Nos. 24-3120, 24-3204

In the United States Court of Appeals
For the Eighth Circuit

THOMAS SANDERSON, *Plaintiff-Appellee*

v.

ANDREW BAILEY, in his official capacity as Attorney General of Missouri, and JAMES HUDANICK, in his official capacity as the Police Chief of Hazelwood, Missouri, *Defendants-Appellants*.

Appeal from the U.S. District Court for the Eastern District of Missouri
St. Louis (4:23-cv-01242-JAR)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Contrary to Sanderson's insistence (at 39), courts in fact *have* squarely adopted Missouri's argument: this Court in *Sindel* and *Arkansas Times*, and the Fifth Circuit (expressly relying on this Court) in *Arnold*. And for good reason: Sanderson's argument proves too much. If the "no candy" sign requirement is unconstitutional, then so is the requirement to publicly register as a sex offender. Courts have rejected Sanderson's compelled-speech argument in that context precisely because public registration does not "require[ ] [a person] (a) to affirm a religious, political, or ideological belief he disagrees with or (b) to be a moving billboard for a governmental ideological message." *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (relying on *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995)). The same is true with the "no candy" posting requirement.

Sanderson is thus forced to reimagine facts and controlling law. As to facts, Sanderson insists the State waived the issue whether the "no candy" message is merely incidental to the unchallenged prohibition on distributing candy. That is demonstrably wrong. So is his claim that law enforcement witnesses did not speak to the need for the signs.

On the law, Sanderson cannot distinguish cases like *Sindel*, *Arnold*, and *Arkansas Times* and instead relies principally on an Eleventh Circuit case. But in that case, it was "undisputed" the content on the sign was *false* and the state "never had an issue with a registrant having unauthorized contact" with children. *McClendon v. Long*, 22 F.4th 1330, 1334, 1338 (11th Cir. 2022). Here, the opposite is true. The unobtrusive message here truthfully says the resident has no candy they can provide, and Sanderson *himself* violated the Missouri law prohibiting contact with children on Halloween. Equally telling is that Sanderson's next-best case is an out-of-circuit, unpublished, TRO "ex parte" decision issued nine days after the plaintiff filed a TRO application. That case did not even address the speech-incident-to-conduct question at issue here. *Doe v. City of Simi Valley*, No. CV 12-8377 PA (VBKX), 2012 WL 12507598, at *2–3 (C.D. Cal. Oct. 29, 2012). Hardly a panacea.

Those inapposite cases aside, the doctrine is clear that there is no compelled speech here. As this Court put it, "The compelled speech doctrine prohibits the government from making someone disseminate a *political* or *ideological* message." *Arkansas Times v. Waldrip*, 37 F.4th 1386, 1394 (8th Cir. 2022) (en banc) (emphasis added). The "no candy"

sign is neither. And it "is plainly incidental to the [statute's] regulation of conduct." *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006).

The Court thus need not even address strict scrutiny. But the State prevails on that issue too. A parade of law enforcement witnesses discussed the importance of signs both for warning parents and children, and for aiding law enforcement in monitoring this high-risk population on Halloween night. Indeed, the un-challenged elements of Missouri's existing law prohibiting distribution of candy have already proven inadequate without a "No candy" sign. Sanderson himself violated that law just a few years ago, which underscores the Supreme Court's judgment that States have an incredibly strong interest in this area in light of the "frightening and high risk of recidivism." *McKune v. Lile*, 536 U.S. 24, 34 (2002). At the very least, it was inappropriate for the district court to issue relief for nonparties when, as Sanderson has proven by violating § 589.426's prohibition on distribution, not all individuals subject to the law are identically situated.

Sanderson's attempt to claim the mantle of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), is more than just

wrong. It also "trivializes the freedom protected in *Barnette*." *FAIR*, 547 U.S. at 62. The Court should reverse.

ARGUMENT

I. The "No candy" sign does not trigger strict scrutiny because it is incidental to a regulation of conduct and merely requires a truthful, non-ideological message.

The district court's greatest error was failing to recognize that Missouri's sign-posting requirement does not trigger strict scrutiny. Section 589.426.1(3) requires a truthful, seven-word message: "No candy or treats at this residence." Sex offenders must post this message as part of Missouri's regulation of *conduct*: no distributing candy, no contact with children. *Nothing* about the message is ideological or political. Indeed, the sign makes no representation about whether, as a policy matter, sex offenders should be able to participate in Halloween. It does not even mention whether a resident is a sex offender.

