APPEAL NO. 21-10092-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CORY McCLENDON, *et al.*,

Plaintiffs-Appellants,

v.

SHERIFF GARY LONG, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia, Macon Division
No. 5:19-CV-358
Hon. Marc T. Treadwell

BRIEF AS *AMICI CURIAE* ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC. AND NATIONAL ASSOCIATION FOR RATIONAL SEX OFFENSE LAWS IN SUPPORT OF APPELLANTS McCLENDON, *ET AL.* AND REVERSAL OF JUDGMENT ON APPEAL

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McClendon v. Long, **APPEAL NO. 21-10092-HH**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, proposed amici curiae the Alliance for Constitutional Sex Offense Laws, Inc., and National Association for Rational Sex Offense Laws submit this Corporate Disclosure Statement and Certificate of Interested Persons, identifying the following individuals and entities with an interest in this case:

Mark Begnaud, counsel for Appellants;

Alliance for Constitutional Sex Offense Laws, Inc., a California non-profit corporation with no parent company and no publicly traded stock;

Janice M. Bellucci, counsel for Amici Curiae; and

Reginald Holden (Appellant)

Gary Long, Sheriff of Butts County, Georgia (Appellant);

Corey McClendon (Appellant)

National Association for Rational Sex Offense Laws, a non-profit corporation with no parent company and no publicly traded stock.

Christopher Reed (Appellant)

Jeanette Riley, Deputy Sheriff of Butts County, Georgia (Appellee)

The Honorable Mark T. Treadwell

Jason Waymire, counsel for Appellees;

Terry Williams, counsel for Appellees

Ben Vaughn, Esq.

Mark Yurachek, counsel for Appellants;

/s/ Janice M. Bellucci
Janice M. Bellucci
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INTEREST OF AMICI CURIAE[1]

Amici are two nationwide civil rights organizations whose membership includes thousands of persons required to register as sex offenders ("Registrants") throughout the United States, as well their family members, and supporters. Amici are dedicated to protecting the constitutional rights of these persons, in part by providing policymakers and courts with relevant data and empirical research so that our nation's laws are grounded in fact, rather than myths that pervade public discourse regarding Registrants.

Among the most pernicious – and baseless – of such myths is an alleged threat posed by Registrants to trick-or-treaters on Halloween. The Respondents in this case, Sheriff Long and Deputy Riley (hereinafter, the "Sheriff") invoke this myth as grounds to infringe the First Amendment rights of Registrants within their jurisdiction.

Amici wish to assist this Court in two ways.

First, Amici will provide this Court with empirical research and other data demonstrating that Registrants do not pose a heightened risk to the public on

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[1] Pursuant to FRAP 29(A)(4)(D), counsel for Amici Curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than the above-referenced Amici, their members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Halloween, and that the Sheriff's sign-posting mandate in fact threatens the safety of Registrants, their families, and their property

In addition, Amici seek to supplement the parties' briefing on the key issue of compelled speech with relevant case law and analysis that is not yet provided by any party, and was not analyzed in the District Court's order on appeal. *Reed v. Long*, __ F. Supp. 3d __, 2020 WL 7265693 (M.D. Ga. Dec. 10, 2020). In fact, the District court noted the lack of authority cited by the parties on the central issue of "whether a compelled speech claim is viable in the absence of an appearance of endorsement," see *id.* at *27, and yet confined its analysis largely, if not exclusively, to the incomplete set for authorities cited by those parties. See *id*. at *27-28. This Amicus brief points to the relevant U.S. Supreme Court opinions on this issue, as well as relevant precedent in the Circuit Courts.

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STATEMENT OF ISSUES

1. The First Amendment's compelled speech doctrine prevents the government from forcing private persons to carry government messages in a manner that is "readily associated with" those private persons. *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). In a first-of-its kind ruling for which no Supreme Court authority was offered, the District Court below severely limited the compelled speech doctrine by holding that no violation exists unless the compelled government message – however pejorative and however invasive its placement – could be viewed as carrying the plaintiff's "endorsement." *Reed v. Long*, __ F. Supp. 3d __, 2020 WL 7265693 at *25-27 (M.D. Ga. Dec. 10, 2020). On this basis, the District Court then ruled, as a matter of law, that a risk of endorsement does not exist whenever the plaintiffs can "disassociate themselves" from the government speech by posting "competing messages," *id.* – even when the entire basis for the compelled speech claim is the First Amendment "right to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

Did the District Court err in establishing a novel "risk of endorsement" element of the compelled speech claim and, on that basis, ruling that undesired compelled government speech is permissible merely because the plaintiff could engage in yet more undesired speech on a topic they wish to avoid in the first place?

