No. 20A108

In the Supreme Court of the United States

STATE OF LOUISIANA,

Applicant,

v.

TAZIN ARDELL HILL

Respondent.

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel A. Alito
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Fifth Circuit

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TO THE HONORABLE JUSTICE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Defendant Tazin Hill contends that the challenged Louisiana laws requiring him to carry an identification card disclosing his status as a convicted sex offender violate his First Amendment rights. He argues that the Louisiana Supreme Court's holding does not split with this Court's jurisprudence or create any division within the lower courts. But Hill is wrong on each of these points. And if the Court does not grant a stay, Louisiana will be irreparably harmed because it will be unable to enforce key provisions of its sex-offender registry statutes that prevent sex offenders from fraudulently altering their State IDs and serve critical public-safety interests by allowing the public and law enforcement to easily identify sex offenders.

ARGUMENT

I. THERE IS A FAIR PROSPECT THE COURT WILL GRANT CERTIORARI AND REVERSE THE LOUISIANA SUPREME COURT'S JUDGMENT.

A. No split is necessary, but there is in fact a split.

Hill incorrectly argues that this Court is unlikely to grant certiorari because there is "there is no split in authority in the courts below." Hill Resp. at 4. A split is not an indispensable predicate to granting certiorari; this Court grants plenary review to preserve the rule of law if a lower court-decision directly conflicts with this Court's precedent. *See* Sup. Ct. R. 10(c); *see also Wilkinson v. United States*, 365 U.S. 399, 401 (1961) (granting certiorari "to consider the petitioner's claim that the Court of Appeals had misconceived the meaning" of the controlling Supreme Court decision). This case easily satisfies this ground for certiorari because the Louisiana

Supreme Court's decision directly conflicts with this Court's holdings that the First Amendment does not protect fraudulent speech—or especially fraudulent *conduct* like altering a State ID to conceal sex-offender status. *See e.g.*, *Illinois, ex rel. Madigan v. Telemarketing Associates., Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 190 (1948); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164 (1939).

In any event, as Hill acknowledges (at 5–6), the Louisiana Supreme Court's decision widened a split between lower courts about whether communicating information on a government ID is essential for government operations. The Louisiana Supreme Court's decision also results in different First Amendment rules for the States and the Federal Government. According to the court, the First Amendment allows the Federal Government to put a sex-offender designation on a passport, but does not allow a State government to put the *same information* on a State ID. No basis in logic supports this distinction. And the Louisiana Supreme Court's holding necessarily imperils the State's sex-offender statutory regime and, if widely adopted, the sex-offender registry of every State in the Country. Although Hill calls Louisiana's sex-offender designation "unusual" (at 4), several States employ similar designations (*see id.*, at 15 n.3).

At the very least, the Louisiana Supreme Court's holding that the State cannot compel disclosure of a person's sex-offender status on a State ID creates serious tension with the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20901 *et seq.*, and the sex-offender registries of every State, including Louisiana. In

accordance with federal law, all States maintain public sex-offender registries. *See* Dep't of Justice, Sex Offender Registration and Notification Act (SORNA), *https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna* ("[E]ach jurisdiction is required to comply with the federal standards outlined in [SORNA]"); *see also People v. Minnis*, 67 N. E. 3d 272, 290 (Ill. 2016) (upholding Illinois statute requiring sex offenders to disclose to the public—and periodically update—information regarding their internet identities and websites). The Louisiana Supreme Court's decision calls into question the legality of SORNA and every State's sex-offender registry and community-notification provisions.

Because the Louisiana Supreme Court's opinion directly conflicts with this Court's jurisprudence, creates different First Amendment rules for the States and the Federal Government, and creates serious tension with federal law generally, this Court is likely to grant certiorari.

