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 Louisiana Supreme Court

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

The Louisiana Supreme Court incorrectly expanded the scope of the First Amendment's protections, twisting the compelled-speech doctrine into an unrecognizable rule that essentially wipes out government's ability to speak for itself through government-issued documents. The court held that the First Amendment prohibits Louisiana from using the words "SEX OFFENDER" to communicate a person's criminal history on a State ID. Reasoning that the designation impermissibly compelled Defendant Tazin Hill's speech, the court prohibited the State from prosecuting Hill—even though he scratched off the designation with fraudulent intent.

The court's decision is incompatible with federal law and this Court's jurisprudence. Congress has provided a comprehensive set of minimum registration and notification standards for States in the Sex Offender Registration and Notification Act (SORNA) that depends on effective government communication with the public about the dangers sex offenders pose. *See* 34 U.S.C. § 20912 ("Each jurisdiction shall maintain a jurisdiction-wide sex offender registry . . . ."). In addition, the federal government places sex-offender designations on passports. 22 U.S.C. § 212b ("[T]he Secretary of State shall not issue a passport to a covered sex offender unless the passport contains a unique identifier . . . ."). And this Court has repeatedly rejected the notion that the First Amendment protects fraud. *See, e.g.*, *Illinois, ex rel. Madigan v.*

Telemarketing Associates, 538 U.S. 600, 612 (2003).

Louisiana placed the sex-offender designation on State IDs for the same reason that Congress enacted SORNA: "Sex offenders are a serious threat in this Nation." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted). This Court has upheld sex-offender registration and notification laws in the face of ex-post facto, due process, and double-jeopardy challenges. *See id.*; *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997). The Court should reject this newest attack on critical public-safety measures "designed to protect [Louisiana's] communities from sex offenders." *Connecticut Dep't of Pub. Safety*, 538 U.S. at 4.

To obscure the importance of the Louisiana Supreme Court's decision, Hill characterizes the State's sex-offender designation on IDs as "idiosyncratic." BIO 8. He accuses the State of "cobbl[ing] together" a test for the compelled-speech doctrine from two footnotes and a single-Justice concurrence. BIO 17. And, going to the merits, he contends the Louisiana Supreme Court's decision is "fully consistent" with this Court's First Amendment jurisprudence. BIO 14. None of these arguments should dissuade this Court from granting review.

To the contrary, Hill's arguments actually underscore the need for this Court to intervene. If the First Amendment forbids a State from communicating

basic facts on an ID—which is State property and contains State speech that is required by State law—SORNA's compulsory disclosure requirements will soon fall under attack. Granting review now will foreclose that attack and prevent significant, foreseeable litigation.

Hill's argument that the State cobbled together a test only highlights the necessity of granting review so this Court can clarify the limits of the compelled-speech doctrine and its relationship with the government speech doctrine. Scholars and courts have remarked on the curious relationship between the government speech and compelled speech doctrines. *See, e.g.*, *Cressman v. Thompson*, 798 F.3d 938, 950 (10th Cir. 2015) (concluding "government-speech and compelled-speech doctrines are concerned with different things"). Other courts have expressed frustration at the lack of a "precise test" for dealing with these issues. *See, e.g.*, *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1230 (11th Cir. 2019); *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074 (11th Cir. 2015). Even without a well-defined test, it is clear that the Louisiana Supreme Court's decision expanded the compelled-speech doctrine well beyond the bounds that this Court's jurisprudence sets.

Now is the time to address these issues. If this Court does not intervene, authorities will be less able to protect the public—especially children—from sex offenders. The stakes are too high for the Court to wait

for further percolation. This case presents an ideal vehicle for the Court's consideration of the First Amendment issues. The Court should grant review.

I. THE LOUISIANA SUPREME COURT EXPANDED THE COMPELLED-SPEECH DOCTRINE—UNDERMINING FEDERAL LAW AND EXACERBATING A SPLIT.

It is difficult to overstate the far-reaching impacts of expanding the First Amendment compelled-speech doctrine to prevent a State from communicating publicly known facts on a State ID. The Louisiana Supreme Court's decision strikes at the State's ability to speak for itself and warn constituents of danger. Hill attempts to mask the importance of the decision by arguing that (1) the decision is "fully consistent" with this Court's jurisprudence; (2) Louisiana's sex-offender designation is "idiosyncratic"; and (3) there is no split of authority. Each of these arguments is unfounded.

1. Hill contends that the Louisiana Supreme Court's opinion "follows directly from this Court's compelled speech precedent." BIO 15. According to Hill, "the Louisiana Supreme Court properly applied this Court's precedent to conclude that the [designation] did not constitute government speech." BIO 16. This is a pure merits argument, which would be better considered with full briefing and oral argument.

But for the purposes of this petition, it is worth

noting the error in Hill's contention that the sex-offender designation is not "government speech." That is plainly wrong. A State ID bearing words required by State law is State speech.[1] People understand—as this Court has observed—that State IDs "convey[] some message on the issuer's behalf." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015) (cleaned up). And, like Texas did with the license plates at issue in *Walker*, Louisiana "maintains direct control over the messages conveyed on" its State IDs. *Id.* at 213.

