APPEAL NO. 21-10092

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY McCLENDON, *et al*.,

Appellants,

vs.

SHERIFF GARY LONG, *et al*.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

APPELLEES' INITIAL BRIEF

Terry E. Williams, Esq.
Jason Waymire, Esq.
Williams, Morris & Waymire, LLC
4330 South Lee St., NE
Building 400, Suite A
Buford, Ga 30518-3027
Telephone: (678) 541-0790
Facsimile: (678) 541-0789

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of the U.S. Court of Appeals for the Eleventh Circuit, the undersigned counsel for Defendants-Appellants certifies that, to the best of his present information, knowledge and belief, the following is a full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case and appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other indefinable legal entities related to a party:

1. Association County Commissioners of Georgia-Interlocal Risk Management Agency (ACCG-IRMA), insurer for Defendants;
2. Begnaud, Mark, counsel for Plaintiffs;
3. Butts County, Georgia Sheriff's Office, Defendant;
4. Crumley, Scott, Defendant,
5. County Reinsurance, LTD, reinsurer for Defendants' insurer ACCG-IRMA;

6. Holden, Reginald, Plaintiff;

7. Horsley Begnaud, LLC, law firm representing Plaintiffs;

8. Long, Gary, Sheriff of Butts County, Georgia, Defendant;

9. McClendon, Corey, Plaintiff;

10. Reed, Christopher, Plaintiff;

11. Treadwell, Mark T., District Court Judge, Middle District of Georgia;

12. Waymire, Jason C., of Williams Morris & Waymire, LLC – Attorney for Defendants;

13. Williams, Terry of Williams Morris & Waymire, LLC – Attorney for Defendants;

14. Yurachek & Associates, LLC, law firm representing Plaintiffs;

15. Yurachek, Mark, counsel for Plaintiffs.

WILLIAMS, MORRIS & WAYMIRE, LLC

/s/ *Jason Waymire*_____
JASON WAYMIRE
Georgia Bar Number 742602
Attorney for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees request oral argument in order to clarify the issues in this appeal and to address any questions the Court may have. Defendants believe oral argument may be particularly helpful in light of the important constitutional issues involved and the unsettled status of the law in this unique case.

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STATEMENT OF THE ISSUES

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2) Whether Defendants' speech right to warn the public, using signs placed in public right-of-way areas, can be censored under Plaintiffs' First Amendment claim.

3) Whether the Sheriff's signs compel any Plaintiff to send a message, where no Plaintiff was required to do anything regarding signs, and legitimate criminal laws prohibited Plaintiffs from interfering with the signs.

4) Whether reasonable third parties would likely conclude that Plaintiffs endorsed the signs, which plainly were labelled as "a community safety message from Butts County Sheriff Gary Long."

5) If the signs are "compelled speech," whether the First Amendment requires rational basis scrutiny or strict scrutiny.

6) If rational basis scrutiny is proper, whether the signs are a reasonable way to meet the Sheriff's compelling interest in warning and protecting the public from sex offenders.

7) If strict scrutiny is proper, whether the signs are narrowly tailored to meet the compelling government interest of warning and protecting the public from sex offenders.

STATEMENT OF THE CASE

A. Course of Proceedings

This case arises out of the Butts County Sheriff's desire to warn the public, particularly trick-or-treating children, about the location of sex offender residences in the community during Halloween. Doc. 5 at 1. The Sheriff's signs warn the public in an effort to prevent unwary trick-or-treating children from coming face-to-face with sex offenders. In late September 2019, Plaintiffs, who are registered sex offenders residing in Butts County, Georgia, filed this lawsuit seeking to enjoin the Sheriff's Office from posting signs in front of their residences during Halloween. Doc. 5 at 19.

Defendants agree with the basic procedural account provided by Plaintiffs in the "Course of Proceedings" portion of Plaintiffs' Brief. Defendants add that on March 30, 2021, the Court dismissed Defendants' appeal of the District Court's preliminary injunction order (appeal 19-14730) based on the District Court's entry of final judgment.

Defendants object to Plaintiffs' request for the Court to consider Plaintiffs' briefing from appeal 19-14730. All pertinent arguments should be contained in Plaintiffs' current brief in this appeal. Nothing in *United States v. Rey*, 811 F.2d 1453 (11th Cir. 1987), allows anything to the

contrary. *Cf. MSP Recovery Claims, Series LLC v. QBE Holdings, Inc.*, 965 F.3d 1210, 1220 n.3 (11th Cir. 2020) ("We pause to note that we disapprove "in the strongest terms" of incorporation by reference of district court briefing."); FRAP 32(a)(7) (briefing word and page limits).

B. Statement of Facts

Background

This case arises out of intended placement of warning signs by the Butts County Sheriff's Office for Halloween 2019. Here is the sign:

Doc. 12-11; Doc. 20 at 43.

The sign has the same message on both sides, and measures

approximately two (2) feet by 18 inches. Doc. 20 at 70. The Sheriff's Office intention was to place signs in public right-of-way areas adjacent to sex offender residences. See Doc. 20 at 73-76; Doc. 51-1 (Riley Decl.) at 2 ¶4.

Plaintiffs

Plaintiff Reginald Holden is a registered sex offender who owns a residence in Butts County. Doc. 20 at 9-11. Mr. Holden's residence fronts a county-maintained roadway. Doc. 20 at 18-19. Real estate records and measurements establish that the government's right-of-way extends well past the paved roadway and onto the grassy area in front of Mr. Holden's residence. Doc. 20 at 92; Docs. 12-13, 12-18, 12-19, 12-20 (50-foot right of way); Doc. 51-1 (Riley Decl.) at 2 ¶6 & 8 (Exhibit marked BCSO scene photos – 12).

Plaintiff Corey McClendon is a registered sex offender who lives with his parents, who own the home where he resides. Doc. 17 at 3. The McClendon residence is adjacent to a county-maintained roadway. Doc. 20 at 35. Real estate records and measurements establish that an 80-foot right-of-way extends well past the paved roadway and past the mailbox area of the residence. Doc. 20 at 36, 72-73, 93; Docs. 12-21, 12-22, 12-23; Doc. 51-1 (Riley Decl.) at 2 ¶8 & 10 (Exhibit marked BCSO scene photos – 50).

Plaintiff Christopher Reed is a registered sex offender who lives with

his father, who owns the residence. Doc. 5 ¶¶15-16. The Reed residence is adjacent to a county-maintained roadway. Doc. 20 at 80; Doc. 12-12. Real estate records establish that a 60-foot right-of-way extends past the paved roadway and past the mailbox that serves the residence. Docs. 12-15, 12-16, 12-17. In 2018, a Sheriff's Office sign was placed within the right-of-way in an area in front of the Reed residence. Doc. 20 at 80; Doc. 51-1 (Riley Decl.) at 2 ¶7 & 9 (Exhibit marked BCSO scene photos – 35).

Historical Context and Reason for the Signs

Sheriff Gary Long is the elected Sheriff of Butts County, Georgia. Doc. 20 at 38. The Sheriff's Office is the law enforcement entity responsible for implementing state sex offender registry and warning laws in Butts County. Doc. 20 at 50. For many years before 2018, the Butts County Chamber of Commerce had an event known as "Halloween on the Square." Doc. 20 at 38. This involved thousands of children trick-or-treating in a central location. Doc. 20 at 38. As a result, not many children went trick-or-treating from house to house on Halloween. *Id*.

In 2018, the local Chamber of Commerce ended "Halloween on the Square." Doc. 20 at 39. Therefore, the Sheriff's Office anticipated that far more children would be trick-or-treating from house to house for Halloween in 2018. Doc. 20 at 39. A large portion of Butts County is rural. Doc. 20 at

41. The Sheriff's Office anticipated families from outside their own neighborhoods, and perhaps from outside the county, visiting local neighborhoods to take children trick-or-treating. *Id*.

Halloween was the only occasion where the Sheriff's Office anticipated significant numbers of children visiting the residences of strangers in local neighborhoods. Doc. 20 at 61. To warn trick-or-treating children and their parents about the presence and specific locations of sex offenders in the community, the Sheriff's Office decided to post warning signs temporarily in front of sex offender residences for Halloween. Doc. 20 at 39, 46. The Sheriff's Office Facebook page included a post about the signs, indicating the signs had been placed in front of sex offender residences to notify the public to avoid the residence. Doc. 20 at 62 & Doc. 12-8.