As this Court and the Supreme Court have held many times, a requirement is not "compelled speech" if it either involves truthful, non-ideological content, *Sindel*, 53 F.3d at 878, or is "incidental to [a law's] regulation of conduct," *FAIR*, 547 U.S. at 62. Missouri's law is

constitutional twice over because it independently satisfies both standards.

Sanderson tries several rejoinders. None succeeds.[1]

1. First, he argues (at 39) that "[n]o court has adopted" the view that the compelled speech doctrine is limited to "political or ideological" messages. To the contrary, this Court explicitly held just that: "A First Amendment protection against compelled speech . . . has been found ***only*** in the context of governmental compulsion to disseminate a particular political or ideological message," such as compelling schoolchildren to pledge allegiance the flag. *Id.* Relying on *Sindel*, the Fifth Circuit held the same, upholding sex-offender registration requirements against a compelled-speech challenge because the registration requirement does not "require[a person] (a) to affirm a religious, political, or ideological belief he disagrees with or (b) to be a moving billboard for a governmental ideological message." *Arnold*, 740 F.3d at 1035. This Court reaffirmed that understanding two years ago:

[1] Sanderson claims (at 15) that Appellants never preserved this argument. Not so. Appellants raised this precise argument at trial, *e.g.*, App.2205–07, R.Doc.67 at 26–28, and at the preliminary-injunction stage, App.0067–69, R.Doc.17 at 12–14.

"The compelled speech doctrine prohibits the government from making someone disseminate a political or ideological message." *Arkansas Times*, 37 F.4th at 1394.

Sanderson's attempt to distinguish these cases is unavailing. He insists (at 47–48) all three cases have a "critical difference": they concerned compelled statements to the government. That ignores the reasoning of each case, which turned *not* on the person spoken to, but *what* they were required to say. Indeed, Sanderson is flat wrong to say registering as a sex offender is merely speech "to the government." Federal law requires sex-offender registries to be open to the public. *See* 34 U.S.C. §§ 20921, 20922, 20923.

No better is Sanderson's invocation of *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999). That case *supports* Missouri. Sanderson (at 40) says *Gralike* rejects cases limiting the compelled speech doctrine to ideological or political speech. To the contrary, *Gralike* rejected a mandatory ballot label because it "compel[led] candidates to express a point of view on term limits," which was "an impermissible restriction on *core political speech*." 191 F.3d at 917–19 (emphasis added).

2. Next, Sanderson does not even bother to dispute the rule that a requirement to speak incident to a regulation of conduct is constitutionally permissible. He instead complains (at 45) that Missouri's requirement is express while (he says) the requirements in *FAIR* were implied.

Even if true, that makes no difference. In both instances, any speech is incidental to a conduct-based regulation. The law schools in *FAIR* needed to "send e-mails and post notices on behalf of the military *to comply with the Solomon Amendment*." 547 U.S. at 61–62 (emphasis added). The Supreme Court never suggested the result would have been different if the federal law required those things expressly rather than implicitly. No court would invalidate a law prohibiting race discrimination in employment just because the law *expressly* directs employers to take down a "White Applicants Only" sign—as both federal and state law require. *E.g.*, 42 U.S.C. § 2000e-3(b); Mo. Rev. Stat. § 213.055.1(3).

FAIR is just like this case because the "compelled statements of fact" in *FAIR* were not political or ideological representations about the military. The express "purpose" of those compelled statements was

"military recruiting" access "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b) (2000). So too here. The "No candy" signs have a conduct-based objective: ensuring sex offenders and children do not interact on Halloween. *See* Mo. Rev. Stat. § 589.426. Just as law schools did not endorse the military by posting about the location of a recruiter, 547 U.S. at 61–62, sex offenders do not endorse an ideological viewpoint by posting: "No candy or treats at this residence."

Missouri's Halloween signs, which simply ensure compliance with regulation of conduct, are a "far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62. Posting a "No candy" sign or information about a recruiting presentation "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." *Id.* Indeed, a "factual disclosure of th[e] kind" at issue here—"aimed at verifying compliance with unexpressive conduct-based regulations"—"is not the kind of compelled speech prohibited by the First Amendment." *Arkansas Times*, 37 F.4th at 1394.

