**APPEAL NO. 19-14730-B**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**CHRISTOPHER REED, *et al*.,**

**Appellees,**

**vs.**

**SHERIFF GARY LONG, *et al*.,**

**Appellants.**

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

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# APPELLANTS' INITIAL BRIEF

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**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 Long and Riley;
2. Begnaud, Mark, counsel for Plaintiffs;
3. Butts County, Georgia Sheriff's Office, Defendant;
4. County Reinsurance, LTD, reinsurer for Defendants' insurer ACCG-IRMA;

5. Holden, Reginald, Plaintiff;

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

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

8. McClendon, Corey, Plaintiff;

9. Reed, Christopher, Plaintiff;

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

11. Vaughn, Benjamin, counsel for Butts County Sheriff's Office;

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

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## STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants 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 JURISDICTION

Jurisdiction in the District Court was based on Plaintiffs' federal claims under 42 U.S.C. § 1983. Doc. 1. Plaintiffs moved for a preliminary injunction. Doc. 6. Following a hearing, the District Court entered an order granting a preliminary injunction in part, and denying it in part. Doc. 17. Defendants timely filed their Notice of Appeal. Doc. 22.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a) and F.R.A.P. 4(a)(1). The appeal is from the grant of a preliminary injunction for which an interlocutory appeal is available.

The enjoined conduct relates to the Halloween holiday, and the 2019 celebration of that holiday has passed. Nevertheless, this case falls "within a special category of disputes that are 'capable of repetition' while 'evading review.' " *Turner v. Rogers*, 564 U.S. 431, 439–40, 131 S. Ct. 2507, 2515 (2011) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279 (1911)). "A dispute falls into that category, and a case based on that dispute remains live, if '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.' " *Id*. (alterations by the Court; quoting *Weinstein*

*v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347 (1975) (*per curiam*)).

Here, the first condition is met because Halloween 2019 occurred before appellate review could be had, and Halloween 2020 is approximately 10 months away. These time frames are too short for full litigation to produce a final judgment by the trial court and a decision by this Court. *See Turner*, 564 U.S. 431, 440, 131 S. Ct. 2507, 2515 (2011) (12 months is too short for full litigation, and therefore qualifies for doctrine); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 774, 98 S.Ct. 1407 (1978) (18–month period qualifies for doctrine); *Southern Pacific Terminal Co., supra,* at 514–516, 31 S.Ct. 279 (2–year period qualifies for doctrine).

The second condition plainly is met because Halloween is certain to recur every year. Plaintiffs will remain registered sex offenders for the foreseeable future, and can be expected to reside in Butts County, Georgia. Moreover, the Butts County Sheriff's Office intends to warn the public about the presence and location of sex offenders during Halloween 2020, and reserves the right to do so in any manner not legally prohibited. Defendants submit in this appeal that posting warning signs on rights-of-way adjacent to sex offender residences is not legally prohibited.

Therefore, this case is not moot and the Court has jurisdiction.

## STATEMENT OF THE ISSUES

1) Whether Sheriff Long's signs convey pure government speech that is not subject to First Amendment regulation, where the signs were to be placed by deputies on government property and convey a message clearly attributed only to Sheriff Long, just as in 2018.

2) Whether the District Court properly accounted for Defendants' First Amendment right to warn the public using signs placed in public rights-of-way.

3) Whether the Sheriff's signs compel any Plaintiff to send a message, where no Plaintiff was required to do anything regarding signs, and unchallenged 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 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.

8) Whether the District Court abused its discretion in balancing Plaintiffs' interests against significant harm to the public and Defendants.

9) Whether the District Court erred in rejecting Defendants' laches defense, where Plaintiffs had no valid explanation for waiting approximately one year before filing their lawsuit, and Defendants were prejudiced by having hastily to defend against injunctive relief just before Halloween 2019.

## 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 a lawsuit seeking to enjoin the Sheriff's Office from posting signs in front of their residences during Halloween. Doc. 5 at 19.

On October 7, 2019, Plaintiffs moved for a preliminary injunction, seeking an order prohibiting the Sheriff's Office from posting signs near their residences during Halloween 2019. Doc. 6. The District Court held a hearing, and on October 29, 2019, it issued a preliminary injunction prohibiting Defendants from posting signs in the right-of-way area in front of Plaintiffs' residences during Halloween. Doc. 17. Defendants timely filed their notice of interlocutory appeal from the District Court's Order. Doc. 22.