Before implementing the plan, the Sheriff's Office sought advice from the Georgia Sheriff's Association. Doc. 20 at 39-41. The Georgia Prosecuting Attorney's Council advised, through the Sheriff's Association, that warning signs could be placed in the public right-of-way if they did not say "sex offender." Doc. 20 at 40-41.

Placement of Halloween Signs

Deputy Jeanette Riley is the sex offender registration compliance

officer for the Butts County Sheriff's Office. Doc. 20 at 68. In 2018, Deputy Riley was involved with posting signs before Halloween. Doc. 20 at 70. Defendant Scott Crumley assisted Riley, and that was his only role regarding the signs. Doc. 46 (Crumley Dep.) at 13, 20, 23, 29. Crumley did not plan or supervise any aspect of the sign project. *Id*.

In 2018, the deputies placed a sign in front of each Plaintiff's residence. Doc. 20 at 13, 80. Deputies placed the signs in the right-of-way in front of sex offender residences. Doc. 20 at 70-71. Deputy Riley normally used the mailbox as a guide for the distance of sign placement from the paved roadway. Doc. 20 at 72-73. For Halloween 2019, Defendants intended to place signs solely in the right-of-way adjacent to sex offender residences, as was done in 2018. Doc. 20 at 75, 77, 84.[1]

Prohibition on Interference with Signs

In 2018, the Sheriff's Office provided a written notice to Plaintiffs about the signs as follows:

> Halloween Safety sign has been placed in front of your residence by Order of Sheriff Gary Long. This order is due to a registered Sex Offender is registered to be living at this address with the Butts County Sheriff Office.

[1] No signs were placed in 2019 because the District Court entered a preliminary injunction against sign placement. The Court dismissed Defendants' appeal from the preliminary injunction order due to entry of a final judgment.

> Ga Code Section 42-1-12 (i) provides as the duty of the Sheriff Office
>
> The sheriff's office in each county shall: (5) Inform the public of the presence of sexual offenders in each community
>
> The sign will be placed at location by the Butts County Sheriff Office on Saturday, October 27, 2018 and removed by The Butts County Sheriff Office Before Sunday, November 4, 2018.
>
> THIS SIGN IS PROPERTY OF THE BUTTS COUNTY SHERIFF OFFICE SHERIFF GARY LONG, IT SHALL NOT BE REMOVED BY ANYONE OTHER THAN THE BUTTS COUNTY SHERIFF OFFICE.

Doc. 12-4 (Plaintiff Hearing Exhibit 1) (punctuation and capitalization in original).

The Sheriff's Office did not have any incident involving someone trying to take down a Halloween warning sign. Doc. 20 at 89. Deputy Riley denies Mr. Holden's claim that, in 2018, she indicated that he would be arrested if he took down the sign. Doc. 20 at 83. Rather, Deputy Riley told Mr. Holden that the sign was property of the Butts County Sheriff's Office and should not be removed from the right-of-way. Doc. 20 at 83.

Georgia law prohibits private citizens from posting signs on government rights-of-way. O.C.G.A. § 32-6-51; Doc. 20 at 87. The Sheriff's Office has no policy about persons posting signs on their own property, and has never had a plan to prohibit the lawful display of signs on private

property. Doc. 51-2 (Sheriff Long Decl.) at 2 ¶4.[2] Consequently, Plaintiffs were always free to post their own signs on property withing their control.

Other Government Usages of Right-of-Way Areas

Government signs commonly are placed on right-of-way areas in Butts County. Doc. 20 at 48, 87. These include public safety signs, notices, traffic control signs and speed monitoring devices. Doc. 20 at 48-49, 87, 90.

Alternatives to Warning Signs

Sex offender lists exist at the Sheriff's Office, the clerk's office, local schools and some other government buildings, and also online. Doc. 20 at 41-42. Sex offender lists normally show a name, an address and the offense. Doc. 20 at 42. Some persons in Butts County lack internet service and/or vehicles. Doc. 20 at 42. Therefore, Sheriff Long decided to post the signs to warn the public. *Id*.

To warn parents and children about specific sex offender residences, the Sheriff's Office's alternative to posting the signs would involve posting a deputy in front of sex offender residences during Halloween. Doc. 20 at 44. The expense to the Sheriff's Office for that type of operation would exceed $10,000. Doc. 20 at 44-45. Furthermore, the Sheriff's Office does

[2] For the first time, Plaintiffs raise a challenge to Sheriff Long's declaration. Plaintiffs' argument about the declaration is considered in the last section of this Brief.

not have enough staff to cover 57 sex offender residences, and officers posted at those locations would be unavailable to carry out other law enforcement functions. Doc. 20 at 44.

C. Standard of Review

The District Court's summary judgment order is reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The District Court's summary judgment order should be affirmed. This case concerns Sheriff Gary Long's plan temporarily to place signs warning the public against trick-or-treating at sex offender residences during Halloween. The Sheriff's Office placed the signs during Halloween 2018. Sheriff Long intended to place signs in right-of-way areas adjacent to sex offender residences. These areas are public property on which Plaintiffs have neither the right to exclude government signs nor the right to place their own signs. *See* O.C.G.A. § 32-6-51.

The signs convey only government speech, which is not subject to First Amendment regulation. *See Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070 (11th Cir. 2015). The Sheriff's Office sign placement plan involves deputies placing signs only on government rights-of-way, and the message clearly is attributed only to Sheriff Long, just as in 2018.

Beyond the "government speech" doctrine, Defendants have a

federally protected right to post Sheriff's Long's message, and Plaintiffs have no veto over that right merely because they live near the signs and object to the message.

The District Court correctly rejected Plaintiffs' First Amendment "compelled speech" theory, which more appropriately should be called a "compelled endorsement" theory. That doctrine does not apply for two reasons. First, the signs do not compel any Plaintiff to send a message, and no Plaintiff was required to do anything regarding signs. Second, no reasonable third party was likely to conclude that Plaintiffs endorsed the signs, which plainly were labelled as "a community safety message from Butts County Sheriff Gary Long." This conclusion does not change due to criminal laws prohibiting Plaintiffs from interfering with Sheriff Long's signs. Beyond that, Plaintiffs had freedom to express their own messages on property they control, which does not include government rights-of-way.

Assuming for the sake of argument that the signs are "compelled endorsement" as Plaintiffs claim, it is an open question whether the First Amendment requires rational basis scrutiny or strict scrutiny. The government safety warning here is more like a commercial safety disclosure than an ideological slogan. Therefore, rational basis scrutiny should prevail. Under that standard, there is no serious doubt that these signs are a

reasonable way to meet the Sheriff's legitimate interest in warning and protecting the public from sex offenders.

If, on the other hand, strict scrutiny applies, the Sheriff's Office did not have comparably effective alternative means to meet what all agree is a compelling government interest in warning and protecting the public from sex offenders. The signs are temporary and provide the most reliable, effective method to warn children away from sex offenders while trick-or-treating during Halloween.

ARGUMENT AND CITATIONS OF AUTHORITY

The District Court held that the signs do not compel Plaintiffs to endorse a message to which they object, which was the basis for its First Amendment summary judgment ruling. Doc. 58 at 26. Defendants respectfully submit that the District Court should be affirmed.

I. PLAINTIFFS WAIVED ANY CLAIM BASED ON ALLEGED "SPEECH AUTONOMY," WHICH AS CONCEIVED BY PLAINTIFFS IS NOT RELEVANT TO THIS CASE

Having failed to convince the District Court that Defendants compelled Plaintiffs' unwilling endorsement of Sheriff Long's signs (*i.e.*, "compelled speech"), Plaintiffs re-frame their claim in a manner never presented in their operative complaint or in briefing in the District Court. On appeal, for the first time Plaintiffs claim a "right to autonomy not to speak to

the public on their own property and the interference with that right the signs engendered." *Appellants' Brief* at 12. The next 12 pages of Plaintiffs' Brief contains more of the same—asserted rights to "seclusion," and so forth.

Plaintiffs waived these arguments by failing to present them to the District Court. See Docs. 50-1, 56 (Plaintiffs' summary judgment briefs). "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (citations and internal punctuation omitted; collecting cases).

