No. 21-10092

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY McCLENDON *et al.*,
Plaintiffs-Appellants,
v.

GARY LONG *et al.*,
Defendants-Appellees.

On appeal from the Middle District of Georgia,
Christopher Reed et al. v. Gary Long et al., No. 5:19-CV-385 (MTT)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae file this Certificate of Interested Persons and Corporate Disclosure Statement, as required by Eleventh Circuit Rules 26.1, 28-1(b), and 29-2.

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Pursuant to Eleventh Circuit Rule 26.1-2(b), this Certificate includes only persons and entities omitted from the Certificate contained in Appellants' Opening Brief.

Corporate Disclosure Statement

Amicus Curiae American Civil Liberties Union Foundation is a non-profit entity that does not have a parent corporation. No publicly held corporation owns 10% or more of any stake or stock in *Amicus Curiae*.

Dated: March 24, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU and its affiliates have appeared in numerous cases to defend the First Amendment rights of all people, including people convicted of sex-related offenses. This includes appearing as counsel in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003) and *Whitaker v. Perdue*, No. 4:06-cv-140-WCO (N.D. Ga. filed June 20, 2006), and as *amicus* in *Smith v. Doe*, 538 U.S. 84 (2003). The ACLU and its affiliates throughout the country have repeatedly raised privacy, due process, and compelled speech concerns about public sex offender registries. *See, e.g.*, John Hardenbergh, *Sex Offender Law Violates Rights, Puts Kids at Risk*, ACLU Speak Freely (Mar. 16, 2009), https://bit.ly/3vIHNLl; Press Release, Susan Goering, ACLU of Md. Exec. Dir., *ACLU of Maryland Voices "Continued Concerns" Over Sex Offender Registry Website* (Apr. 22, 2002), https://bit.ly/3vIol1c.

[1] *Amicus* confirms that Plaintiffs-Appellants consented to and Defendants-Appellees do not oppose the filing of this brief, that no party or counsel for any party authored this brief in whole or in part, and that no person other than *Amicus* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

As an organization committed to protecting the right to freedom of speech and promoting a fair and effective criminal legal system, *Amicus* have a strong interest in the proper resolution of this case.

STATEMENT OF THE ISSUES

Whether Butts County's Halloween signs are a form of compelled speech triggering strict scrutiny.

SUMMARY OF THE ARGUMENT

The Supreme Court has recognized, in cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977), and *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), that the First Amendment prohibits the government from compelling private individuals to post on their residential property ideological and nonfactual messages with which they disagree. Any regulation that compels speech in this way must satisfy strict scrutiny.

Shortly before Halloween 2018, the Butts County Sheriff posted signs in front of Plaintiffs' residences reading, "Warning! No trick-or-treat at this address!! A community safety message from Butts County Sheriff Gary Long." Def. Stmt. Of Undisputed Material Facts ¶ 1, ECF No. 51-3. The district court held that Plaintiffs' First Amendment rights were not implicated when the Butts County Sheriff placed these warning signs in their yards because, it reasoned, the public was unlikely to

perceive residents as having endorsed the government messages on their lawns. Summ. J. Order 26, ECF No. 58.

In so holding, the district court granted government officials capacious authority to coerce individuals into disseminating government messages at their residences. While the government's interest in protecting children is undisputed, Butts County has overstepped its authority because the compelled display of its Halloween signs is not the least restrictive means available to achieve that interest. The government could very easily disseminate its message through its own means. This Court should reverse.

ARGUMENT

I. THE FORCED DISPLAY OF BUTTS COUNTY'S HALLOWEEN SIGNS IS A FORM OF COMPELLED SPEECH TRIGGERING STRICT SCRUTINY.

The Butts County Sheriff placed warning signs on Plaintiffs' property that read, "Warning! No trick-or-treat at this address!! A community safety message from Butts County Sheriff Gary Long." [2] Plaintiffs were subsequently told by

[2] The district court concluded that there was insufficient evidence to find as a matter of law that the signs were placed on rights-of-way on the Plaintiffs' property, Summ. J. Order 13–14; thus, on appeal from the grant of Defendant's summary judgment motion, the Court must assume that the county is forcing Plaintiffs to display the signs on purely private property. But even if the signs were placed in the rights-of-way, the result would be the same. Plaintiffs, as abutting residents, have a possessory interest in the rights-of-way. *See* P.I. Order 11, ECF No. 17 (citing *Seaboard Air Line Ry. Co v. Greenfield*, 128 S.E. 430, 434 (Ga.

sheriff's deputies that removing the sign would be a "criminal action." Mot. Hearing Tr. 31–32, ECF No. 20; Summ. J. Order 4–5. The compelled display of these signs on Plaintiffs' property undoubtedly implicated their First Amendment rights. It is long-settled that the government may not "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." *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. And as the Supreme Court recognized in *City of Ladue v. Gilleo*, "residential signs have long been an important and distinct medium of expression." 512 U.S. 43, 55 (1994).