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal turns on a single legal issue of immense importance to First Amendment jurisprudence, and specifically to the compelled speech doctrine: Whether a plaintiff who is being "forced . . . to host or accommodate another speaker's message," *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 63 (2006), must prove a "risk of misattribution" to the plaintiff, or a "perception of endorsement" by the plaintiff, as a necessary element of a compelled speech claim.

In a critical error of law, the District Court ruled that "risk of endorsement" is a necessary element of a compelled speech claim, and that no compelled speech violation exists without proof of that element. *Reed v. Long*, __ F. Supp. 3d __, 2020 WL 7265693 at *25-27 (M.D. Ga. Dec. 10, 2020) (hereinafter "*Reed II*").

At issue is a program instituted by the Sheriff of Butts County, Georgia, that requires all persons listed on the sex offender registry ("Registrants") to display conspicuous signs on the front law of their homes that broadcast false and injurious information about themselves. The District Court ruled that the signs do not compel Registrants' speech in violation of the First Amendment for two reasons: First, the signs are government speech. Second, as Registrants "are now free to disagree with that message by posting competing signs," "no reasonable observer could now conclude the resident agreed with the sign's message." *Id.* at *26.

This severe constriction of the First Amendment's defense against compelled speech is not, and cannot be, the law. First, that fact that the signs are "government speech" does not resolve the issue of whether Registrants can be compelled to "host or accommodate" that speech. "[T]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Walker v. Texas Sons of Confederate Veterans*, 135 S.Ct. 2239, 2246, 2253 (2015), emphasis added. Government speech can be "particularly harmful" where, as here, "[the speech] appear[s on] . . . an official document produced by the state." *Gralike v. Cook*, 191 F.3d 911, 918-19 (8th Cir. 1999), *aff'd on other grounds Cook v. Gralike*, 531 U.S. 510 (2001). Notably, the District Court itself acknowledged that "even the Defendants [*i.e.*, the Sheriff's Office] admit that 'government speech can also be compelled speech' in certain circumstances." *Reed II*, 2020 WL 7265693 at *31 n.19. Yet, the District Court's decision does not address the circumstances in which government speech may be compelled, but merely concludes in a circular and incomplete fashion that the signs are not compelled speech because they are government speech.

Second, the U.S. Supreme Court has never ruled that endorsement is a necessary element of a compelled speech claim, and has in fact indicated the opposite in several decisions that the District Court's opinion does not discuss or cite. Those Supreme Court decisions are discussed below (See below at 16-19.)

Critically, the Supreme Court has also rejected the premise, adopted by the District Court below, that a party may be forced to accommodate government speech merely because he or she can theoretically disclaim that message or post competing messages. That is, the government cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (law mandating newspaper to publish statements by political candidates was unlawful despite "not prevent[ing] the Miami Herald from saying anything it wished," because such reasoning "begs the core question").

Accordingly, the District Court's ruling in this case turns the compelled speech doctrine on its head by discounting the "right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), and by concluding instead that the government can require a person to host speech they do not wish to make merely because that person can engage in yet more speech on a subject they do not wish to address in the first place. This reasoning is illogical, self-defeating, and in this context, dangerous for Registrants, for whom signs of this type "subject[] them to dangerous mischief common on Halloween night and to community harassment in the weeks and months following[.]" *Doe v. City of Simi Valley*, 2012 WL 12507598, at *7-9 (C.D. Cal. Oct. 29, 2012).

The District Court's decision significantly restricts an important component of the First Amendment, without support in precedent. For these and the additional reasons addressed below, as well as in Appellants' brief, Amici respectfully request that this Court reverse the District Court's ruling on compelled speech.

