ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC.
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October 27, 2022

Mike Tregre, Sheriff
(sheriff@stjohnsheriff.org)
Lt. Gloria Tassin
(gloria.tassin@stjohnsheriff.org)
(info@stjohnsheriff.org)
St. John Parish Sheriff's Office
P. O. Box 1600
1801 W. Airline Hwy.
Laplace, LA 70068

Re: ***Halloween signs for registered sex offenders in St. John the Baptist Parish***

Dear Sheriff Tregre and Staff:

The purpose of this letter is to address the St. John Parish Sheriff Office's requirement that all registered sex offenders "post a sign on their residence" stating "STOP – No Trick-or-Treats at this Address – A Community Safety Message from St. John the Baptist Parish Sheriff's Office," as disclosed on your office's Facebook page and elsewhere.

Forcing registrants to post such signage on Halloween is a clear violation of the First Amendment because it is compelled speech. Earlier this year, the Eleventh Circuit Court of Appeals ruled that the Sheriff of Butts County, Georgia violated the First Amendment by posting virtually identical signs on the lawns in front of registrants' houses on and before Halloween. The Court's opinion in *McClendon v. Long*, 22 F.4th 1330 (11th Cir. 2022) is enclosed for your reference.

The fact that the Butts County signs, like yours, were nominally designated a "community safety message" from law enforcement intensified, rather than resolved, their illegality. The Court in *McClendon* ruled that "the Sheriff's yard signs are compelled government speech, and their placement in a homeowner's yard is unconstitutional unless the signs are a narrowly tailored means of serving a compelling government interest." The Court further ruled that the signs were not narrowly tailored, and thus "unconstitutional," because the Sheriff "has not offered evidence that any of the yard signs would accomplish the compelling purpose of protecting children from sexual abuse."

Indeed, no such evidence could be offered, because the notion of a threat posted by registrants on Halloween is an "urban myth similar to past myths warning of tainted treats."[1] Academic studies in criminology confirm "there is no research that sex offenses increase on Halloween, no evidence that sex offenders target children on Halloween, and, in fact, no evidence that a child has ever been a victim of sexual abuse by a stranger while out trick-or-treating."[2]

In fact, compelling registrants to post a sign on their homes that warn others away on Halloween is an invitation to vigilante violence against registrants, their families, and their property, especially since your office publicizes the fact that "If you see this sign in a window or on a door in St. John Parish, this is a house of a SEX OFFENDER." This exact concern was noted by a federal judge in the United States District Court for the Central District of California when he enjoined a local police department from posting similar signs in the city of Simi Valley. The Court ruled:

> [T]he sign requirement, heavily publicized in the Simi Valley area, poses a danger to sex offenders, their families and their property. Although the sign employs innocuous language, its function and effect is likely to approximate that of Hawthorne's Scarlet Letter — drawing immediate public attention to Plaintiffs and potentially subjecting them to the dangerous mischief common on Halloween night and to community harassment in the weeks and months following . . . .

Doe v. City of Simi Valley, 2012 U.S. Dist. LEXIS 191137, at *25 (C.D. Cal. Oct. 29, 2012).

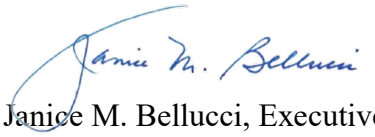
Please be advised that we intend to hold the St. John's Parish Sheriff's Office as well as St. John's Parish responsible for any and all damages incurred by registrants as a result of the sign-posting mandate, resulting vigilante violence, and the clear First Amendment violation they represent. My organization, the Alliance for Constitutional Sex Offense Laws, Inc., brings and supports lawsuits throughout the nation, including the *McClendon* and *Doe* cases cited above. We will not hesitate to pursue all available legal remedies against the St. John's Parish Sheriff's Office and St. John's Parish should you persist in posting, or requiring registrants to post, any signage related to Halloween.

[1] Mark Chaffin, Jill Levenson, et al., *How Safe are Trick-or-Treaters? An Analysis of Child Sex Crime Rates on Halloween*, Vol. 21:3 Sexual Abuse: A Journal of Research and Treatment 363, 363-374 (2009), http://sax.sagepub.com/content/21/3/363.abstract.

[2] EMILY HOROWITZ, PROTECTING OUR KIDS? HOW SEX OFFENDER LAWS ARE FAILING US, p. 71 (2015).

Please confirm immediately whether or not your office intends to go forward with its sign-posting mandate. Thank you.

Sincerely,



Janice M. Bellucci, Executive Director
Attorney-at-Law

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-10092

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

Plaintiffs-Appellants,

versus

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

individually,

Defendants-Appellees,

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

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:19-cv-00385-MTT

Before WILLIAM PRYOR, Chief Judge, GRANT, and HULL, Circuit Judges.

HULL, Circuit Judge:

In October 2018, two deputies from the Butts County Sheriff's Office placed signs in the front yards of the residences of all 57 registered sex offenders within the County, warning "STOP" and "NO TRICK-OR-TREAT AT THIS ADDRESS." Before Halloween 2019, three registered sex offenders living in Butts County sued, seeking to enjoin the Sheriff from placing the signs

again. The district court denied a permanent injunction and granted summary judgment in favor of the Sheriff.

After review and with the benefit of oral argument, we conclude that the Sheriff's warning signs are compelled government speech, and their placement violates a homeowner's First Amendment rights. Thus, we vacate the district court's judgment in favor of the Sheriff and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. The Plaintiffs

Plaintiffs Reginald Holden, Corey McClendon, and Christopher Reed are residents of Butts County and are required to register as sex offenders under O.C.G.A. § 42-1-12, *et seq.* The Georgia statute not only requires individuals with certain convictions to register as sex offenders, but also requires Georgia to classify registrants based on whether they pose an increased risk of recidivism. *Id.* § 42-1-14. None of the three plaintiffs have been classified as posing an increased risk of recidivism.

In 2004, Holden was convicted of lewd and lascivious battery in Pinellas County, Florida. He has been a homeowner in Butts County since May 2017. He lives by himself and works as a warehouse coordinator.

In 2001, McClendon was convicted of statutory rape of a minor in Butts County. He lives with his daughter and his parents,

who own the home where they all reside. He holds a commercial driver's license.

In 2007, Reed was convicted of sexual assault of a minor in Cook County, Illinois. He works as a truck driver and has lived with his father, who owns their home, since 2011.

In the 2020 order now on appeal, the district court found that all three plaintiffs "have, by all accounts, been rehabilitated and are leading productive lives." The Sheriff does not dispute this, nor does the record support a contrary finding.