## 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 (transcript) at 43.

The sign has the same message on both sides, and measures approximately two (2) feet by 18 inches. Doc. 20 (transcript) at 70. Defendants stipulated, and the Court accepted, that the Sheriff's Office

intention for Halloween 2019 was to place signs only in public right-of-way areas rather than on private property. Doc. 20 (transcript) at 73-76.

**Plaintiffs**

Plaintiff Reginald Holden is a registered sex offender who owns a single-family residence in Butts County. Doc. 20 (transcript) at 9-11. Mr. Holden's sex offender status is based on a conviction in Florida for lewd and lascivious sexual battery. Doc. 20 (transcript) at 9, 21. Holden served 10 years in prison for that offense. Doc. 20 (transcript) at 10. Mr. Holden's residence fronts a county-maintained roadway. Doc. 20 (transcript) at 18-19. Real estate records and testimony establish that the government's right-of-way extends well past the paved roadway and onto what Mr. Holden regards as his yard. Doc. 20 (transcript) at 81, 92; Docs. 12-13, 12-18, 12-19, 12-20 (50-foot right of way).

Plaintiff Corey McClendon was convicted of statutory rape as the result of an incident that occurred in 2001 when he was seventeen. Doc. 17 at 3. McClendon lives with his parents, who own the home where he resides. *Id*. The McClendon residence is adjacent to a county-maintained roadway. Doc. 20 (transcript) at 35. Real estate records establish that an 80-foot right-of-way extends well past the paved roadway and past the mailbox area of the

residence. Doc. 20 (transcript) at 36, 72-73, 93; Docs. 12-21, 12-22, 12-23. In 2018, a Sheriff's Office sign, like the one proposed for 2019, was placed well within the right-of-way, near the mailbox. Doc. 20 (transcript) at 29, 72-73; Doc. 12-7.

Plaintiff Christopher Reed was convicted of sexual assault in 2007 in Illinois. Doc. 5 ¶¶15-16. The Complaint asserts that he lives in Butts County with his father, who owns the home. *Id.* The Reed residence is adjacent to a county-maintained roadway. Doc. 20 (transcript) 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. 12-2, 12-15, 12-16, 12-17. In 2018, a Sheriff's Office sign was placed well within the right-of-way, near the mailbox. Doc. 20 (transcript) at 80.

**Historical Context and Reason for the Signs**

Sheriff Gary Long is the elected Sheriff of Butts County, Georgia. Doc. 20 (transcript) at 38. The Sheriff's Office is the law enforcement entity responsible for implementing sex offender registry and warning laws in Butts County. Doc. 20 (transcript) at 50. For many years before 2018, the Butts County Chamber of Commerce had an event known as "Halloween on the Square." Doc. 20 (transcript) at 38. This involved thousands of children trick-

or-treating in a central location. Doc. 20 (transcript) 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 (transcript) 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 (transcript) at 39. A large portion of Butts County is rural. Doc. 20 (transcript) 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 (transcript) 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 (transcript) 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 (transcript) at 62 & Doc. 12-8.

Before implementing the plan, the Sheriff's Office sought advice from the Georgia Sheriff's Association. Doc. 20 (transcript) 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 (transcript) 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 (transcript) at 68. In 2018, Deputy Riley was involved with posting signs before Halloween in 2018. Doc. 20 (transcript) at 70.

In 2018, the Butts County Sheriff's Office placed a sign in front of each Plaintiff's residence. Doc. 20 (transcript) at 13, 80. Plaintiffs assert that they objected to placement of signs in 2018, and would object to placement of signs in 2019. *See* Complaint.

Deputy Riley placed the signs in the right-of-way in front of sex offender residences in 2018. Doc. 20 (transcript) at 70-71. Deputy Riley normally used the mailbox as a guide for the distance of sign placement from the paved roadway. Doc. 20 (transcript) at 72-73. Defendants explained that the intention for 2019 was to place signs solely in the right-of-way adjacent

to sex offender residences, as was done in 2018. Doc. 20 (transcript) at 75, 77, 84. For 2019, the Sheriff's Office intended to place signs on October 30 and pick them up on November 1, 2019. Doc. 20 (transcript) at 84.