As a general matter, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Id.* at 207. This is the "government-speech doctrine," without which the "government would not work." *Id.* For example, "[h]ow could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who

[1] The fact that Louisiana offers some "vanity" automobile drivers licenses—as Hill points out in his response—does not alter this analysis. Issuers of State IDs "'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated.'" *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)). And, in any event, the sex-offender designation is not optional—like height, weight, and age.

oppose this type of immunization?" *Id.* at 207–08. States convey essential information on IDs, including the height, weight, and age of the ID's bearer. This Court has never required the government to survive a heightened scrutiny analysis for placing such information on a government ID. But under Hill's view and the Louisiana Supreme Court's holding, persons who object to disclosing their weight on a driver's license now have an unqualified First Amendment right to withhold it. After all, the Louisiana Supreme Court held that disclosing sex-offender status *facially* violates the First Amendment—it's unlawful in *every* circumstance—and Hill never shows how the unwanted disclosure of a prior criminal conviction differs from the unwanted disclosure of a person's weight.

Courts are confused about the interplay between the compelled-speech doctrine and the government-speech doctrine—as illustrated by the Louisiana Supreme Court's opinion. *See* Pet App. 28. ("[W]e are faced with the question of whether Louisiana's identification [card is] more like a license plate, which can be a hybrid of compelled and government speech, or more like a passport, which at least one federal district court ruled is government speech that is immune to the reach of the First Amendment."). Other courts have articulated the difficulty of addressing similar issues in the absence of a clear test from this Court. *See, e.g.*, *Cambridge Christian Sch.*, 942 F.3d at 1230 (observing that courts "lack a precise test for separating government speech from private speech"); *Mech*, 806

F.3d at 1074. Scholars and courts have observed the "curious relationship" between the government-speech and compelled-speech doctrines. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 Harv. L. Rev. 2411, 2422 (2004); *see Cressman*, 798 F.3d at 950. Hill only confirms the point by suggesting that the "government compels speech" whenever "it mandates 'speech that a speaker would not otherwise make'"—a standard that necessarily would invalidate sex-offender designations on passports. BIO 14 (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)). This Court should avoid that result and clarify the scope of the compelled-speech doctrine.

Finally, the Louisiana Supreme Court's compelled-speech holding was not its only break from this Court's precedent. This Court has said again and again that the First Amendment does not protect *fraud*. *See, e.g.*, *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 189–91 (1948); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939). "Specific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). And yet, the Louisiana Supreme Court's ruling prohibits the State from prosecuting Hill for fraudulently altering his ID.

2. Hill attempts to obscure the importance of the Louisiana Supreme Court's decision by arguing that the sex-offender designation is "idiosyncratic" and has been adopted by relatively few States. BIO 27. This

argument ignores the broader implications of the Louisiana Supreme Court's reasoning. The Louisiana Supreme Court limited its holding to State ID cards—but its *ratio decidendi* went much further and undermines federal law. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020) (plurality op.) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."). The court said that the State lacks power to designate Hill's status as a sex-offender on a State ID. That holding strikes directly at the State's power to require sex offenders to reveal their status to people in their communities. That, in turn, calls into doubt States'—and SORNA's—registration schemes.

For example, Louisiana law requires a sex offender to "give notice of the crime for which he was convicted, his name, residential address, a description of his physical characteristics . . . and [his] photograph" to "[a]t least one person in every residence or business within a one-mile radius in a rural area and a three-tenths of a mile radius in an urban or suburban area." La. Rev. Stat. 15:542.1. Moreover, sex offenders must also notify "[t]he superintendent of the school district where the offender will reside" of their presence and status. *Id.* The validity of these laws—and similar laws in other States—are now in question. *See, e.g.*, Ariz. Rev. Stat. § 13-3825; Colo. Rev. Stat. § 16-13-901 et seq.; Del. Code tit. 11, § 4120; 730 Ill. Comp. Stat. 152/120; Tex. Code Crim. Proc. art. 62.056.

Expanding the compelled-speech doctrine also will

have ramifications for federal law. It is SORNA, after all, that establishes the minimum registration and notification guidelines for all States. It compels sex offenders to provide information "to the appropriate official for inclusion in the sex offender registry"—including the offender's name, social security number, address, educational institution, license plate number, vehicle description and more. 34 U.S.C. § 20914; *see id.* § 20920. Moreover, a "sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person" and inform local authorities of the change. *Id.* § 20913.