B. Halloween 2018

Several days before Halloween in 2018, at the direction of Sheriff Gary Long, Deputies Jeanette Riley and Scott Crumley placed warning signs in the front yards of the residences of every registered sex offender in Butts County, including Holden, McClendon, and Reed. At the residences, the deputies also gave to, or left for, the registrants a leaflet stating that the signs were the property of Sheriff Long and could not be removed by anyone other than the Butts County Sheriff's Office.

This was the sign, which had the same message on both sides:

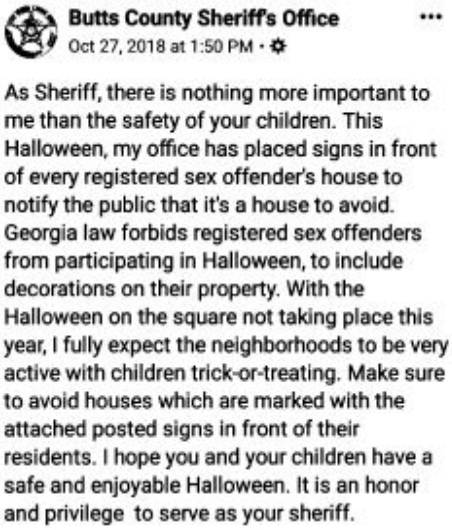
According to Deputy Crumley, the signs were placed "in the general vicinity within probably 2 feet front or back of the mailbox or next to the driveway." As an example, this picture shows the sign placed at Plaintiff McClendon's residence:

The Sheriff's Office placed these warning signs in front of the listed homes of all registered sex offenders in Butts County, without considering whether the State had classified any of them as posing an increased risk of recidivism. The deputies collected the signs on November 1.

Plaintiff Holden came home and saw the sign in his front yard in 2018. He then called Deputy Riley. At that time, Riley oversaw Butts County's compliance with Georgia's sex-offender registry requirements. Holden asked why the sign was placed on his lawn without his knowledge or permission. Riley told Holden that the sign was the property of the Sheriff's Office and he should

not remove it from the right-of-way. Between Riley's statement and the leaflet stating that no one could move the sign except the Sheriff's Office, Holden believed he would be arrested if he moved the sign. And Sheriff Long later testified that he would not have permitted Holden to cover the sign or place a competing sign.

After the warning signs were placed, Sheriff Long posted a message on his official Facebook page, along with a picture of the sign. In his post, he explained that the signs had only been placed in front of the homes of registered sex offenders. His message also represented that Georgia law forbids registered sex offenders from participating in Halloween:



It is now undisputed, however, that Georgia law does not forbid registered sex offenders from participating in Halloween.

At an injunction hearing, Sheriff Long testified that he considered the Facebook post to be an effective way to

communicate to Butts County residents that the signs marked the residences of sex offenders. The goal of his Facebook post was to associate the signs with the registrants who lived on the properties.

Sheriff Long explained that he believed the signs were "imperative" to warn the public about the residences of registered sex offenders. Prior to 2018, the Sheriff's Office had provided registrants with a flier at Halloween and asked them to place it on their doors. He believed that placing a yard sign out by the road would be more effective because it would prevent children from walking to the door.

Since 2013, Long had been Sheriff in Butts County and in that time did not know of any incidents in Butts County involving registered sex offenders on Halloween. In fact, during his six-year tenure as Sheriff, there were no issues with any registered sex offenders in Butts County having unauthorized contact or reoffending with minors at any time.

C. Plaintiffs' Lawsuit

In September 2019, the plaintiffs sued Sheriff Long in his official and individual capacities, Deputy Riley in her individual capacity, and three John Doe defendants. The complaint alleged that the defendants had violated the plaintiffs' First Amendment rights by compelling their speech.[1] It sought declaratory and

[1] The plaintiffs also alleged a state-law trespass claim and a takings claim under the Fifth and Fourteenth Amendments. In their appellate brief, however, they do not raise any arguments about their trespass or takings claims. They argue

injunctive relief, as well as damages. The district court granted a preliminary injunction based on the First Amendment claim and prohibited the Sheriff from placing the signs in the plaintiffs' yards for Halloween 2019.

In April 2020, the plaintiffs amended their complaint, adding Deputy Crumley as a defendant and dropping the John Doe defendants. In September 2020, both parties moved for summary judgment. In addition, the plaintiffs moved for a permanent injunction against the placement of the signs.

The defendants attached to their summary judgment motion a declaration by Sheriff Long, which emphasized that Sheriff Long had never prohibited a sex offender from placing his own sign contesting the Sheriff's warning sign. Long declared:

> To my knowledge there was never a situation where any sex offender registrant expressed some desire to place the offender's own sign or message relating to the Sheriff's Office sign. The Sheriff's Office has never had a policy about that, and there is no Sheriff's Office prohibition on signage on private property that complies with state law and local ordinances.
>
> Had any sex offender registrant placed his own sign relating to the Sheriff's Office sign, any response by the Sheriff's Office would have involved review of

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only that the district court erred in granting summary judgment on their First Amendment claims. Thus, we do not address their trespass or takings claims.

> applicable law and consultation with a competent attorney. However, to my knowledge that situation never arose.

The district court granted the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment and a permanent injunction.

Regarding the plaintiffs' compelled speech claim, the district court found that "[t]he Plaintiffs are free to offer speech competing with the Sheriff's Office's views and to disassociate themselves from those views." Thus, because (1) the signs were government speech and (2) the plaintiffs were free to disagree by posting a competing message, no reasonable observer could conclude that the residents of the properties where the signs were posted agreed with the sign's message. The court determined that the signs were not compelled speech because "[n]o reasonable jury could find that there is a risk the Plaintiffs will appear to endorse the signs' message."

The district court further found that Sheriff Long was immune from any damages claims in his official capacity under the Eleventh Amendment, and that all three defendants were entitled to qualified immunity from the plaintiffs' claims for damages in their individual capacities, as they had not violated any clearly established law. The district court dismissed the plaintiffs' First Amendment claims for injunctive relief without prejudice and their claims for damages with prejudice.

The plaintiffs timely appealed. On appeal, they do not challenge the district court's rulings as to damages or qualified immunity. The only remedies they continue to seek are declaratory and injunctive relief against Sheriff Long in his official capacity on their First Amendment claim.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of summary judgment, viewing the record in the light most favorable to the non-moving party. *NAACP v. Hunt*, 891 F.2d 1555, 1559–60 (11th Cir. 1990). A movant is entitled to summary judgment upon showing that there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

III. SHERIFF'S YARD SIGNS ARE COMPELLED GOVERNMENT SPEECH

First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* (quotation marks omitted). The compelled speech doctrine applies to ideological speech and purely factual, non-commercial speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–98, 108 S. Ct. 2667, 2677–78 (1988); *Nat'l Inst. of Family and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372–73 (2018).

