RECORD NO. 21-10092

In The

United States Court Of Appeals
For The Eleventh Circuit

COREY MCCLENDON,
on behalf of themselves and a class of similarly situated persons,
REGINALD HOLDEN,
on behalf of themselves and a class of similarly situated persons,
CHRISTOPHER REED,
on behalf of themselves and a class of similarly situated persons,

Plaintiffs – Appellants,

v.

GARY LONG, in his official capacity and individually,
JEANETTE RILEY, individually,
SCOTT CRUMLEY, individually,

Defendants – Appellees,

JOHN AND OR JANE DOES, 1-3, individually,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

APPELLANTS' REPLY BRIEF

Mark A. Yurachek, Esq.
Georgia Bar No. 783599
MARK ALLEN YURACHEK & ASSOCIATES, LLC
1344 Lafrance Street, NE
Suite 3
Atlanta, GA 30307
(470) 319-8721

Mark A. Begnaud, Esq.
Georgia Bar No. 217641
ESHMAN BEGNAUD, LLC
315 W. Ponce de Leon Ave
Suite 775
Decatur, GA 30328
(404) 665-9601

Counsel for Appellants

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1406 (23218) ♦ Richmond, VA 23219
(804) 249-7770 ♦ www.gibsonmoore.net

CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel hereby certifies that the following persons may have an interest in the outcome of this case:

Christopher Reed

Reginald Holden

Corey McClendon

NARSOL (National Association for Rational Sexual Offense Laws)

ACLU (American Civil Liberties Union)

ACSOL (Alliance for Constitutional Sex Offender Laws)

Mark Begnaud, Esq.

Michael Eshman, Esq.

Mark Yurachek, Esq.

The Honorable Marc T. Treadwell

Sheriff Gary Sheriff Long

Deputy Jeanette Riley

Former Deputy Scott Crumley

Jason Waymire, Esq.

Terry Williams, Esq.

Ben Vaughn, Esq.

Date: June 4, 2021

/s/ Mark Yurachek
_____
Mark Yurachek
Georgia Bar No. 783599

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ARGUMENT & CITATION OF AUTHORITY

Appellees' Response in this appeal appears largely to reassert the primary points of their now-dismissed appeal in Case No. 19-14730-B.[1] They decline to address many of the significant points Appellants made in their opening brief or offer arguments which are already countered by arguments in Appellants' opening brief.

For instance, Appellees merely regurgitate their position that endorsement is an essential element of a compelled speech claim, relying on out-of-Circuit authority without meaningfully addressing the Supreme Court cases which have addressed the issue, such as those cited in Appellants' opening brief. Compare Cressman v. Thompson ("Cressman II"), 798 F.3d 938,

[1] Appellees object to Appellants' request that the Court take judicial notice of the proceedings in Eleventh Circuit Case #19-14730, their appeal of the district court's grant of a preliminary injunction, which this Court dismissed on March 30, 2021. They cite MSP Recovery Claims, Series LLC v. QBE Holdings, Inc., 965 F.3d 1210, 1220(III)(B)(2)(b) n.3 (11th Cir. 2020), but the footnote cited does not control Appellants' request. Rather, that footnote states that the Court "disapprove[s] 'in the strongest terms' of incorporation by reference *of district court briefing*." (emphasis added). Appellants made no reference to the district court's proceedings, however. They merely requested that the Court "take judicial notice of the proceedings in Case 19-14730, which remains in abeyance, and adopt and incorporate all arguments and citations of authority in that case which are relevant to the present proceedings as if set forth, *verbatim*, in this brief." [App't Br. at 3]. Without belaboring the point, the authority cited in Appellants' Brief, United States v. Rey, 811 F.2d 1453, 1457(I) n.5 (11th Cir. 1987), does state, "[a] court may take judicial notice *of its own records* and the records of inferior courts" and Appellants believe the Court is authorized to do so. (emphasis added).

962(VI)(C)(2)(10th Cir. 2015) with Wooley v. Maynard, 430 U.S. 705, 715(A)(10), 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977).