Moreover, Plaintiffs have no right to raise on appeal claims that were not raised in their operative complaint. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (refusing to entertain claim raised in response to motion but not in complaint); Doc. 39 at 14-16 (second amended complaint, which claims that Defendants compelled speech by placing signs).

Even if Plaintiffs' new arguments can be considered, Plaintiffs' claimed First Amendment right to speech autonomy at their homes is not the precise right under the operative facts of this case. Rather, the issue is whether Sheriff Long's posting *his own* message on property *adjacent to* Plaintiffs' residences infringes Plaintiffs' right against forced endorsement

of an objectionable government message. That is the issue briefed in the District Court, that is the issue that the District Court ruled upon, and the remainder of this Brief concerns various aspects bearing on that fundamental issue.[3]

II. THE SIGNS CONVEY PURE GOVERNMENT SPEECH THAT IS NOT SUBJECT TO FIRST AMENDMENT REGULATION

The Sheriff's Office signs are not subject to Plaintiffs' First Amendment challenge because they convey only government speech. Drawing from the Supreme Court decisions in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 135 S.Ct. 2239, 2245 (2015), and *Pleasant Grove City v. Summum,* 555 U.S. 460, 470, 129 S.Ct. 1125, 1132 (2009), the Eleventh Circuit considers "[1] history, [2] endorsement, and [3] control" to test whether a message falls into the "government speech" category. *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1075 (11th Cir. 2015). If so, then there is no First Amendment ground to interfere with the government's speech. *Id.* "Whether speech is government speech is inevitably a context specific inquiry." *Id.*

The record establishes that the signs convey only government speech.

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[3] There is some general overlap between Plaintiffs' new theories—or at least their underlying authorities—and the arguments presented to and ruled upon in the District Court. In that sense, the remainder of this Brief is responsive to Plaintiffs' new arguments.

First, in regard to history, the testimony establishes that in 2018 the Sheriff's Office posted its own signs in the Halloween time frame warning the public, specifically the same signs that it intended to post on Halloweens. No Plaintiff, and no private party, was involved in choosing the content or posting a Halloween warning sign.

Second, in regard to endorsement, the test is whether "observers reasonably believe the government has endorsed the message." *Mech*, 806 F.3d 1076. Here, the sign on its face is endorsed by, and attributable to, Sheriff Long. Every reader has to conclude that Sheriff Long endorsed the sign. By contrast, the signs bear no hint of endorsement by any Plaintiff.

Third, in regard to "the government's control over the message," *Mech*, 806 F.3d at 1078, the Sheriff's Office controlled the message, locations and timing of sign placement. Importantly, the signs are intended to be placed on government property, which distinguishes this case from cases where a government insisted on displaying its message on private property.[4] Everything about these signs evidences government control rather than speech subject to First Amendment regulation.

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[4] For example, the issue in *Wooley v. Maynard*, was "whether the State may constitutionally 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, 97 S. Ct. 1428, 1434–35 (1977) (emphasis supplied).

It follows that the signs are "government speech," and consequently "Plaintiffs' claim under the First Amendment fails." *Mech*, 806 F.3d at 1079. For First Amendment purposes, there is no difference between sex offender information posted in a government building, on a government web site, or on a sign placed on government right-of-way.

To be sure, government speech can also be "compelled speech." See Doc. 17 at 16.[5] Plaintiffs may attempt to distinguish this case from *Walker* and *Summum* because the plaintiffs in those cases sought to compel the government to convey the plaintiffs' messages. However, that distinction does not hold water, because here Plaintiffs also want to control the Sheriff's message. Specifically, Plaintiffs want completely *to prevent* Sheriff Long from posting his message via the signs. Plaintiffs demand one of the *worst* forms of interference with speech—no speech at all.

In sum, the signs convey "government speech" that is not subject to interference on First Amendment grounds. *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1079 (11th Cir. 2015). "The natural outcome of government speech is that some constituents will be displeased by the stance their government has taken. Displeasure does not necessarily equal unconstitutional compulsion, however, and in most cases the electoral

[5] The compelled speech analysis is considered in detail below.

process—not First Amendment litigation—is the appropriate recourse for such displeasure." *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006).

III. DEFENDANTS' SPEECH RIGHTS ARE ENTITLED TO PROTECTION FROM PLAINTIFFS' CENSORSHIP ATTEMPT

"A government entity has the right to 'speak for itself.' " *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 1131 (2009) (quoting *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346 (2000)). Whether the signs are characterized as government speech or as the speech of Defendants as individuals who work for a government entity, federal law entitles Defendants to protection from censorship.

Censorship is the entire aim of Plaintiffs' lawsuit. Plaintiffs' First Amendment protections, if any, end where Defendants' speech rights begin. Even if Plaintiffs have a legitimate First Amendment claim (which Defendants deny), the Court is obligated to strike a legally appropriate balance.

There can be no serious dispute that Defendants have a federally protected right to send messages, including the subject signs. Federal law has long recognized the right of government entities to send their own

messages without interference from people who simply do not like the message. *Summum*, 555 U.S. at 467, 129 S. Ct. 1125; *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 864 (11th Cir. 2020) ("The defendant governments obviously hold an opposing viewpoint—one that they surely have **the right to promote**."); *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (government has "the **right** to 'speak for itself,' " and can freely "select the views that it wants to express."); *Echols v. Lawton*, 913 F.3d 1313, 1320 (11th Cir. 2019) (balancing "an official's right to engage in protected speech" against plaintiff's protection from retaliation); *Mulligan v. Nichols*, 835 F.3d 983, 990 (9th Cir. 2016) ("It is well established that public employees and officials retain rights to free speech.").

Defendants' right to speak is particularly acute in cases like this, where the message touches on matters of public concern and safety. *See Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983) ("speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.").

Defendants' speech rights are no less weighty than those asserted by Plaintiffs, and frankly, more substantial because Plaintiffs do not have a viable First Amendment case. See § IV below. Federal law protects Defendants' right to post the Sheriff's message on public property,

particularly where there is no objection from the public entity that owns the right-of-way areas involved here. By contrast, non-owners (Plaintiffs) simply object to *the message* that Defendants sought to send, as well as the *location* of the message.

While Plaintiffs' object to the *location* of the signs adjacent to their residences, location is crucial to the effectiveness of the warning provided by these signs. *See Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004) (explaining legal protection of right to expression *in particular area* if "that expression depends in whole or part on the chosen location."). Each sign references a residence, and that message makes no sense if there is no residence nearby.

Plaintiffs attempted through this lawsuit to silence Defendants from a particular type of speech in a location that Plaintiffs have no right to control. Plaintiffs' case seeks the pure content-based restriction that the First Amendment almost never allows. *See United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012) ("content-based restrictions on speech have been permitted … only when confined to the few historic and traditional categories of expression long familiar to the bar." (internal punctuation and citations omitted)); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35, 112 S.Ct. 2395 (1992) ("Speech cannot ...

be punished or banned, simply because it might offend" those who hear it.); *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) ("The heckler's veto is … odious viewpoint discrimination" prohibited by the First Amendment). Plaintiffs are not entitled to their desired pure content-based speech regulation, which seeks completely to eliminate Defendants' message at the location and for the occasion (Halloween) when the speech was necessary.

Put succinctly, Plaintiffs' lawsuit asked the District Court to impose a content-based restriction on Defendants' speech. The District Court rightly refused. Content-based speech restrictions can only stand if they meet the demands of strict scrutiny. *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 135 S. Ct. 2218 (2015). Plaintiffs made no argument that their desired restriction on the Sheriff's Office message passes strict scrutiny, so their claim fails.

IV. THE SIGNS ARE NOT "COMPELLED SPEECH"

Plaintiff's First Amendment claim is premised on a corollary to the "compelled speech" doctrine. As discussed below, the compelled speech doctrine is not implicated here because no Plaintiff is compelled to endorse the message on Sheriff Long's sign, and no reasonable third party could conclude that any Plaintiff endorses Sheriff Long's message.

A. Overview of the Compelled Speech Doctrine

The key dynamic in "compelled speech" cases is the government coercing a citizen personally to express a message to which the citizen objects. *See West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178 (1943) (government could not force student to recite pledge of allegiance or salute the flag); *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428 (1977) (government could not punish motorist for covering up state motto on license plate); *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667 (1988) (state could not force charitable solicitors to utter certain disclosures in their solicitations);[6] *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004) (same as *Barnette*).

