Nos. 24-3120, 24-3204
Decided via Published Opinion on January 2, 2026
The Honorable James B. Loken, Jane Kelly, and Ralph R. Erickson

In the United States Court of Appeals
For the Eighth Circuit

THOMAS SANDERSON,
Plaintiff-Appellee
v.

CATHERINE L. HANAWAY, in her 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)

Petition for Rehearing *En Banc*

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JURISDICTIONAL STATEMENT

This appeal is from the final judgment of the District Court for the Eastern District of Missouri entered on October 2, 2024. App.2242, R.Doc.71. The District Court had jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. On October 2, 2024, the District Court declared Mo. Rev. Stat. § 589.426.1(3) unconstitutional and permanently enjoined its enforcement by Appellants statewide. App.2240–41, R.Doc.70 at 22–23. The Missouri Attorney General timely appealed on October 18, 2024. The Chief of Police for Hazelwood, who joins the Attorney General in this appeal, timely appealed on October 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1).

STATEMENT OF ISSUES

I. **Whether the panel misapplied controlling Supreme Court precedent governing Sanderson's facial challenge.**

- *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024)
- *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008)

II. **Whether the panel's conclusion that the State-required disclosure qualifies as compelled speech conflicts with controlling Supreme Court precedent and a relevant decision by the United States Court of Appeals for the Fifth Circuit.**

- *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017)
- *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)
- *United States v. Arnold*, 740 F.3d 1032 (5th Cir. 2014)

INTRODUCTION AND RULE 40(b) STATEMENT

This case concerns whether the First Amendment forbids requiring sex offenders to truthfully notify the public that they cannot—under an unchallenged Missouri law—distribute candy on Halloween. Appellee Thomas Sanderson is a registered sex offender, so Missouri law prohibits him from distributing candy on Halloween and requires him to "[p]ost a sign" on Halloween "stating, 'No candy or treats at this residence.'" Mo. Rev. Stat. § 589.426.1(3).

After police discovered Sanderson violating both requirements, Sanderson challenged the sign-posting requirement under the First Amendment. The District Court agreed with Sanderson and declared the sign-posting requirement was unconstitutional compelled speech. So did the panel.

But in reaching its holding, the panel never grappled with the different circumstances in which the law governs and, hence, failed to apply the controlling facial standard. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). This case exemplifies why courts should not rush to decide constitutional challenges "en masse." *Id.* Rather than engaging with varying scenarios in which the law could apply, the panel decided—

without elaboration—that the law had a "sole application" to all registered sex offenders. Slip Op. 5. That curt conclusion does not satisfy the standard recently expounded upon by the Supreme Court: Courts "must explore the [challenged] laws' full range of applications." *NetChoice*, 603 U.S. at 726. Here, at minimum, that required considering the law's application to different kinds of offenders—such as to offenders who qualify as sexually violent predators. Simply assuming that all sex offenders come equal and making decisions about the law's impact based on that assumption violates *NetChoice*'s clarification of how the facial standard applies in First Amendment cases.

The panel also ignored how its compelled-speech holding conflicts with a decision by the United States Court of Appeals for the Fifth Circuit. Relying on a precedent of this Court, the Fifth Circuit rejected a claim that disclosing status as a sex offender constitutes compelled speech. *See United States v. Arnold*, 740 F.3d 1032, 1034–35 (5th Cir. 2014) (citing *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995)). The Fifth Circuit was correct and the panel was wrong: Requiring sex offenders to disclose *factual* information is not unconstitutional compelled speech. *See, e.g.*, *Zauderer v. Off. of Disciplinary Couns. of*

Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (mandate to disclose "factual and uncontroversial information" does not trigger strict scrutiny). Before creating a circuit split, this Court should grant *en banc r*eview.

STATEMENT OF THE CASE

Missouri law generally prohibits sex offenders from going near children. For example, many sex offenders must stay away from places commonly frequented by children, such as schools, daycares, and parks. Mo. Rev. Stat. §§ 566.147–.150. Yet once a year, millions of doorsteps become places frequented by children—because Halloween creates an implied invitation for children to approach the doorsteps of strangers. Missouri law thus prohibits sex offenders from having contact with children in that context as well—forbidding them from distributing candy on Halloween and requiring them to "[p]ost a sign" on Halloween stating "No candy or treats at this residence." Mo. Rev. Stat. § 589.426.1(3).