B. Hill's State ID implicates no First Amendment concerns.

The government is free to speak on its own behalf without violating the First Amendment. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009)). And the government may permissibly require individuals to speak under some circumstances—"as in the case of compulsion to give evidence in court." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

Hill's State ID is government speech, and it does not offend the First Amendment because the ID does not make Hill an instrument of the State's

messaging. That remains true even when Hill uses his ID to conduct some private transactions; that usage does not transform the ID into a public, mobile billboard for government messaging. And, as this Court has observed, people generally associate the contents of an ID with the issuer of the ID, not the bearer. *See Walker*, 576 U.S. at 212.

Hill assures this Court (at 6)—as he assured the Louisiana Supreme Court—that he does not seek to challenge the sex-offender registry, nor dispute the interest furthered by the registry. ("This case does not challenge the government's authority to maintain a sex offender registry or to require people convicted of sex offenses to provide information for that purpose."). But make no mistake: If this Court concludes that the State ID unconstitutionally compels Hill's speech, the entire sex-offender registry will soon be attacked on the same grounds.

In Louisiana, when a sex offender is released from custody, he must provide "his name, residential address, a description of his physical characteristics . . . and a photograph" to "every residence or business" near his residence. La. Rev. Stat. 15:542.1.; *see also id.* at 15:542.1.5. Under SORNA, every State must include as part of its public sex-offender registry "a thorough community notification system . . . so that other law enforcement agencies, community organizations, and the public at large are aware of any new or changed registrations." Lori McPherson, The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future, 64 Drake L. Rev. 741, 761 (2016). If more onerous registration and community notification requirements can survive judicial review,

the State ID sex-offender designation should survive *a fortiori*.

C. The First Amendment does not protect fraudulently altering a State ID.

Although this Court has explained many times that the First Amendment does not protect fraud (or fraudulent conduct), Hill contends that the Constitution requires striking the Louisiana law that prohibits fraudulently altering a State ID with a sex-offender designation. La. Rev. Stat. 15:542.1.4(C). According to Hill, this is required because the Louisiana Supreme Court held that the provision requiring sex-offenders obtain the State ID—La. Rev. Stat. 40:1321(J)—is not severable from the provision that forbids fraudulently altering a State ID with a sex-offender designation. Thus, Hill reasons, because the statute requiring sex offenders to obtain and carry the marked license is unconstitutional, the fraudulent alteration provision necessarily falls too.

But this cannot be right. "Where the government does not target *conduct* on the basis of its *expressive content*, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). Fraudulent alteration of a State ID is unquestionably conduct that the First Amendment does not protect.

Even if Hill were correct, and the sex-offender designation violated the First Amendment, Hill could not take matters into his own hands and fraudulently deface his ID. When Hill defaced his ID, no court had struck down the designation, and so the public generally would have relied on Louisiana's laws as they were written on the books. This situation is not at all similar to *Wooley v. Maynard*, 430 U.S. 705, 715

(1977) or *United States v. O'Brien*, 391 U.S. 367 (1968)—where the defendants *publicly* defaced government property to make a political statement. Allowing Hill to commit a crime with serious public-safety ramifications to remedy a potential constitutional wrong is intolerable.

Under this Court's precedents, the First Amendment does not even protect fraudulent *speech*, let alone fraudulent conduct. The Louisianan Supreme Court split sharply from those precedents.

D. Louisiana's laws survive strict scrutiny.

The First Amendment requires that restrictions on speech be "narrowly tailored," but not that they be "perfectly tailored." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (citing *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). States have flexibility when crafting laws necessary to protect people from sex offenders. The fact that other States do not require marked IDs does not prove that Louisiana's law is insufficiently tailored, particularly given the State's express interest in informing the public, and not just law enforcement, of sex offenders' status. Narrow tailoring does not require a state to water down its laws to match the "lowest common denominator" relative to other States.

This Court has previously upheld laws calling for the *civil commitment* of sexual predators after their criminal sentences were completed—an imposition on liberty far greater than the restrictions on Hill at issue here. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997). Other programs calling for the registration and tracking of sex offenders have also been upheld by this Court. *See, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 395–96 (2013); *Smith v. Doe*, 538 U.S. 84, 103 (2003).