In *Wooley*, the Supreme Court held that it was unconstitutional for the State of New Hampshire to prosecute a citizen for covering the State motto, "Live Free or Die," on his license plate. *Wooley*, 430 U.S. at 713, 97 S. Ct. at 1434–35. Specifically, the Court held that a state could not "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." *Id.* The Court stated that the New Hampshire statute "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715, 97 S. Ct. at 1435.

This case is materially similar to *Wooley*. The Sheriff's warning signs, like the State motto on the New Hampshire license plate, are government speech. Indeed, the signs expressly bore the imprimatur of government, stating that they were "a community safety message from Butts County Sheriff Gary Long." The deputies placed the signs despite the homeowners' and/or residents' objections. The deputies explained, both verbally and through the accompanying leaflet, that only the Sheriff's Office could remove the signs. *See Mech v. Sch. Bd.*, 806 F.3d 1070, 1075 (11th Cir. 2015) (holding that banners on school fences were government speech because they "[bore] the imprimatur of the school[] and the school[] exercise[d] substantial control over the messages that they convey[ed]"). In other words, the Sheriff required the use of private property as a *stationary* billboard for his

own ideological message, "for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713, 97 S. Ct. at 1434–35. The Sheriff's warning signs are a classic example of compelled government speech.

In concluding otherwise, the district court erred in two ways. First, it determined that a compelled government speech claim requires a finding that a reasonable third party would view the speech as "endorsed" by the plaintiff. *Wooley* contains no such requirement. *Wooley* held New Hampshire's law unconstitutional because the law required the plaintiff to "participate in the dissemination of an ideological message" against his will, and it used the plaintiff's private property (his vehicle) to do so. *Id.* at 713, 97 S. Ct. at 1434. That the message is intended to be seen by the general public is of course necessary to the idea that the State is using the plaintiff's property to disseminate the message. But the primary harm in *Wooley* is just that: the required use of the plaintiff's property as a "billboard" for government speech. There is no explicit or implicit requirement that those reading the "billboard" believe the plaintiff has endorsed a government message that he is being forced to host. *Id.*; *cf. Hunt*, 891 F.2d at 1566 (holding that Alabama did not compel its citizens' speech by flying the confederate flag at the capitol building because the State did "not compel its citizens to carry or post the flag themselves" *or* "to support whatever cause it may represent").

Second, the district court erred by determining that the plaintiffs' ability to place their own yard signs disagreeing with the

warning signs could cure the original violation. This ignores that the harm here is the forced display of a government message on private property in violation of the "right to refrain from speaking at all," *see Wooley*, 430 U.S. at 714, 97 S. Ct. at 1535, not the "forced appearance of endorsement" of that message. Indeed, yard signs at "one's own residence" are a "distinct and traditionally important medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 56, 57 n. 16, 57 114 S. Ct. 2038, 2046 & n. 16 (1994). Residents, then, should be able to decide whether to use that traditional medium for speech in the first instance.

No limiting principle exists under the district court's post-a-second-sign version of the compelled speech doctrine. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636, 63 S. Ct. 1178, 1184 (1943) ("If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority. . . ."). If the only constitutional requirement for the government to compel citizens to host its speech on their private property is that it also permits them to post a second sign disagreeing with the first, the Sheriff could place *any* sign identifying himself as the speaker in *any* county resident's yard. This result is inconsistent with *Wooley*. The Sheriff's yard signs are compelled government speech, and their placement in a homeowner's yard is unconstitutional unless the signs are a narrowly tailored means of serving a compelling government interest.

IV. SHERIFF'S YARD SIGNS DO NOT PASS STRICT SCRUTINY

When the government "compel[s] speakers to utter or distribute speech bearing a particular message," as the Sheriff does here, such a policy imposes a content-based burden on speech and is subject to strict-scrutiny review. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42, 114 S. Ct. 2445, 2459 (1994); *see Pacific Gas & Elec. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 19, 106 S. Ct. 903, 913 (1986). Thus, to be valid under the First Amendment, the placement of the warning signs must be a narrowly tailored means of serving a compelling state interest. *Pacific Gas & Elec.*, 475 U.S. at 19, 106 S. Ct. at 913; *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454, 135 S. Ct. 1656, 1671 (2015) (explaining that "narrowly tailored" does not mean "perfectly tailored" (internal quotation marks omitted)).

All parties agree—as do we—that the Sheriff's interest in protecting children from sexual abuse is compelling. However, the yard signs are not narrowly tailored to achieve that goal.

In 2018, the Sheriff's deputies placed the signs in the yards of all 57 registered sex offenders in Butts County. Prior to placing the signs, the Sheriff did not consider whether any of the registrants were classified by Georgia as likely to recidivate.[2] He even

[2] In his brief, the Sheriff argues that all convicted sex offenders pose enough of a recidivism risk to justify his signs. Because Georgia has a system requiring all sex offenders to register and be monitored, the Sheriff argues that he can

admitted that, since he took office in 2013, he had never had an issue with a registrant having unauthorized contact or reoffending with a minor on Halloween or at any other time. The Sheriff has not provided any record evidence that the registrants in Butts County actually pose a danger to trick-or-treating children or that these signs would serve to prevent such danger. And the Sheriff bears the burden of proof on the issue of whether his signs are narrowly tailored. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 868 (11th Cir. 2020).

Assuming that yard signs alerting people to the residences of registered sex offenders on Halloween would prevent the sexual abuse of children (which, we repeat, is not supported by any record evidence), the signs are not tailored narrowly enough. Sheriff Long testified that the sex-offender registry, which contains each registrant's name, address, and photograph, is available on the State of Georgia's website, on the Butts County website, at Butts County administrative buildings, and at the Butts County Superior Court Clerk's Office. The Sheriff has made the sex offender

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treat them all as a dangerous class too, and his warning signs can mitigate that danger.

The Sheriff ignores that Georgia's registration system includes an *individual* determination of recidivism risk performed by a State board. *See* O.C.G.A. § 42-1-14. The statute even requires county sheriffs to maintain a list of each resident offender's risk classification. *Id.* § 42-1-12(i)(1). Yet the Sheriff has not placed any evidence into this record showing that the State has classified any of the 57 registrants living within Butts County as having an increased risk of recidivism.

registry widely available through government sources, diminishing the need to require residents to disseminate the same information in yard signs on their private property. And, while "narrowly tailored" does not mean "perfectly tailored," *Williams-Yulee*, 575 U.S. at 454, 135 S. Ct. at 1671 (internal quotation marks omitted), the Sheriff has not met his burden to show the yard signs were narrowly tailored, *see Otto*, 981 F.3d at 868, because he has not offered evidence that any of the yard signs would accomplish the compelling purpose of protecting children from sexual abuse.

For these reasons, the Sheriff's placement of the yard signs in a homeowner's yard is not narrowly tailored to serve the compelling government interest of protecting children from sexual abuse.