Thomas Sanderson is a Tier II sex offender because, in 2001, at the age of thirty-five, he committed second-degree statutory sodomy against B.C., a then-sixteen year-old girl. Tr. 15:21–16:6, 86:20–96:5; App.1346, R.Doc.57 Ex. KKK. One evening, a drunken Sanderson burst into B.C.'s bedroom. App.1166, R.Doc.57 Ex. HHH at 9. B.C. tried to leave, App.

1167–68, R.Doc.57 Ex. HHH at 10–11, but Sanderson stopped her and told her to "lay down" on a bed. App.1168, R.Doc.57 Ex. HHH at 11. B.C. refused and instead sat on the edge of one the bed. *Id.* Sanderson then moved his leg on top of B.C. and tried to kiss her. App.1170, R.Doc.57 Ex. HHH at 13. He next sat on top of her. App.1171, R.Doc.57 Ex. HHH at 14. B.C. told Sanderson to stop, but Sanderson refused to listen. *Id.* Sanderson moved B.C.'s underwear, "smiled" at her, *id.*, and inserted his fingers into B.C.'s vagina, App.1171–72, R.Doc.57 Ex. HHH at 14–15. Only when B.C. told him to stop "really loud," did he finally stop. *Id.*

On October 31, 2022, police received a tip that Sanderson was distributing candy; they investigated the tip and videotaped Sanderson personally distributing candy. App.94, R.Doc.18-1; App.640, R.Doc.57 Ex. V5. A verbally abusive Sanderson repeatedly refused to comply with police orders to turn off his Halloween display and cease distributing candy. Tr. 22:13–23:8. He later pleaded guilty to violating Section 589.426, both for distributing candy and for failing to post the no-candy sign. App.127–28, R.Doc.18-8 at 1–2.

Sanderson then brought this action, alleging that the sign-posting requirement of Section 589.426.1(3) is facially unconstitutional under the

First Amendment. App.27; R.Doc.1 at 15. Although Sanderson advanced a facial challenge and requested a statewide injunction, he called only two witnesses at trial: himself and Defendant James Hudanick. *See* Tr. 13:6–34:7; Tr. 56:15–65:11. Sanderson volunteered his lengthy criminal history, including convictions or arrests for: statutory sodomy; five DUI offenses; four domestic disturbances; two incidences of public urination; a boating-while-intoxicated offense; a battery offense; an offense for brandishing a plastic gun; an offense for exposing his "buttocks" to "a group of young people" at a Taco Bell; an offense for assaulting his neighbor; and an offense for fighting in a Home Depot parking lot. Tr. 29:11–31:20. Sanderson also testified that when he was incarcerated, he did not complete the Missouri Sexual Offender Program ("MOSOP"). Tr. 37:17–20. David Oldfield, a retired Director of Research and Evaluation for the Missouri Department of Correction, testified that offenders who fail or refuse to participate in MOSOP are three times more likely to reoffend sexually relative to offenders who successfully complete the program. Tr. 196:21–24.

Despite Sanderson bearing the burden of proving the statute facially unconstitutional, the State still called a number of witnesses to

help demonstrate the statute's constitutional application. An expert, Dr. Paul Simpson, explained 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. Tr. 158:8–159:13, 186:5–187:4. Dr. Simpson also testified that, while psychological science can provide information about the risk across populations, it can be difficult to identify which individuals will re-offend. Tr. 166:1–168:6.

Dr. Simpson's testimony was cut short by the District Court—it intervened *sua sponte* several times contending that testimony about psycho-sexual risk assessments was not relevant. Tr. 161:11–23, 180:17–19, 184:20. The court also refused to let Dr. Simpson testify about the risks that Sanderson himself poses and the need for Sanderson to abide by the sign-posting requirement. Tr. 185:21–186:6. Likewise, the District Court refused to let B.C. testify about Sanderson's sex offense—even though that testimony could have helped show how Sanderson engaged in grooming behavior. Tr. 91:6, 91:24–92:1, 93:12–13, 93:18–20, 94:3, 94:11, 94:24.

