NO. 20-1587

In the Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

TAZIN ARDELL HILL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF OKLAHOMA, ARIZONA, ARKANSAS, IDAHO, KENTUCKY, MISSISSIPPI, MONTANA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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JUNE 14, 2021

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QUESTIONS PRESENTED

1. May a State require convicted sex offenders to obtain and carry a state identification bearing the words "sex offender" without facially violating the First Amendment's prohibition on compelled speech?

2. Does a convicted sex offender have a First Amendment right not to be prosecuted for fraudulently altering a state identification card after scratching off a statutorily required sex-offender designation?

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INTERESTS OF AMICI CURIAE[1]

Amici States have strong interests in communicating vital and accurate information about our citizens through government identification documents. We create and control these documents, and we rely on our ability to effectively communicate information within our own respective agencies and with each other.

Amici States also have strong interests in protecting the public against convicted sex offenders. States have a long history of registering sex offenders and communicating registered information to affected communities. Several of *Amici* States also have a particular interest in driver's license notation laws like the one at issue here. *See, e.g.*, Okla. Stat. tit. 47, § 6-111. Our ability to effectively notify law enforcement, each other, and the public of sex offenders does not violate the First Amendment.

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[1] *Amici* notified the parties of the intention to file this brief at least ten days in advance, and *Amici* submit this brief pursuant to Sup. Ct. Rule 37.4.

SUMMARY OF THE ARGUMENT

Driver's licenses are state-created identification documents, and they should be classified as government speech exempt from First Amendment analysis. *Amici* States control the design and message of those licenses, and no reasonable observer would believe that information on the license is endorsed by or the message of the licensee, making those licenses a classic example of government speech.

The Louisiana Supreme Court concluded that driver's licenses are both government speech and private speech by misapprehending the test for government speech, which needs greater clarification from this Court. Lower courts have inconsistently applied several multi-factor tests for government speech. The hybrid doctrine of government and private speech used in license plate cases is also incorrectly being applied outside that unique factual context. The practical result is that the muddled legal analysis is leading courts to second-guess *Amici* States' decisions regarding identification documents rather than apply clear legal rules.

Even if driver's licenses are private speech in some form, the sex offender designation that Louisiana uses would survive scrutiny. States have a long history of using registration and community notification laws to protect the public from sex offenders. Linking our registration systems to our driver's license systems help us ensure the accuracy of our registration systems. Adding the "sex offender" label to licenses furthers our goals of notifying law enforcement, the general public, and other sovereigns.

ARGUMENT

States communicate information about their citizens in a multitude of ways every day. This speech is not ordinarily subject to First Amendment analysis because "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Our "government[s] would not work" if every aspect of our communication about our citizens were subject to objections. *Id.*

One primary way that states communicate information about our citizens is through state-issued driver's licenses and identification cards. States pick the format and design of the cards, decide on the information they convey, record the relevant information, and issue the cards. *See, e.g.*, Okla. Stat. tit. 47, §§ 6-101–6-309; Okla. Admin. Code. §§ 595:10-1-1–595:10-1-101.

While acknowledging these cards are government speech, the Louisiana Supreme Court read this Court's precedents to require simultaneously treating these cards as private speech. Pet.App.20-21. As a result, it applied strict scrutiny to Louisiana's decision to identify certain citizens as sex offenders on their driver's licenses. Pet.App.23. This decision was not only incorrect, but it also demonstrates the need for this Court to clarify this area of law.

Amici States agree with Louisiana that the driver's licenses we issue are government speech, not private speech. As Louisiana explains, the best inter-

pretation of this Court's precedents is that driver's licenses are government speech. Pet.8-13. They are "government IDs" in the clearest sense possible. *Walker*, 576 U.S. at 212.

In addition to supporting Louisiana's arguments in its Petition, we offer these two further reasons for granting certiorari in this case. First, existing jurisprudence on government speech is too vague, leading to inconsistent lower court decisions on the validity of our laws. Second, even if driver's licenses are private speech, sex offender notations on driver's licenses are critical to our efforts to protect the public such that they survive First Amendment scrutiny.

I. THE LACK OF A CLEAR TEST FOR GOVERNMENT SPEECH IS CREATING CONFLICTING PRECEDENT IN LOWER COURTS.

Again, *Amici* agree with Petitioner that the decision below conflicts with the best reading of this Court's precedent. But certiorari is also warranted because of the lack of clarity in that precedent. Since this Court's jurisprudence does not clearly define the boundaries between government and private speech, lower courts are often inclined to second-guess state speech without First Amendment justification. The confusion only compounds when courts attempt to expand the scope of this Court's license plate cases, which create a hybrid doctrine combining government speech and free speech analysis for those peculiar state-created items. The practical result is that states are often subject to unpredictable decisions from lower courts that extend the hybrid doctrine to new fact patterns as a consequence of the lack of clarity on government speech.