**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 [*sic*] to be living at this address with the Butts County Sheriff Office.
>
> Ga Code Section 42-1-12 (i) provides as the duty of the Sheriff Office [*sic*]
>
> 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.
>
> HIS 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 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 (transcript) 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 (transcript) 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 (transcript) at 83.

At the preliminary injunction hearing, on cross examination Sheriff Long answered various hypothetical questions, all about scenarios that never occurred. Doc. 20 (transcript) at 46-47, 53-55. One such answer, of note only because the District Court apparently viewed it as relevant, was as follows:

> 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 (transcript) at 47.

Georgia law prohibits private citizens from posting signs on government rights-of-way. O.C.G.A. § 32-6-51; Doc. 20 (transcript) at 87.

**Other Government Usages of Right-of-Way Areas**

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

(transcript) at 48-49, 87, 90. There is no indication that signs unrelated to the Halloween warning had been placed in the right-of-way directly adjacent to Plaintiffs' residences. Doc. 20 (transcript) at 88.

**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 (transcript) at 41-42. Sex offender lists normally show a name, an address and the offense. Doc. 20 (transcript) at 42. Some persons in Butts County lack internet service and/or vehicles. Doc. 20 (transcript) 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 (transcript) at 44. The expense to the Sheriff's Office for that type of operation would exceed $10,000. Doc. 20 (transcript) at 44-45. Furthermore, the Sheriff's Office does 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 (transcript) at 44.

### C. Standard of Review

The Court reviews a district court's preliminary injunction ruling for abuse of discretion regarding each of the four prerequisites for preliminary injunctive relief. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).[1] "A district court abuses its discretion when its factual findings are clearly erroneous, when it follows improper procedures, when it applies the incorrect legal standard, or when it applies the law in an unreasonable or incorrect manner." *Id.* The Court reviews "the district court's findings of fact under a clearly erroneous standard, and its conclusions of law *de novo*." *CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 265 F.3d 1193, 1200 (11th Cir. 2001).

## SUMMARY OF THE ARGUMENT

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. Sheriff Long intended to place signs in right-of-way areas

[1] The four factors are whether the "(1) [movant] has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*).

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.

Defendants submit that the signs convey only government speech that 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 Halloween 2019 plan involved only 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, the First Amendment protects Defendants' 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 enjoined the signs based on a First Amendment "compelled speech" theory. That doctrine does not apply for two reasons. First, the Sheriff's signs would 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 speech," 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, and 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, Defendants submit that the District Court erred in finding that Defendants had reasonable alternative means to meet what all seemingly 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 means to warn children away from sex offenders while trick-or-treating during Halloween.

In regard to balancing harm to the Defendants and the public, the District Court ignored the impact of its injunction on Defendants' First Amendment rights, and harm to the public by making it more difficult for

Defendants to fulfill the legislative mandate to warn and protect the public against sex offenders.

Finally, the District Court erred in rejecting defendants' laches defense. Plaintiffs waited until late September 2019 to file their lawsuit, without justification. Plaintiffs then waited until October 7, 2019 to move for a preliminary injunction. Defendants were required to defend under tight time constraints and had no appellate recourse from the injunction order that took effect shortly before Halloween 2019.

## ARGUMENT AND CITATIONS OF AUTHORITY

The District Court held that the signs compel Plaintiffs to send a message to which they object, and that the signs fail "strict scrutiny" under the First Amendment. Doc. 17 at 17. Defendants respectfully submit that the District Court erred on both points.

### I. STANDARDS GOVERNING PRELIMINARY INJUNCTIVE RELIEF

At the threshold, an injunctive relief claim requires Plaintiffs to have standing. *See Juidice v. Vail*, 430 U.S. 327, 332, 97 S. Ct. 1211 (1977). A preliminary injunction is an "extraordinary and drastic remedy that should not be granted unless the movant carries its burden of persuasion." *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165,1166 (11th Cir.2001).