Two core First Amendment concerns rest at the heart of the "compelled speech" doctrine. The first can be characterized as "freedom of

[6] *Riley* is a true compelled speech case, where the government sought to make a private speaker actually communicate a specific message to third parties. Here, by contrast, nobody is forcing any Plaintiff to say anything. Rather, the nub of Plaintiffs' First Amendment argument—to the extent it has any real basis in the First Amendment—is that third parties will perceive that Plaintiffs endorse Sheriff Long's message, when in fact Plaintiffs disagree with the message. Consequently, it is crucial whether any reasonable third party is indeed likely to conclude that any Plaintiff endorses Sheriff Long's message. As the District Court ruled, the answer is easy: no.

thought," and it is not implicated here.[7] The second is freedom from compulsion to utter or endorse an objectionable message. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65, 126 S. Ct. 1297, 1310 (2006) (discussing compelled-speech precedents where "violations … result[ed] from interference with a speaker's desired message"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557, 125 S. Ct. 2055, 2060 (2005) (describing "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government"). These two concerns explain all of the Supreme Court's handful of "compelled speech" cases.

Plaintiffs do not seriously claim that they are forced to utter an objectionable message. Rather, they claim that the signs give third parties the impression that Plaintiffs endorse Sheriff Long's message. *Cf. Johanns*, 544 U.S. at 568, 125 S. Ct. at 2066 (Thomas, J., concurring) ("The government may not … associate individuals … involuntarily with speech

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[7] *See Wooley*, 430 U.S at 714, 97 S. Ct. at 1435 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind;" also referencing "the right of freedom of thought protected by the First Amendment"). This case does not implicate freedom of thought. The Sheriff's signs, no matter where they are placed, do not force any Plaintiff to believe anything at all. Nobody has asked, much less compelled, any Plaintiff personally to believe in the message on the sign. No Plaintiff is required to take any action regarding a sign. Plaintiffs are free to disagree with the Sheriff's Office message.

by attributing an unwanted message to them … .”). For the reasons discussed below, there is no basis for Plaintiffs’ compelled endorsement claim.

B. Precedent Relating to Forced Endorsement Claims

Plaintiffs claim the signs are “compelled speech” because allegedly Plaintiffs would be forcibly associated with an objectionable message. There is very little binding precedent for this type of theory, and that precedent does not support Plaintiffs’ case.

The clearest compelled speech cases involve the government demanding a citizen affirmatively to endorse a message, like a requirement to salute the flag or recite the pledge of allegiance. *Holloman*, 370 F.3d at 1269. This case does not fit that category because the Halloween signs do not require any Plaintiff to say or do anything. *See N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (rejecting compelled speech challenge to Alabama flag because “[t]he government of Alabama does not compel its citizens to carry or post the flag themselves, or to support whatever cause it may represent.”).

The most prominent forced endorsement case is *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428 (1977), where the Supreme Court ruled that the First Amendment protects citizens from being forced to communicate to

third parties—recipients of the citizen's speech—the impression that the citizen endorses an objectionable message. In *Wooley*, the Supreme Court held that Mr. Maynard had a right against having to display the slogan "Live Free or Die" on his personal vehicles. *Wooley*, 430 U.S. at 715, 97 S. Ct. at 1435.

Neither the Supreme Court nor the Eleventh Circuit has articulated a specific test or set of elements for "compelled speech," much less a test for a claim that third parties will perceive a plaintiff to have endorsed an objectionable message. However, in *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015), the Tenth Circuit adopted a workable test that appears to encompass the basic elements of the Supreme Court's "compelled speech" precedent.[8] For an ordinary "compelled speech" claim (*e.g.*, a government mandate to *say* the pledge of allegiance), a plaintiff must establish (1) speech; (2) to which he objects; that is (3) compelled by some governmental action. *Cressman*, 798 F.3d at 951.

The test is slightly different for a *forced endorsement* claim like the one raised by Plaintiffs in this case. Where the plaintiff claims that the government has forced him to associate with an objectionable message, he must also prove a fourth element, namely that the government message "is

[8] Like *Wooley*, *Cressman* involved a challenge to a state license plate.

readily associated with the plaintiff." *Cressman*, 798 F.3d at 949–51.[9] The test for this "ready association" element asks whether the plaintiff is " '**closely linked with the expression in a way that makes [him] appear to *endorse* the government's message**.' " *Cressman*, 798 F.3d at 949 (italics in original; quoting *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 565 n. 8, 125 S.Ct. 2055 (2005)).[10]

Here, there is no dispute about the first two elements of the forced endorsement claim because the signs amount to speech to which Plaintiffs object. However, as discussed below, Plaintiffs' compelled speech claim falters on the third and fourth elements.

C. Application of the "Compelled Speech" Elements

1. The Signs Do Not Compel Plaintiffs to Send a Message

As noted above, a compelled speech claim requires a credible showing that the government is forcing the plaintiff to send a message. "In order to compel the exercise ... of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that

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[9] As discussed below, the "readily associated" language is imprecise, which lends itself to confusion and arguments not relevant to the First Amendment protection at issue. That is why the specific test for ready association is crucial to the compelled endorsement analysis.

[10] In *Johanns,* the Supreme Court rejected a compelled speech claim where the law in question did not "require[] attribution" of an advertising message to the plaintiffs. *Johanns*, 544 U.S. at 565, 125 S.Ct. at 2065.

is 'regulatory, proscriptive, or compulsory in nature.' " *Phelan v. Laramie County Community College Bd. of Trustees*, 235 F.3d 1243, 1244–47 (10th Cir.2000) (quoting *Laird v. Tatum*, 408 U.S. 1, 11, 92 S.Ct. 2318 (1972)); *see Johanns*, 544 U.S. at 565, 125 S. Ct. 2055 (rejecting compelled speech claim "[s]ince neither the Beef Act nor the Beef Order require[d] attribution" to plaintiffs).

In the District Court, Plaintiffs' primary argument about government compulsion involved the Sheriff's Office warning that the signs are government property that can only be removed by the Sheriff's Office. Plaintiffs erroneously equate standard legal protections of government property with coercion. The reality is that the Sheriff's Office intended to place signs on public rights-of-way, not Plaintiffs' property. Georgia law plainly prohibits Plaintiffs from interfering with signs that (a) do not belong to Plaintiffs and (b) are not on Plaintiffs' property. Defendants never planned or attempted to make any Plaintiff display a sign.

In the District Court Plaintiffs claimed compulsion based on the false claim that they *could not display competing messages*. The apparent evidentiary basis for this idea is that (1) Plaintiffs were prohibited from moving or defacing Sheriff's Office signs, and (2) Sheriff Long's answer to the following question:

Q. And could a registrant have placed a sign next to yours that says, "disregard and come on and trick-or-treat"?

A. No.

Doc. 20 at 47.

As to interference with signs, of course Plaintiffs are prohibited from interfering with government property that is lawfully posted on government right-of-way. That is simply a matter of Georgia criminal law. O.C.G.A. § 16-7-24 (a) ("A person commits the offense of interference with government property when he destroys, damages, or defaces government property… ."); O.C.G.A. § 16–7–21 (criminal trespass to "intentionally damage[] any property of another without consent of that other person … or knowingly and maliciously interfere[] with the possession or use of the property of another person without consent of that person."). A sign does not lose its legal protection simply because someone objects to a message on the sign. That basic legal protection is not "coercion," and it lends no support to Plaintiffs' First Amendment challenge.

In regard to Sheriff Long's testimony above, it requires more discussion. As detailed next, Sheriff Long's denial that Plaintiffs could place their own signs "next to" his has no relevance to the First Amendment claim pleaded in the Amended Complaint. In his declaration, Sheriff Long

explained exactly what he meant. He did *not* mean that any Plaintiff would ever be prohibited from placing his own sign on his own property. Doc. 51-2 (Sheriff Long Decl.) at 2 ¶4.

a. The Sheriff's Office Does Not Have a Policy or Practice Prohibiting Lawful Speech by Any Plaintiff

The District Court concluded that the Butts County Sheriff's Office has no policy or practice to prohibit any Plaintiff's lawful expression on private property. Doc. 58 at 22; Doc. 51-2 (Sheriff Long Decl.) at 2 ¶4. For several reasons, Sheriff Long's denial that Plaintiffs could place their own signs "next to" his, see Doc. 20 at 47, never legitimately supported anything of consequence to this case. First, the question was purely hypothetical. No Plaintiff ever tried to put up his own sign or wanted to, and the Sheriff's Office never responded to that type of situation.