1. Courts "lack a precise test for separating government speech from private speech." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1230 (11th Cir. 2019). The existing multi-factor tests are often too open-ended to provide meaningful guidance on what constitutes government speech. *See* Clay Calvert, *The Government Speech Doctrine in Walker's Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 WM. & MARY BILL RTS. J. 1239, 1244-45 (2017).

One possible indication of government speech is if a government has designed a message "from beginning to end" rather than taking input from others. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). But not all government speech is designed by the government. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009). Another factor is whether the speech occurred in a form that a reasonable observer would "closely" identify with the government. *See id.* at 472. Sometimes government speech occurs when governments have long used a particular format to communicate, *Walker*, 576 U.S. at 211, setting a limit on states' ability to experiment with new forms of communication. With so many indicia of possible government speech, even this Court has apparently felt obligated to review several multi-factor tests in order to determine whether a case before it constituted government speech. *See Matal v. Tam*, 137 S.Ct. 1744, 1759-60 (2017).

In the context of identification documents, one particular ambiguity in precedent is the most concerning: whether government speech becomes private speech when it is merely *associated* with a private

person, or whether it must appear to be *endorsed* by a private person. *Compare Wooley*, 430 U.S. at 717 n.15, *with Johanns*, 544 U.S. at 565 n.8. The court below applied the association standard, Pet.App.15, Pet.App.16, Pet.App.23, while the dissent believed a government document becomes compelled speech only when it appears to be *endorsed* by a private person, Pet.App.32-33. This distinction is of enormous importance when addressing identification documents. All identification documents are by definition affiliated with a particular person, as they would cease to be meaningful documents otherwise. Louisiana is correct that the endorsement test is the better reading of this Court's jurisprudence and the better interpretation of the First Amendment. Pet.8-10. But the court below did not lack citations from this Court for its contrary reading. Pet.App.15, Pet.App.16-17, Pet.App.23. Certiorari is warranted to make clear the test for government speech, and especially the test for when speech is *exclusively* government speech.

2. Because there is no clear government speech test, lower courts are attempting to export to other contexts this Court's license plate cases, where the Court stated that government speech can "also implicate the free speech rights of private persons." *Walker*, 576 U.S. at 219. Courts do not have to clearly determine what constitutes government speech if they can find an excuse to apply more familiar First Amendment tests by just saying it is private speech, too. The result is that litigation in the lower courts is muddling application of speech doctrines rather than clarifying them.

But outside the license plate context, jurisprudence on compelled speech cannot reasonably apply to gov-

ernment speech. Compelled speech is a type of "content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). Such regulations alter the content of private messages rather than convey the message directly. *See id.* One of the factors in reviewing such regulations for constitutionality is whether they compel speech that the government could deliver directly instead of compelling others to speak. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2376 (2018). Such a rule makes little sense if government speech qualifies as compelled speech. Yet several lower courts have avoided grappling with this obvious tension by broadly applying the hybrid rule unique to license plates.

The rationale of a hybrid doctrine in the context of license plates is due to their *sui generis* nature, not easily expanded to other contexts. *Cf. Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). After all, the license plate cases that feature prominently in this Court's jurisprudence are government-issued identifications that many States allow citizens to personalize. As a result, plates may carry both slogans and imagery from a private speaker as well as "identifying numbers and letters" from the government. *See id.* at 246-47. It is evident why past cases found it difficult to categorize these unique facts as solely private or government speech.

Yet the idiosyncratic nature of personalized license plates does not warrant a collapse of private speech and government across all identification documents. The "marketplace of ideas," *Walker*, 576 U.S. at 207, exists in license plates but not in driver's licenses.

There are no personalized driver's license designs that we are aware of. There are no vanity driver's licenses. The State controls the message, with little to no room for input from the person carrying the identification document other than listing objective information that the State requires listing (such as height and weight). Labelling such a license as a free speech concern is just a back door creating objector's rights to government speech. Perhaps that is why some courts have rejected an expansive view of this hybrid doctrine. *See, e.g.*, *Shurtleff v. City of Boston*, 986 F.3d 78, 92-93 (1st Cir. 2021) (treating third-party flags displayed at City Hall as solely government speech).