V. SHERIFF'S ARGUMENT ABOUT RIGHTS-OF-WAY

Even if his signs are compelled government speech that do not survive strict scrutiny, the Sheriff argues that his intent was, and remains, to place the warning signs in the public rights-of-way that abut the private homes where the plaintiff registrants reside. The Sheriff argues that the plaintiffs cannot control what a government actor, like the Sheriff, might place on public property (the right-of-way) in front of their private residences.

Although a government entity may own a public right-of-way outright in fee, private homeowners may also own the property abutting a road in fee and grant an easement to a government entity for various public road or transportation

purposes. *See* O.C.G.A. § 32-3-1. Here, though, the Sheriff has not shown that a government entity—much less the Sheriff—owns a right-of-way in fee across the front yards where the plaintiffs reside.[3] Further, even if a government entity had a right-of-way easement on any of the three properties, the Sheriff's evidence does not address who possesses the easement or for what purpose.

Even assuming that the record established that the government owned the right of way in fee and the signs were placed in the right of way, Georgia law makes it "unlawful for any person to erect, place, or maintain within the dedicated right of way of any public road any sign, signal, or other device" unless authorized by a state law or a municipal ordinance. *See* O.C.G.A. § 32-6-51(a)(1), (2). And the Sheriff conceded at oral argument that no Georgia statute or Butts County ordinance authorizes him to place his warning signs in the public rights-of-way.

While Sheriff Long cites no case law applying § 32-6-51, the plaintiffs cite *Fortner v. Town of Register*, a Georgia Supreme Court decision holding a municipality's actions to be unlawful

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[3] Before placing the signs in 2018, the deputies did not conduct research to assure themselves the signs would be placed in rights-of-way. In 2019, for the preliminary injunction hearing, the Sheriff introduced some poorly scanned copies of subdivision plats that do not include any keys, legends, or labels; the plat maps are not self-explanatory. He also introduced aerial Google Maps photos of roads with lines drawn across them. But those maps do not indicate who owns the underlying fee where the lines are drawn, or that the lines represent right-of-way easements—much less who possesses any easements or for what purpose.

under § 32-6-51(b), which uses language identical to § 32-6-51(a) to describe who is covered by the statute. *See* 604 S.E.2d 175, 278 Ga. 625 (2004). Section 32-6-51(b) makes it "unlawful for *any person* to erect, place, or maintain" certain unauthorized structures visible from public roads. O.C.G.A. § 32-6-51(b) (emphasis added).

In *Fortner*, the Georgia Supreme Court held that the defendant municipality could be held liable for negligence because it erected unauthorized structures that created a traffic hazard, in violation of § 32-6-51(b). 604 S.E.2d at 178–79, 278 Ga. at 627–28. Because both sections of the Georgia statute contain the same coverage language ("any person") and forbid similar conduct, the *Fortner* decision suggests that the Sheriff, like the municipality in *Fortner*, is subject to the restrictions in § 32-6-51 and is barred by § 32-6-51(a) from placing his warning signs in the alleged public rights-of-way without legislative authority to do so.

Another code section in Title 32 also points us in this direction. Section 32-6-6 makes it "unlawful for *any person*" to camp on state highways. O.C.G.A. § 32-6-6(b) (emphasis added). It continues: "This Code section shall not apply to state or local government officials or employees acting in their official capacity and while performing activities as part of their official duties." *Id.* § 32-6-6(d). If the Georgia legislature did not consider "government officials or employees acting in their official capacity" to be "any person" in Title 32, then arguably there would be no

need to carve them out of the highway camping restriction in § 32-6-6.[4]

At bottom, state law governs the right-of-way issues here, and we are loath to opine conclusively about them. All we do in this case is conclude that, based on this record and the limited briefing before us, the Sheriff has failed to show either that he is not covered by the sign-posting prohibition in § 32-6-51(a) or that he is authorized to place the yard signs.

VI. APPLICATION TO THE THREE APPELLANTS

We now apply the above First Amendment principles to the plaintiffs in this case.

A. Plaintiff Holden Is Entitled to Summary Judgment

Plaintiff Holden owns his home. The Sheriff's warning sign impermissibly burdens his First Amendment right to be free from being forced to host a government message on his private property. The First Amendment prevents Sheriff Long from

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[4] All sections in Title 32 use this broad definition of "person": "any individual, partnership, corporation, association, or private organization of any character." O.C.G.A. § 32-1-3(20). The Sheriff's brief, however, did not cite this definitional code section or case law construing it, nor did his brief expressly argue that he is not a "person" or "individual" under § 32-1-3(20).

Rather, the Sheriff's conclusory argument, as best we can tell, is that "private citizens" cannot place signs in public rights-of-way and that "[g]overnment signs commonly are placed on right-of-way areas in Butts County." Since the Sheriff does not cite or argue about this definitional code section, nothing in our opinion should be read as construing § 32-1-3(20).

posting his warning sign on Holden's property. Thus, we reverse the district court's judgment in favor of the Sheriff on Holden's First Amendment claim and remand for the district court (1) to grant summary judgment in Holden's favor on that claim and (2) to permanently enjoin the Sheriff from requiring Holden to display a sign on his front yard relating to his registered sex offender status.

B. Issues Remain as to Plaintiffs McClendon and Reed

Plaintiffs McClendon and Reed both live with their parents on property owned by their parents. McClendon, however, claims he has a right to exclude persons from his parents' property, he helps with chores, and he has paid rent in the past. And the record is not developed as to Reed's arrangement as a resident or tenant on his father's property. Reed's father, though, did call the Sheriff's Office to complain that he did not want the sign on his property.

If Plaintiffs McClendon and Reed have no ownership or tenancy interest in the properties where they reside (such as under state common law or by lease contract), then threshold issues arise as to whether they have any right to complain about a sign displaying government speech on another person's property. We need not address these threshold issues because McClendon and Reed have now expressed an intent on remand to seek to amend their complaint to add their parents as plaintiffs. If the district court allows the plaintiffs to so amend, that would resolve the issues. If not, the district court will need to address these issues in the first instance.

At this stage, neither McClendon, Reed, nor the Sheriff have shown they are entitled to summary judgment. Thus, we vacate the entry of judgment for the Sheriff on McClendon's and Reed's First Amendment claims and remand for further proceedings.

VII. CONCLUSION

For these reasons, we: (1) reverse the district court's judgment in favor of the Sheriff on Plaintiff Holden's First Amendment claim and remand with instructions to enter summary judgment and a permanent injunction in Holden's favor; and (2) vacate the judgment in favor of the Sheriff on Plaintiffs McClendon's and Reed's First Amendment claims and remand for further proceedings consistent with this opinion.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 12-8377 PA (VBKx)	Date	October 29, 2012
Title	John Doe # 1, et al. v. City of Simi Valley		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	N/A	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - ORDER

Before the Court is an *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction (the "Application"), filed by ten plaintiffs proceeding under pseudonyms (collectively, "Plaintiffs"). [Docket No. 15.] Defendant City of Simi Valley (the "City") has filed an Opposition.