If such an issue had arisen, and if Sheriff Long was concerned enough to consider action, then the Sheriff's Office would have sought legal counsel —just as it did when considering whether to post Halloween signs. *See* Doc. 20 at 39-41. One legal consideration would be that no Plaintiff has a legal right to post his own sign *next to* the Sheriff's sign on government right-of-way.[11] *Cf*. Doc. 20 at 47 ("could a registrant have placed a sign next to yours

[11] *See* O.C.G.A. § 32-6-51(a) (prohibiting placement of most items on rights-of-way); *Crider v. Kelley*, 232 Ga. 616, 619, 208 S.E.2d 444, 446 (1974) ("The management and control of the right-of-way of the state's

…?"). If placed next to Sheriff Long's sign, then the registrant's sign would illegally be on government right-of-way, regardless of any message on the hypothetical sign. That is why Sheriff Long indicated his belief that no such sign could be placed "next to" his. Doc. 51-2 (Sheriff Long Decl.) at 2 ¶6. It is a matter of law rather than a matter of censorship.

Second, Sheriff Long was not articulating a policy when he answered the question. He simply was trying to answer a hypothetical question posed by an opposing lawyer. In response, Sheriff Long gave his personal opinion about a hypothetical situation that never occurred. In fact there is no policy, and the situation never arose. Doc. 51-2 (Sheriff Long Decl.) at 2 ¶4.

Aside from the foregoing, there are serious substantive flaws with any reliance upon the idea that the Sheriff's Office prohibited any Plaintiff from posting a sign. Those flaws are considered next.

b. Plaintiffs Raised a Challenge Only to Signs, Not a Challenge to an Alleged Sheriff's Office Prohibition on Plaintiffs' Own Expression

The operative Complaint challenges placement of the Sheriff's Halloween signs on the basis of a "compelled speech" theory. There is no

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system of roads is vested in the Dept. of Transportation. Likewise, the control of the right-of-way of streets within a municipality not on the state system is vested in the governing body of the municipality. *Without doubt either could require the removal of any obstruction placed thereon without express permission*." (emphasis supplied; citation omitted)).

claim about an alleged Sheriff's Office prohibition on *Plaintiffs' own* signs or messages, and it would be error to entertain such a claim. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (refusing to entertain claim not raised in response to motion but not in complaint). At any rate, there was never such a prohibition, and there was never an issue about a Plaintiff wanting to post his own sign on private property.

c. The Signs Do Not Squelch Competing Messages

It is an analytical mistake to confuse a claim about *Sheriff's Office signs* with some supposed Sheriff's Office *prohibition on speech*. Government speech (*i.e.* the message on a sign) is very different from government censorship of private speech, and each raises its own distinct First Amendment questions.

If a claimant pleads and proves that a Sheriff's Office policy violates the First Amendment due to unlawful censorship of protected speech, then the claimant is entitled to an injunction *against that particular policy*. That type of challenge should be framed as a claim against "a content-based restriction on speech." *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005) (First Amendment challenge to sign ordinance).

Plaintiffs never raised that type of claim. Even if such a claim was at issue, it would not follow that the Sheriff's *own signs*—which obviously are

distinct from any regulation of any Plaintiff's hypothetical speech—amount to "compelled speech" prohibited by the First Amendment.

There is no basis (in the pleadings or the record) to consider a content-based restriction on any Plaintiff's speech. More to the point, that type of issue is irrelevant to Plaintiffs' "compelled speech" claim.

d. Plaintiffs Were Not Compelled to Endorse the Signs

To sum up, Defendants did not compel any Plaintiff to endorse Sheriff Long's message. The record supports only that Plaintiffs were prohibited from interfering with Sheriff Long's signs, which is only to say that the signs have the same protection as any other piece of government property. That is far different from compelling any Plaintiff to endorse a message. Lack of compulsion is fatal to Plaintiffs' "compelled speech" claim.

Beyond that fatal flaw, Plaintiffs' compelled speech claim also fails because no reasonable third party was ever likely to get the impression that Plaintiffs endorse the Sheriff's message. That equally fatal deficiency is considered next.

2. The Signs Are Not Readily Associated with Plaintiffs in Any Sense that Infringes Their First Amendment Rights

The test for compelled endorsement of an objectionable message asks in part whether the speech is "readily associated with" the plaintiff. That inquiry looks to whether the plaintiff "is 'closely linked with the expression

in a way that makes [him] appear to *endorse* the government's message.' " *Cressman v. Thompson*, 798 F.3d 938, 949 (10th Cir. 2015) (emphasis in original; quoting *Johanns v. Livestock Marketing Association,* 544 U.S. 550, 565 n. 8, 125 S.Ct. 2055 (2005)). As discussed below, proper application of that test verifies that Plaintiffs have no "compelled speech" claim.

a. Alleged Association With a Message is Measured Against Reasonable Third Party Perception

Critically for the present case, the First Amendment concern about perceived endorsement is only triggered when a third party can believe reasonably that the plaintiff endorses the objectionable message. *Cf. Wooley*, 430 U.S. at 717, 97 S. Ct. at 1436 (describing motorist's "First Amendment right to avoid becoming the courier for [the state's] message", and noting that "As a condition to driving an automobile a virtual necessity for most Americans the Maynards must display "Live Free or Die" to hundreds of people each day."). For example, the license plate slogan in *Wooley* was readily associated with the plaintiff because the state required its display on his personal vehicle and by necessity he had to drive the vehicle publicly. By contrast, the signs in this case are not "readily associated with" any Plaintiff because no third party reasonably can draw a conclusion that a Plaintiff endorses the message on Sheriff Long's sign.

The Supreme Court's precedent teaches that where reasonable third

parties are unlikely to regard the plaintiff as having endorsed the objectionable message, the First Amendment is not implicated. Put differently, Plaintiffs' First Amendment claim is only viable if a third party reasonably could conclude that a message adjacent to a Plaintiff's residence, and occasioned by the Plaintiff's sex offender status, is thereby endorsed by the Plaintiff. As the District Court held, Plaintiffs cannot make that case.

One controlling precedent is *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980), where the Supreme Court upheld a law requiring a shopping center owner to allow certain expressive activities by others on its property. Relying upon *Wooley*, the plaintiff made the same basic argument that Plaintiffs make here: it claimed that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Robins*, 447 U.S. 74, 85, 100 S. Ct. at 2043. Plaintiffs' claim in the present case varies only slightly and is weaker. Plaintiffs claim a right against a clearly government message placed in the government right-of-way adjacent to their residences.

Robins rejected the First Amendment compelled speech argument under the rationale "that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was

'not ... being compelled to affirm [a] belief in any governmentally prescribed position or view.' " *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65, 126 S. Ct. 1297, 1310 (2006) (quoting *Robins*, 447 U.S. at 88, 100 S.Ct. 2035). The same is true here, where Sheriff Long's signs unambiguously ascribe the message to Sheriff Long, and Plaintiffs remain free to disassociate themselves from the signs.

Similarly, in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006), an association of schools complained of "compelled speech" due to a law that required them to allow military recruiters the same access as non-military recruiters. *Id.* at 52, 126 S. Ct. at 1302. The Court rejected the compelled speech argument because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the [relevant law] restricts what the law schools may say about the military's policies." *Rumsfeld*, 547 U.S. at 65, 126 S. Ct. at 1310. Likewise, here nothing about the Sheriff's sign suggests that any Plaintiff agrees with the message on the sign, and nothing on the sign restricts what a Plaintiff may say. As discussed further below, the location of a sign adjacent to a Plaintiff's residence does not change those crucial facts.

b. Plaintiffs' Argument Against the Reasonable Third Party Perception Standard Is Meritless

In spite of the precedent detailed above, Plaintiffs claim that their forced endorsement claim does not incorporate a reasonable third party standard. Plaintiffs offer no alternative standard, much less one that is established by precedent. As discussed above, the Supreme Court standard incorporates reasonable third party perception. *Rumsfeld*, 547 U.S. at 65, 126 S. Ct. 1297; *Robins,* 447 U.S. at 88, 100 S.Ct. 2035.