Appellees fail even to address Appellants' supported position that the opportunity to respond is irrelevant to the compelled speech analysis, instead parroting the district court's position that this opportunity acts as a *panacea* to their violation of Appellants' rights. See Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of Ca. ("PG&E"), 475 U.S. 1, 14-16(III)(B), 106 S. Ct. 903, 89 L.Ed.2d 1 (1986). See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, ___ U.S. ___, 138 S. Ct. 1719, 1740, 201 L.Ed.2d 35 (2018)(Thomas, J. concurring).

Appellees also hone in on a number of points or authorities, e.g. rights-of-way and the Middle District of Alabama's decision in Doe 1 v. Marshall, 367 F.Supp.3d 1310, 1324(IV)(A)(1)(a)(M.D. Ala. 2019), which are of limited relevance to this appeal. Eschewing any extended discussion of *insignificata* or over-regurgitation of points thoroughly reviewed in their opening brief, Appellants do believe the Court would benefit from a few clarifications.

I. Appellees Have Failed To Show Why The Rule From Wooley Should Not Apply Here

Appellants are only aware of one other federal case which has litigated the legality of signs placed at registrants'

homes. See Doe v. City of Simi Valley, 2012 WL 12507598 at *7-9 (C.D. Cal. 2012). *Amicus* ACSOL addresses this case extensively in its brief and it need not be examined again here.[2] Beyond City of Simi Valley, though, the case which bears the closest resemblance to the present matter is Wooley, which is controlling in this Court. Yet Appellees have failed to distinguish the present case from Wooley in any meaningful way.

Though superficial distinctions (car vs. home, license plate vs. sign) exist, there is no substantive difference between the two cases. This is fatal to Appellees' efforts to persuade this Court to use a standard other than the one set forth in Wooley, which forbids a, "state measure which forces an individual, as part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." 430 U.S. at 715(A)(10).

Appellees argue, "the license plate slogan in Wooley was readily associated with the plaintiff because the state required its display on his personal[3] vehicle and by necessity he had to

[2] Appellees also fail to address this case at all in their response.

[3] Appellees similarly argue, "the signs are intended to be placed on government property, which distinguishes this case from cases [like Wooley] where a government insisted on displaying its message on private property." [App'e Br. at 16, n. 4]. Their failure to make a record of where any sign was placed is why their attorneys could only argue repeatedly where the signs were *intended to* be placed. As the district court found, Appellees are simply not able to prove that they actually did so. See Reed

drive the vehicle publicly." [Id. at 44]. They also distinguish Wooley from this case because, "[t]his case does not implicate freedom of thought," whereas Wooley does. [Id. at 23 n. 7]. Then, rather than make any argument as to why Wooley is different or more violative than their actions in this case, Appellants leap to conclusory claims like, "no third party reasonably can draw a conclusion that a Plaintiff endorses the message on Sheriff Long's sign," and "[t]he Sheriff's signs, no matter where they are placed, do not force any Plaintiff to believe anything at all." [Id. at 23 n.7; 44].

What is missing in between is any explanation of what differences exist between the facts in Wooley and this case which would demand that a different rule apply. Cf. City of Ladue v. Gilleo 512 U.S. 43, 56-57(IV), 114 S. Ct. 2038, 129 L.

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v. Long ("Reed II"), ____ F.Supp.3d ___, 2020 WL 7265693 at *7(III)(B)(3)(M.D. Ga. 2020). Their intention to do so is a debatable point as well. The record reflects that neither Riley, nor Crumley, conducted any sort of research which would have told them where the rights-of-way were on the properties they visited, nor did they record where they actually placed the signs to verify that they had used rights-of-way. [Doc. 46 at 14]. Though the district court cast a pox on both parties' houses for failing to delineate the rights-of-way, at least at Appellants' homes, Appellants stress, for reasons extensively argued in their opening brief, that whether the signs were placed on rights-of-way was not material to proof of their claims. See Reed v. Long, 420 F.Supp.3d 1365, 1374(III)(B)(M.D. Ga. 2019)(holding that placement of signs was irrelevant to First Amendment analysis). Failing to prove the same would seem at least to cast doubt on Appellees' claims regarding their intentions, if not their capability of using only rights-of-way in the future.

