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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Louisiana Supreme Court correctly apply this Court's decisions in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), to conclude that a state law requiring an individual to obtain and carry an identification card on which the individual had to identify to the public as a "SEX OFFENDER" violated the First Amendment?

2. Did the Louisiana Supreme Court correctly conclude that the First Amendment protects an individual from prosecution under a statute that both (a) required the individual to obtain and carry an identification card on which the individual had to identify to the public as a "SEX OFFENDER" and (b) prohibited fraudulent alteration of that card?

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INTRODUCTION

Louisiana has long surveilled the whereabouts and activities of registered sex offenders, mandating that they provide detailed information to local authorities and neighbors. Until last year, the State went further, requiring registrants to carry on their persons at all times identification cards branded with the words "SEX OFFENDER"—identification cards that registrants must regularly display when checking out at the grocery store, withdrawing money from a bank teller, applying for new gym memberships, and the like.

The Louisiana Supreme Court struck down the State's branded-identification law as inconsistent with the First Amendment. The court held that the First Amendment does not permit the State to force some of its residents to carry an identification card advertising the State's chosen message—that the bearer is a "SEX OFFENDER"—and to communicate that message to anyone who comes into contact with the card. The court also found that the State had failed to make any showing that the law was necessary to advance any government interest. The branded-identification requirement was simply a solution in search of a problem, and operated only to subject registrants to public opprobrium and rebuke. The court's decision, which was grounded in this Court's compelled speech jurisprudence, aligned precisely with the only other court to have considered this issue, and it brought Louisiana's laws in line with the vast majority of the States.

Louisiana now asks this Court to step in to correct an error the court below did not make and to heal a split of authority that does not exist. The Court should decline the invitation; nothing about this case warrants review.

STATEMENT

A. Statutory Background

Louisiana—like every other State—imposes numerous disclosure requirements on residents who have completed terms of incarceration for sexual offenses. Indeed, the State mandates compliance with roughly a dozen different disclosure provisions, requiring sex offenders to:

- register in person with the parish sheriff and/or the chief of police in the parish in which the registrant resides, La. Rev. Stat. § 15:542(B)(1);
- register in person with the parish sheriff and/or the chief of police in the parish in which the registrant is employed, *id.* § 15:542(B)(2);
- provide their name and any aliases used, their physical address, their place of employment, a photograph, fingerprints, palm prints, and DNA, their telephone number, a description of all motor vehicles registered or operated, a copy of their driver's license, their social security number and date of birth, and all email addresses and online screen names, among other things, to the appropriate officials upon registration, *id.* § 15:542(C);
- notify at least one person in every residence or business within a three-tenths-of-a-mile radius around their residence of their crime and date of conviction, as well as the superintendent of the school district in which they reside, their landlord, lessor, or the owner of their residence, and the superintendent of any park, playground, or

recreation districts near their residence, *id.* § 15:542.1(A)(1);

- publish notice in the official journal of the governing authority of their parish, as well as in the local newspaper, *id.* § 15:542.1(A)(2)(a);
- notify the sheriffs and/or chiefs of police in both their old and new parishes of their residence when they move from one parish to another, *id.* § 15:542.1.2(A)-(B);
- update the appropriate officials if they have a change in name, place of employment, or in any other information previously provided, *id.*;
- notify law enforcement agencies in the destination State should they seek to travel from Louisiana under certain circumstances, *id.* § 15:542.1.3(E)-(F); and,
- notify the management of any emergency shelter the person enters during a declaration of emergency, *id.* § 15:543.2(A).