To obtain preliminary injunctive relief, Plaintiffs had the burden to establish the following: (1) Plaintiffs' claim(s) have a substantial likelihood of success on the merits; (2) Plaintiffs will suffer irreparable injury unless the injunction issues; (3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and (4) if issued, the injunction would not be adverse to public interests. *ACLU v. Miami–Dade Cnty.*, 557 F.3d 1177, 1198 (11th Cir.2009).

"[B]urdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428, 126 S. Ct. 1211, 1219 (2006). Moreover, "[w]hen a preliminary injunction would alter the status quo … the movant bears a heightened burden and must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (internal quotations omitted).

## II. PLAINTIFFS HAVE NO RIGHT TO EXCLUDE SIGNS ON RIGHTS-OF-WAY

The District Court correctly found that real estate theories provide no basis to enjoin placement of signs in right-of-way areas. Doc. 17 at 12 n.7

(denying injunction premised on trespass or taking claims).[2] In fact, 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).

Defendants respectfully disagree with the District Court's assertion that "Plaintiffs, because their residences abut the rights-of-way, have rights

[2] The District Court took the view that nobody, including Sheriff Long, has "the right to place signs on rights-of-way in front of private residences." Doc. 17 at 10. O.C.G.A. § 32-6-51 prohibits most non-traffic signs in rights of way, unless they are authorized by the statute or "any other law." Here, O.C.G.A. § 42-1-12 (i)(5) is "any other law." It permits sheriffs to "Inform the public of the presence of sexual offenders in each community." That includes the signs in question.

However, whether the right-of-way owner(s) authorized these signs is beside the point in this action. The right-of-way owners are not parties and are not complaining. The District Court seemed implicitly to recognize that it lacks authority to enforce any property rights of strangers to the lawsuit, much less state criminal law governing usage of rights-of-way.

in the rights-of-way superior to those of the general public." Doc. 17 at 11. Plaintiffs Reed and McClendon do not own real estate. Plaintiff Holden did not prove any legal interest in the 50-foot right-of-way abutting his lot.

Plaintiffs' lack of legal control over right-of-way areas matters a great deal to their First Amendment claim because Plaintiffs have no First Amendment right to control messages posted on a third party's property. As discussed in the next section, 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 hung on a flagpole on public property were government speech).

## III. 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.*, — U.S. —, 135 S.Ct. 2239, 2245 (2015), and *Pleasant Grove City v. Summum,* 555 U.S. 460, 470, 129 S.Ct. 1125, 1132 (2009), this Court 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. First, in regard to history, the testimony establishes a history of the Sheriff's Office posting its own signs in the Halloween time frame warning the public, specifically the same signs that it intended to post for Halloween 2019. No Plaintiff, and no private party, was involved in choosing the content or posting a 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 evidence established that 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.[3] Everything about these signs evidences government control rather than speech subject to First Amendment regulation.

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.

The District Court agreed that the signs convey government speech, but observed that government speech can also be "compelled speech." Doc. 17 at 16. The District Court distinguished 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

[3] For example, the issue in the "Live Free of Die" license plate case, *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).

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.

The District Court's only other answers to the government speech doctrine involve a reiteration about why it viewed the signs as "compelled speech." Doc. 17 at 17-18. The District Court's compelled speech analysis is considered in detail below in § V.

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). Defendants respectfully submit that the District Court erred in holding otherwise.

## IV. THE DISTRICT COURT REFUSED TO RECOGNIZE AND PROTECT DEFENDANTS' FIRST AMENDMENT RIGHTS

There can be no serious dispute that the First Amendment protects Defendants' right to send messages, including the subject signs. *See 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 when 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' First Amendment rights are no less weighty than those asserted by the Plaintiffs. Defendants respectfully submit that the First Amendment protects their right to post their own speech on public property, particularly where there is no objection from the public entity that owns the right-of-way. While Plaintiffs primarily object to the *location* of the signs adjacent to sex offender residences, that location is crucial to the effectiveness of the warning provided by the signs. *See Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004) (explaining First Amendment 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.

The District Court focused solely on Plaintiffs' asserted First Amendment rights, while declining to enforce the First Amendment's equal protections for the Defendants. While the District Court's approach conveniently avoided a thorny question, it is hardly faithful to the First Amendment.