Despite Sanderson declining to present any evidence at trial in support of his facial challenge, the District Court held that the sign-

posting requirement of Section 589.426.1(3) is facially unconstitutional under the First Amendment. App.2240–41, R.Doc.70 at 22–23. The 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 ones. App.2229–30, R.Doc.70 at 11–12 (citing *NetChoice*, 603 U.S. at 723). But lacking concrete evidence in support of a facial challenge, the court never cited any evidence about the application of Section 589.426.1(3) to offenders other than Sanderson. App.2229–38, R.Doc.70 at 11–20. Neither did the court address why Section 589.426.1(3) does not lawfully apply to sexually violent predators, who are more dangerous than Sanderson. *See id.*

The panel largely followed in the District Court's footsteps. The entirety of the panel's facial-standard analysis totaled two sentences. *See* Slip Op. 5. The panel tersely concluded that "the statute does not apply differently to anyone within the category of those required to register" and proceeded to find that this "sole application" to all sex offenders compelled speech. *Id.* By concluding that all offenders are equal, the panel never addressed the State's arguments regarding application of the law to different kinds of offenders—such as sexually violent predators.

See id.; *see* Opening Br. 44–45. The panel likewise never considered a decision by the Fifth Circuit rejecting a compelled-speech claim for more onerous disclosures under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 16913. *See* Opening Br. 51–52.

ARGUMENT

I. The Panel's Decision Misapplies Controlling Supreme Court Precedent.

Sanderson "chose to litigate [this] case[ ] as [a] facial challenge[ ], and that decision comes at a cost." *NetChoice*, 603 U.S. at 723. But the panel's decision waives that cost—permitting Sanderson to prevail on an abstract claim without considering whether the sign-posting requirement constitutionally applies to sex offenders with elevated risk profiles (like Sanderson himself). *See* Slip Op. 5 (holding that the statute "does not apply differently").

This is not how facial challenges work: "[C]ourts usually handle constitutional claims case by case, not en masse," because facial resolutions "'often rest on speculation' about the law's coverage and its future enforcement." *NetChoice*, 603 U.S. at 723 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Therefore, in every case involving a facial challenge, a court must

consider the full range of "activities" and "actors" regulated by a law. *Id.* at 724. In First Amendment cases, "[t]he question is whether 'a *substantial* number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 723 (emphasis added) (second alteration in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)).

This analysis proceeds in two steps. The first step is to assess the scope of the challenged law. *Id.* at 724. That requires a court to consider, "What activities, by what actors, do[es] the law[ ] prohibit or otherwise regulate?" *Id.* Second, a court must "decide which of the law['s] applications violate the First Amendment" and "measure them against the rest." *Id.* at 725. Put another way, a court must consider a law in all its applications—both "constitutionally impermissible and permissible"—and "compare the two sets." *Id.* at 726.

Applying that standard, Missouri's statute is clearly constitutional in a "substantial" set of applications. *Id.* at 723. The panel correctly recognized that Missouri has a compelling interest in protecting children—and even curtailing the "conduct of sexual offenders on Halloween." Slip Op. 7. True indeed, the State's interest is surely at its

greatest magnitude when the State is trying to shield children from violent sex offenders. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (recognizing the serious threat that sex offenders present to society—and children in particular—given their higher recidivism rate than other criminals). And at least with respect to violent sex offenders, it is hard to see how the statue is not narrowly tailored. Without requiring the posting of a sign with the factual disclosure that candy is unavailable at a violent sex offender's house, Missouri faces an inevitable risk that children will approach that violent sex offender's door.[1]

The panel did not meaningfully contest those points because it did not follow the governing facial-challenge standard. Specifically, with its *ipse dixit* that the law has no differing effect based on offenders' risk profiles, Slip Op. 5, the panel did not explore the "full range" of the statute's "applications," *NetChoice*, 603 U.S. at 726. It never analyzed

[1] The panel acknowledged Missouri presented evidence on this point. *See* Slip op. at 8. But the panel reasoned that parents' ability to consult "the publicly accessible sex offender database" and the ban on sex offenders from participating provided sufficient protection. *Id.* However, the panel never addressed the State's fundamental point: that ample evidence showed that children will still approach darkened homes of sex offenders complying with the statute's remaining provisions. *See, e.g.*, Tr. 140:11–15; Tr. 208:1–8.

whether the varying dangers posed by sex offenders and the needs of police departments influence the constitutionality of the sign-posting requirement in given circumstances. *See* Slip Op. 8–9 (failing to address differential application in its narrow-tailoring analysis).[2] And it did so on a record where Sanderson never presented evidence—or even discussed—the application of Section 589.426.1(3) to any offender other than himself. *See* Opening Br. 23–25 (summarizing Sanderson's evidence).