3. Further, the line Sanderson proposes—that strict scrutiny applies to *all* public disclosures—makes no sense of *FAIR* and *Arnold*. *FAIR* involved public disclosures: speech on school bulletin boards and in emails to the student body. 547 U.S. at 61–62. *Arnold* also involved a public disclosure. *Arnold* concerned a First Amendment challenge to the Sex Offender Registration and Notification Act ("SORNA"), 740 F.3d 1032, and SORNA is *far* more intrusive than § 589.426. SORNA requires a sex offender to share what they look like, where they live, where they work, and the nature of their sex offense. 34 U.S.C. §§ 20913, 20914. States post that information online for public access send it directly to "[v]olunteer organizations in which contact with minors or other vulnerable individuals might occur." *Id.* §§ 20923(b)(6), 20921, 20922. If Missouri's Halloween sign triggers strict scrutiny, it is impossible to imagine how SORNA would not as well.

Also, the line Sanderson proposes makes no sense of the centuries-old duty of private parties to warn of dangerous conditions. *See Fogerty v. Pratt*, 9 F. Cas. 332 (D. Pa. 1809); *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268, 275 (1922); *Hull v. Gillioz*, 130 S.W.2d 623, 627 (Mo. Div. 1 1939). And laws often mandate specific factual messages, such as "EXIT"

signs above doorways with "letters large enough to be read from any part of the room." Mo. Rev. Stat. § 316.060. Likewise, local ordinances lawfully mandate signage at local swimming pools. *See, e.g.*, Clay Cnty., Mo. Ordinance, § 202.08(G) ("All Category II swimming pools where lifeguard service is not continuously provided shall provide a warning sign stating 'WARNING — NO LIFEGUARD ON DUTY' . . ."). Sanderson's rule would subject all commonsense disclosures to strict scrutiny simply because they are public messages.

4. Unable to rebut Missouri's cases, Sanderson relies on two inapposite cases.

Consider Sanderson's principal case, the Eleventh Circuit decision in *McClendon*. That case is nothing like this one. There, it was "undisputed" that the message was false; "Georgia law does *not* forbid registered sex offenders from participating in Halloween." 22 F.4th at 1334 (emphasis added). Here, the opposite is true. There, the defendant sheriff "had never had an issue with a registrant having unauthorized contact or reoffending with a minor on Halloween." *Id.* at 1338. Here, Sanderson *himself* violated the law against distribution of candy on Halloween. The signs in *McClendon* were an untruthful publicity stunt

by a local sheriff who put his name on the signs. *Id.* at 1333, 1336 ("the signs expressly bore the imprimatur of government"). Here, Missouri uses the signs to ensure that sex offenders comply with Missouri law regulating conduct; they also do not bear the imprimatur of the government.

Sanderson also cites an unpublished, ex parte,[2] TRO decision issued on an emergency timeline. *Doe v. City of Simi Valley*, 2012 WL 12507598 (C.D. Cal. Oct. 29, 2012). But Sanderson does not even dispute that the court never considered whether a "No candy" sign was permissible incident to a regulation of conduct. *Id.*

5. Failing all else, Sanderson claims that the "No candy" sign *is* a political or ideological message. He reasons (at 40) that the sign sends a message "about his and other registrants' risk to the public on Halloween." But those seven words do no such thing. The "No candy" sign makes no representation about the policy wisdom of keeping sex offenders away from children on Halloween or about Sanderson's dangerousness. It does not even say that he is a sex offender. Others on

[2] The court described the hearing as "ex parte" after the city chose to file only a barebones response to the TRO application. *See* No. 2:12-cv-08377, ECF 17.

Halloween post similar signs just to avoid children ringing their doorbells. Tr. 111:7-18.

Further, even if the "No candy" sign *did* say that Sanderson was a sex offender, that would not make the sign ideological or political. The postings in *FAIR* told students when and where to meet with a military recruiter, but that did not make the speech ideological or political. 547 U.S. at 61–62. Likewise, the statute in *Arkansas Times* required public contractors to certify that they had never boycotted Israel; this Court held that certification was merely a "factual disclosure," which was "not the kind of compelled speech prohibited by the First Amendment." 37 F.4th at 1394. Together, *FAIR* and *Arkansas Times* show that required speech is not "political or ideological" just because it communicates facts related to a politically charged topic.

Appellants also strongly dispute the claim that the signs are a Scarlet Letter. The signs say *nothing* about why a sex offender is not participating in Halloween. But even if the signs did, that would not mean that the signs are unconstitutional. As the Supreme Court noted in a case about sex offender registries, "our criminal law tradition *insists* on public indictment, public trial, and public imposition of sentence" even

though "publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." *Smith v. Doe*, 538 U.S. 84, 99 (2003) (emphasis added). Indeed, at one point in our history, "[h]umiliated offenders were required 'to stand in public with signs cataloguing their offenses.'" *Id.* Sanderson's "Scarlet Letter" argument defies history and precedent.