BACKGROUND

In each of the 50 states, Registrants face myriad and often onerous restrictions on many aspects of their lives, including where they may live, the jobs they may hold, the places they may visit, and the persons with whom they may associate. Nevertheless, despite the prevalence and comprehensiveness of such restrictions, there are no state or local jurisdictions which require Registrants to post, or otherwise be forced to endure, conspicuous signage warning the public away from their homes on Halloween. The uniform opinion of jurisdictions throughout the country, including the State of Georgia, therefore seems to be that Halloween signs on or near the homes of Registrants are not warranted. That opinion is validated by the First Amendment problems that such signs create, since the First Amendment's compelled speech doctrine protects all persons, including Registrants, from being forced to "denunciat[e]" themselves. *Gralike v. Cook*, 191 F.3d 911, 918-19 (8th Cir. 1999).

The local Sheriff of Butts County, Georgia has unilaterally added to the mandates already imposed upon Registrants in that county by branding Registrants'

homes with pejorative and potentially dangerous signage. The signs must remain in place for up to seven days, during which time they are visible to any person traveling near the Registrants' homes, including persons who might do harm to those Registrants, their families, or their property. See *Reed v. Long*, 420 F. Supp. 3d 1365, 1370 (M.D. Ga. 2019) (noting that signs are placed for up to seven days).

Other than the District Court opinion currently on review, the sole reported case from any jurisdiction regarding Halloween signs is *Doe v. City of Simi Valley*, 2012 WL 12507598, at *7-9 (C.D. Cal. Oct. 29, 2012). In that case, a small city in California enacted an ordinance requiring Registrants to post signs on their front doors that read "No Candy or Treats at this Residence." *Id*. at *1. The court issued a temporary restraining order against the sign-posting mandate on the grounds that the sign "compels sex offenders to speak." *Id*. at *7. The *Simi Valley* court further found that a sign

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

Id. at *9.

The signs at issue in this appeal present an even greater danger to Registrants and their families in Butts County, Georgia due to their large size, conspicuous placement near the street, and extended duration. The District Court below

originally ruled, in preliminarily enjoining the signs, that the signs are unconstitutional compelled speech because they are "readily associated with" the Registrants, similar to the expressive content on government-issued license plates which is "readily associated with" individual drivers and therefore cannot be commandeered as a "mobile billboard" for government speech. *Reed v. Long*, 420 F. Supp. 3d 1365, 1376 (M.D. Ga. 2019); *Wooley v. Maynard*, 430 U.S. 705, 715, 717 n.15 (1977). However, the District Court later reversed its position on summary judgment, in the novel ruling that is the subject of the present appeal.

ARGUMENT AND CITATION TO AUTHORITY

A. A RISK OF MISATTRIBUTION OR PERCEIVED ENDORSEMENT IS NOT AN ELEMENT OF A COMPELLED SPEECH CLAIM

The District Court implicitly acknowledged a lack of authority for its holding in the following sentence: "The question of whether a compelled speech claim is viable in the absence of an appearance of endorsement is a more difficult one. Perhaps surprisingly, the Plaintiffs provide no authority supporting their argument that 'The Law Requires Association, Not Endorsement.'" *Reed II*, 2020 WL 7265693 at *27. Although the District Court's opinion distinguished the compelled speech cases that Appellants/Plaintiffs cited in their briefs, the District Court's opinion does not cite any case which supports the contrary and novel ruling that the law of compelled speech "requires endorsement." Nor does the

District Court's opinion discuss or cite the numerous cases that support the Plaintiffs' argument that "The Law Requires Association, Not Endorsement."

1. Relevant Supreme Court Precedent

In *Rumsfeld v. Forum for Academic and Institutional Rights*, a unanimous Supreme Court ruled that "Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." 547 U.S. 47, 63 (2006) (emphasis added). The *Rumsfeld* court cited three examples within Supreme Court precedent of impermissibly forcing a party to host or accommodate another's message. *Id*. at 63-64.

In the first example, *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566, (1995), the high court ruled that "state law cannot require a parade to include a group whose message the parade's organizer does not wish to send." *Rumsfeld*, 547 U.S. at 63-64.

In the second, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, (hereinafter, "*PG&E*") 475 U.S. 1, 20–21 (1986) (plurality opinion); *accord id.*, at 25 (Marshall, J., concurring), the high court ruled that "[a] state agency cannot require a utility company to include a third-party newsletter in its billing envelope." *Rumsfeld*, 547 U.S. at 63-64.