It bears emphasis that Congress has required a sex-offender designation on passports, which are the federal equivalent of a state-issued ID. 22 U.S.C. § 212b. But the Louisiana Supreme Court inexplicably held that the First Amendment tolerates sex-offender designations on passports but not State IDs. *See* Pet. App. 32. The court reasoned that "[p]assports are not routinely viewed by the public" and they are a "letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 292–93 (1981)). This is wrong. Passports are routinely viewed for interstate travel, job verification, and other identification purposes. Passports are a designated alternative to the REAL ID and are recognized for I-9 verification. *See* U.S. Citizenship and Immigration Services, *Form I-9 Acceptable Documents*,

https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents; Department of Homeland Security, *About REAL ID*, https://www.dhs.gov/real-id/about-real-id. Both documents constitute forms of government-issued identification that people usually carry "in a purse or pocket." *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). A State ID contains State speech in exactly the same way that a passport contains government speech.

The Louisiana Supreme Court's analysis is, in effect, a smoke signal to this Court that lower courts around the country need a test to guide them when addressing compelled-speech claims. *See Cambridge Christian Sch.*, 942 F.3d at 1230. This Court's intervention is warranted.

3. Finally, Hill contends that "there is no split of authority on the questions presented." BIO 9. Once again, Hill unduly narrows the court's rationale. Properly understood, the decision deepens a split among authorities across the country.

The Louisiana Supreme Court relied heavily on a federal district court opinion striking down Alabama's requirement of a sex-offender designation on State IDs. *See* Pet. App. 24 (citing *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019)). But if the Alabama federal district court and the Louisiana Supreme Court are correct—and the First Amendment prohibits States from mandating speech that a speaker would not otherwise make—then the government also

lacks power to place sex-offender designations on passports.

The *ratio decidendi* of the Louisiana and Alabama courts conflicts with the decisions other lower courts that have properly rejected sex-offenders' First Amendment claims. *See, e.g.*, *Doe v. Kerry*, No. 16-CV-0654-PJH, 2016 WL 5339804, at *18 (N.D. Cal. Sept. 23, 2016) (rejecting challenge to sex-offender designation on passports); *see also Benson v. Fischer*, No. 16-CV-509-DWF-TNL, 2019 WL 3562693, at *5 (D. Minn. Aug. 6, 2019) (rejecting a First Amendment challenge brought by sex-offenders in a program requiring them wear badges labelled "Minnesota Sex Offender Program.").

Hill's contention that the Louisiana Supreme Court's decision did not split with *Reed v. Long* further demonstrates the confusion that abounds regarding the interplay of the government-speech and compelled-speech doctrines. In *Reed*, a district court rejected a compelled-speech challenge to a sheriff's practice of placing warning signs at the residences of registered sex offenders before Halloween. No. 5:19-CV-385 (MTT), 2020 WL 7265693, at *12 (M.D. Ga. Dec. 10, 2020). Hill contends that there is no split with the Louisiana Supreme Court's decision because *Reed* is distinguishable. The signs at issue in that case—unlike the State IDs at issue here, according to Hill—"clearly state that the speaker is the government." BIO 13 (internal quotation marks omitted). As dis-

cussed, State IDs are State speech. When the Louisiana Supreme Court concluded otherwise, it split with authorities such as *Reed*. This Court should grant review and resolve the split.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO CONSIDER THE LIMITS ON THE COMPELLED-SPEECH DOCTRINE.

This Court has observed that sex offenders pose a "serious threat" to their communities and the nation. *Connecticut Dep't of Pub. Safety*, 538 U.S. at 4 (internal quotation marks omitted). The ability to warn the public of the danger is the keystone of the federally mandated registration and notification system. The Louisiana Supreme Court's decision undermines the stability of SORNA, sex-offender designations on passports, and every State's registration and notification scheme.

The critical public-safety concerns animating those laws warrant this Court's review of these issues now. Children die when recidivistic sex offenders hide their status. For example, in *State v. Langley*, defendant Ricky Langley evaded his parole, crossed state lines, concealed his status as a sex offender, and rented a room in a house with children. *State v. Langley*, 2010-969 (La. App. 3 Cir. 4/6/11), 61 So. 3d 747, 751, writ denied, 2011-1226 (La. 1/20/12), 78 So. 3d 139. Langley ultimately confessed to molesting and brutally murdering one of the neighbor's boys. *Id.* at 752. Congress cited many similar examples when

passing SORNA. 34 U.S.C. § 20901 (listing numerous children from around the country who suffered at the hands of sex offenders).

Nor does Hill's rhetorical device—labeling the disclosure rules "branding requirements," BIO 15—counsel against granting the petition. Any stigma from sex-offender disclosure or registration laws "results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Smith v. Doe*, 538 U.S. 84, 98 (2003). Disseminating accurate information about a criminal record on a government ID offends the First Amendment no more than disseminating the information on a public registry.

This Court has upheld sex-offender registration and notification laws many times, against a myriad of different attacks. *See id.*; *Connecticut Dep't of Pub. Safety*, 538 U.S. at 4; *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997). The Court should again uphold these laws—which are of "paramount" importance—against Hill's compelled-speech challenge. La. Rev. Stat. 15:540(A).

CONCLUSION

Louisiana respectfully asks the Court to grant the petition for a writ of certiorari.

Respectfully Submitted,

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