Ed. 2d 36 (1994)(considering the close association between signs placed at one's own residence with the occupant of the residence). Failing to do so likewise fails to show why it matters what third parties think in this case, when it was of minimal importance in Wooley. In both cases, the offensive message was affixed to a piece of government property (a license plate/a right-of-way) which was attached to a citizen's private property (a car/his land). In doing so, the owners were forced, "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Wooley, 430 U.S. at 715(A)(10). The Supreme Court held that doing so violated the First Amendment and, rather than any categorical analysis, *this* is the test for compelled speech. See Wooley at 715(A)(10). See also NIFLA v. Becerra, ___ U.S. ___, 138 S. Ct. 2361, 2379, 201 L.Ed.2d 835 (2018)(Kennedy, J. concurring)(applying the Wooley standard to its compelled speech analysis); Carroll v. Blinken, 957 F.2d 991, 998(I)(2d Cir. 1992)(same); Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338, 349(III)(A)(5th Cir. 2017)(same); DeBoer v. Village of Oak Park, 267 F.3d 558, 572(2)(C)(1)(7th Cir. 2001)(same); Frudden v. Pilling, 742 F.3d 1199, 1205(I)(B)(1)(9th Cir. 2014)(same); Cressman v. Thompson ("Cressman I"), 719 F.3d 1139, 1157(II)(B)(2)(b)(10th Cir. 2013)(same); Coleman v. Miller, 117 F.3d 527, 531(III)(11th Cir. 1997)(same); Beckett

v. Air Line Pilots Ass'n, 59 F.3d 1276, 1280 (D.C. Cir. 1995)(same).

Appellees must distinguish Wooley from this case before they can reasonably support any argument that a different standard should apply to the compelled speech analysis. They have failed to do so.

II. The Amorphous Government Speech Doctrine Does Not Protect Governments To An Equal Or Greater Extent Than The First Amendment Protects Citizens

Appellants' First Amendment rights represent a line of demarcation for any right Long might have to speak on behalf of the government, so Appellees' specious claim that "[c]ensorship is the entire aim of [sic] Plaintiffs' lawsuit" should not give the Court much, if any, pause in its consideration of their compelled speech claim.[4] [App'e Br. at 18].

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[4] Appellees make the baffling assertion that Appellants waived their sole issue on appeal, that the district court erred in granting summary judgment to Appellees, which is largely grounded in their claim that Appellees violated their right against compelled speech, as they have argued from the first pleading in this case to now. See [Doc. 5 at ¶¶11; 12(b)(1); 14; 47; 49; 50-60; Doc. 6 at 6; Doc. 25 at 2; Doc. 50-1 at 7; Doc. 56 at 10]. Rather than "re-fram[ing]" the issue, Appellants have taken care in this appeal to explore the entire compelled speech doctrine, on which they have based their claims, in an effort to reverse the district court's erroneous grant of summary judgment. "Although new claims or issues may not be raised [on appeal], new *arguments* relating to preserved claims may be reviewed on appeal." Pugliese v. Pukka Development, Inc., 550 F.3d 1299, 1304 n.3 (11th Cir. 2008). See also Yee v. City of Escondido, Cal., 503 U.S. 519, 534(III)(B), 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992)(observing, "[o]nce a federal claim is properly presented, a party can make any argument in support of

Appellees ask this Court to be the first on record to equate – or in fact favor – a government entity's "right to 'speak for itself'" to private citizens' First Amendment protections, so that the Sheriff may require Appellants to host defamatory messages in front of their own homes, with the threat of arrest if they move them.[5] Id. (quoting Grove City, Utah v. Summum, 555 U.S. 460, 467(I)(A), 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009)). In doing so Appellees tacitly argue that that government speech is subject to fewer (if any) of the guardrails established by the Courts for First Amendment speech. See e.g. Gertz v. Robert Welch, Inc., 418 U.S. 323, 387(II), 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974)(holding that "the First Amendment was not intended to protect every utterance" and collecting cases observing the same).