I. Background

On September 10, 2012, in light of "[s]tatistical information indicat[ing] that the supervised release of sex offenders has only been marginally effective from keeping them from committing another sex offense" and amid concerns that trick-or-treating on Halloween offers unique opportunities for sex offenders to victimize children, the Simi Valley City Council enacted Ordinance No. 1201 (the "Halloween Ordinance" or "Ordinance"). See Ordinance No. 1201, Simi Valley Municipal Code ("S.M.V.C.") § 5-43.01 – 5-45.04. The Halloween Ordinance aims to "protect children from the dangers posed by registered sex offenders convicted of offenses against minors" by imposing lifetime restrictions on Simi Valley registered sex offenders (October 31st of each year). Id. § 5-43.01.

The Halloween Ordinance regulates the conduct of "Sex Offenders,"[1/] who are defined in the ordinance as "any person for whom registration is required pursuant to Section 290 of the California Penal Code, regardless of whether that person is on parole or probation, and has been convicted of an offense against a child." Id. § 5-43.02(b). The Ordinance defines "child or children" as "any person(s) under the age of eighteen (18) years of age." Id. § 5-43.02(a).

The Halloween Ordinance imposes four separate restrictions on the conduct of sex offenders on Halloween. The Ordinance provides:

1/ Unless otherwise noted, the term "sex offender" as used in this Order shall comport with the definition assigned that term by the Halloween Ordinance.

Any sex offender, as defined herein, shall be required, between 12:00 a.m. and 11:59 p.m., on October 31 of each year to do the following:

(a) Post a sign, no smaller than twelve (12) inches by twenty-four (24) inches, with a font size no smaller than 72 points, on the front door at his or her residence stating, "No candy or treats at this residence." This requirement shall only apply to sex offenders who: i) are visible on the Megan's Law website, as maintained by the State of California Department of Justice, Office of the Attorney General; and ii) have been criminally prosecuted and convicted of a sex crime(s) upon a child, as defined herein.

(b) Leave all exterior residential, decorative, and ornamental lighting off during the evening hours starting at 5:00 p.m. until midnight, the next day;

(c) Refrain from decorating his or her front yard and exterior of the residence with Halloween decorations;

(d) Refrain from answering the door to children who are trick or treating.

Id. § 5.43-03. A violation of any of these provisions constitutes a misdemeanor. Id. § 5.43-04.

The Halloween Ordinance went into effect on October 11, 2012. On October 18, 2012, the City of Simi Valley Office of the Chief of Police adopted the Registered Sex Offender Halloween Restrictions Enforcement Policy to clarify the provisions of the Halloween Ordinance and guide its enforcement. (See Declaration of Cpt. John McGinty in Support of Opposition to Application for TRO, Ex. A ("Enforcement Policy").) The Enforcement Policy is being distributed to Simi Valley registered sex offenders. The interpretations provided by the Enforcement Policy will, to the extent necessary, be discussed in the Court's analysis.

B. Factual & Procedural Background

Plaintiffs are a group of Simi Valley registered sex offenders and their spouses and children who are subject or potentially subject to the Halloween Ordinance. Plaintiffs desire to hand out candy to trick-or-treaters and decorate the exterior of their residences with lights and Halloween decorations. On September 28, 2012, Plaintiffs filed suit in this Court alleging a single cause of action under 42 U.S.C. §

1983. Plaintiffs then filed a Verified Amended Complaint on October 12, 2012.[2/] Through this action, Plaintiffs seek a declaration that the Halloween Ordinance is facially unconstitutional in violation of the First Amendment, as applied to the States through the Fourteenth Amendment.

Plaintiffs filed the Application on October 19, 2012.[3/] Having considered the parties' submissions, and for the reasons that follow, the Court grants in part and denies in part Plaintiffs' Application.

II. Preliminary Considerations

A. Jurisdiction

The City argues that the Court lacks jurisdiction over this action because Plaintiffs "filed their original Complaint . . . under John Doe and Jane Doe pseudonyms, without first seeking leave to do so." (Opp'n at 2.) The City relies on a Tenth Circuit case, W.N.J. v. Yocom, 257 F.3d 1171 (10th Cir. 2001), to support its argument.

As explained by the Tenth Circuit, Federal Rule of Civil Procedure 17(a)

> mandates that 'every action shall be prosecuted in the name of the real party in interest.' . . . When a party wishes to file a case anonymously or under a pseudonym, it must first petition the district court for permission to do so. If a court grants permission, it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter. Where no permission is granted, the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.

Id. at 1172.

Notwithstanding the Tenth Circuit's decision in Yocom, "district courts within the Ninth Circuit have concluded that dismissal for lack of jurisdiction is not warranted when the plaintiff files a motion to proceed under a pseudonym, even if that motion is filed after the defendant filed a motion to dismiss." Doe v. Network Solutions, LLC, 2008 U.S. Dist. LEXIS 7397, at *9 (N.D. Cal. Jan. 22, 2008) (emphasis added) (citing Roe v. Providence Health System, Inc., 2007 U.S. Dist. LEXIS 50655 (D. Or. Apr. 24, 2007); Roe v. City of San Diego, 2001 U.S. Dist. LEXIS 26137, at *10-12 (S.D. Cal. Dec. 21, 2001)).

2/ Plaintiffs' verifications were filed under seal.

3/ Also on October 19, Plaintiffs filed a Motion for Leave to Proceed Under Pseudonym. [Docket No. 21.] That Motion is not presently before the Court.

Such a rule makes sense, as "[t]he initial complaint is a matter of public record, and once a plaintiff has opened a file number in federal court using his or her real name, any attempt to proceed under a pseudonym would be pointless." City of San Diego, 2001 U.S. Dist. LEXIS 26137, at *11.

Plaintiffs have filed a Motion for Leave to Proceed Under Pseudonyms. [Docket No. 21.] That Motion was filed the same day as Plaintiffs' Application. In light of that Motion, and considering the obvious reasons Plaintiffs have chosen to file under pseudonyms, the Court declines to deny Plaintiffs' Application for lack of jurisdiction.

B. *Ex Parte* Application Requirements

Plaintiffs' request for a temporary restraining order is filed as an *ex parte* application. To justify *ex parte* relief, "the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regularly noticed motion procedures." See Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995). Moreover, the moving party must be "without fault" in creating the need for *ex parte* relief or establish that the "crisis [necessitating the *ex parte* application] occurred as a result of excusable neglect." K. Clark v. Time Warner Cable, 2007 U.S. Dist. LEXIS 100716, at *2 (C.D. Cal. May 3, 2007) (citing Mission Power Eng'g Co., 883 F. Supp. at 492).