II. The sign-posting requirement satisfies any level of scrutiny.

Even if Missouri's statute triggered heightened scrutiny, protecting children is a compelling interest, and Missouri's unobtrusive sign requirement is narrowly tailored. The statute merely requires posting seven words. And the message is the same Sanderson would have to give if he answered the door; he has no candy he can provide to trick-or-treaters.

Sanderson never contests the district court's correct holding that there is "no doubt" Missouri "has a compelling interest" in preventing contact between sex offenders and children on Halloween. App.2234–35, R.Doc.70 at 16–17. Neither should there be any doubt about narrow tailoring. The district court's speculation that § 589.426's other provisions are adequate is belied by the facts here; Sanderson himself

violated the prohibition on contact between sex offenders and children on Halloween. The district court also disregarded uncontroverted testimony that the sign-posting requirement is necessary to keep offenders away from children. And Sanderson's brief completely misunderstands the entire point of Missouri's expert testimony about grooming. It is impossible to tell before an offender re-offends whether otherwise innocuous conduct is motivated by grooming. The "No candy" sign is a necessary and clear two-way barrier to ensure that children do not end up on the doorsteps of individuals with a "frightening and high risk of recidivism." *McKune*, 536 U.S. at 34.

A. Speculation that "other statutory restrictions" might keep sex offenders away from children does not replace the need for "No candy" signs.

Sanderson's brief never addresses Missouri's lead argument on strict scrutiny—that the district court rejected Missouri's evidence only through speculation and without *any* contrary evidence. Instead, Sanderson likewise speculates (at 51) that other statutory restrictions in § 589.426 adequately address all of Missouri's interests.

That theory is refuted by Sanderson's own conduct. He admits he violated the "other statutory provisions" for 15 years before he was

caught, prosecuted, and convicted. Indeed, he even continued unlawfully violating the statute after law-enforcement warned him and his fiancée to stop. Tr. 61:4–61:23. Sanderson's own conduct proves necessary this prophylactic that makes it easy for law enforcement to measure compliance and discourages children from knocking.

Nothing about the statute's other requirements (avoid contact with children, stay home with exterior lights off) unambiguously[3] notify the community to stay away—only the sign posting requirement has such a two-sided function: the offender must post the sign; parents and children know to stay away. And the correct seven words on the offender's home communicate to law enforcement that the offender knows and is in compliance with the statutory requirements without expressly notifying the community that this person is a sex offender, unlike in *McClendon*, 22 F.4th 1330.

[3] While there was some speculation by the Court that the requirement to turn off exterior lights might deter some trick-or-treaters, the record shows the opposite: "children walk up with the lights off, and that sign is just a little bit of enforcement not to knock on that door, because a child will knock on the door. The light off means absolutely nothing." (Sgt. Penny Cole) Tr. 140:11-14.

Sanderson offered no evidence discounting the importance of these essential functions. In fact, the *only* evidence in the record about the role played by the sign-positing requirement was testimony explaining why the sign-positing requirement is *necessary*—including from several law enforcement officers and a forensic psychologist. Tr. 106:22-107:23; 108:25-109:20; 111:7-14; 139:19-141:4; 150:15-151:9; 207:8-208:11; 209:20-25.

And the evidence shows that there are "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith v. Doe*, 538 U.S. 84, 103 (2003). Not only did Sanderson sexually abuse a child nearly two decades his junior and violate the no-distribution law for 15 years, but he also has an extensive and well-established record of: drug abuse;[4] alcohol abuse (five DUIs);[5] a string of assaults and batteries against girlfriends, neighbors,

[4] App.1951, Ex. ZZZ at 155. "Q: What other substances have you ingested?" "A: Cocaine, marijuana. . . all kind of stuff. . . . I tried about everything. . . . we did acid and everything."

[5] App.2024, *Id.* at 228, "Q: And then you also ran from the police with the DUI—your fifth DUI, too; right? A: No, I was just doing like an O.J. slow speed. . . . I knew I was screwed."

and strangers alike;[6] exposing himself to teenagers in a Taco Bell;[7] fleeing law enforcement both on foot and in a car;[8] and public urination shortly before trial.[9] Sanderson is not a person who has put his lawbreaking ways behind him.