In the third, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the high court held that a state's "right-of-reply" statute, which required newspapers to publish a political candidate's responses to negative coverage, "violates the editors' right to determine the content of their newspapers." *Rumsfeld*, 547 U.S. at 63-64.

Critically, all three cases, the compelled speech at issue was obviously that of a third party, and no case holds that a risk of misattribution is a required element of the claim. Rather, the compelled speech doctrine was violated because "the complaining speaker's own message was affected by the speech it was forced to accommodate," which "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Rumsfeld*, 547 U.S. at 63-64).

The Supreme Court in *Rumsfeld* then distinguished the findings of impermissible compelled speech in *Hurley*, *PG&E*, and *Miami Herald* from occasions on which the speaker's "autonomy to choose the content of his own message" was not threatened by a government mandate. The first involved the situation at issue in *Rumsfeld*, in which a statute required law schools to grant military recruiters access to their campuses on the same terms as other recruiters, or suffer a loss of funding. *Rumsfeld*, 547 U.S. at 51. The Supreme Court ruled that the equal access requirement did not violate the compelled speech doctrine

"because the schools are not speaking when they host interviews and recruiting receptions." *Rumsfeld*, 547 U.S. at 64.

The second distinction arose in *PruneYard Shopping Center v. Robins*, in with the Supreme Court upheld a law requiring a shopping center owner to allow groups to distribute pamphlets and engage in other expressive activities on its property. 447 U.S. 74 (1980). The compelled speech doctrine was not violated in that case because, as the Supreme Court explained, "absent from *PruneYard* was any concern that access to [the mall] might affect the shopping center owner's exercise of his own right to speak" or any allegation that the owner "objected to the content of the pamphlets." *PG&E*, 475 U.S. at 12 (plurality opinion), emphasis added.

These Supreme Court precedents reveal the critical flaw in the District Court's decision below. That is, by being forced to host and accommodate the Sheriff's signs, a Registrant's "own message [is] affected by the speech it [is] forced to accommodate," which "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Rumsfeld*, 547 U.S. at 63-64, quoting *Hurley*, 515 U.S. at 573.

As the District Court below acknowledged, "front yards are a traditional forum for residents' speech, and display of a yard sign typically coveys the residents' approval, endorsement, or acquiescence of a message." *Reed II*, 2020

WL 7265693 at *24. Thus, the front yard of the Registrants' homes is an expressive forum, akin to the parade in *Hurley*, the envelope in *PG&E*, and the newspaper in *Miami Herald.* Unlike the law schools in *Rumsfeld*, the Registrants decision to place, or not to place, messages in their front yards is expressive activity. Indeed, a front yard is much more "readily" and intimately "associated with" Registrants than is a parade to a parade organizer, a billing envelope to a utility company, and a newspaper to its editors. And in this sensitive forum, Registrants wish to remain silent. The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) "[T]he latter is perhaps the more sacred of the two rights. [Citation] After all, the 'choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2021), quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000). This desire to remain silent distinguishes Registrants from the distant shopping center owners in *PruneYard*, because Registrants strenuously "object to the content" of the Sheriff's signs, thereby implicating the protection of the compelled speech doctrine. *See PG&E*, 475 U.S. at 12 (plurality opinion). Accordingly, Supreme Court compelled speech precedent does not support the District Court's ruling.

2. *Wooley v. Maynard* and its Application

The District Court's reliance upon the seminal compelled speech case of *Wooley v. Maynard* likewise does not support its ruling. In fact, the District Court acknowledged that *Wooley* "did not discuss the issue of endorsement," but reasoned that "the dissent [in *Wooley*] and subsequent courts have interpreted it as applying an endorsement test." *Reed II*, 2020 WL 7265693 at 30. This ruling misstates compelled speech precedent. As Appellants' brief aptly argues, endorsement is one harm that the compelled speech doctrine exists to prevent, but it is not the only one. The application of *Wooley* is therefore not restricted to occasions in which private parties "endorse" government speech, but instead applies broadly to any occasion in which a private party is "readily associated with" the government speech. *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977) (emphasis added).

There are many ways that a private party can be forced to "readily associate" with government speech without a finding that the speech is endorsed. For example, courts have restricted government speech when:

- A private party is forced by the government to affix warning labels that "undermine its own economic interest." *E.g.*, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18, 22-23 (D.C. Cir. 2014).