In addition to this extensive regime—and unlike almost every other State—Louisiana went further: Until the Louisiana Supreme Court struck down the provisions as unconstitutional, App. 6-45, the State also required registrants to obtain a "special identification card" stamped with the words "SEX OFFENDER" in orange capital letters and to carry that card "on the[ir] person[s] at all times," La. Rev. Stat. § 40:1321(J) (the "obtain-and-carry provision"). Registrants were also barred from fraudulently altering their identification cards by, for example, removing the "SEX OFFENDER" language. La. Rev. Stat. § 15:542.1.4(C) (the "fraudulent-alteration provision"). Violation of the

fraudulent-alteration provision carried a $1,000 fine and two to ten years of "imprison[ment] at hard labor." *Id.*

Louisiana's branded-identification regime was an outlier in singling registrants out for public opprobrium. Just two other States require identification cards to display phrases like "SEX OFFENDER,"[1] while only six States have laws that require identification cards to include other types of sexual offense disclosure—typically a symbol or statute number recognizable only to law enforcement.[2]

B. Factual And Procedural Background

1. In 2016, after completing his term of incarceration for committing a sex offense, Tazin Hill reported to

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[1] *See* Fla. Stat. § 322.141(3) (requiring identification cards issued to individuals "designated as sexual predators" to bear the "marking 'SEXUAL PREDATOR'"; individuals "subject to registration as a sexual offender" must carry identification cards with the marking "943.0435, F.S."); Okla. Stat. tit. 47 § 6-111(E) (requiring inclusion of the phrase "Sex Offender" on identification cards).

[2] Delaware requires the inclusion of a "Y" symbol on an identification card. 21 Del. C. § 2718(e). Kansas mandates a "readily distinguishable" marker on an identification card. Kan. Stat. §§ 8-1325a(b), 8-243(d). Mississippi requires a "designation identifying the licensee … as a sex offender." Miss. Code Ann. § 63-1-35(3). Tennessee mandates a "designation sufficient to enable a law enforcement officer to identify the bearer of the license or card as a sexual offender." Tenn. Code Ann. § 55-50-353. West Virginia requires that a person's identification card be "coded" that they are a sex offender only if a court has determined, after a hearing, that the person is dangerous. *See* W. Va. Code §§ 15-12-2a, 17B-2-3(b). And, as a result of the decision in *Doe 1* v. *Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019), Alabama no longer mandates inclusion of the words "CRIMINAL SEX OFFENDER" on an identification card and, instead, now requires only a code known to law enforcement. *See* Ala. Code § 15-20A-18.

the Lafayette Parish Sheriff's Office to update his address (as required under state law). App. 73. When Hill was asked to produce his identification card, an officer observed that the words "SEX OFFENDER" no longer appeared. App. 73-74. Hill was arrested and charged with violating the fraudulent-alteration provision. App. 64-65.

Hill moved to quash the bill of information, arguing that both the obtain-and-carry provision and the fraudulent-alteration provision violated the First Amendment's prohibition on compelled speech. App. 48-53. The State responded that because Hill was only charged with violating the fraudulent-alteration provision, he lacked standing to challenge the obtain-and-carry provision, and that he was further barred from challenging either provision because he had engaged in "self-help" by removing the "SEX OFFENDER" label from his identification card instead of bringing a preemptive challenge. App. 53-55. On the merits, the State contended that (1) the First Amendment did not apply because "SEX OFFENDER" was government speech rather than compelled speech; (2) even if it was compelled speech, the challenged laws satisfied strict scrutiny; and, finally, (3) the First Amendment did not protect purportedly fraudulent actions like removing "SEX OFFENDER." App. 54-62. The State did not submit any evidence suggesting that the challenged provisions were necessary to achieve its stated interest in protecting the public from recidivist sex offenders. Instead, it relied exclusively on broad statements of legislative purpose. *See* App. 56.

After a hearing, the trial court granted Hill's motion to quash and invalidated both provisions under the First Amendment. App. 46-62. The court explained that the two laws were "not the least restrictive way to

further the State's legitimate interest in notifying law enforcement" of an individual's past conviction for a sex offense. App. 62. That goal, the court concluded, "could be accomplished in the same way that some other states utilize," namely by employing "more discreet labels in the form of codes that are known to law enforcement." *Id.*