Against this, Sanderson argues (at 59) that Missouri's law could be satisfied by the tiniest font on a sticky note inside the house. Nonsense, and it was legally incorrect for the district court to suggest that is true. Courts interpret statutes reasonably according to their ordinary meaning to the regular reader, not hyper literally. What matters is the "*fair meaning* of the text," not "the hyperliteral meaning of each word." Scalia & Garner, *Reading Law* 355–56 (2012). This has been the law for more than 200 years: "The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816).

Just as the ordinary reader knows that a law prohibiting "laying hands on a person" also prohibits "kicking, head-butting, even the use of

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[6] App.1921-22, *Id.* at 125-26; App.1939-40, 143-44; App.1954-58, 158-162.

[7] App.1926, *Id.* at 130.

[8] App.1920-21, App.2024, *Id.* at 124–25, 228.

[9] App.1960-61, *Id.* at 164-5.

a weapon," *Reading Law* at 356–57, so too the ordinary and "fair meaning" of Missouri's law requires a sign that serves the overarching and plain purpose of Missouri's prohibition on Halloween contact. *See Behlmann v. Century Sur. Co.*, 794 F.3d 960, 963 (8th Cir. 2015) ("This Court interprets statutes in a way that is not hyper-technical, but instead, is reasonable and logical and gives meaning to the statute." (quotation omitted)). Indeed, construing Missouri's statute unreasonably—as the district court did and Sanderson does—also violates the canon of "constitutional avoidance." *Jennings v. Rodriguez*, 583 U.S. 281, 286, (2018). Where, as here, a statute which can be interpreted in various ways has a constitutional interpretation, this Court picks the constitutional meaning. *Sisney v. Kaemingk*, 15 F.4th 1181, 1199 (8th Cir. 2021).

Sanderson cannot agree with the district court's strange construction of the statute. If he did, he could just leave a sticky note on his refrigerator year-round. Under that construction, Sanderson would not be entitled to the "drastic and extraordinary remedy" of an injunction, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); Missouri law would impose no meaningful harm at all.

"The First Amendment requires that [a state code of judicial conduct] be narrowly tailored, not . . . 'perfectly tailored.' . . . and the First Amendment does not confine a State to addressing evils in their most acute form." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454, (2015). That is exactly what Missouri has done. The sign requirement applies to individuals who are, as a class, uniquely disposed to reoffend. And Missouri crafted language specific enough to achieve that purpose while being generic enough to avoid Sanderson's concerns about needlessly identifying him as a sex offender.

B. Sanderson misses the entire point of uncontroverted testimony on grooming and re-offense rates.

The sign-posting requirement is narrowly tailored to the State's compelling interest in preventing sex offenders from interacting with children; such interactions otherwise might, to an outsider, appear innocent when they are actually an offender grooming future victims. Sanderson's brief misses this point. Sanderson acknowledges (at 19–20) that Dr. Simpson testified that beginning or continuing a grooming relationship is a primary concern on Halloween. But cherry-picking the potentially "completely innocent" appearance of grooming behaviors, Sanderson flips Dr. Simpson's meaning on its head.

Dr. Simpson's point was that the statute cannot be more narrowly tailored *because* it is impossible to distinguish between innocent behavior and grooming. So the only effective means of preventing re-offense is a statute requiring all sexual offenders to post a sign that stands between potential groomers and children on Halloween night.

Sanderson claims that Dr. Simpson did not testify that the documented re-offense rate is 24 to 34 percent with the actual re-offense rate likely higher. However, he said exactly that, explaining that sexual offenders re-offend: "anywhere from . . . five percent within the first few years up to 24 to 34 percent over the span of years." Tr. 186:5-15. Dr. Simpson also testified that there is gross underreporting of sex crimes against children. Tr. 158:8–159:13; *see also Belleau v. Wall*, 811 F.3d 929, 935 (7th Cir. 2016) ("A nationwide study. . . found that 70 percent of child sexual assaults reported in the interviews had not been reported to police.").

Sanderson's brief also misreads (at 20-21) Dr. Simpson's testimony about the re-offense rate, apparently confused about the difference between *re-offense* and *recidivism*. Sanderson is even more confused about the difference between short-term recidivism and long-term re-

offense. That difference resolves the supposed conflict Sanderson alleges between the State's witnesses.