- A private party is required to carry a message on a controversial topic when the private party would rather remain silent. *E.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (compelled disclosure of controversial "conflict minerals" present in company's products would "require[e] company to publicly condemn itself.").
- A private party is forced to suffer "official denunciations" of themselves on government documents. *Gralike v. Cook*, 191 F.3d 911, 917-19 (8th Cir. 1999).

The case of *Gralike v. Cook* is instructive because its facts are similar to the facts in this case. In *Gralike*, a Missouri law directed that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" appear on ballots next to the names of candidates who did not adopt a particular position regarding term limits. 191 F.3d at 914. The Eighth Circuit ruled that this 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. *Id*. at 917-18. Specifically, the Eighth Circuit 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." *Id*.

In addition, the Eighth Circuit ruled that ballot labels in *Gralike* 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.

Finally, the pejorative ballot labels placed by the government next to candidates' names effectively forced the candidates to issue "official denunciations" of themselves by the very act of appearing on the ballot. *Id*. In affirming this Eighth Circuit's ruling on other grounds, the Supreme Court agreed that the Missouri ballot label was a "Scarlet Letter." *Cook v. Gralike*, 531 U.S. 510, 525 (2001).

Other courts have agreed that forcing a private party to adopt, carry, or be associated with government speech harmful to their interests is unconstitutional compelled speech, in the absence of an express finding of attribution or endorsement. *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 Federation of 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).

3. The Sheriff's Halloween Signs Threaten Every Injury that the Compelled Speech Doctrine Exists to Prevent

In this appeal, although all parties acknowledge that the Sheriff's signs are "speech," the District Court's opinion does not fully describe the content and impact of that speech, as well as the Sheriff's intent. This omission precludes a thorough analysis of the compelled speech claim against the signs under the authorities described above. *Cf. Stuart*, 774 F.3d at 246 (Because "context matters" in compelled speech claims, court looks to messages implied by the speech, as well as to the government's intent in compelling the speech.)

For example, the signs contain, at a minimum, speech that: (1) identifies the occupants of the homes, in some cases falsely, as Registrants; (2) falsely implies that

the residents cannot participate, or choose not to participate, in trick-or-treating, (3) implies, without any basis, that the occupants of the homes threaten public safety; (4) communicates the Sheriff's judgment that the residents threaten public safety, (5) communicates the Sheriff's desire that trick-or-treaters avoid the homes; and (6) invites harm to the Registrants, their families, their homes, and their reputations.

As a result, the signs threaten every injury that the compelled speech doctrine exists to prevent.

For example, like the ballot labels in *Gralike* that were emblazoned by the government on a government document next to the candidate's name, the Sheriff's signs and the Sheriff's message are effectively emblazoned on Registrants' private homes. Accordingly, as in *Gralike*, the signs placed by the Sheriff next to Registrants' homes "do not allow [Registrants] to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak." *Gralike*, 191 F.3d, at 917-18.

Also, the Sheriff's signs force Registrants to accommodate "official denunciations" of themselves on their residences, akin to what the Supreme Court termed a "Scarlet Letter." That is, as with the mandated disclosures in *Gralike*, *R. J. Reynolds*, *Riley*, *Stuart*, and *National Association*, the signs are a "pejorative" label that create "a negative impression" among the public about Registrants. In fact, the Sheriff intends to create a negative impression about Registrants, with

furthers his intent that the public stay away from Registrants' homes. As the D.C. Circuit held in *National Association*, requiring a private person or entity "to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive not less so." 800 F.3d at 530.

Finally, Registrants, their families, and other occupants of their homes, not the Sheriff, will bear the negative consequences of the speech. *Cf. Ariz. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) (messages on license plates are private speech, in part because the driver bears the "ultimate responsibility for the content of the speech.").

Accordingly, a plaintiff need not prove a "risk of endorsement" to state a violation of the compelled speech doctrine. It is sufficient that the compelled speech be "readily associated with" the plaintiff. *Wooley*, 430 U.S. at 717 n. 15. Otherwise, the compelled speech doctrine will fail to protect private parties from all the harms caused by being forced to speak when they would prefer to remain silent, or by being commandeered as "mobile billboards" for another's injurious message. *Id.* at 715.

