above in connection with the propriety of Sanderson's facial challenge to the Sign Requirement, the relevant issues at trial were whether the signs compel speech, whether the signs are necessary to achieve a compelling government interest, and whether the signs are the least restrictive means of doing so. As also discussed above, those issues are resolved from the plain text of the Statute and the testimony already received regarding the Statute's enforcement. Missouri does not and cannot indicate how the existing record was deficient, or relies upon speculation.

Missouri's attempt to characterize evidence about Sanderson as necessary "rebuttal" to his compelled speech claim is also false. Mo. Br. 70. Sanderson's testimony about the facts of his offense and recent conviction under the Statute was offered to establish his standing to challenge the Sign Requirement, which Missouri had inexplicably contested despite Sanderson's very recent prosecution under the Statute. See App.0172-74, R.Doc.27, at 3-7 (Motion to Dismiss).

It should also be noted that Missouri's' testifying expert, Dr. Simpson, never examined Sanderson, and was not designated as an

expert on anything specific to Sanderson. Tr. 169:4-14. "Courts frequently exclude new opinions . . . that were not timely disclosed in the expert's report." *In re E.I. du Pont de Nemours and Co. C-8 Personal Injury Litig.*, 342 F. Supp. 3d 773, 784 (S.D. Ohio 2016) (citing cases). Nevertheless, the District Court had a full record of Sanderson's sex offense conviction (e.g., App.0541-44, 0602-63, 0788-99, 0916-71, 0984-1317), as well as Sanderson's complete criminal history, in the record. E.g., App.0512-31, 0545-601, 0633-34, 0723-736, 0974-79, 1346-47. Accordingly, no prejudice resulted from the exclusion of Missouri's irrelevant and redundant testimony.[3]

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[3] In excluding this and other irrelevant testimony that Missouri sought to introduce, the District Court was managing its docket, a significant effort given the large number of witness that Missouri sought to call for a one-day trial. App.0464-65, 0505. Even with these limitations, the Court found "that the majority of the testimony and evidence presented by the parties at trial were irrelevant to determining" "whether the sign posting requirement constitutes compelled speech in violation of the First Amendment," (App.2220, R.Doc.17, at 2 n.3), a factor that persists in this appeal.

E. A STATEWIDE INJUNCTION IS PROPER BECAUSE THE SIGN REQUIREMENT HAS NO LEGITIMATE APPLICATION ANYWHERE, AND MISSOURI'S CONTRARY ARGUMENTS MISCHARACTERIZE SUPREME COURT PRECEDENT

Finally, Missouri contends that the District Court erred in issuing a statewide injunction because "five Supreme Court Justices held last year [in *Labrador v. Poe*, 144 S. Ct. 921 (2024)] that statewide injunctions are improper." Mo. Br. 72. Again, Missouri mischaracterizes the law.

1. Labrador v. Poe *Does Not Address Facial Injunctions in the First Amendment Context*

As a preliminary matter, *Labrador v. Poe* is not a reasoned decision at all, but is instead a 3-sentence summary memorandum opinion staying a District Court's preliminary junction of a state law pending appeal. While *Labrador v. Poe* does contain concurring opinions that address the law of injunctions, there is no mention of the First Amendment, and the concurring opinions therefore do not address the propriety of an injunction in the First Amendment context.

Moreover, the particular concurring opinion to which Missouri refers, by Justice Gorsuch, addresses a subject that is not at issue in this case, that is, *injunctions prohibiting the enforcement of statutory provisions not actually challenged in the suit*. Specifically, in *Labrador*

v. Poe, the underlying preliminary injunction by the District Court had prevented enforcement of a multifaceted Idaho law that "regulate[d] a number of practices upon a child for the purpose of attempting to alter the . . . child's sex." *Labrador v. Poe*, 144 S.Ct. at 921 (Gorsuch, J., concurring), emphasis added. Those practices ranged from "access to drug treatments" to "the surgical removal of children's genitals." *Ibid.* Justice Gorsuch's concern was that the scope of the injunction covered not only the particular practice that the plaintiff sought (drug treatment), but also "purported to bar the enforcement of 'any provision' of the law against anyone [else]." *Ibid.*

Justice Gorsuch's concurring opinion does note the general "rule[] of equity . . . ., [that] a federal court may not issue an equitable remedy more burdensome to the defendant than necessary to [redress] the plaintiff's injuries." *Id.* at 923. Yet, that is not what the permanent injunction in this case achieved. That is because the discrete Sign Requirement at issue in this First Amendment case is not comparable to the multi-faceted statute at issue in *Labrador v. Poe*. A statewide injunction against the Sign Requirement covers only the statutory provision to which Sanderson is subject, and would simply prevent the

enforcement of that facially unconstitutional provision against any registrant.