Moreover, "[i]n determining whether a law is facially invalid, [courts] must . . . not . . . go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449–50. Yet, in its narrow-tailoring analysis, the panel

[2] The panel briefly noted concern about sexually violate predators in a footnote, faulting the State for failing to offer evidence "that sexually violent predators, once released, pose a different level of risk than any other person required to register." Slip Op. 9 n.1. But the Supreme Court places the burden on Sanderson to establish that "unconstitutional applications substantially outweigh its constitutional ones"—meaning it was Sanderson's job to show that State's purported justifications were without merit. *NetChoice*, 603 U.S. at 724; *see also Brakebill v. Jaeger*, 932 F.3d 671, 677–78 (8th Cir. 2019) (describing the burden). Regardless, the panel's (incorrect) effort to shift the burden epitomizes its broader failure to engage with the State's contention that the statute can have varied effects based on offender risk. *See* Opening Br. 44–45.

latched onto (unrealistic) speculation that offenders could defeat the requirement's effect by making their signs too small to read or putting them somewhere out of sight. Slip Op. 7–8. But this comes from a speculative comment made in answer to a hypothetical question posed by the District Court—Sanderson never presented evidence that the sign-posting requirement is broadly inefficacious. Tr. 117:22–118:5. "[T]his court must deal with the case in hand and not with imaginary ones." *Wash. State Grange*, 552 U.S. at 455 (alteration in original) (quoting *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912)).

The panel also relied on impermissible (and patently unrealistic) speculation to establish that Missouri's sign requirement is not useful. The panel acknowledged testimony from police officers that the sign requirement *is useful* in protecting children on Halloween. Slip Op. at 8. But the panel dismissed that evidence by speculating parents could adequately protect their children by consulting "the publicly accessible sex offender database" or relying on violent sex offenders to comply with Missouri's separate prohibition on sex offenders' participating in Halloween—and resisting any urge to answer the door if children knocked. *Id.* Hypothesizing that all parents on Halloween night will

prevent their children from approaching the doors of violent sex offenders by doing pre-Halloween online research, or that children approaching the homes of violent sex offenders can just trust the violent sex offenders to stay in legal compliance, is not a permissible basis to facially enjoin Missouri's law. *See Wash. State Grange*, 552 U.S. at 455.

* * *

As the Supreme Court itself made clear in *NetChoice*, facial challenges—even in First Amendment contexts—are supposed to be "hard to win." *NetChoice*, 603 U.S. at 723. Unfortunately, the panel's decision turns this high bar on its head, making it *easier* for sex offenders like Sanderson to assert compelled speech in a facial suit—thereby circumventing evidence of the offender's own risk profile that would dominate an as-applied challenge. Nothing in First Amendment jurisprudence countenances such a perverse result. To the contrary, the panel's failure to grapple with whether the sign-posting requirement constitutionally applies to sex offenders with differing risk profiles defies *NetChoice* and warrants the full Court's intervention. *See* Fed. R. App. P. 40(b)(2)(B).

II. The Panel's Decision Conflicts with a Decision of the Fifth Circuit and Supreme Court Authority.

The Court should also rehear this case to correct the panel's misalignment with an on-point case from a sister circuit. *See* Fed. R. App. P. 40(b)(2)(C).

In *United States v. Arnold*, 740 F.3d 1032 (5th Cir. 2014), the Fifth Circuit rejected a First Amendment challenge to the registration requirement of SORNA. There, a sex offender argued that the registration requirement unconstitutionally compelled speech. *See id.* at 1032–33. The court noted that the offender had "not identified any decisions striking a registration requirement as being compelled speech in violation of the First Amendment." *Id.* at 1034. Then, relying on *this Court's* holding in *United States v. Sindel*, the Fifth Circuit compared the registration requirement to the lawful "compelled disclosure of information on an IRS form," which was at issue in *Sindel*. *Id.* at 1034–35 (citing *Sindel*, 53 F.3d at 878). The Fifth Circuit agreed with this Court that "[t]here is no right to refrain from speaking when 'essential operations of government require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.'" *Id.* at 1035 (quoting *Sindel*, 53 F.3d at 878).