If this hybrid doctrine is expanded to all identification documents, more than driver's licenses will experience new micro-management by objectors. As Louisiana explains in detail, the community notification aspects of the federal Sex Offender Registration and Notification Act ("SORNA") might be subject to the same First Amendment attack leveled here. Pet.21-23. Several states satisfy SORNA's community notification requirement by having the offender mail the required notices to nearby residences and businesses rather than the states mailing it themselves. A lower court might find that the offender is speaking by mailing the notice, or it might even find that the states that mail the notice themselves are still subject to strict scrutiny because the offender is affiliated with the notices.

A significant problem with extending this hybrid doctrine beyond its narrow license plate confines is that it ends up suppressing speech that both the government and private speech doctrines are designed to protect. As one scholar has described, the current application

of the government speech doctrine in this fuzzy framework "presses down heavily in favor of censorship on the scales of justice that balance government interests with those of free expression." *Calvert*, 25 WM. & MARY BILL RTS. J. at 1299. After all, the rule with license plates is effectively that neither the government nor the private person can say anything that the other dislikes. *See Walker*, 576 U.S. at 214 (government speech analysis prevents private speech); *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977) (free speech analysis prevents government speech). In short, this hybrid doctrine is problematic because it suppresses speech wherever it extends.

3. The practical experience for states under these misapplications of this Court's current jurisprudence is that lower court outcomes on the speech at issue are unpredictable. For example, passports can apparently include sex offender notations, *see Doe v. Kerry*, No. 16CV654, 2016 WL 5339804, at *18 (N.D. Cal. Sept. 23, 2016), while driver's licenses cannot, *see Doe 1 v. Marshall*, 367 F.Supp.3d 1310, 1324–26 (M.D. Ala. 2019); Pet.App.5. It is not clear that the hybrid rule even works that well for license plate disputes, either. Several courts have held that states *cannot* regulate personalized letters and numbers on plates even though they can regulate personalized design of those same plates. *See Carroll v. Craddock*, 494 F.Supp.3d 158, 166 (D.R.I. 2020); *Kotler v. Webb*, No. 19CV2682, 2019 WL 4635168, at *8 (C.D. Cal. Aug. 29, 2019); *but see Comm'r of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2015). *Amici* States are wholly unclear on what possible legal rule could obligate us to print "FKGAS" or "COYW" (abbreviation for "Come On You Whites") when

requested but does not obligate us to print the confederate flag when requested.

Decisions like the one below mean that state agencies and legislatures are at a loss on what the law permits for state identification documents. A single upset objector to a state identification document can drag the state through years of litigation even if "a reasonable observer" would never share the plaintiff's idiosyncratic concerns. *See, e.g.*, *Cressman v. Thompson*, 798 F.3d 938, 950 (10th Cir. 2015), *cert. denied*, 577 U.S. 1216 (2016) (objection to Native American image on license plate).

Only this Court can correct the jurisprudential confusion in lower courts. In seeking a clearer government speech doctrine, *Amici* States are also well-aware of this Court's caution on government speech. *See Matal*, 137 S.Ct. at 1758. We are not seeking some broad definition "susceptible to dangerous misuse." *Id.* States simply need better guidance on what constitutes government speech and whether the unique hybrid of government and private speech doctrines applies just to license plates or now reaches all of our identification documents. This Court should grant certiorari to end the vague and disparate applications of government speech doctrine occurring in lower courts. Further percolation will only lead to further confusion.

II. DISSEMINATING INFORMATION ON KNOWN SEX OFFENDERS TO STATE OFFICERS, OTHER SOVEREIGNS, AND THE COMMUNITY IS A VITAL STATE INTEREST.

Should this Court subject the content of driver's licenses to First Amendment scrutiny, then the sex offender designation would survive strict scrutiny. Pet.13-16. *Amici* States, like all states, have a long tradition of using registration and notification to protect the public against sex offenders. Linking driver's licenses to sex offender registries helps us improve our registration efforts, using notations on driver's licenses is a valuable part of improving community notification.