2. *Applicable Case Law Confirms the Propriety of a Statewide Injunction of "Plainly Unconstitutional" Laws Like the Sign Requirement*

Case law that actually discusses statewide injunctions in the First Amendment context confirms they are "quite ordinary" and proper, because the Sign Requirement is facially invalid and "plainly unconstitutional." *Rodgers v. Bryant*, 942 F.3d 451, 458-59 (8th Cir. 2019); *Free Speech Coalition, Inc. v. Rokita*, 738 F.Supp.3d 1041, 1069-70 (S.D. Ind. 2024) (where party asserts facial overbreadth challenge, "[i]t is quite ordinary in that context to enjoin the entire statute statewide because in facial challenges the claimed constitutional violation inheres in the terms of the statute, not its application" (citing cases)).

For example, in *Clement v. California Department of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) (per curiam), an inmate brought a First Amendment challenge to a single prison's "policy prohibiting inmates from receiving mail containing material downloaded from the internet." *Id.* at 1150. Eight other prisons (far less than half of the

statewide total) had adopted similar policies. *Clement*, 364 F.3d. at 1150. The District Court enjoined the internet-mail policy statewide, at all prisons. *Ibid*. The Ninth Circuit upheld the statewide injunction, reasoning that:

> the state offers no argument that a total internet mail ban [in that one prison] might be constitutional if implemented at a different prison. In such circumstances, it would be inefficient and unnecessary for prisoners in each California state prison to separately challenge the same internet mail policy; it would simply force CDC to face repetitive litigation.

Id. at 1153.

Likewise, in this matter, there is no reason why the Sign Requirement would be unconstitutional as applied to Sanderson, or in the City of Hazelwood, but constitutional as applied to registrants elsewhere in Missouri who are still subject to the Statute's proscription of "all Halloween-related contact with children," and others. For the same reason, the entitlement to a statewide injunction is not contingent upon over 100 plaintiffs suing the over 100 local law enforcement agencies in Missouri with jurisdiction to enforce the Sign Requirement, which would be a waste of judicial and other government resources. To the contrary, the fact that numerous agencies can and do enforce the Sign Requirement underscores the need for a statewide injunction.

Finally, under Eighth Circuit precedent, a statewide injunction is warranted because it "would cause no injury." *Rodgers*, 942 F.3d at 458-59. In fact, the "public interest is best served by preventing governmental intrusions into the rights protected under the Federal Constitution." *Ibid.*

III. CONCLUSION

Laws that compel speech are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). If the compelled speech doctrine means anything, it must mean that persons cannot be required to "denunciate themselves" on their own private property with a government-prescribed message based upon the government's view of their own dangerousness. *Gralike v. Cook*, 191 F.3d 911, 917-18 (8th Cir. 1999). Because Missouri's Sign Requirement is "classic" compelled speech, and because the District Court's ruling below correctly applies First Amendment precedent, that ruling should be affirmed in full.

Dated: February 19, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 28(a)(11) and 32(a)(7), this brief contains 11,500 words, excluding those parts exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(6) in that, other than headnotes, this brief is prepared in a proportionally spaced typeface with serifs (Century Schoolbook, 14 point) in Microsoft Word.

In addition, pursuant to 8th Circuit Rule 28A(h), I certify that this Brief has been scanned for virus using commercially available software, which confirms the Brief is virus-free.

Dated: February 19, 2025

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PROOF OF SERVICE

Pursuant to Fed. R. App. P. 25(d), this document was filed on February 19, 2025, using the Court's CM/ECF system, and all counsel were served thereby.

Dated: February 19, 2025

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