Here, Butts County seeks to hijack that particularly personal means of expression to broadcast its own message about the dangers Plaintiffs pose to society, on Plaintiffs' own property. That is a classic example of compelled speech. Where the government compels private actors to display ideological or other nonfactual messages with which they disagree, strict scrutiny applies. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19 (1986). Compelled speech burdens First

1925)). The district court rightly held at the preliminary injunction stage that "the fact that the signs are in rights-of-way, rather than a few feet closer to the homes, does not alter the First Amendment issues." P.I. Order 12.

Amendment rights whether the government's message is ideological, a statement of opinion, or even a statement of fact. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988).

The district court erred by adopting an endorsement test under which speech is compelled only if the private speaker could reasonably be perceived as "endorsing" the government's message. In so holding, the district court departed from well-established precedent, in a manner that would dramatically expand the government's power to compel speech.

A. The District Court Erred In Adopting An Endorsement Test For Compelled Speech.

The district court held that the First Amendment rights of private persons who are compelled to post and disseminate government messages are violated only if those private speakers would reasonably be perceived as "endorsing" the government's message. Summ. J. Order 21–25. Relying on Justice Rehnquist's dissent in the Supreme Court's *Wooley* decision and an inapposite symbolic speech case from the Tenth Circuit, the district court created a restrictive endorsement test that would eviscerate compelled speech doctrine and would have changed the result in *Wooley*. There, the Supreme Court held that requiring the display of the New Hampshire state motto "Live Free or Die" on automobile license plates was compelled speech, even though there was no suggestion that reasonable audiences

perceived drivers in New Hampshire to be individually endorsing the phrase. 430 U.S. at 714–15. It was enough that the plaintiffs in the case were forced to "use their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715.

Wooley stands for the principle that private actors have a "First Amendment right to avoid becoming the courier" of government messages. *Id.* at 717. *Cf. Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 219, 230–31 (2015) (holding that the government cannot be compelled to include private speech in its license plate designs, because the designs are government speech, while acknowledging that the compelled display of those designs implicates private speech rights (citing *Wooley*, 430 U.S. at 715, 717 n.15)); *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (holding that no First Amendment violation occurred where the state "does not compel its citizens to carry or post" the government's message.) If the government cannot require individuals to serve as "mobile billboards" for its message, neither can it require them to serve as stationary billboards, particularly when the message itself is hostile to the people being compelled to display it.

Post-*Wooley*, courts have recognized that a private speaker's First Amendment rights are implicated even where it is clear the speaker does not endorse the message. For example, in *Pacific Gas & Electric*, the Supreme Court recognized that the government could not compel a private actor to convey third-party messages

it did not support, even if those messages were accompanied by a disclaimer to prevent misattribution of the message. 475 U.S. at 16. Thus, the district court's reliance on the fact that the Halloween signs at issue here were clearly labeled as a message from the Sheriff was misplaced. Likewise, the ability of property owners to post their own signs bearing their own messages—a fact deemed critical by the district court—is of little import; after all, nothing in *Wooley* prohibited drivers in New Hampshire from putting expressive bumper stickers on their cars. The district court's reduction of compelled speech doctrine to an endorsement test is unfounded and would upend decades of First Amendment jurisprudence.

The contours of compelled speech doctrine can admittedly be "hard to pin down." Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355, 356 (2018). But courts have held that the First Amendment rights of people previously convicted of sex offenses are implicated when they are required to convey government messages with which they disagree on their private property. In a strikingly similar case, *Doe v. City of Simi Valley*, No. CV 12-8377 PA, 2012 WL 12507598, at *9 (C.D. Cal. Oct. 29, 2012), the court held that requiring such populations to post signs on their front doors stating "no candy or treats at this residence" was compelled speech triggering strict scrutiny. In that case, the court recognized that the government had a compelling interest in protecting children on Halloween; however, the court held that the sign requirement was not narrowly

tailored to achieve that interest, because less restrictive means were available to communicate the information, including the sex offender registry website.

This Court has never applied an endorsement test for compelled speech. And other district courts in this circuit have explicitly rejected the endorsement test as the *sine qua non* of a compelled speech claim. In *Doe v. Strange*, No. 2:15-CV-606-WKW, 2016 WL 1079153, at *18 (M.D. Ala. Mar. 18, 2016), the court explicitly rejected defendants' theory that plaintiffs were required to show that they "affirm" the state's message. 2016 WL 1079153 at *18. The court, relying on *Wooley* and *Riley*, held that sex offender plaintiffs had stated a plausible compelled speech claim with regard to branded identification documents required under Alabama law. *Id.* at *17–18.