1. Laws notifying the public of sex offender status have a well-established pedigree. In 1937, Florida became the first state to create a sex offender registry. Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008). In 1947, California became the first state to implement a state-wide registry for all sex offenders. *Id.* at 5. By 1989, twelve states had operating sex offender registries. *Id.*

A series of high profile crimes by convicted sex offenders brought national attention to the need for publicly available and widely disseminated information about the identities of known sex offenders. *See* 34 U.S.C. § 20901 (listing 17 examples from 1989 to 2002). In one widely known case in 1994, 7-year-old Megan Kanka was kidnapped, raped, and murdered by strangulation at the hands of her neighbor, who had two previous convictions for sexually assaulting young girls. *Nichols v. United States*, 136 S.Ct. 1113, 1116 (2016);

Smith v. Doe, 538 U.S. 84, 89 (2003); Daniel M. Filler, *Making the Case for Megan's Law*, 76 IND. L. J. 315, 315-17 (2001). Megan's parents were unaware that the man living across the street was a convicted pedophile—and they continue to believe that their daughter would still be alive today if they had access to this information. *See* Filler, 76 IND. L. J. at 315.

"By 1996, every State, the District of Columbia, and the Federal Government had enacted" some version of "Megan's Law." *Smith*, 528 U.S. at 90. Yet Congress was not satisfied with the limited information available in many of the state registries. In 2006, it transitioned toward a comprehensive set of federal standards to govern state sex offender registration and notification programs by promulgating SORNA, 34 U.S.C. §§ 20901–20962, part of the Adam Walsh Child Protection & Safety Act. Pub. L. No. 109-248, §§ 101-155, 120 Stat. 587 (2006). This law created uniform standards "cover[ing] more sex offenders" and "impos[ing] more onerous registration requirements[] than most States had before." *Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019) (plurality op.). SORNA exists to ensure that states create a nationally coordinated system "[i]n order to protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901. This was meant "to make more uniform what had remained 'a patchwork of federal and 50 individual State registration systems,' with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'" *Nichols*, 136 S.Ct. at 1119 (quoting *United States v. Kebodeaux*, 570 U.S. 387, 399 (2013). It conditioned federal funding to states on their substantial implementation of certain requirements, 34 U.S.C.

§ 20927(a), including the dissemination of certain information on internet sites. 34 U.S.C. § 20920.

All fifty states currently monitor and track convicted sex offenders through systems implementing SORNA. Many states provide greater protection for the public than merely the minimum required by SORNA, operating a framework of laws that contain registration requirements, residency restrictions, and other limitations. In virtually every state, sex offenders must provide a copy of their driver's license and license plate number for the sex offender registry.

2. Two of the largest problems for states are (1) ensuring that they have accurate information to track convicted sex offenders and (2) ensuring that they are communicating that information in a timely and effective manner. States are experimenting with different ways of addressing these two problems.

The magnitude of the first problem—inaccurate sex offender records—varies across states. For example, studies between 2006 and 2010 found that Nebraska's records were 90% accurate, while New York's records were only 63% accurate, Oklahoma's records were just 56.5% accurate, and Vermont's records were a mere 25% accurate. *See Sex Offender Management Assessment and Planning Initiative*, Ofc. Justice Progs., U.S. Dep't of Justice, March 2017, at 201, *available at* https://SMART.gov/SOMAPI. Understandably, states with larger accuracy problems have placed a greater priority on solving those problems. Some states have engaged in very aggressive efforts to track sex offenders. *See, e.g.*, Wis. Stat. § 301.48 (GPS tracking). For many states, because state-issued driver's licenses are the most commonly issued form of government identification, and because these are directly linked to a

resident's address, these have proved the most natural way to accurately track sex offenders.

Congress noticed this accuracy problem and ordered a study to address it. *See* 120 Stat. 645 (2006). In particular, Congress ordered the Government Accountability Office to study the feasibility of using driver's license registration to improve compliance with sex offender registration requirements. *See id.* The study itself was aimed at determining the cost and feasibility of requiring driver's license systems "to automatically access State and national databases of registered sex offenders" in a manner similar to a system already implemented in Nevada. *Id.*

While no federal law has required linking the driver's license and sex offender systems, states have tried five different types of laws to achieve that link. See *Convicted Sex Offenders: Factors That Could Affect the Successful Implementation of Driver's License-Related Processes to Encourage Registration and Enhance Monitoring*, GAO-08-116, U.S. Gov't Accountability Ofc., January 2008, at 10-14, 41-42. Mandatory identification laws require sex offenders to obtain driver's licenses or similar identification cards through driver's license-related processes. *See id.* at 12. Shortened renewal laws require sex offenders to obtain new driver's licenses more frequently than other license holders, keeping address information up to date. *See id.* at 13. License suspension laws require state agencies to suspend, cancel, or refuse to issue or renew licenses for offenders not in compliance with registration requirements. *See id.* at 11. License notation laws require agencies to note on a sex offender driver's license or identification cards that the person is a sex offender. *See id.* Finally, cross-validation laws require

state agencies to affirmatively confirm that a sex offender registry has valid information through validation checks with motor vehicle agency records. *See id.*

While some of these laws only concern accurate records, others also further the State's compelling interest in disseminating that information in a timely and effective manner. The conviction information for sex offenders is often already public, but registry and notification laws serve a vital function: "mak[ing] the document search more efficient, cost effective, and convenient for [the] citizenry." *Smith*, 538 U.S. at 99. Sex offenders have been known to exhibit higher rates of recidivism, *see, e.g.*, *Kebodeaux*, 570 U.S. at 395, and states have a moral duty to warn their citizens of the risk of sex offenders in their community.