2. The State appealed to the Louisiana Supreme Court, which affirmed the trial court's order in full. *See* App. 6-45.

The court first concluded that the "requirement to carry a branded identification card constituted compelled speech." App. 14.[3] The court analogized Hill's branded card to the "Live Free or Die" motto on New Hampshire license plates that was at issue in *Wooley* v. *Maynard*, 430 U.S. 705 (1977); just as this Court prohibited New Hampshire from requiring an objecting individual to display the motto on his vehicle, Louisiana could not require Hill to display "SEX OFFENDER" on his identification card. *See* App. 22, 29. The court also cited *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), observing that in *Riley* this Court "expanded its compelled speech doctrine to the realm of facts" by holding that compelled factual speech—in addition to compelled ideological speech—"'burdens protected speech'" and is "subject to exacting First Amendment scrutiny." App. 18-19 (quoting *Riley*, 487 U.S. at 797-798). As such, the court concluded, the mandatory "SEX OFFENDER" language, even if only a factual statement, constituted

[3] The court held that Hill had standing to challenge both provisions because the State was required to "prove" a violation of the obtain-and-carry provision "as an element of" the fraudulent-alteration offense. App. 13.

compelled speech. App. 18, 28, 29. The court found "instructive" the decision in *Doe 1* v. *Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019), which struck as unconstitutional compelled speech Alabama's nearly-identical requirement that sex offender registrants obtain and carry an identification card bearing the phrase "CRIMINAL SEX OFFENDER" in red letters. App. 23-25.

The Louisiana Supreme Court applied strict scrutiny and held that the challenged provisions were not narrowly tailored to further a compelling state interest. *See* App. 32-33. The regime failed, the court explained, because forcing registrants to add "SEX OFFENDER" to their identification cards was not the least restrictive means of satisfying the State's asserted interest—protecting the public from recidivist sex offenders. *Id.* In the court's view, a "symbol, code, or a letter designation" would be sufficient to "inform law enforcement" of the individual's status without "unnecessarily requiring disclos[ure of] that information" to those whom the registrant might have to show his identification card for unrelated reasons. *Id.* And for the public, the court noted, Louisiana's "sex offender registry and notification" system, *see supra* pp. 2-3, was "available to those [with] a need to seek out" information about a registrant's status. App. 32-33. One member of the court separately concurred to highlight that the State had presented "no evidence" demonstrating that the challenged provisions served a compelling interest or were narrowly tailored to achieve the State's ends other than "the Louisiana Legislature's findings and purpose with regard to the [S]tate's sex offender registration requirements" as a whole. App. 40 (J. Weimer, concurring). "On the present record," Justice Weimer wrote, the State had "clearly

failed to meet its evidentiary burden under the strict scrutiny test." App. 41.

Finally, the court rejected the State's argument that Hill's removal of compelled speech from his identification card was fraudulent conduct unprotected by the First Amendment. *See* App. 33-37. The court reasoned that the "inclusion of fraud as an element" could not "salvage" the fraudulent-alteration provision due to its inseverable requirement that a defendant obtain and carry a branded identification card that violated his First Amendment rights. App. 37.

The State requested rehearing, which the court denied, App. 4-5, and then moved to stay the court's judgment pending disposition of a petition for certiorari, which the court also denied, App. 1-3. On December 11, 2020, the State petitioned Justice Alito for an emergency stay. Justice Alito referred the State's application to the full Court, which denied it without comment. *See* No. 20A108 (Dec. 30, 2020).

REASONS FOR DENYING THE PETITION

Louisiana's petition presents no "compelling reasons" warranting certiorari. *See* Sup. Ct. R. 10. The State fails to identify a split of authority between the Louisiana Supreme Court's decision and any federal court of appeals or state high court. *Id.* 10(a)-(b). And the decision below did not decide an "important question of federal law" in a way that "conflicts with relevant decisions of this Court," *id.* 10(c); to the contrary, the Louisiana Supreme Court carefully applied this Court's First Amendment precedent to Louisiana's idiosyncratic branded-identification scheme. Louisiana's petition does not merit review.

I. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTIONS PRESENTED

There is no split of authority for this Court to resolve. No federal court of appeals has opined on either question presented nor has the highest court of any state (except Louisiana). The only other court that has considered the first question presented is a federal district court in Alabama, which resolved it identically to the Louisiana Supreme Court. *See Doe 1* v. *Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019). And the State can point to no other court in the nation that has opined on the second question presented.