The Fifth Circuit also carefully noted that the sex offender "ha[d] not urged that SORNA either requires him (a) to affirm a religious, political, or ideological belief he disagrees with or (b) to be a moving billboard for a governmental ideological message." *Id.* Instead, "Congress enacted SORNA as a means to protect the public from sex offenders by providing a uniform mechanism to identify those convicted of certain crimes." *Id.* The Fifth Circuit concluded that "[t]he logic of *Sindel* extends to the present case: When the government, to protect the public, requires sex offenders to register their residence, it conducts an 'essential operation[ ] of [the] government,' just as it does when it requires individuals to disclose information for tax collection." *Id.* (alterations in original) (quoting *Sindel*, 53 F.3d at 878).

Despite the Fifth Circuit's reliance on this Court's precedent and despite Appellants' heavy emphasis of *Arnold*, *see* Opening Br. 51–52; Reply Br. 1–2, 5, 9, the panel never addressed that case in its compelled-speech analysis, *see* Slip Op. 5–7. *Arnold*, however, shows the correct result—the sign-posting requirement (like SORNA) does not force sex offenders to propagate an ideological message. *See* 740 F.3d at 1035. Indeed, this case is even easier than SORNA, because Missouri's statute

does not require sex offenders to out themselves publicly. Mo. Rev. Stat. § 589.426.1(3).[3] Given the Fifth Circuit's reliance on this Court's precedent in upholding SORNA's more onerous disclosure requirements, the full Court should rehear this case to bring its precedent into proper alignment.

Even putting aside *Arnold*'s reliance on this Court's precedent, *Arnold* fits better with Supreme Court precedent than the panel's decision. Indeed, the Supreme Court has repeatedly recognized that requiring purely factual disclosures does not trigger strict scrutiny. *See Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017); *Zauderer*, 471 U.S. at 651; *see also Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109 (D.C. Cir. 2011) (holding agencies may require factual disclosures to them). Missouri's required message is purely factual: The resident legally cannot distribute candy. *See* Mo. Rev. Stat. § 589.426.1.

[3] Missouri's not requiring sex offenders to identify themselves as offenders distinguishes this case from an Eleventh Circuit decision cited by the panel. *See* Slip Op. 9 (citing *McClendon v. Long*, 22 F.4th 1330 (11th Cir. 2022)). There, the court found compelled ideological speech because the signs suggested that all sex offenders were dangerous. *See McClendon*, 22 F.4th at 1336–37. Here, however, the statute merely requires offenders to post a factual message that any law-abiding citizen not participating in Halloween could put on her door. *See* Mo. Rev. Stat. § 589.426.1(3).

Yet, the panel perceived an ideological undertow in the statement and treated it like "'compelled statements of opinion.'" Slip Op. 6 (citation omitted). Letting the panel's logic stand would mean that *every* required factual disclosure—from SORNA on down to warning-label regulations—will receive the same treatment as a state mandate to profess an orthodox opinion.[4] The *en banc* Court should reject that approach, avoid a circuit split, and realign this Court's caselaw with Supreme Court authority.

CONCLUSION

For these reasons, this Court should grant the petition.

[4] Similarly, the panel's emphasizing that Missouri requires specific verbiage is also erroneous. *See* Slip. Op. 6–7. The Supreme Court has already held that the government can require factual disclosures to use particular language. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010). Rightly so; if litigants could receive strict scrutiny by simply quibbling over the phrasing a state sets for a disclosure, it would be practically impossible to enforce even basic labeling regulations. *Cf., e.g.*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc) (confronting a challenge to country-of-origin labels).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limits of Fed. R. App. P. 32(a)(4)–(6) and 40(d)(3)(A) in that it contains 3,698 words excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) in that this document has been prepared in a proportionally spaced typeface using Microsoft Word (size 14 Century Schoolbook font).

/s/ Louis J. Capozzi III
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CERTIFICATE OF SERVICE

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 January 16, 2026.

/s/ Louis J. Capozzi III
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