3. Several states have adopted sex offender notations on driver's licenses in order to advance their compelling interest in protecting the public. These notations take a variety of forms. Oklahoma uses the notation "sex offender." Okla. Stat. tit. 47, § 6-111(E). Florida uses the notation "sexual predator" for some offenders while using the code "943.0435, F.S." for other offenders. Fla. Stat. § 322.141(3). Delaware uses a restriction, "Y," to denote sex offenders. Del. Code tit. 21, § 2718. Kansas, Mississippi, Tennessee, and West Virginia also have their own notations on driver's licenses. Kan. Stat. § 8-243(d); Miss. Code. § 63-1-35(3); Tenn. Code § 55-50-353; W. Va. Code § 17B-2-3(b).

These notations reach three different populations: in-state law enforcement, other sovereigns, and the general public.

To start, these notations are valuable to in-state law enforcement because they immediately alert the officer of the individual's status. At first blush, an adult with a child appears to be a normal interaction; but furnished with the awareness that the driver is a habitual or aggravated sex offender, the officer might handle the situation differently.

The notations with the words "sex offender" are also especially valuable to other sovereigns. To be sure, an in-state officer may be familiar with a "symbol, code, or a letter designation," Pet.App.23, as some states use. But if a sex offender drives out of Delaware and is loitering by a playground, police officers in another state or tribal jurisdiction might have no clue what the "Y" indicates. The same problem arises when a sex offender attempts to obtain a driver's license from another state whose agencies are unfamiliar with the code. Thus, while all notations advance the states' interests, some states have spelled out "sex offender" in order to better apprise officers and administrators in other jurisdictions.

States are not alone in this view in the value of the "sex offender" label in communications with other sovereigns. Just a few year ago, Congress enacted the International Megan's Law, which directs the government to develop and implement a plan for marking U.S. Passports with an indication of the holder's status as a sex offender, in order to apprise foreign countries of the holder's status upon entry. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016). The current notation on passports states "The bearer was convicted of a sex offense against a minor, and is

a covered sex offender pursuant to 22 United States Code Section 212b(c)(1)." *See Passports and International Megan's Law*, U.S. Dep't of State, available at https://travel.state.gov/content/travel/en/passports/legal-matters/passports-and-international-megans-law.html.

Beyond law enforcement and sovereigns, these notations are valuable to the general public. The store clerks and security guards who might see a driver's license are precisely those well-situated in the community to monitor the activities of sex offenders. As an illustration of the state's interest, consider the case of Michael Slatton. *See* Lori Fullbright, *Oklahoma Requires Aggravated Sex Offenders To Have It Printed On License*, NEWS ON 6 (May 6, 2014), *available at* http://www.newson6.com/story/25447223/oklahoma-requires-aggravated-sex-offenders-to-have-it-printed-on-license. Oklahoma police were able to catch Slatton when a store clerk noticed that the man had the words "sex offender" stamped on his license. "The clerk says those words caught his attention because Stratton was acting strange and buying coloring books and crayons." *Id.* Because of this awareness, police were able to rescue the 8-year-old whom he had kidnapped. "That information was key to Slatton's arrest and recovering the eight-year-old girl who'd been kidnapped." *Id.*

To be sure, the challenge of encouraging sex offenders to partake in constructive citizenship, while limiting the dangers they present to society, is a difficult one. *See McGinnis v. Royster*, 410 U.S. 263, 269-270 (1973). At one extreme, states could achieve maximum security for children by incarcerating sex offenders for life. At the other extreme, states could reintroduce sex offenders without any public notification and hope for the best.

The current system of registration and community notification is a reasonable middle road. States continue to ensure that their systems are accurate and distribute information when and where it is needed. Explicit labels on driver's licenses are an effective and tailored way of serving those goals and advancing the states' compelling interest in protecting the public. By concluding otherwise, the Louisiana Supreme Court did not properly scrutinize Louisiana's law and undermined public safety.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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JUNE 14, 2021