Aside from precedent, the problem at the heart of a forced endorsement case is *third party perception* that a plaintiff is endorsing a message with which he does not agree or wish to endorse. *Some* standard is necessary, and surely it does not turn on *irrational* perceptions by third parties. That leaves reasonable third party perception as the only contender. Plaintiffs only resist the reasonable third party standard because it is fatal to their case.

In arguing that the signs are "compelled speech," Plaintiffs miss the point of the compelled speech doctrine, opting instead for word games. They mistakenly argue that Sheriff Long's signs are "readily associated with" them because the signs have to do with them and are posted near their homes.

Plaintiffs overlook that a message *relating* to them (namely the sign)

does not thereby appear to a reasonable observer to be *endorsed* by them. The First Amendment is concerned with *forced endorsement*, but not with government messages that are merely *about* a particular person(s).

Plaintiffs aptly quote Justice Thomas's comment that "[t]he government may not, consistent with the First Amendment, associate individuals ... involuntarily with speech **by attributing an unwanted message to them**." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 568, 125 S.Ct. 2055 (2005)(Thomas, J. concurring)(emphasis supplied); *Appellants' Brief* at 31. Yet Plaintiffs miss the point of that statement, which defeats their claim.

Justice Thomas's point is that *involuntary attribution* is the key problem in forced endorsement cases. Consequently, a key issue is whether the signs give reasonable third parties the impression that Plaintiffs endorse Sheriff Long's message. The obvious answer is "no," which is why Plaintiffs try to confuse the issue. Specifically, Plaintiffs argue that the signs are "associated with" them in the sense of *relating to* them and being posted near their residences. Yet that type of "association"—the same "association" that exists in "wanted" posters—has absolutely no relevance to the compelled speech doctrine.

c. Reasonable Third Parties Cannot Conclude that Plaintiffs Endorse the Message on Sheriff Long's Sign

As established above, a citizen's freedom from personal association with objectionable government messages is only at issue when a third party can believe reasonably that plaintiff endorses the objectionable message. *Cressman*'s "readily associated with" test gets at that by asking whether the plaintiff was " 'closely linked with the expression in a way that makes [him] appear to *endorse* the government's message.' " *Cressman*, 798 F.3d at 949 (emphasis in original). Because the signs are clearly labeled as Sheriff Long's message, are posted on government property, and because nobody would believe that a sex offender would advertise his sex offender status on a sign outside his residence (or endorse such a sign), Plaintiffs' claim abjectly fails the ready association test.

First, one need only read the sign to see that Plaintiffs' claim fails the test. The sign clearly identifies itself as "a community safety message from Butts County Sheriff Gary Long." Doc. 12-11. There is not the slightest hint that any sex offender endorses the sign. No reasonable person can read the sign and conclude that any Plaintiff created, agrees with, or otherwise endorses the sign. The sign's proximity to any given house does not make an endorser out of the occupant(s), any more than a speed limit sign, a condemnation notice, or an orange safety cone would.

Second, the signs are intended to be posted on government property. Plaintiffs argue that passers-by cannot see right-of-way lines and may assume that Plaintiffs' property extends to the roadway, even if that is not true. While the opinions or beliefs of passers-by are not in the record, even widespread public ignorance about government ownership of right-of-way areas does not justify a finding that *reasonable* third parties are likely to attribute these signs to Plaintiffs. Reasonable third parties are presumed to know the law, which is that government right-of-ways abut the land occupied by Plaintiffs. More than that, reasonable third parties will conclude that the signs bear a message only from Sheriff Long.

One last point puts the endorsement issue to rest. In the District Court Plaintiffs emphasized that, even though the signs bear no reference to sex offenders, Sheriff Long intended the public to know that the signs warn about sex offenders. Doc. 20 at 57. Ironically, that is one of the strongest testaments that no third party reasonably can conclude that Plaintiffs endorse the signs. No reasonable person would believe that a sex offender would put a sign outside his residence that tends to broadcast his sex offender status. That alone is ample reason to conclude that no reasonable person could believe that any Plaintiff is "closely linked with the [sign] in a way that makes [him] appear to *endorse* the … message" on the sign. *See Cressman*,

798 F.3d at 949 (emphasis in original).

d. Plaintiffs Misapply the "Ready Association" Element

Plaintiffs argue that the signs are "associated with" the sex offender who lives at the house near the sign. Any truth to that idea flows from the ambiguity inherent in the term "association." Plaintiffs's only "association" with the signs only exists in the legally irrelevant sense that signs are placed to warn about the sex offender who lives there. As discussed below, that type of "association" does not matter for Plaintiffs' First Amendment compelled endorsement claim. A message alerting the public to the presence of a sex offender is not evidence that the sex offender endorses the message, particularly where the message is plainly labeled as the message of Sheriff Long.

When courts properly consider whether allegedly compelled speech is "readily associated with" a plaintiff, they are *not* asking merely whether the message is *about* the plaintiff. It does not matter whether the message *relates to* the plaintiff, or *references* the plaintiff. None of that helps determine whether the message is "compelled speech." [12]

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[12] This is so even though—due to imprecise use of language—a message merely *referencing* or *relating to* a plaintiff can be said to be "readily associated with" that plaintiff. A judgment with a prison sentence may be regarded as "readily associated with" the convict, but nobody can argue that the sentencing judge is forcing the convict to endorse the sentence. A "wanted" poster about a fugitive is associated with the fugitive,

Notably, *every* government communication identifying a sex offender as such—whether posted on the internet, in a government building, or on a sign near the sex offender's residence—is "readily associated with" the sex offender, in the same way that a "wanted" poster is "readily associated with" the wanted fugitive. Yet no reasonable third party is likely to conclude that sex offenders endorse the government communications identifying them as such.

This observation highlights a key error in *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019), a case upon which Plaintiffs placed heavy reliance in the District Court.[13] *Marshall* struck down the part of an Alabama law that "branded" sex offender "driver's license[s] … with "CRIMINAL SEX OFFENDER" in bold, red letters." *Id.* at 1318.[14] The law required offenders to "obtain ... and always have in [their] possession, a valid driver license or identification card" with that label. *Marshall*, 367 F. Supp. 3d at 1321 (quoting statute).[15]

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but it does not follow that the fugitive endorses the message. Likewise, a message *about* a plaintiff does not thereby give the impression that the plaintiff *endorses that message* for First Amendment purposes.

[13] Interestingly, Plaintiff decline to cite or discuss *Marshall* on appeal, in apparent recognition that it does not help their case.

[14] Whether *Marshall* reached the right overall conclusion is debatable, but that is beside the point for purposes of this discussion because *Marshall* presents a very different set of facts. *Marshall* was never appealed.

[15] One of the many factual distinctions between this case and *Marshall* is that the Alabama sex offenders were required to pay for, obtain and

Marshall's analysis on the "ready association" element reflects confusion about what "ready association" means in the First Amendment compelled speech context. *Marshall* misapplied the Tenth Circuit's "ready association" test, which asks whether the plaintiff is "'closely linked with the expression in a way that makes [him] appear to *endorse* the government's message.' " *Cressman v. Thompson*, 798 F.3d 938, 949 (10th Cir. 2015) (emphasis in original). Instead of testing for endorsement, *Marshall* asked only whether the labelling on the driver's license was *about the sex offender plaintiffs*:

> The words "CRIMINAL SEX OFFENDER" are *about* Plaintiffs. The ID cards are chock-full of Plaintiffs' personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color, and signature. Just as George Maynard was associated with his stationwagon, Plaintiffs are associated with their licenses. When people see the brand on Plaintiffs' IDs, they associate it with Plaintiffs. The dirty looks that Plaintiffs get are not directed at the State.

Marshall, 367 F. Supp. 3d at 1326 (emphasis in original).