As discussed by Mr. Oldfield, Missouri's *recidivism* statistics include only subsequent offenses for which an individual is charged, convicted and subsequently incarcerated within Missouri. And the data presented by Mr. Oldfield involved only convictions during a short time after initial release where offenders were returned to a *Missouri* state prison (not federal prisons or prisons in other States). Tr. 200:14-24. Dr. Simpson was responding to a question from the court asking "what percentage of sex offenders re-offend"; his response referred to an aggregate rate "over a span of years." Tr. 186:5-12. It is the high *re-offense* rate that Missouri's Halloween statute targets, regardless of conviction status or recidivism rate associated with the same.

III. The district court erroneously excluded evidence about Sanderson as irrelevant.

In the alternative, this Court should reverse and remand for a new trial because of the district court's mistaken understanding that evidence specific to Sanderson was irrelevant at trial. In its rush to complete a trial scheduled for two days in half that time, the district court excluded critical evidence: (1) testimony from Sanderson's victim, B.C., and (2)

testimony about Sanderson from Dr. Simpson. These exclusions were erroneous for two reasons. First, this evidence was relevant to rebut Sanderson's claim that § 589.426 burdened *his* First Amendment rights. Second, evidence specific to Sanderson was relevant for purposes of the facial challenge.

Appellants should *at least* have a chance to provide evidence about why the Halloween statute lawfully applies to Sanderson specifically, as well as to others like him. The district court allowed Sanderson to testify about his own Halloween display. Tr. 13:20–34:1. Sanderson said he operated the Halloween display for decades and that "hundreds of kids" frequented his display, allegedly without incident. *Id.* at 20:8. That opened the door for Appellants to rebut Sanderson's limited evidence with their own rebuttal evidence from B.C. and Dr. Simpson. *See United States v. Zephier*, 989 F.3d 629, 636–37 (8th Cir. 2021).

Sanderson claims (at 61) that Appellants had no right to offer rebuttal evidence because he merely proffered evidence "to establish his standing to challenge the Sign Requirement." This makes no sense. Appellants agree that Sanderson offered virtually no evidence, which is partly why this Court should reverse. But Sanderson's minimal evidence

still opened the door for rebuttal. This is especially true since the district court (wrongly) concluded that § 589.426 triggered strict scrutiny. If strict scrutiny applied, then Appellants had a right to provide evidence about Sanderson's own behavior to show why § 589.426 is narrowly tailored and serves a compelling interest.

Sanderson claims (at 60–62) that the district court rightly excluded concrete evidence about Sanderson because, on a facial challenge, the district court cannot consider party-specific evidence or anything beyond "the plain text of the Statute." (citing *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1080 (8th Cir. 2024)). But Sanderson misreads *Animal Legal*. In the section of *Animal Legal* that Sanderson cites, this Court was distinguishing facial challenges from as-applied challenges—where courts *do* sometimes hold that a statute is unconstitutional solely based on the statute's unique application to a specific party. *See* 89 F.4th at 1080. But *Animal Legal* never said that, on a facial challenge, States cannot use party-specific evidence to show why State law satisfies strict scrutiny. Further, *Animal Legal* expressly agreed with the Supreme Court's decision in *Washington State Grange*, which reversed a facial invalidation of a statute because the lower court's opinion rested on

"sheer speculation" and "[a] statute 'is not to be upset upon hypothetical and unreal possibilities.'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454–55 (2008) (quoting *Pullman*, 235 U.S. at 26); *Animal Legal*, 89 F.4th at 1082.

Sanderson's reading also makes no sense—especially in light of the court's strict scrutiny analysis. If evidence about the statute's application to specific individuals is inadmissible on a facial challenge, then no statute would *ever* survive strict scrutiny: a State could never provide concrete evidence about its compelling interest and narrow tailoring. Instead, concrete individualized evidence could simply be dismissed as "irrelevant." Like the district court, Sanderson overlooks controlling law, which requires courts to "deal with the [facial First Amendment challenge] in hand and not with imaginary ones."[10] *Washington State Grange*, 552 U.S. at 454–55.

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[10] Sanderson claims that the Attorney General agreed at trial that party-specific evidence is irrelevant on a facial challenge. Sanderson Br. at 60–61. Nonsense. Sanderson cherry-picked an incomplete quote from an objection battle in which counsel was explaining the relevance of evidence about the risks that sex offenders pose as a class. *See* Tr. 161:10–163:18. Counsel's point was that aggregate data about sex offenders is relevant on a facial challenge because facial challenges do not *just* concern an alleged violation of Sanderson's rights *alone*.