1. The State drums up a "3-2" "split" between the Louisiana Supreme Court's decision in this case and the Alabama district court's decision in *Doe 1*, on the one hand, and three unpublished district court decisions, on the other. Pet. 23. Even if that were somehow sufficient to warrant review, *see* Sup. Ct. R. 10(a)-(b), Louisiana substantially overstates things; there is no split to resolve. Indeed, the State fails to even identify the precise legal question on which the courts it cites are purportedly split, offering a scattershot of authorities all addressing different inquiries.[4]

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[4] For example, at one point, the State frames the relevant question as "whether forced disclosure of sex-offender status violates the First Amendment's prohibition on compelled speech." Pet. 23. The petition does not present that question, *see* Pet. i., and this case does not concern whether forced disclosure of sex-offender status *always* constitutes compelled speech. Circumstances matter, *see United States* v. *United Foods, Inc.*, 533 U.S. 405, 415 (2001) (looking to the "context of a program" to determine the constitutionality of "compelled subsidies for speech"), and here, neither the trial court nor the Louisiana Supreme Court was asked to pass on whether any of Louisiana's several other disclosure rules is constitutional.

The State first points to *Doe* v. *Kerry*, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016), which concerned a challenge to a yet-to-be-implemented requirement that United States passports indicate, in some circumstances, that the holder has committed a sexual offense. The district court dismissed the plaintiffs' claims on standing grounds, reaching the First Amendment questions only in cursory dicta. *Id.* at *16.

Nevertheless, the State cites the district court's passing comment that a "passport [status] identifier does not suggest or imply that the passport-holder has adopted or is sponsoring an ideological or political point of view." Pet. 23 (citing *Kerry*, 2016 WL 5339804, at *18). According to the State, that comment amounts to a "conclusion[]" that is "opposite" to the one the Louisiana Supreme Court reached in this case. *Id.* But the two cases addressed separate questions. Passports and identification cards are completely different types of documents with wholly different First Amendment implications.

As the court made clear in *Kerry*, passports are intended to communicate from government to government during international travel—not from individuals to diverse, often private, audiences like bank tellers and store clerks who ask for identification cards during everyday transactions. *See* 2016 WL 5339804, at *16 (describing the "function of a passport" as "a 'letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer' and as a 'travel control document' representing 'proof of identify and proof of allegiance to the U.S.'"). Indeed, no one is required to obtain a passport unless they choose to travel internationally or to carry that passport on their person to display to others except in

the unique circumstance in which they present themselves at a foreign border.

Louisiana, by contrast, required all registrants to obtain a branded identification card and to carry it with them at all times. As the district court explained, because passports are used only in limited contexts, the proposed identifier was "not a public communication and w[ould] not even be displayed to the public." *Kerry*, 2016 WL 5339804, at *18. Government-issued identification cards, however, are omnipresent in day-to-day life. They are needed to make certain purchases, enter certain businesses, and, in Louisiana along with many other States, to vote. *See* La. Rev. Stat. § 18:562. The State not only admits but emphasizes as much, defending the statutory provisions here on the very ground that the "*public*, and not merely law enforcement, needs to know of a sex offender's status." Pet. 15 (emphasis in original). Put simply, a passport's sole purpose is to permit one government to communicate with another; as Louisiana acknowledges, one of the core purposes of a state identification card is for members of the public to convey information about themselves to each other. Given these profound differences, *Kerry* does not even address the same question as the Louisiana Supreme Court, much less land on the opposite side of the ledger from it.

Next, the State points to *Benson* v. *Fischer*, 2019 WL 3562693 (D. Minn. Aug. 6, 2019). Pet. 23. In that case, the plaintiff alleged a First Amendment claim based on an "'institutional policy'"—not a generally applicable law—that required individuals civilly committed to the Minnesota Sex Offender Program ("MSOP") to wear an identification badge displaying the name of that program while out of their cells. 2019 WL 3562693, at *4-5, *7; *see also Benson* v. *Piper*, 2017 U.S. Dist.