The First Amendment broadly guarantees Defendants the right to send their own message without interference from Plaintiffs, as long as Defendants otherwise comply with the law. As discussed in the sections below, Defendants sought to exercise their First Amendment rights in compliance with prevailing law. Plaintiffs simply objected to *the message* that Defendants sought to send, as well as the *location* of the message.

That is, Plaintiffs' lawsuit is an attempt 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)); *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).

Put succinctly, Plaintiffs' injunction motion asked the District Court to impose a content-based restriction on Defendants' speech, and the District Court complied by issuing a preliminary injunction. Of course content-based

speech restrictions can only stand if they meet the demands of strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S. Ct. 2218 (2015). The District Court's injunction order made no effort to meet that standard, apparently because the District Court refused to consider Defendants' First Amendment rights.

Accordingly, the District Court's preliminary injunction should be reversed.

## V. THE DISTRICT COURT ERRED IN HOLDING THAT THE SIGNS ARE "COMPELLED SPEECH"

The District Court's injunction is premised entirely on the First Amendment prohibition on "compelled speech." As discussed below, the compelled speech doctrine is not implicated because there is no legitimate claim that any Plaintiff would be compelled to endorse the message on the Sheriff's sign.

### 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); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004) (same as *Barnette*).

There are two core First Amendment concerns at the heart of the "compelled speech" doctrine. The first can be characterized as "freedom of thought," and it is not implicated here.[4] 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

[4] *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 vehemently.

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 claim that they are forced to utter an objectionable message. Rather, they claim, and the District Court found, that the signs give third parties the impression that Plaintiffs endorse the Sheriff'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 by attributing an unwanted message to them … ."). For the reasons discussed below, the District Court erred in concluding that any Plaintiff is compelled to endorse Sheriff Long's sign.

### B. Precedent for Freedom Against Endorsing Objectionable Messages

The District Court found that 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 the District Court's ruling.

The most obvious 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 "The 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 precedent for a forced endorsement claim 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. Specifically, 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 this Court 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. In *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015), the Tenth Circuit adopted a four-part test that appears to encompass the basic elements

of the Supreme Court's "compelled speech" precedent.[5] For a straightforward "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.

Where the plaintiff claims that the government has impermissibly forced him to associate with an objectionable message, he must also prove a fourth element, namely that the government message "is readily associated with the plaintiff." *Cressman*, 798 F.3d at 949–51. A basic 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 (emphasis in original; quoting *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 565 n. 8, 125 S.Ct. 2055 (2005)).[6]

The District Court tried to apply the foregoing four-part analysis. There is no dispute about the first two elements because the signs amount to speech to which Plaintiffs object. However, as discussed below, Plaintiffs'

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

[6] 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.

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 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)); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 565, 125 S. Ct. 2055, 2065 (2005) (rejecting compelled speech claim "Since neither the Beef Act nor the Beef Order require[d] attribution" to plaintiffs).

Here, the District Court equated standard legal protections of government property with coercion. The Sheriff's Office intended to place signs on public rights-of-way, and Plaintiffs would be prohibited from interfering with signs that (a) do not belong to Plaintiffs and (b) are not on Plaintiffs' property. There was no evidence of a plan to compel a Plaintiff to display a sign in Halloween 2019.

Ignoring this lack of coercion, the District Court emphasized its belief that Plaintiffs allegedly *could not display competing messages*. The apparent evidentiary basis for this idea is that (1) Plaintiffs would be 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 (transcript) 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 because the District Court used it as a launching point for a host of errors. As detailed next, three serious errors flowed from the District Court's consideration of Sheriff Long's unelaborated denial that Plaintiffs could place their own signs "next to" his.

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

To be clear, the Butts County Sheriff's Office has no policy or practice to prohibit any Plaintiff's speech, to the extent such speech is protected by the First Amendment and does not otherwise run afoul of reasonable time, place and manner restrictions. The District Court's oft-repeated assertion to the contrary is based solely on Sheriff Long's answer to the following hypothetical question, already quoted above:

> 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 (transcript) at 47.

There are several reasons why this question and answer do not

legitimately support anything of consequence to this case. First, the question is purely hypothetical. There is no evidence that any Plaintiff ever tried to put up his own sign or wanted to, and no evidence of an actual response by the Sheriff's Office.