The district court found in Sanderson's favor after depriving Appellants of the opportunity to present any concrete evidence specific to Sanderson himself, or to others similarly situated. That severely prejudiced Appellants. Sanderson claims (at 62) that Appellants suffered no prejudice because "the District Court had a full record of Sanderson's sex offense conviction, as well as Sanderson's complete criminal history, in the record." But that does not disprove prejudice. Prior evidence of Sanderson's conviction is no replacement for the new testimony that his victim, B.C., would have offered about the grooming she experienced. B.C. would have provided extensive testimony about Sanderson's ability to use seemingly innocent behavior to exploit unsuspecting victims. Evidence of Sanderson's criminal record is also no replacement for the testimony of an expert, like Dr. Simpson. Simpson told the district court frankly that he had "serious concerns" and that "[t]here [were] a number of things" he wanted to share about Sanderson specifically. Tr. 185:21–

Sanderson's reading that objection exchange is also nonsensical in light of the Attorney General's repeated attempts to introduce party-specific evidence, including testimony from B.C. and Dr. Simpson. *See, e.g.*, *id.* at 4:20–5:3 (arguing that B.C.'s testimony about Sanderson's "grooming behavior" was relevant and "[n]ot all of that is going to be captured" in evidence about Sanderson's criminal record).

186:6. But the district court refused to consider evidence specific to Sanderson. *Id.* Sanderson cannot possibly claim that the district court received all relevant evidence.

To illustrate just how much evidence the district court excluded, consider Sanderson's demonstrably erroneous claim (at 62 n.3) that—through dozens of *sua sponte* exclusions—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." That is not what happened. Trial was scheduled for *two* days, *see* App.0008, R.Doc.51, but the district court excluded so much evidence *sua sponte* that trial was cut to one day. The district court's exclusion of relevant evidence on a facial challenge deprived Appellants of half their affirmative case.

IV. The district court failed to apply correctly the Supreme Court's current doctrine on facial challenges and universal injunctions.

The district court both failed to conduct a proper overbreadth analysis and also issued a remedy beyond the equitable authority of federal district courts.

A. The district court's overbreadth analysis incorrectly focused on speculation instead of weighing constitutional applications of the statute.

"Because it destroys some good along with the bad, invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Hansen*, 599 U.S. 762, 770 (2023) (quotations omitted). Sanderson incorrectly claims that the district court did not need to analyze individual applications of the Halloween statute because, he alleges, the interests are the same across the board for every offender. The contrary is true: The Supreme "Court has . . . made facial challenges hard to win," *Moody v. NetChoice, LLC*, 603 U.S. 707, 723, and a successful facial challenge cannot rest on "sheer speculation," *Washington State Grange*, 552 U.S. at 454–55. In the First Amendment context, a plaintiff must show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 615 (2021).

Moreover, "[i]n determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington*

State Grange, 552 U.S. at 449–50. At trial, Sanderson produced *no* evidence about anyone but himself. That is insufficient to prove a facial challenge.

In evaluating statutory challenges under the First Amendment, a court must weigh "*all* of the law's applications, determine the constitutionality of each application, and judge the statute relative to its plainly legitimate sweep." *Hansen*, 599 U.S. at 770. And as the Supreme Court emphasized just two years ago, "[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep. In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.*

The district court acknowledged that, for Sanderson to succeed on his facial challenge, he must prove that the Halloween statute's unconstitutional applications substantially outweighed its constitutional applications. App.2229–30, R.Doc.70 at 11–12 (citing *NetChoice,* 603 U.S. 707). But the court failed to weigh *any* application other than the application to Sanderson. And the district court's hypotheticals about a tiny sign posted on a back door are exactly the fanciful speculation

Hansen forbade. Worse still, Sanderson offered no evidence about any other application of the statute: to different tiers of offenders, or classes of offenders such as Sexually Violent Predators. And when Missouri tried to offer such testimony (*i.e.*, from Dr. Simpson, Mr. Oldfield, or many of the law enforcement officers who testified), the court incorrectly dismissed such evidence as "irrelevant." *E.g.*, Tr. 100:19-101:9; 113:9-19; 124:12-18; 133:5-134:2; 161:4-163:10; 188:14-189:6; 208:20-211:23; *see also* Tr. 130:15-18 (THE COURT: "Many times with a facial challenge to a Statute, there is no evidence that is necessary, and that's part of the issue that I was trying to talk to counsel about here at the sidebar.").