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that claim, parties are not limited to the precise arguments they made below"). Appellants' claim is, was and always will be grounded in Appellees' violation of their First Amendment right against compelled speech, so the issues attacked by Appellees as waived are, at most, "new arguments" which the Court may consider. Pugliese, 550 F.3d at 1304 n.3.

[5] Appellees propose that Appellants, "erroneously equate standard legal protections of government property with coercion" because they have argued that Riley's threats of arrest essentially required Appellants to bear Long's message. [App'e Br. at 27]. Enforcing government property laws can infringe upon First Amendment rights, so it is of little value for Appellees to minimize their behavior in this way. See generally Dellums v. Powell, 566 F.2d 167, 194-195(III), 184 U.S.App. D.C. 275 (D.C. Cir. 1977)(observing that officers who arrest protesters exercising First Amendment rights for trespass are liable for violating protesters' First Amendment rights). See also Wooley at 713(4).

However, the government speech doctrine is subject to limitations. In Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208(II), 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015), the Supreme Court held, "the 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." In Matal v. Tam, ___ U.S. ___, 137 S. Ct. 1744, 1758(III)(A), 198 L. Ed. 2d 366 (2017), the Court noted that its decision in Walker, "likely marks the outer bounds of the government-speech doctrine."

By asserting that Long can require Appellants and others who live with them to host defamatory signs in front of their homes on property they own,[6] without infringing upon their First Amendment rights, Appellees are asking this Court to extend the government speech doctrine well beyond its breaking point and invoke the Supreme Court's concern about "dangerous misuse" of the doctrine "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval." Matal, 137 S. Ct. at 1758(III)(A).

[6] Appellees also argue that the signs, "alleviate the need for an already busy citizen to undertake the time-consuming task of working through a lengthy list of sex offender names," etc., thus justifying their use. [App'e Br. at 48-49]. The United States Supreme Court has responded to similar arguments by noting that, "the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" (cit.s and internal quotes omitted) McCullen v. Coakley, 573 U.S. 464, 486(IV), 134 S. Ct. 2518, 2534–35, 189 L. Ed. 2d 502 (2014).

Even if Appellants were to concede, *arguendo*, that the signs represented a form of government speech, Appellees' actions are not thereby exempted from the strictures of the First Amendment. See Walker, 576 U.S. at 208(II). See also Reed II, 2020 WL at *19(III)(C). Any claim to the contrary, like Appellees' claim that their message is entitled to, "more substantial" protection than Appellants' rights under the First Amendment, is unsustainable. [App'e Br. at 19].

III. Long's Declaration Was Accorded Too Much Weight By The District Court

There are two reasons why Long's declaration in support of Appellees' summary judgment motion should not have tipped the balance in the district court's summary judgment order: first, the right to respond or disassociate does not cure a First Amendment violation *vis-à-vis* compelled speech, so establishing that Appellants have that right means little to the question of whether their First Amendment rights were violated; second, the declaration fit the definition of a sham under the law.[7] See

[7] Appellees claim that Appellants' arguments concerning Long's declaration were waived. [App'e Br. at 55]. There is some irony to Appellees invoking a rule whose policy justification is to prevent sandbagging (failing to raise a claim and instead springing the claim on the opponent at the last second) to insulate their own efforts to sandbag Appellants below (by springing a sham declaration on Appellants after discovery and submission of their summary judgment motion). Nonetheless, Appellees are wrong for two reasons. First, and likely decisively, at the first opportunity to do so, Appellants presented nearly the same substantive argument to the district

PG&E, 475 U.S. at 12(III)(A). See also Cleveland v. Policy Mgmt. Syst. Corp., 526 U.S. 795, 806(II), 119 S. Ct. 1597, 143 L.Ed.2d 966 (1999).