If such an issue had arisen, and if Sheriff Long was concerned enough to consider action, then presumably the Sheriff's Office would have sought legal counsel—just as it did when considering whether to post Halloween signs. *See* Doc. 20 (transcript) at 39-41. After consultation the Sheriff's Office would consider framing its response, within the confines of governing law. That is a typical process when government policymakers intend to formulate policy for new, untested situations.

One legal consideration in that process would be that a Plaintiff has no legal right to post his own sign *next to* the Sheriff's sign on government right-of-way.[7] *Cf*. Doc. 20 (transcript) at 47 ("could a registrant have placed a sign

[7] *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 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)).

next to yours …?"). 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 explains Sheriff Long's answer. Such a sign could not be located "next to" his, as a matter of law rather than a matter of censorship.

Second, it is not appropriate for a District Court to credit a witness with having made up a policy on the witness stand in a contested hearing, in response to a hypothetical question from a hostile attorney. That is true even if that witness is the Butts County Sheriff. Sheriff Long was not articulating a policy when he answered the question. He simply was trying to cooperate, and he gave his personal opinion about a hypothetical situation that never occurred.

Third, the hypothetical question was framed in the *past tense,* presumably in reference to Halloween 2018. By contrast, injunctive relief looks to current policy and the future. So, even if in the past the Sheriff's Office had a policy to prohibit competing Halloween signs (it did not), Sheriff Long's answer did not establish a *current* policy about hypothetical competing signs.

The foregoing discussion details basic evidentiary and analytical

deficiencies. There are, however, even more serious substantive flaws with the District Court's 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**

Plaintiffs' amended Complaint, and their preliminary injunction motion, challenged placement of the Sheriff's Halloween signs on the basis of a "compelled speech" theory. They did not raise a claim or seek an injunction against an alleged Sheriff's Office prohibition on *Plaintiffs' own* competing signs or messages. That is because there was no such prohibition, and there was never an issue about a Plaintiff being prohibited from posting his own sign on private property.

It was fundamentally unfair, then, for the Plaintiffs to argue[8] or the District Court to rely upon a First Amendment theory that was not previously raised.[9] Defendants were denied notice and an opportunity to be heard on this

[8] The first argument from Plaintiffs about an alleged prohibition on their own hypothetical messages came near the last minute of a 5:00 p.m. post-hearing briefing deadline, and Defendants had no opportunity to respond. *See* Doc. 16 at 1.

[9] Had any such claim been raised, it would have been mooted by an agreement that the Sheriff's Office intends to respect well-settled First Amendment protections for citizen speech.

point. If Plaintiffs genuinely wanted to post their own signs, felt prohibited from doing so, and wanted to challenge an alleged prohibition, they had an obligation to raise that distinct claim in their Complaint and in their preliminary injunction motion. *See Geter v. United States*, 534 F.App'x 831, 834 (11th Cir. 2013) ("[T]his Court does not permit parties to raise new issues in supplemental briefing."); *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).

Because Plaintiffs raised their censorship argument for the first time in a supplemental brief, the District Court erred in relying upon alleged intent by the Sheriff's Office to prohibit competing messages from Plaintiffs.

**c. The Signs Do Not Squelch Competing Messages**

Aside from evidentiary deficiency and lack of procedural due process, the District Court erred in granting a preliminary injunction *against Sheriff's Office signs* based in whole or part upon consideration of a supposed Sheriff's Office *prohibition on competing 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 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). Yet, even if a Plaintiff could make that case, it would not follow that the Sheriff's *own signs*—which obviously are distinct from any alleged policy impacting any Plaintiff's hypothetical sign—amount to "compelled speech" prohibited by the First Amendment.

If the District Court had legitimate grounds to both consider and issue an injunction against a content-based restriction on Plaintiffs' speech, then the injunction should have been limited to that discrete point. Instead, the District Court confused an alleged speech restriction—which was not raised in the pleadings or supported by the record—with its "compelled speech" analysis.

**d. Plaintiffs Were Not Compelled to Endorse the Signs**

To sum up, Plaintiffs did not present evidence that Defendants compelled them to endorse Sheriff Long's message. The record supports only that Plaintiffs are prohibited from interfering with the 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 sign. Lack of compulsion is fatal to Plaintiffs' "compelled speech" claim.