The heavy burdens on a plaintiff seeking to overturn a lawful statute underscored by the Supreme Court in *NetChoice* and *Hansen* build on a long history of robust requirements for facial challenges: "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Washington State Grange*, 552 U.S. at 450 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). "A statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Id.* at 455 (quoting *Pullman Co. v. Knott*, 235 U.S. 23, 26

(1914)). "[T]his court must deal with the case in hand and not with imaginary ones." *Id.* at 455 (quoting *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912)).

Sanderson's and the court's rejection of the relevance of evidence about sexually violent predators ("SVPs") is enigmatic of the legal error of failing to weigh the various constitutional applications of § 589.426. Sanderson claims that the court was right to reject this evidence as redundant (because SVPs are allegedly similar to other offenders) or irrelevant (because SVPs are allegedly locked up for life). These hypotheses are incorrect: Missouri defines sexually violent predators to be individuals who suffer "from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." Mo. Rev. Stat. § 632.480(5). Such individuals are *often* civilly committed after commission of one or more sexually violent offenses—but not always. *Id.* Many sexually violent predators were in the community on the sex offender registry before being re-imprisoned or civilly committed; and these predators can later be released—even if they remain at some risk of reoffending. Mo. Rev. Stat. §§ 632.480 to 632.513. Sanderson's own conduct violating the

Halloween statute for years along with many other types of offenses shows there are many kinds of offenders—some who flout any criminal statute they dislike, not just Halloween requirements. Refusing to consider the application of the Halloween statute to sexually violent predators and others is reversible error.

In one last attempt, Sanderson says (at 36) that the district court heard sufficient evidence to support a facial challenge because "Missouri admits that it 'called several [trial] witnesses who testified about the application of [the Statute] across Missouri.'" But Missouri's witnesses do not support Sanderson's case factually and he bears the legal burden to present evidence that proves a constitutional violation; his argument implicitly admits he presented no such evidence.

* * *

In short, Sanderson failed to provide any evidence about § 589.426's application other than to himself. He therefore fails to lodge a successful facial challenge. He cannot demonstrate that there are any unconstitutional applications of this statute, still less that such applications outweigh the many constitutional applications of the statute

that keep children away from the doors of sex offenders, about one-third of whom will re-offend.

B. Even if Sanderson succeeded on his facial challenge, a universal injunction is improper.

Sanderson's two arguments fail to excuse the district court's legal error in entering a universal injunction. First, Sanderson misinterprets *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921 (2024), erroneously claiming (at 63–65) that *Poe* merely concerned "injunctions prohibiting the enforcement of statutory provisions not actually challenged in the suit." In fact, none of the Justices in *Poe* assessed the lower court's merits analysis that the Idaho statute was facially invalid. *Compare Poe ex rel. Poe v. Labrador*, 709 F. Supp. 3d 1169 (D. Idaho 2023), *with Poe*, 144 S. Ct. 921. Instead, "the Court stay[ed] the district court's injunction *to the extent it applies to nonparties*, which is to say to the extent it provides 'universal' relief." *Poe*, 144 S. Ct. at 921 (Gorsuch, J., concurring); *see also id.* (Op. of the Court) (staying the injunction "except as to the provision *to the plaintiffs*" (emphasis added)). Contrary to Sanderson's misinterpretation, *Poe* does hold that a court should not issue a universal injunction even if the plaintiff were likely to succeed on a facial challenge. Lest it exceed its equitable jurisdiction, a court must award relief no

greater "than necessary to redress the plaintiff's injuries." *Id.* at 923 (alterations omitted) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

Second, Sanderson cites (at 65–67) decades-old lower court precedent supposedly holding that a statewide injunction is warranted if a plaintiff succeeds on their facial challenge. But none of those cases undermine *Poe*, decided *last year*, where the Supreme Court's opinion firmly rejects that statewide relief is warranted whenever a plaintiff succeeds on a facial challenge. *Poe*, 144 S. Ct. 921. Further, Sanderson's lower court precedent does not undermine other Supreme Court precedents on which *Poe* relied—holding that equitable remedies should "be limited to" redressing the only the plaintiff's injury. *Gill v. Whitford*, 585 U.S. 48, 68 (2018). This Court should, at a minimum, reverse the statewide injunction.

CONCLUSION

This Court should reverse the district court's order and vacate its injunction. In the alternative, the Court should reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. Counsel for Appellee will receive a copy of the foregoing document through the CM/ECF system on March 27, 2025.

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