B. THE THEORETICAL ABILITY TO POST "COMPETING MESSAGES" DOES NOT CURE A COMPELLED SPEECH VIOLATION

Building upon its erroneous ruling that a compelled speech claim requires a finding of endorsement, the District Court ruled that "no reasonable jury could find that there is a risk the plaintiffs will appear to endorse the signs' message" because "the plaintiffs are free to offer speech competing with the Sheriff's Office's views and to disassociate themselves with those views." *Reed II*, 2020 WL 7265693 at *25-26. Critically, the District Court offers no citation for the proposition that compelled speech is constitutional merely because the plaintiff can issue a disclaimer. That is because no such authority exists.

The most recent statement in a U.S. Supreme Court (concurring) opinion on this subject called the District Court's reasoning "badly misguided" and cited cases demonstrating why that is so. *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1744 (2018) (Thomas, J., concurring). In *Masterpiece Cakeshop*, the state of Colorado sough to force a baker to design cakes for same-sex weddings over the baker's ideological objection. *Id*. at 1723. The baker argued that forcing him to design and create such cakes compelled him to speak in violation of the First Amendment. *Id.* The Supreme Court majority ruled for the baker without reaching the compelled speech question, but Justice Thomas and Justice Gorsuch issued a concurring opinion in which they explained why, under the same Supreme

Court precedent recited in *Rumsfeld*, the opportunity to disclaim speech that one is compelled to make has never rendered the compelled speech constitutional:

> The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo*, *supra*, at 256, 94 S.Ct. 2831. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." [*PG&E*], 475 U.S., at 16[]. States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." [Citation].

Masterpiece Cakeshop, 138 S.Ct. at 1745, emphasis added (Thomas, J., concurring).

Relying upon similar precedent, the Eighth Circuit ruled that a state law that compelled wedding videographers to produce videos of same-sex weddings against their wishes was not constitutional merely because the videographers "can say that they disapprove of same-sex marriage in some other way." *Telescope Media Group v. Lucero*, 936 F.3d 740, 757 (8th Cir. 2021). The Eight Circuit reasoned:

> But just like New Hampshire could not "require [drivers] to display the state motto" Live Free or Die on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 717 [] (1977), even if they could disavow the motto through "a conspicuous bumper sticker," *id*. at 722 [] (Rehnquist, J., dissenting), so too would a disclaimer here be inadequate. The reason is that the constitutional "protection of a speaker's freedom would be empty" if "the government could require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (brackets and citation omitted).

Id., emphasis added.

Likewise, in this matter, the theoretical opportunity for Registrants to disassociate themselves from the Sheriff's signs by "posting competing messages" is similarly self-defeating and contrary to precedent. That is, Registrants wish to say nothing whatsoever on the subjects implicated by the signs, yet the District Court held that the Sheriff may force Registrants to host and accommodate his speech because they are free to engage in yet more speech that they do not wish to make in the first place.

In addition to contradicting precedent, the District Court's ruling fails to appreciate that being "free to disagree" with the Sheriff's message is a pyrrhic victory at best, and threatens the safety of Registrants and their families at worst. It is absurd to expect Registrants to draw further attention to themselves by erecting competing signage, inviting trick-or-treaters to their homes despite the Sheriff's sign, or otherwise broadcasting "disagreement" with the Sheriff's message. The more realistic assessment of the impact of such signs was offered by the District Court in *Doe v. City of Simi Valley*, which found that the government's Halloween sign

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

Doe v. City of Simi Valley, 2012 WL 12507598, at *9 (C.D. Cal. Oct. 29, 2012). Accordingly, the District Court's ruling that compelled speech claims require a risk of attribution or endorsement is contrary to precedent and should be reversed.

C. MYTHS REGARDING THE THREAT POSED BY REGISTRANTS ON HALLOWEEN SHOULD NOT OVERRIDE FIRST AMENDMENT RIGHTS

The origin of the Sheriff's sign-posting policy is a speculative assertion by a single Deputy Sheriff that all Registrants pose uniformly high risks of re-offense on Halloween. The Sheriff admittedly lacks any other basis for their policy, which amounts to public shaming of Registrants by the local law enforcement agency responsible for protecting both their physical safety and constitutional rights. Disturbingly, the Sheriff appears to assume that this Court will uncritically sanction any "public safety" measure merely because the targeted parties are "sex offenders." However, the myths associated with "sex offenders" and Halloween are demonstrably inaccurate, as numerous empirical studies demonstrate.