Simply put, *Marshall* never considered whether a reasonable person would conclude that the sex offenders *endorsed* the "criminal sex offender"

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present their driver's licenses—bearing the sex offender message—regularly to third parties. Driving and presenting a photo ID is a condition of ordinary life in this society, and the Alabama sex offenders faced presenting the challenged message on a day-to-day basis for a lifetime. Also, there was no indication on the Alabama driver licenses that the label was a government message.

messages on their licenses. Rather, *Marshall* literally only asked whether the "criminal sex offender" message was "*about* plaintiffs." *Id*. at 1326. By contrast, the whole point of *Cressman*'s "ready association" test is whether a third party reasonably can view the plaintiff as having *endorsed* the offensive message. *Marshall* completely misses that point. So do Plaintiffs.

The driver license labelling in *Marshall* is also distinguishable from this case because here the message is clearly presented as coming from Sheriff Long.

The bottom line is that there is no basis—legal or factual—to find that any rational third party will perceive that a Plaintiff endorses Sheriff Long's Halloween sign. Aside from that, Plaintiffs were always free to disassociate themselves from Sheriff Long's message. Consequently, the District Court properly rejected Plaintiffs' "compelled speech" claim.

D. The Signs Withstand First Amendment Scrutiny

Assuming for the sake of argument that Plaintiffs could show that the signs amount to forced endorsement of Sheriff Long's message, the Court would have to reach whether the signs pass the appropriate scrutiny standard. In a pure "compelled speech" case involving ideological speech, like *Barnette* or *Wooly*, it appears that "strict scrutiny" applies. Here, however, the message at issue is not ideological. Rather, it is a public safety

warning by Sheriff Long, clearly labeled as such.

Therefore, the warning on the sign is more like a product safety label than an ideological slogan. Government-created product safety labeling is reviewed for whether "there is a rational connection between the warnings' purpose and the means used to achieve that purpose." *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 561 (6th Cir. 2012) (holding that textual and graphic warnings required for advertising were reviewed under rational basis scrutiny); *see also Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 560–562, 125 S.Ct. 2055 (2005) (applying lower scrutiny when the challenged speech is made by the government).

Because the law is unclear about the proper level of scrutiny, both levels are considered below. Before that, however, Defendants discuss the seemingly undisputed point that protecting the public from sex offenders is a compelling government interest.

1. Protecting the Public from Sex Offenders is a Compelling Government Interest

The District Court found that the signs tend to further a compelling government interest, namely protecting the public from sex offenders. That interest is furthered by warning the public and particularly children.

Both Congress and the Georgia General Assembly have declared strong public policies in warning and protecting the public—and particularly

children—from sexual offenders. Congress adopted the Sex Offender Registration and Notification Act (SORNA), under the following policy:

> In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders.

34 U.S.C.A. § 20901. That statute then lists 17 child victims from across the country.

Likewise, Georgia's sex offender registration laws advance "the State's legitimate goal of informing the public for purposes of protecting children from those who would harm them." *Rainer v. State*, 286 Ga. 675, 678, 690 S.E.2d 827, 829 (2010).[16] That is precisely what the signs in question are designed to do.

O.C.G.A. § 42-1-12 (i)(5) requires sheriffs to "Inform the public of the presence of sexual offenders in each community." That is the purpose of the Halloween signs. O.C.G.A. § 42-1-12 (j)(3) requires sheriffs to "release such other relevant information collected under this Code section that is necessary to protect the public concerning sexual offenders required to

[16] "By requiring sex offenders to register, the legislature intended to notify the public of individuals who may pose a threat. It also intended the sex offender registry statute to have broad applicability by design[ing] [the statute] to require registration for a wide array of offenses." *Jenkins v. State*, 284 Ga. 642, 645, 670 S.E.2d 425, 428 (2008) (citations and internal punctuation omitted).

register under this Code section … .” By warning children away from sex offenders, the Sheriff’s Office is fulfilling its mandate to protect the public —and particularly children—from sex offenders.

Plaintiffs try to minimize the risk posed at Halloween by sex offenders as a class. However, three points establish that the signs serve an important protective role. First, both federal and state governments have recognized that sex offenders as a class pose enough of a recidivism risk to justify elaborate registration, tracking and warning systems. The risk evaluation drawn by informed legislatures across the United States is entitled to controlling deference.

Second, lack of information about past sex offender violations against trick-or-treating children in Butts County may simply be a testament to law enforcement protection and mitigation efforts in prior years. It may also be a function of the fact that not all crimes are reported, which results in understated crime statistics.

Third, nobody can predict the future, and sex offenders as a group have demonstrated a statistically significant risk of victimizing other people sexually. That is why the sex offender registration laws exist. The Sheriff’s Office would be irresponsible to fail to mitigate a known risk merely for lack of information that the risk has materialized in Butts County in the recent

past. Moreover, even a low risk of victimization is well worth elimination when the crimes of sex offenders often are horrific and destroy the lives of their innocent victims.

2. The Signs Pass Rational Basis Scrutiny

Rational basis scrutiny in the compelled disclosure context measures whether the "disclosure requirements are reasonably related to the State's interest… ." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 2282, (1985). This requires "a fit between the … ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028 (1989).

Here, the signs directly further the government interest of warning the public about the location of sex offenders. The signs tell the public exactly where sex offenders reside at a time when the likelihood of public exposure to sex offenders at sex offender residences is high. This allows members of the public to take appropriate precautions. Plainly the signs pass "rational basis" scrutiny.

3. The Signs Pass Strict Scrutiny

Plaintiffs argue that the signs fail strict scrutiny because other means exist to warn the public about sex offenders, without infringing Plaintiffs'

First Amendment rights.[17]

Strict scrutiny asks whether the signs are "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 S. Ct. 2218 (2015). The evidence is that the signs are quite temporary, intended to be present for up to three days, including Halloween. The signs are conspicuous enough to be read, but not nearly as conspicuous as a police vehicle or a deputy in front of a house sending the same message as a sign. The signs do not bear the term "sex offender." The signs do not burden any Plaintiff's speech, or require any Plaintiff to endorse the message. No Plaintiff is required to do, or say, anything.

A sign in the right-of-way in front of a sex offender residence is a simple, efficient, effective way to alert trick-or-treating children and their parents to avoid direct contact with sex offenders. No literate person, young or old, needs sophistication, internet access, or computer skills to read and heed a sign.

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 and addresses, and then correlating addresses with real structures to

[17] Plaintiffs' primary argument involves a misguided statutory construction of Georgia's sex offender registration law. Because that argument is largely a distraction from the real strict scrutiny analysis, it is considered only briefly in a separate section below.

avoid. Not everyone has the time, resources or capability competently to compile a list of residences to avoid for trick-or-treating. The signs are temporary warnings, narrowly tailored to achieve what everyone acknowledges is a compelling government interest. Therefore, the signs pass "strict scrutiny."

E. Georgia's Sex Offender Registry Law Authorizes, and Does Not Prohibit, the Signs

Plaintiffs present a statutory construction argument about Georgia's sex offender statute. So far as Defendants can tell, the argument is irrelevant to the First Amendment claim at issue in this appeal. Even if Plaintiffs could establish that the registry law does not authorize the signs, their case is only helped (marginally) if they can show that the registry law actual *prohibits* the signs.[18] Obviously it does not. Nevertheless, below is a brief explanation of why Plaintiffs' statutory arguments are wrong.

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[18] Regardless whether state law specifically authorizes a sheriff's particular official action, the action is presumptively legitimate. *United States Dep't of State v. Ray,* 502 U.S. 164, 179, 112 S.Ct. 541, 550 (1991) ("[w]e generally accord ... official conduct a presumption of legitimacy."); *Ollila v. Graham*, 126 Ga. App. 288, 290, 190 S.E.2d 542, 544 (1972) ("The law presumes that public officers will do their duty and every presumption is indulged in favor of the validity and legality of the official acts of public officers."). It is impossible and undesirable for legal codes to spell out every particular act that a public official can take. Instead, the law establishes public offices and normally provides officials with authority to accomplish certain general goals, without specifying all the means that can be used to accomplish those goals.

Plaintiffs' statutory construction argument is that Georgia's sex offender statute spells out the locations where sheriffs have to post sex offender information, *e.g.*, online, at the courthouse, and other public buildings. *See* O.C.G.A. § 42-1-12 (i), (j). From this Plaintiffs claim that the law does not provide sheriffs authority to post sex offender information anywhere else.