With Halloween fast approaching, Plaintiffs will be unable to challenge the constitutionality of the Halloween Ordinance without expedited review of their claims. Thus, *ex parte* relief is appropriate. The City argues, however, that Plaintiffs unjustifiably delayed in filing their Complaint and Application, and that relief should be denied on that basis. The City points out that the "first reading" of the Halloween Ordinance took place in August. Based on this notice of the impending passage of the Ordinance, the City argues, Plaintiffs' filing of the Application in October was unreasonably late and subjected the City to prejudice.

The Complaint was filed just over two weeks after the passage of the Ordinance and before it went into effect. In light of the City Council's recent passage of the Ordinance and the sensitive interests at stake on both sides of this litigation, the Court does not believe that Plaintiffs are at fault in creating the need for emergency relief.

The City also faults Plaintiffs for failing to follow precisely the notice requirements of Local Rule 7-19(b), which provides that "[i]t is the duty of the attorney [] applying [for *ex parte* relief] . . . to advise the Court in writing and under oath of the efforts to contact other counsel and whether any other counsel, after such advice, opposes the application." Plaintiffs' Application did not provide that information. However, Plaintiff provided actual notice to the City of the impending Application (Opp'n at 3), and the City had sufficient time to respond adequately to it. Thus, the Court declines to strike the Application for failure to abide by the letter of Local Rule 7-19(b).

Accordingly, the Court proceeds to the merits of Plaintiffs' Application.

III. Legal Standard: Temporary Restraining Order

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiffs seek a temporary restraining order enjoining the City from enforcing the entirety of the Halloween Ordinance effective October 31, 2012. For the reasons that follow, the Court temporarily enjoins only § 5.43-03(a) of the Ordinance (the sign posting requirement).

IV. Analysis

A. Likelihood of Success on the Merits

Plaintiffs argue that "[t]he Ordinance prohibits, regulates and mandates speech and regulates association speech and other expressive activity on private property by imposing four burdens on the speech and association rights of [sex offenders]. By virtue of the Ordinance's broad prohibitions relating to the entire residence of any [sex offender], all who reside with [sex offenders] are burdened by the Ordinance." (Application at 6.)

The Court addresses the provisions of the Halloween Ordinance in reverse order.

1. Simi Valley Municipal Code § 5.43-03(d): Ban on Receiving "Trick-or-Treaters"

Section 5.43-03(d) provides that "any sex offender . . . shall be required, between 12:00 a.m. and 11:59 p.m., on October 31 of each year to . . . [r]efrain from answering the door to children who are trick or treating." Plaintiffs claim that this provision violates their First Amendment right of association.

To the extent that the spouses and children of sex offenders bring this claim, they have failed to demonstrate a likelihood of success on the merits. That is, the plain language of the Halloween

Ordinance and the Enforcement Policy's interpretive guidelines make clear that it is only a "sex offender," and not his or her spouse or children, who is prohibited from answering the door to "trick or treaters." The Enforcement Policy, for example, explains that

> Section 5.43-03 section (d) prohibits *a sex offender within the scope of the ordinance* from answering the door when persons who appear to be under the age of 18 approach the sex offender's residence on October 31 for 'trick or treating' activities. Children are deemed to be 'trick or treating' on October 31 if they are dressed in costumes. This provision does not prohibit sex offenders from answering the door to adults, or to members of their own immediate family.

Enforcement Policy § 4(e) (emphasis added).

Three additional considerations bolster the Court's conclusion that the prohibition on opening the door to "trick-or-treaters" applies only to sex offenders as defined by the statute. First, the explicit recognition by the Enforcement Policy of the impact that the Ordinance might have on a sex offender's "own immediate family" by acknowledging that such persons are not barred from opening the door to "trick or treaters." Second, the Enforcement Policy confirms that the term "sex offender" as used in the Halloween Ordinance is a term of art that "*narrows* the definition of 'sex offender'" rather than expands its scope or reach. Enforcement Policy § 2. Finally, the City's Opposition never argues that this provision extends to persons who do not fall within that narrow definition.

Thus, this provision of the Halloween Ordinance plainly does not regulate the conduct of any persons who do not fall within its narrowly defined group of "sex offenders." Accordingly, those plaintiffs who are the spouses and children have failed to demonstrate a likelihood of success or that serious questions are raised on their claim that their constitutional rights are infringed by this provision.

Whether this provision infringes the constitutional rights of sex offenders is another matter. Plaintiffs baldly assert that this provision implicates their rights to freely associate. (Application at 12-13.) However, Plaintiffs neither explain the basis for their assertion that having underage "trick-or-treaters" visit their homes on Halloween is a constitutionally protected associational activity, nor do they cite any authority for this proposition. (Id.) The existence of such a right is far from clear, moreover, as the freedom of association protects the rights (1) "to enter into and maintain certain intimate human relationships" such as marriage and familial cohabitation, and (2) "to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). Receiving "trick-or-treaters" – that is, opening the door to costumed children to provide them with pieces of candy – does not readily fall within either of these categories. Accordingly, Plaintiffs have failed to meet their burden to demonstrate even a serious question going to the merits (let alone a likelihood of success on the merits) of their claim that the

Halloween Ordinance's ban on answering the door to underage "trick-or-treaters" is facially unconstitutional.

2. Simi Valley Municipal Code §§ 5.43-03(b)-(c): Restrictions on Halloween Decorations & Exterior Lighting

a. Exterior Lighting & Halloween Decorations as Expressive Conduct

Sections 5.43-03(b) and (c) of the Simi Valley Municipal Code impose restrictions on the decoration and presentation of the exterior of a sex offender's residence. A sex offender is required to "[l]eave all exterior residential, decorative, and ornamental lighting off during the evening hours starting at 5:00 p.m. until midnight, the next day," § 5.43-03(b), and to "[r]efrain from decorating his or her front yard and exterior of the residence with Halloween decorations," § 5.43-03(c). As defined by the Enforcement Policy, "the duty . . . to extinguish exterior lighting and to refrain from decorating the exterior of his or her residence applies only to such exterior lighting and exterior areas that are visible from sidewalks or other places open to the public." Enforcement Policy § 4(c). "Halloween decorations," moreover, "include decorations . . . or symbols that a reasonable observer would perceive as relating to Halloween, including, but not limited to, Jack-o-lanterns or carved pumpkins, spider webs, ghosts, witches, skeletons, black cats, bats, monsters and tombstones." Id. § 4(d).

Plaintiffs argue that these provisions are facially unconstitutional as content-based prior restraints and compelled speech activities. As written, these provisions do not prohibit or compel verbal or written speech. As a threshold matter, then, Plaintiffs have failed to demonstrate that these provisions even implicate the First Amendment at all.