Beyond that fatal flaw, Plaintiffs' compelled speech claim also fails because nobody is 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 a repugnant 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). 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 the 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 endorsed by the Plaintiff. Under binding precedent, Plaintiffs cannot make that case.

For example, in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980), 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 the 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), in that they 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 the signs unambiguously ascribe the message to Sheriff Long, and Plaintiffs remain free to dissociate themselves from the signs.

Similarly, in *Rumsfeld*, *supra*, 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. *Rumsfeld*, 547 U.S. at 52, 126 S. Ct. at 1302. The Court rejected the compelled speech argument because "Nothing 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, in the present case 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 facts.

**b. Nobody Reasonably Can Conclude that Plaintiffs Endorse the Message on the Sign**

As established above, a Plaintiff's freedom from personal association with repugnant 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).

Here, one need only read the sign to see that Plaintiffs' claim fails the endorsement 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.

The District Court believed that passersby commonly think that a resident endorses the sign in front of his residence. True or not, that is not a proper subject of judicial notice, and the record does not reflect a basis for that assumption. Regardless, even widespread public ignorance about the government's control, and Plaintiffs' lack of control, over rights-of-way 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, and will read that the signs bear a message from Sheriff Long.

One last point puts the endorsement issue to rest. At the hearing Plaintiffs' counsel highlighted 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 (transcript) at 57. Yet 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).

**c. The District Court Misapplied the "Ready Association" Test**

The District Court concluded that the signs are "associated with" the sex offender who lives at the house near the sign. That is true, but only in the 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 in a 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."

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 said to be "readily associated with" the convict, but nobody can argue that the sentencing judge is forcing the convict to endorse "compelled speech." A "wanted" poster about a fugitive is associated with the fugitive, 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.

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 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 district court opinion upon which the District Court below placed heavy reliance. *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.[10] 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).[11]

*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 was " '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

[10] 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.

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

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" 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. Respectfully, the District Court below made the same error.

The District Court repeated *Marshall*'s error by failing to test for reasonable third party perception of endorsement. The District Court also erred to the extent that it relied upon the unsupported idea that Plaintiffs were prohibited from disassociating themselves from Sheriff Long's message. *See*

§ V(C), *supra*. Because no third party reasonably can conclude that any Plaintiff endorses the message on Sheriff Long's sign, Plaintiffs cannot sustain a "compelled speech" claim. The District Court erred in holding otherwise.

**3. The Signs Withstand First Amendment Scrutiny**

In a pure "compelled speech" case involving ideological speech, like *Barnette* or *Wooly*, it appears that "strict scrutiny" applies. By contrast, Defendants submit that the message at issue is not ideological. Rather, it is a public safety warning by Sheriff Long, clearly labeled as such.

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.

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

The District Court found, and Defendants agree, 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).[12] 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 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.

While acknowledging the compelling government interest, the District Court minimized the risk posed at Halloween by sex offenders as a class. The District Court suggested that, due to the wide sweep of sex offender

[12] "By requiring sex offenders to register, the legislature intended to notify the public of individuals who may pose a threat. *Spivey v. State,* 274 Ga.App. 834, 837, 619 S.E.2d 346 (2005). 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." *Id*. at 835, 619 S.E.2d 346 (perpetrator caught in a sting and convicted of attempted child molestation was required to comply with the sex offender registry statute)." *Jenkins v. State*, 284 Ga. 642, 645, 670 S.E.2d 425, 428 (2008).

registration laws, perhaps many registered sex offenders pose no real risk to trick-or-treating children. Also, the Sheriff's Office is not responding to a considerable historical record of local sex offender violations against trick-or-treating children.

These considerations, however, overlook three salient points. 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. Courts have no legitimate basis to second-guess the risk evaluations drawn by informed legislatures across the United States. This is doubly true when the District Court had only the benefit of a rudimentary record from a hastily arranged preliminary injunction hearing.

Second, a lack of known 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.