Louisiana has a "paramount" interest in protecting its residents from sex offenders. La. Rev. Stat. 15:540(A). The State's marked ID laws are necessary to fully realize this interest in guarding *the entire public* from sex offenders. Louisiana's interest is therefore broader than Alabama's interest in enforcing the law challenged in in *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310,1326 (M.D. Ala. 2019) (identifying Alabama's interest as "enabling law enforcement to identify a person as a sex offender"). There is no obvious way this could be accomplished with a mark less conspicuous than those mandated by Louisiana Revised Statute 40:1321(J).

As described in the State's Application here, many provisions of Louisiana's statutory scheme rest upon the assumption that sex offenders will be carrying a marked ID. *See, e.g.*, La. Rev. Stat. 29:726(E)(14)(c)(i) (prohibiting sex offenders from knowingly being sheltered with other evacuees); *see* La. Rev. Stat. 14:313.1 (prohibiting sex offenders from distributing candy or gifts on Halloween or other public holidays); La. Rev. Stat. 14:313 (prohibiting wearing of masks, hoods, or other facial disguises in public places). Enforcing these provisions will be virtually impossible unless a sex offender has a marked State ID.

Hill faults the State (at 14) for failing to provide sufficient evidence demonstrating that the challenged laws are narrowly tailored to further a compelling interest. But the Legislature buttressed its sex-offender registry laws with factual findings of its own—and the Louisiana Supreme Court has agreed with the "findings of the Legislature that this legislation was of paramount governmental interest." *State ex rel. Olivieri v. State*, 2000-0172 (La. 2/21/01), 779 So. 2d 735, 747. Indeed,

this Court has observed that the Alaska "*legislature's findings* [about sex offenders] are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith v. Doe*, 538 U.S. 84, 103 (2003). Under Louisiana law, factual findings by the Legislature enjoy a presumption of correctness. *Randolph v. Vill. of Turkey Creek*, 240 La. 996, 1016, 126 So. 2d 341, 347–48 (1961). And "[i]n the absence of any evidence contradicting the legislative determination, the presumption is that its declarations are correct and accurate."[1] *Bd. of Barber Examiners of La. v. Parker*, 190 La. 214, 291–92, 182 So. 485, 510 (1938). Hill has not provided any evidence to contradict the Legislature's findings.

Even assuming the Louisiana law requiring sex offenders to obtain and carry a marked license does not survive strict scrutiny, Louisiana's law prohibiting fraudulently altering a State ID—which is the only law the State charged Hill with violating—should survive any level of judicial scrutiny.

II. LOUISIANA NEEDS URGENT RELIEF.

A key provision of Louisiana's sex-offender registry statutes has been struck down on First Amendment grounds. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers)).

Louisiana's laws are meant to protect the State's population from recidivistic

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[1] Apparently only one Justice of the Louisiana Supreme Court believed that the State failed to satisfy its evidentiary burden. App. 28a.

sex offenders. The Louisiana Supreme Court has noted that "unless there [is] registration and community notification, sex offenders could remain hidden and thereby increase the risk to public safety." *Olivieri*, 779 So. 2d at 747.

Hill contends (at 17) that "[t]he Louisiana Supreme Court, as the highest court in its jurisdiction, is better placed to consider the potential harm to Louisiana residents than this Court." But that is the wrong question: The issue here is whether the challenged laws violate the First Amendment. That is a question of federal law. It is a truism that "[s]tate courts are the final arbiters of their own state law; this Court is the final arbiter of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 291–92 (2008) (Robert, C.J., dissenting) (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). This Court has the constitutionally final say on whether Hill has been injured under the First Amendment. Because the challenged laws do not even implicate Hill's First Amendment rights, the answer to that question is no.

CONCLUSION

Louisiana respectfully asks this Court to issue a stay of the Louisiana Supreme Court's judgment as soon as possible to maintain the status quo pending the filing and disposition of a petition for a writ of certiorari.

Respectfully Submitted,

/s/ Elizabeth Baker Murrill

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