As would be expected, Appellees ask the Court to adopt the district court's position that "endorsement … is the appropriate question for determining whether, if the signs are posted this Halloween, the speech will be readily associated with the Plaintiffs" and the ability to place competing signage eliminates any question of endorsement. Reed II at 10(III)(C). See also [App'e Br. at 24-30]. Appellees fail, completely, to address the precedents, cited in Appellants' opening brief, which demonstrate that endorsement is not an element in the compelled speech analysis. See e.g. Riley v. Nat'l Fed'n of the

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court. See [Doc. 56 at 18]. See also Pugliese at 1304 n.3. Second, the error alleged, crediting a self-serving declaration, is one which is preserved by virtue of Appellants' raising the grant of summary judgment as error. None of the authorities cited by Appellees involved, for instance, a motion to strike or specific objection to the declaration in question. See e.g. Leoncio v. Louisville Ladder, Inc., 601 F. App'x 932, 933 (11th Cir. 2015). Each nonetheless directly considered the affidavit's weight as part of the larger question of whether or not summary judgment was appropriate in the case, which is what Appellants request this Court do. See Leoncio, 601 F. App'x at 933. Appellees' supporting authority, Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324 (11th Cir. 2004), does not compel the Court to ignore this issue. Rather, that case dismisses the appeal of a dismissal under Fed. R. Civ. P. 12(b)(6) because the appeal inartfully failed to link any of the alleged errors on appeal to claims in the complaint. This has little relevance to this case since the Complaint could hardly have anticipated Long's attempt to alter his clear and direct testimony at the injunction hearing with a declaration asserting that "no" was not a clear and direct answer at the summary judgment stage.

Blind of N. Carolina, Inc., 487 U.S. 781, 798(III), 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). They also fail to address Appellants' position that the right to respond does not cure the constitutional damage already inflicted when Long foisted his message upon them, summed up by Justice Thomas's stern conclusion that, "[t]his reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak." Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, ___ U.S. ___, 138 S. Ct. 1719, 1740, 201 L.Ed.2d 35 (2018)(Thomas, J. concurring). See also PG&E at 15-16(III)(B).

Although the second point, that Long's declaration fits the criteria set forth in Franks v. Nimmo, 796 F.2d 1230, 1237(II)(10th Cir. 1986), as well as various Eleventh Circuit precedents, has already been argued thoroughly, one point bears repeating based on Appellees' arguments. In keeping with the Response's theme, the next-to-last sentence in Appellees' Argument and Citation of Authority claims, "[t]iming is irrelevant to the content of the declaration," as they must, given the nearly one-year lapse between Long's hearing testimony and his declaration. But see Franks, 796 F.2d at 1237(II)(listing two factors in determining whether an affidavit is a sham to be "whether … the affiant had access to the relevant evidence at the time of the earlier testimony [and

whether] the affidavit was predicated on newly discovered evidence). Beyond Franks, Appellants also cited this Court's decision in Leoncio, which made a point of noting that the discredited affidavit, "was filed four months after Mr. Leoncio's deposition and three days before the plaintiffs' response to the defendant's summary judgment motion was due." 601 F. App'x at 933. Timing is most certainly relevant and argues strenuously that Long's affidavit should have been of little significance to the district court's decision.

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CONCLUSION

WHEREFORE, Appellants request that this Honorable Court **reverse** the district court's order granting summary judgment to Appellees and denying the same to appellants as well as its order denying Appellants motion for a permanent injunction and provide any further relief required by the ends of justice.

This 4 day of June, 2021. Respectfully Submitted,

/s/ Mark Yurachek
Mark Yurachek
Georgia Bar No. 783599
MARK ALLEN YURACHEK & ASSOCIATES, LLC
1344 Lafrance Street, NE
Suite 3
Atlanta, GA 30307
(470) 319-8721

/s/ Mark Begnaud
Mark Begnaud
Ga. Bar No. 217641
ESHMAN BEGNAUD, LLC
315 W. Ponce de Leon Ave
Suite 775
Decatur, GA 30328
(404) 665-9601

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

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/s/ **Mark Yurachek**

_____

Mark Yurachek
Georgia Bar No. 783599

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of June 2021, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users. All participants in the case are registered CM/ECF users and service will be accomplished using the appellate CM/ECF system.

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Date: June 4, 2021

/s/ **Mark Yurachek**
_____
Mark Yurachek