The First Amendment reads, in its entirety: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In relation to expression, the First Amendment specifically addresses only speech. The United States Supreme Court has found, however, that conduct, when sufficiently imbued with clear elements of expression, also implicates the First Amendment's protections.

As the Supreme Court has summarized,

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, [391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)], we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and

> Fourteenth Amendments," [Spence v. Washington, 418 U.S. 405, 409, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974)]. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." [Spence, 418 U.S. at 410-11.]

Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). "The nature of [a plaintiff's] activity, combined with the factual context and environment in which it was undertaken" are relevant considerations in determining whether the communicative aspects of conduct amount to speech. O'Brien, 391 U.S. at 376.

Plaintiffs claim that these provisions "impose[] a government-mandated burden upon every [sex offender] to express the viewpoint that they do not wish to participate in Halloween." (Application at 13.) On the present record, however, it is not clear that the use or non-use of "exterior residential, decorative, and ornamental lighting" and the display or non-display of "Halloween decorations" constitutes expressive conduct. In support of their Application, Plaintiffs have submitted the declaration of John Doe #6. He explains: "My family and I regularly leave on exterior lighting at our home during the evening, in large part to declare our presence to would-be vandals or thieves[, and we] celebrate[] Halloween . . . by decorating the front yard and exterior and interior of our home [with Halloween decorations]." (Application, Declaration of John Doe #6, ¶¶ 9-10.) This declaration does not indicate that John Doe #6 intends to convey any particularized message by either the use of exterior lighting or the display of Halloween decorations. Cf. Muscko v. McClandless, 4 Am. Disabilities Cas. (BNA) 625 (E.D. Pa. 1995) (" In order to prove that his conduct was protected, plaintiff will have to establish that his exterior decorating was intended to express an idea . . . . This issue is better addressed in more factual detail at the summary judgment stage.").

Moreover, the same display of exterior lighting (ornamental or otherwise) and Halloween decorations can convey any of a number of "messages" ranging from the most general or abstract – for example, as a signal that someone is present in the residence, or simply a message akin to "Happy Holidays!" or "Happy Halloween!" – to relatively particularized – such as the display of Halloween decorations to signify that "trick-or-treating" at a particular residence is encouraged. The Court notes that Halloween itself encompasses a variety of beliefs and superstitions, both secular and non-secular, and that Halloween decorations are likewise varied; any message a person might intend to convey through such decorations is likely to be accordingly ambiguous and opaque. Thus, given the weakness of Plaintiffs' evidence and the multitude of messages, both generalized and particularized, that might be conveyed by the same lights or decorations, the Court is not convinced that, even within the context of Halloween night, "the likelihood [is] great that the [particularized] message [intended] would be understood by those who viewed it." Spence, 418 U.S. at 410-11.

At this stage of the proceedings, Plaintiffs bear a heavy burden of persuasion. Nonetheless, Plaintiffs present only conclusory argument and unpersuasive evidence in support of their claim that the Halloween Ordinance's prohibitions on the display of exterior lighting and Halloween decorations implicate conduct that falls within the ambit of the First Amendment. This is insufficient at this stage of the proceedings. On a more developed record, the Court may indeed agree with Plaintiffs that such activities constitute expressive conduct, but on the record, Plaintiffs have failed to raise even a serious question going to the merits of this claim, let alone a "clear showing" that they are likely to succeed on the merits.

b. The Halloween Ordinance's Prohibitions on Exterior Lighting & Halloween Decorations Satisfy are Valid

Assuming *arguendo* that these provisions of the Halloween Ordinance do in fact impose restrictions on expressive conduct, these provisions nonetheless appear to pass constitutional muster.

"The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Johnson, 491 U.S. at 406. Thus, a message "delivered by conduct that is intended to be communicative . . . may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (citations omitted). Notably, "narrowly drawn" here does not mean the "least restrictive or least intrusive means of" achieving a government's legitimate content-neutral interests. Ward v. Rock Against Racism, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Rather, the regulation must "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 294.

As discussed in more detail below, the City's interests here are legitimate – indeed, they are compelling. Moreover, to the extent that the message conveyed by exterior lighting and Halloween decorations is that the residence and its occupants "wish to participate in Halloween" (Application at 13), these provisions leave open ample alternative channels for the communication of this message. As the City points out:

> [N]umerous other opportunities remain for Plaintiffs to celebrate Halloween. They can attend parties, visit at a friend's house or go ["trick-or-treating"] door-to-door themselves. Indeed, the ordinance imposes no restrictions on their ability to stand [in public view] on the sidewalk, at the foot of the driveway, or in other public places and hand out candy.

(Opp'n at 15.) These activities clearly suffice to communicate to the public Plaintiffs' festive Halloween spirit. Thus, the Court finds that even had Plaintiffs shown that these provisions regulate expressive conduct, Plaintiffs still cannot demonstrate even that serious questions going to the merits of this claim are present here.

3. Simi Valley Municipal Code § 5.43-03(a): Sign Posting Requirement

Finally, those sex offenders whose names also are "listed on the portion of the Megan's law website visible to the general public" are further required to "[p]ost a sign, no smaller than twelve (12) inches by twenty-four (24) inches, with a font size no smaller than 72 points, on the front door at his or her residence stating, "No candy or treats at this residence." Enforcement Policy, §3(2); S.M.V.C. § 5.43-03(a).

Plaintiffs contend that this provision of the Halloween Ordinance is unconstitutional as compelled speech that requires them to espouse – in written words directed to the general public – a viewpoint to which they do not adhere. (See Application at 12.)

It is well-established that a regulation compelling noncommercial speech is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); Riley v. National Federation of Blind, Inc., 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). The First Amendment protects not only "the right to speak freely," but also "the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," laws that compel speech are normally considered "content-based regulation[s] of speech" and therefore are subject to strict scrutiny. Riley, 487 U.S. at 795.

The City nonetheless argues that because "the sign posting requirement . . . is an accurate, viewpoint neutral statement of fact[, it] should not be subject to strict scrutiny." (Opposition at 13.) Strict scrutiny applies, however, "even in cases where the compelled disclosure is limited to factually accurate or non-ideological statements." Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council, 683 F.3d 539, 552 (4th Cir. 2012); see also Riley, 487 U.S. at 797-98 (invalidating a requirement that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity); Hurley, 515 U.S. at 573 (stating that the "general rule[] that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact").