**b. 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.

**c. The Signs Pass Strict Scrutiny**

The District Court ruled that the signs fail strict scrutiny because other means exist to warn the public about sex offenders, without infringing Plaintiffs' First Amendment rights. By this the District Court apparently meant that "Halloween on the Square" was an option in 2019, as it was in 2017 and years before that. Doc. 17 at 19. The record, however, established that Sheriff Long had no control over "Halloween on the Square," which was discontinued after 2017 by local businesses rather than the Sheriff's Office. Doc. 20 (transcript) at 38-39. Otherwise the District Court cited Facebook posts, which simply referenced "Halloween on the Square" and Sheriff Long posting signs. Doc. 12-2; 12-8.

Strict scrutiny asks whether the signs are "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, ––– U.S. –––, 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 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," and the District Court's preliminary injunction should be vacated.

## VI. THE DISTRICT COURT ERRED IN DISCOUNTING HARM TO THE PUBLIC AND DEFENDANTS

In balancing relative injury, potential harm and the public interest, the District Court minimized the risk posed by Plaintiffs to trick-or-treaters. Doc. 17 at 21. However, Georgia's General Assembly considered risks posed by

sex offenders, and responded by telling Georgia sheriffs to warn the public. O.C.G.A. § 42-1-12. The District Court had neither the expertise nor the factual record to justify second-guessing Georgia's legislature. This case offers no occasion, much less a legitimate reason, to interfere with Sheriff Long's authority to warn parents and children in his jurisdiction in an efficient, effective manner.

Aside from the compelling interest in protecting the public from sex offenders, the First Amendment protects Defendants' right to post warnings on government property. *See* § IV, *supra.* Sheriff Long and Deputy Riley did not give up their First Amendment protections when they accepted public service roles, and the First Amendment protects their right to send the public safety message at issue here. The District Court made no mention of Defendants' rights in its purported balancing of interests.

The preliminary injunction imposed substantial harm to the public interest, infringed Defendants' First Amendment rights and made it more difficult for Defendants to fulfill their mandate to protect the public from sexual predators. On the other side of the balance stood Plaintiffs and their doubtful compelled speech claim. Because the District Court misjudged or completely overlooked the relative gravity of interests, the temporary

injunction should be vacated.

## VII. THE DISTRICT COURT ERRED IN REJECTING DEFENDANTS' LACHES DEFENSE

The laches doctrine requires unreasonable lack of diligence by the plaintiff that result in prejudice to Defendants. *Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 822 (7th Cir.1999); *see also Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534 (1961). Both elements clearly are met.

At the hearing Plaintiffs testified that that they were aggrieved by signs posted in October 2018. Plaintiffs then waited until late September 2019 to file their lawsuit. Plaintiff Holden testified that nothing stopped him from filing a lawsuit within a reasonable time, and no Plaintiff presented evidence of any impediment to filing suit in time for a ruling long before Halloween 2019. However, Plaintiffs waited until October 7, 2019 to file their "emergency" motion for a preliminary injunction. Doc. 6. Halloween fell on October 31, 2019.

Plaintiffs' delay easily meets the unreasonable lack of diligence prong. *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) (legislative apportionment suit filed eight months before general election); *Simkins v. Gressette*, 631 F.2d 287, 289 (4th Cir. 1980) (reapportionment challenge filed two days before the start of the candidate-qualifying period

and eight months before the general election). This is so regardless of any representation by Plaintiffs' attorney about his reason for delay. Doc. 17 at 22. Laches accounts for *Plaintiffs*' diligence or lack thereof, not to efforts or troubles experienced by their attorneys.

Due to Plaintiffs' unreasonable delay, Defendants were required to conduct a mini-trial within roughly three weeks after service of the Complaint, and submit substantial briefing under tight time constraints, with very little time to create contingency plans for Halloween 2019.

The District Court's ruling on October 29 left very little time to accomplish an alternative plan for Halloween 2019, which passed with no opportunity for effective appellate review. Defendants' First Amendment rights were infringed, and their legally mandated duties were made considerably more difficult. All of this was prejudicial, requiring denial of injunctive relief. Respectfully, the District Court erred in overruling Defendants' laches defense, which barred a preliminary injunction.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to vacate the District Court's preliminary injunction.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Counsel certifies that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 11,758 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 **APPELLANTS' INITIAL BRIEF** upon all parties to this appeal electronically through the Court's CM/ECF system:

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This 21 day of January, 2020.

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