In another case out of the same court, *Doe #1 v. Marshall*, No. 2:15-CV-606-WKW, 2018 WL 1321034 (M.D. Ala. Mar. 14, 2018), the court held that requiring the words "CRIMINAL SEX OFFENDER" to be printed on plaintiffs' identification cards was compelled speech even though the speaker could hardly be interpreted as having endorsed such a message. The court pointed to the fact that the government message appeared on driver's licenses which were displayed in public and "readily associated" with the bearer. 2018 WL 1321034, at *13. While these cases focused on the unique context of identification documents, the analysis is applicable here and yields the inescapable conclusion that compelled public posting of government

messages on private property implicates First Amendment rights. Indeed, the private speakers' interest in preventing the compelled display of the government's nonfactual speech on their property, visible to the public at all times, is at least as strong as preventing government intrusion on their driver's licenses.

B. Restricting Compelled Speech Claims To Compelled Endorsements Would Dramatically Expand The Government's Power To Compel Speech.

The readily foreseeable implications of reducing compelled speech doctrine to an endorsement test make clear why this Court should avoid this course. If the district court's decision were allowed to stand, the government would have the power to force people to display offensive signs outside their homes without implicating their First Amendment rights—so long as the government purported to disassociate the private speaker from the government message. If endorsement were dispositive, compelled messages could include ideological or political signs in support for the government, so long as it was clear that the message was coming from the government itself. But the fact that the government affixes its name to a message does not resolve First Amendment concerns, it simply clarifies that the message is government speech. Indeed, the compelled ideological speech such a rule would allow is anathema to a free and democratic society.

Limiting compelled speech claims to compelled endorsements would also allow the government to compel the display of signs that convey factual information

that private individuals may prefer not to disclose. For example, a municipality might require residents to display their political party registrations, or more troublingly, a government might require only some subset of residents to display their party affiliations. One might imagine all manner of publicly available information, such as campaign donations, that the government could require people to post on their property. In such a situation, the fact that the sign might be identifiably government speech, and that the private resident would remain free to post other signs, would be small comfort. Forced dissemination of government messages through signs placed on residential property must be considered compelled speech under any constitutional standard.

Finally, one can imagine a policy that people who have been convicted of sex crimes or other offences be required to convey the fact of the conviction to the public through lawn signs provided by and bearing the name of the locality. Such a regulation would plainly not amount to a compelled "endorsement," but the First Amendment requires heightened scrutiny whenever the government requires private individuals to display or disseminate a government message. The government interest in protecting public safety and the precise content of the government message are of course relevant to the strict scrutiny analysis, but it can scarcely be argued that the First Amendment would not be implicated at all when the

government is "[m]andating speech that a speaker would not otherwise make." *Riley*, 487 U.S. at 795.

II. BUTTS COUNTY CANNOT SATISFY STRICT SCRUTINY.

Regulations that compel speech and implicate the First Amendment are allowable only if the government can show that it has a sufficiently compelling interest and that the regulation is the least restrictive means to achieve that interest. *Pacific Gas & Electric* at 19. Here, it is undisputed that the government has a compelling interest in protecting children from sexual abuse. *See Smith v. Doe*, 538 U.S. 84, 85 (2003) (holding that some "imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective"). However, as the district court recognized in its Order granting a preliminary injunction against Butts County, the Halloween signs at issue here are not the least restrictive means of achieving that objective. P.I. Order 19.

Most obviously, the government can avoid infringing on Plaintiffs' rights by simply using its own means to convey its message. *Id.* The district court pointed to the Sheriff's use of Facebook to disseminate public notices as evidence that Defendants "can serve th[eir] interest[s] through means that would not violate the Plaintiffs' First Amendment rights." *Id.* The government fell far short of its obligation to show that less restrictive means would be ineffective. Indeed, "the absence of evidence of criminal activity by registrants suggests that less restrictive

means have been entirely effective." *Id.* The government could just as well abandon this misguided idea altogether.

In *Doe v. City of Simi Valley*, the court held that requiring Halloween warning signs on registered sex offenders' residences failed strict scrutiny because other measures taken by the city, including restricting exterior lighting and decorations, were less restrictive alternatives. 2012 WL 12507598 at *8. In that case, as in Butts County, all registered sex offenders were required to display the challenged signs on their property. *Id*. The court recognized that in that context, the registry itself represented a less restrictive means of achieving its interests. *Id.* There, as here, the government did not bear its burden of showing that those less restrictive means were insufficient.

Finally, the Halloween signs are not narrowly tailored to achieve the government's interest in protecting children because, as the district court recognized, "the Sheriff's Office placed its 'danger' signs in front of the homes of all sex offenders in the county without regard to any consideration of whether those offenders posed a particular risk." Summ. J. Order 4. The First Amendment requires more precision when regulating speech, particularly because "[m]any state registries are rife with errors, such as wrong addresses or names of offenders who died as long as 20 years ago." Cheryl W. Thompson, *Sex Offender Registries Often Fail Those They Are Designed to Protect*, NPR (Aug. 25, 2020) https://n.pr/2P83l38. Butts

County does not contend that the Halloween signs are "necessary" to address "a particular danger to the public," and therefore the regulation cannot satisfy strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should reverse.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,854 words, excluding the parts of the brief exempted by Rule 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) and 32(g) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2021, the foregoing Brief of *Amicus Curiae* American Civil Liberties Union Foundation was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

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