The Halloween Ordinance does indeed compel sex offenders to speak, mandating that they post a sign that there is "no candy or treats at this residence." Thus, the Court applies strict scrutiny to that provision. Cf. Greater Balt. Ctr., 683 F.3d at 552 (applying strict scrutiny to ordinance requiring pregnancy center "to post a sign that it 'does not provide or make referral for abortion or birth-control services'"). This exacting standard is appropriate notwithstanding the substantial and delicate interests

served by laws regulating the conduct of sex offenders. See White v. Baker, 696 F. Supp. 2d 1289, 1311-12 (N.D. Ga. 2010) (applying strict scrutiny in First Amendment challenge to invalidate law authorizing the public release by law enforcement officials of identifying information about registered sex offenders).

Content-based speech regulations such as the Halloween Ordinance's sign requirement "are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The City thus bears the burden of rebutting the presumption of invalidity. Playboy Entm't Group, 529 U.S. at 817. Indeed, "[i]t is rare that a regulation restricting [or compelling] speech because of its content will ever be permissible." Id. at 818. The City can, nonetheless, rebut the presumption if it is able to show that the ordinance is "narrowly tailored to promote a compelling Government interest," such that the ordinance is the "least restrictive alternative" to serve the government's purpose. Id. at 813; Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004).

The CIty has successfully demonstrated that a compelling governmental interest underlies the Halloween Ordinance. The Simi Valley City Council enacted the Halloween Ordinance in order to protect children from the dangers posed by sex offenders while "trick-or-treating," a night-time activity during which children of all ages frequently come into close and unsupervised contact with strangers. In particular, the City's statute aims at substantially decreasing the likelihood that children will be in vulnerable locations near the entry areas of the residences of sex offenders while "trick-or-treating."

It has been recognized that "[s]ex offenders are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Statistics show that when "convicted sex offenders reenter society they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." Id. at 32-33. "[E]very . . . State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders." Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 4, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

The City provides no documentary evidence that Halloween is a particularly dangerous time for children vis-à-vis sex offenders. It is common sense, however, that young "trick-or-treaters" are indeed vulnerable to child predators on Halloween. Thus, the Court agrees with the City that the interest underpinning the Halloween Ordinance is sufficiently compelling to satisfy the strict scrutiny standard.

Nonetheless, the Halloween Ordinance's sign requirement is not narrowly tailored to achieving that compelling interest. First, the Court notes that the sign is ambiguous and does not clarify the "danger" that the statute serves to mitigate. Moreover, and more importantly, a number of less speech-restrictive alternatives exist that serve substantially to further the aims of the statute. The three remaining substantive provisions of the Halloween Ordinance, for example, are powerful avenues by which "trick-or-treaters" will be dissuaded from venturing onto the properties of sex offenders. Moreover, all the sex offenders who would, under the Ordinance, be required to post a sign are already visible on California's Megan's Law website. Thus, in light of these less restrictive, effective

alternatives to the sign posting requirement, the Court finds that Plaintiffs are likely to prevail on the merits of their claim that the sign requirement is unconstitutional.

B. Likelihood of Irreparable Harm

It is undisputed that the that loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); see also Assoc. General Contractors of Calif. v. Coalition for Econ. Equity, 950 F.2d 1401, 1412-13 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm."); New York Magazine v. Metro. Transp. Auth, 136 F.3d 123, 127 (2d Cir. 1998) (same). As discussed above, Plaintiffs have made a clear showing that they are likely to succeed on the merits of their claim that the sign requirement – a form of compelled speech – runs afoul of the free speech guarantee of the First Amendment. Thus, they are likely to suffer irreparable harm absent issuance of a temporary restraining order.

Furthermore, the sign requirement, heavily publicized in the Simi Valley area, poses a danger to sex offenders, their families and their property. Although the sign employs innocuous language, its function and effect is likely to approximate that of Hawthorne's Scarlet Letter – drawing immediate public attention to Plaintiffs and potentially subjecting them to the dangerous mischief common on Halloween night and to community harassment in the weeks and months following – and in that way the Ordinance's sign requirement is different in kind from the disclosure requirements of California's Megan's Law. These considerations further support the issuance of a temporary restraining order.

C. Balancing of the Equities & Public Interest Considerations

As noted, Plaintiffs are likely to suffer irreparable harm in the form of lost First Amendment freedoms. Moreover, the sign posting requirement potentially subjects Plaintiffs to harm to their persons, properties, and reputations. These are significant hardships that support the issuance of an injunction.

The City responds that enjoining enforcement of any part of the Halloween Ordinance – the sign posting requirement in particular – contravenes the public interest and imposes a hardship on the City that far outweighs that imposed on Plaintiffs. The Court is sensitive to the City's concerns. State and local governments should – and do – have substantial freedom to fashion laws regulating the post-release conduct of convicted sex offenders, particularly those whose sex crimes targeted children. The compelling governmental interest such laws serve, however, does not render them immune to constitutional scrutiny. In light of the effective alternatives to the sign posting requirement and the identifying information already publicly available on California's Megan's Law website, the Court does not believe that an injunction against the sign posting requirement will impose a substantial hardship on the City or the public. Accordingly, the balance of hardships tips in Plaintiffs' favor.

Finally, a limited temporary restraining order is in the public interest. Plaintiffs have made a strong showing that the sign posting requirement is facially unconstitutional and likely to pose a risk to sex offenders and their families and cohabitants. The public interest is not served – indeed, it is undermined – by enforcement of an unconstitutional law singling out a discrete, outcast group to speak in such a way that their persons, property, and loved ones may be endangered. Because the impact on the public of enjoining this section of the Halloween Ordinance is likely to be negligible, the Court finds that a temporary restraining order is in the public interest.

Conclusion

Plaintiffs have failed to call into question the constitutionality of sections 5.43-03(b)–(d) of the Halloween Ordinance. Thus, the Court denies Plaintiffs' Application as it pertains to those provisions.

Plaintiffs have, however, made a clear showing that they are likely to succeed on the merits of their facial challenge to the sign posting requirement of the Halloween Ordinance and that they are likely to suffer irreparable harm absent a temporary restraining order. Moreover, the Court also finds that the balance of equities tips in Plaintiffs' favor and that the public interest will be served by a limited injunction. Thus, the Court finds that the issuance of a temporary restraining order is appropriate.

In light of the foregoing, the Court grants in part and denies in part Plaintiffs' *Ex Parte* Application for Temporary Restraining Order. The Court hereby temporarily enjoins the City from enforcing the sign posting requirement of the Halloween Ordinance, section 5.43-03(a) of the Simi Valley Municipal Code.[4/] This Minute Order shall constitute the temporary restraining order; no further Order shall issue at this time.

IT IS SO ORDERED.

NOT FOR PUBLICATION

4/ Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court orders the temporary restraining order is effective for 14 days. Plaintiffs' request for an order to show cause why a preliminary injunction should not issue is denied without prejudice inasmuch as Halloween falls within that 14 day period. If this matter is not resolved or tried on the merits before the celebration of Halloween in 2013, Plaintiffs are free to renew their motion for a preliminary injunction.