1. The Myth of Increased Sex Offenses on Halloween Has Been Discredited by Empirical Data and Scholarship

The myth that Registrants prey upon the public during Halloween is one of the most pervasive, yet easily discredited, myths that exist. For example, in a recent nine-year survey of criminal conviction data nationwide, entitled "How Safe are Trick-or-Treaters?," sociologist Jill Levenson, Ph.D. and coauthors concluded that threats to children from Registrants on Halloween are virtually non-existent because

there is no evidence of such crimes occurring in any state.[2] Specifically, the study found that:

- "Law enforcement officials note that Halloween laws were not developed in response to actual attacks reported to have occurred on 31 October or in a trick-or-treat context;"
- "[There is] no significant increase in risk for nonfamilial child sexual abuse on or just prior to Halloween," and "no increased [crime] rate on or just before Halloween;" and
- "There does not appear to be any need for alarm concerning sexual abuse on these particular days."

The study's findings "suggest that Halloween polices may in fact be targeting a new urban myth similar to past myths warning of tainted treats."[3] In addition, Emily Horowitz, Ph.D., Chair and Associate Professor of Sociology and Criminal Justice at St. Frances College in New York, also concludes:

> There is no research that sex offenses increase on Halloween, no evidence that sex offenders target children on Halloween, and, in fact,

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[2] Mark Chaffin, Jill Levenson, et al., *How Safe are Trick-or-Treaters? An Analysis of Child Sex Crime Rates on Halloween*, Vol. 21:3 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 363, 363-374 (2009), http://sax.sagepub.com/content/21/3/363.abstract.

[3] *Id*. at 372.

> no evidence that a child has ever been a victim of sexual abuse by a stranger while out trick-or-treating.[4]

Thus, the threat posed to children by Registrants on Halloween is unsubstantiated. Smaller still is the specific threat posed by Registrants to children who approach their residences on Halloween evening – the sole focus of the Sheriff's overbroad sign-posting policy.

2. The Label "Sex Offender" Does Not Predict A Risk of Re-Offense

Numerous empirical studies demonstrate that Registrants are statistically unlikely to re-offend, and of those that are, the risk of re-offense diminishes with each passing year until it ultimately disappears. Research by Dr. Karl Hanson, the foremost authority on this topic, confirms that even high risk sex offenders who have not re-offended in 17 years are no more likely to commit a new sex offense than other offenders who has never committed a sex offense.[5] For medium-risk offenders, that threshold is 12.5 years. The risk of re-offense is lower still when the Registrant is employed, cooperates with supervision, and participates in treatment.

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[4] Emily Horowitz, PROTECTING OUR KIDS? HOW SEX OFFENDER LAWS ARE FAILING US 71 (2015) (emphasis added).

[5] R. Karl Hanson, *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. OF INTERPERSONAL VIOLENCE 2792, 2802 (2014) (research confirming that, at five years post-offense, the re-offense rate for low-risk offenders is 2 percent, while the re-offense rate for moderate-risk offenders is 7 percent, with the risk of re-offense for both groups diminishing with each passing year).

Even if differences within risk tiers are ignored, the aggregate risk of re-offense among Registrants remains low. Specifically, the U.S. Department of Justice reports that the overall re-offense rate for all sex offenders nationwide is only 5.3 percent.[6] Among male offenders with a contact offense against a child, the re-offense rate is even lower, with only 3.3 percent arrested for another sex offense within three years.[7] Yet, the Sheriff's sign-posting policy ignores these differences, and imposes its draconian requirement equally upon persons whose offenses occurred long in the past, did not involve a child, and who lack any indicia of a present risk to public safety on Halloween.

The Sheriff's irrational and unfounded fears regarding the threat of Registrants on Halloween derives in part from the distortive power of the label "sex offender." To most people, the term suggests dangerous individuals with uncontrolled compulsions who are likely to do harm. But law enforcement experts should know better because the sex offender registry is a legal classification and civil monitoring scheme, not a prediction of dangerousness. In addition, the classification "sex offender" is applied to a very diverse group of individuals who have widely

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[6] U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, at 7 (Nov. 2003), http://www.bjs.gov/content/pub/pdf/rsorp94.pdf

[7] *Id*. (reporting that 96.7% of Registrants nationwide remained offense-free three years post-incarceration)

varying criminal histories as well as psychological traits. Some Registrants have never been accused of a violent act, or of physical contact with a victim. Yet while it is implausible that all persons captured by the label "sex offender" share a similar re-offense risk, it is difficult to avoid that mistaken understanding in any discussion in which Registrants are referred to with a label that re-characterizes one event in a Registrant's life into a dominant personality trait.