Plaintiffs' interpretation is mistaken because it renders duplicative the directive in O.C.G.A. § 42-1-12 (i)(5) for sheriffs to "inform the public of the presence of sexual offenders in each community." The signs accomplish that goal, and the statute's more specific directives do not claim to spell out comprehensively all the ways that sheriffs can protect and inform the public. If the statute's other directives, requiring sheriffs to post sex offender lists in public buildings and online, are the only authorized means to inform the public, then (1) the statute would say so, and (2) there would be no reason for the statute to add that sheriffs must "inform the public of the presence of sexual offenders in each community." *Id*.

In Georgia "[i]t is a basic rule of construction that a statute or constitutional provision should be construed 'to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning.' "

Gilbert v. Richardson, 264 Ga. 744, 747–48, 452 S.E.2d 476, 479 (1994) (quoting *Houston v. Lowes of Savannah, Inc.,* 235 Ga. 201, 203, 219 S.E.2d 115 (1975)). Plaintiffs' construction renders O.C.G.A. § 42-1-12 (i)(5) redundant and pointless, so Plaintiffs' construction must be wrong.

Plaintiffs also assert that public warnings already exist in the form of sex offender lists on the internet and in some public buildings. They fail to acknowledge the obvious point that the signs are a far more effective and efficient way to tackle the particular circumstances surrounding Halloween in Butts County, Georgia. Sheriff Long is uniquely qualified to judge the needs for his community, a point generally recognized by federal courts for generations. *Avery v. Midland Cty., Tex.*, 390 U.S. 474, 485, 88 S. Ct. 1114, 1120 (1968) (recognizing Constitution's flexibility in allowing local governments to solve their unique issues with means "suitable for local needs and efficient in solving local problems."); *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 268 (7th Cir. 1982) (home rule doctrine recognizes that "local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns."). Plaintiffs offer no reason to depart from that well-settled presumption.

V. PLAINTIFFS HAVE NO RIGHT TO EXCLUDE SIGNS ON RIGHT-OF-WAY AREAS

Plaintiffs assert that sign placement in right-of-way areas does not matter, that the record lacks clarity about where the signs were placed in 2018, that right-of-way areas are Plaintiffs' property, and a number of related arguments. The points most relevant to the First Amendment are considered here.

Initially, Plaintiffs McClendon and Reed do not claim to own real property, so they have no arguable standing to assert any claim that turns on a real property interest. Doc. 5 at ¶¶16, 33 (parent(s) own property, not Reed or McClendon); *see Coffin v. Barbaree*, 214 Ga. 149, 151, 103 S.E.2d 557 (1958) (" 'To maintain an action for trespass or injury to realty, it is essential that the plaintiff show either that he was the true owner or was in possession at the time of the trespass.' [Cits.]"); *Moses v. Traton Corp.*, 286 Ga. App. 843, 844, 650 S.E.2d 353, 355 (2007) (homeowner's trespass claim was barred because he did not own right-of-way area in "his" front yard).[19]

[19] Plaintiffs cite general legal principles—rather than real estate records—in support of their claim that right-of-way areas are still their property. Some right-of-ways involve division of property rights among different owners in the same real estate, while most involve fee simple ownership by a government entity. *See Swanberg v. City of Tybee Island*, 271 Ga. 23, 24, 518 S.E.2d 114, 116 (1999) (holding that "property was conveyed to Chatham County and its assigns in fee simple absolute, and was not subject to a reversionary interest in the grantor if its use as a county road ceased."). The reality is that the nature and extent of rights in a public right-

More broadly, Plaintiffs' lack legal control over right-of-way areas. That matters to the First Amendment claim because Plaintiffs have no First Amendment right to control messages posted on a third party's property. That is doubly true when the challenged message is government speech posted on government property. *See United Veterans Mem'l & Patriotic Ass'n of the City of New Rochelle v. City of New Rochelle*, 615 Fed.Appx. 693 (2d Cir.2015) (rejecting First Amendment challenge and holding that the flags displayed on public property were government speech).

While Plaintiffs question whether Georgia law allows the Sheriff to post signs on right-of-way areas, for purposes of this case the only relevant point is that Plaintiffs have no right to control signage in government right-of-way areas. In the First Amendment context, the right-of-way discussion matters because signs were intended to be placed adjacent to, but not on, property occupied by sex offenders. Of course Plaintiffs can control messages on their *own* properties, but the First Amendment does not provide them with veto power over messages on someone else's property—even if the message is posted adjacent to their residences. A sign on a right-of-way

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of-way is a case-by-case matter. Here, the property deeds and certain plat records are part of the District Court record. For the District Court's First Amendment ruling, it was sufficient that no reasonable third party could conclude that any Plaintiff endorsed Sheriff Long's sign. Doc. 58 at 26. That approach has the benefit of avoiding what the District Court viewed as unresolved factual issues about property rights.

is a message on public property, not a message on any Plaintiff's property.

Therefore, the actual First Amendment issue is whether Plaintiffs can exercise censorship power over the Sheriff's message posted near Plaintiffs' property. As discussed at length above, the answer should be an easy "no."

VI. PLAINTIFFS' EMOTIONAL APPEALS MISS THE MARK

Throughout their brief, Plaintiffs invite the Court to emote with them about their alleged plight. This is a common ploy of litigants who recognize that their legal arguments are weak.

Plaintiffs posit that Sheriff Long's signs represent a slippery slope. In Plaintiffs' telling, if the signs escape this First Amendment challenge then a parade of horribles is waiting in the wings. These supposedly include possible requirements for "registrants to wear placards identifying them as unsafe anytime they were outside, affix a scarlet "R" to their clothing to denote their registrant status or ... to have a sign in front of their home, year-round, to inform the public that their house threatens community safety." *Appellants' Brief* at 52.

Of course none of those scenarios are before the Court. Just as surely, any step in those directions would undoubtedly land before the Court in due time. Most important for this case, the only issue under discussion is whether Sheriff Long's temporary Halloween signs, placed in government

right-of-way areas adjacent to sex offender residences, force any Plaintiff to endorse a message with which he disagrees. The answer is no, which requires affirming the District Court's judgment for Defendants.

VII. PLAINTIFFS WAIVED THEIR MERITLESS CHALLENGE TO SHERIFF LONG'S DECLARATION

Plaintiffs attempt to distract the Court by claiming that Sheriff Long's declaration is a "sham affidavit." This is the first appearance of this argument, which Plaintiffs waived by failing to present it to the District Court. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

Aside from Plaintiffs' waiver, Sheriff Long's declaration does not contradict his prior testimony, so it is not a "sham affidavit." *Cf. Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1316 (11th Cir. 2007) ("when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."). In his declaration, Sheriff Long explained his prior testimony and dispelled an erroneous inference argued by Plaintiffs. The declaration explains that the Sheriff's Office has no policy against a sex offender posting his own message on his own property. Doc. 51-2 (Sheriff Long Decl.) at 2 ¶4. That is consistent with Sheriff

Long's hearing testimony.

Last, Plaintiffs query why the declaration was not filed sooner, which hardly merits a response. Timing is irrelevant to the content of the declaration, and Plaintiffs do not actually challenge the content. Beyond that, Defendants filed the declaration based on the District Court's summary judgment deadline, since the declaration was submitted in support of Defendants' summary judgment motion.

CONCLUSION

Plaintiffs have no First Amendment "compelled speech" claim. Rather, Plaintiffs seek a veto over Sheriff Long's message. For the reasons detailed above, and as articulated by the District Court, Defendants respectfully request the Court to affirm the District Court's judgment.

Respectfully submitted,

Williams, Morris & Waymire, LLC

/s/ Jason Waymire
JASON WAYMIRE
Georgia Bar No. 742602
TERRY E. WILLIAMS
Georgia Bar No. 764330
Attorney for Defendants

Bldg. 400, Suite A
4330 South Lee Street
Buford, Georgia 30518
678-541-0790
678-541-0789
jason@wmwlaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 12,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **APPELLEES' INITIAL BRIEF** upon all parties to this appeal electronically through the Court's CM/ECF system:

Mark Yurachek, counsel for Plaintiffs
mark@myappealslawyer.com

Mark Begnaud, counsel for Plaintiffs
markbegnaud@gmail.com

This 14 day of May, 2021.

/s/ Jason Waymire
JASON C. WAYMIRE
Attorney for Defendants