The mistaken perception that Registrants pose uniform, high, and enduring rates of re-offense has become embedded in both statutory and judicial language. A recent article in the journal *Constitutional Commentary* by Professor Ira Ellman and Tara Ellman traces some of the history of this mistake to *McKune v. Lyle*, 536 U.S. 24, 33-34 (2002), in which the plurality opinion described the re-offense rates of "sex offenders" as "frightening and high," thought to approach "80 percent."[8] The plurality opinion took that 80 percent figure from one essay in an anthology put together by the Justice Department. *Id.* at 33, quoting U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* (1988), at xiii. However, that essay offered no data of its own to

[8] Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

support this 80 percent figure. Instead, the essay cited a single casual and data-free comment in an article in "Psychology Today," a mass-market magazine.[9]

McKune's language was quoted the next year by the Court majority in *Smith v. Doe*, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is 'frightening and high.'"). Over the following years, the Court's "frightening and high" description of registrant re-offense rates was cited in many judicial opinions. The effect was to validate a popular myth that anyone who ever committed a sexual offense is a "sex offender" and thus extraordinarily more likely than others released from custody to repeat his or her offense. The same idea, if not the precise words, found its way into statutory formulations, adopted by legislatures who felt no need to provide empirical verification for this widely accepted myth.

As the Ellmans' scholarly article explains, there never was any scientific basis for either the rogue 80 percent claim, or for the notion of "frightening and high" re-offense rates among Registrants. Indeed, both the author of the Psychology Today article, as well as the author of the anthologized essay that cited it, have since

[9] The Psychology Today article touted the author's prison counseling program for sexual offenders. The 80% figure for untreated offenders was offered as a contrast with the article's equally unsupported claim about the lower rate for those who completed the author's program. The article contained no data of any kind. See Ellman, *supra* note 8, at 497-498.

recanted the claim on camera.[10] Courts have now begun to realize the mistake. *See, e.g.*, *Does v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), *cert. denied* 138 S.Ct. 55 (2017) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that the risk of recidivism posed by sex offenders is frightening and high." [internal quotation marks omitted]).

In this appeal, the Sheriff's uniquely damaging public shaming regime should not evade scrutiny on the basis of similarly hollow assumptions and an uncritical reliance upon the label "sex offender."

CONCLUSION

In sum, while there is much debate about the wisdom of the restrictions imposed upon Registrants in our society, this appeal presents an atypically uncontroversial case. That is, this appeal concerns a measure that virtually no state or local jurisdiction in the county has seen fit to enact: the public branding of Registrants on and around Halloween through the posting of signs adjacent to their homes. Further, the Sheriff's signs infringe upon one of the most cherished constitutional rights that exist – the Freedom of Speech – for no discernable public safety purpose. The District Court itself seemed to signal that the Sheriff's legal authority to post the signs is dubious, noting "scant authority" for the Sheriff's

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[10] Jacob Sullum, *"I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, Reason (Sep. 14, 2017); David Feige, *A "Frightening" Myth About Sex Offenders*, New York Times Video Op-Doc (Sept. 12, 2017).

position. *Reed II*, 2020 WL 7265693 at *33. Further, as the District Court noted in granting the preliminary injunction in this case, "[s]ex offenders are not second-class citizens. The Constitution protects their liberty and dignity just as it protects everyone else's." *Reed v. Long*, 420 F. Supp. 3d 1365, 1379 (M.D. Ga. 2019) (citation omitted). For these and the additional reason set forth above and in Appellant's brief, Amici respectfully request that the Court reverse the order below.

Date: March 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(g), I certify that this amicus brief complies with the length limitations set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 6,476 words, as counted by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

I further certify that this amicus brief was filed in electronic format through the Court's CM/ECF system on the 24th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on March 24, 2021, I served the foregoing Brief as Amici Curiae upon all counsel of record by and through the Court's CM/ECF system.

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