LEXIS 158017, at *2, *4-7 (D. Minn. Mar. 31, 2017); *Ivey* v. *Mooney*, 2008 WL 4527792, at *1 (D. Minn. Sept. 30, 2008) (explaining that MSOP "provides treatment" in a "secure facility" to "persons committed by the courts as sexual psychopathic personalities or sexually dangerous persons"). Minnesota justified the policy on the grounds that the challenged identification badge "'enhance[d] a staff member's ability to identify [the program's] clients and therefore enhance[d] the staff member's ability to supervise clients,'" and the district court agreed, concluding that the identification did not violate the First Amendment. *Benson*, 2019 WL 3562693, at *6-7. Requiring an individual who is "currently confined" pursuant to a court order, *id.* at *6, to display a marker identifying the name of his program involves wholly different considerations than a statute, like Louisiana's, that forced a released individual to broadcast his former conviction to the general public, *cf. Youngberg* v. *Romeo*, 457 U.S. 307, 319-321 (1982) (explaining that the curtailment of certain constitutional rights is permissible in civil commitment).

Finally, the State cites *Reed* v. *Long*, 506 F. Supp. 3d 1322 (M.D. Ga. 2020). Again, the State is wrong to argue it evidences a split. In *Reed*, the plaintiffs challenged a sheriff's "practice of placing warning signs at the residences of registered sex offenders before Halloween." *Id.* at 1328. After preliminarily enjoining the practice, the district court declined to issue a permanent injunction, largely on the ground that the sheriff clarified that the plaintiffs were "free to disagree with [the warning signs'] message by posting competing messages." *Id.* at 1340. Perplexingly, Louisiana slots this decision into its "split" despite the fact that the court expressly distinguished the Louisiana Supreme Court's decision below. *Id.* at 1341. The district court

explained that "the signs" at issue in that case—"unlike [the] driver's licenses" at issue here—"clearly state that the speaker is the government." *Id.* And the court noted that Louisiana's fraudulent-alteration provision "made it practically impossible for the criminal defendant to disassociate from the message or disclaim the message without facing prosecution," whereas the *Reed* plaintiffs were "free to disassociate themselves or place competing messages." *Id.* As *Reed* itself explained, the two cases are different.

2. The State is also incorrect to suggest a "square split" between the Louisiana Supreme Court and the Tenth Circuit. Pet. 24. In *Carney* v. *Oklahoma Department of Public Safety*, 875 F.3d 1347 (10th Cir. 2017), the Tenth Circuit considered a Fourteenth Amendment challenge alleging that Oklahoma's "Sex Offender" license-branding requirement was "enacted out of animus toward aggravated sex offenders." *Id.* at 1354. Concluding that there was no evidence of animus, the court noted that the "license requirement does not stray from what state governments do each and every day: communicate important information about its citizens on state-issued IDs." *Id.* The court specifically refused to consider a First Amendment challenge to Oklahoma's branding requirement, and conducted no compelled-speech analysis. *Id.* at 1351-1352. In short, the Tenth Circuit did not even consider the same constitutional challenge as the one at issue here, much less create a "square split" with the Louisiana Supreme Court.

II. THE LOUISIANA SUPREME COURT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

Nor is certiorari warranted on the ground that the Louisiana Supreme Court's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). To the contrary, the court's First Amendment analysis is entirely consistent with this Court's jurisprudence.

A. Louisiana's Branding Requirements Compel Private Speech

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says," and its statements "do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). However, "a government's ability to express itself is not without restriction," and the "Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Id.* at 208. The government compels speech when it mandates "speech that a speaker would not otherwise make." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *see also Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("It is … a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.") (quotation marks omitted). Both statements of "opinion" and statements of "fact" can constitute compelled speech, as "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-798; *see also Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[T]his

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 speaker would rather avoid.").

1. The Louisiana Supreme Court described, analyzed, and applied this settled law and concluded that Louisiana's branding requirements constituted compelled speech rather than government speech. *See* App. 14-33; *see also* App. 14 (explaining that "whether [the challenged provisions] amount[] to government speech or compelled speech … necessarily involve[d] a review of First Amendment jurisprudence"). That conclusion follows directly from this Court's compelled speech precedent.

The court first analogized Louisiana's identification cards to the license plates at issue in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where this Court held that a "Jehovah's Witness driver in New Hampshire could not be punished by the state for repeatedly obscuring the state motto 'Live Free or Die' on his license plate." *See* App. 17. As this Court explained, New Hampshire "could not 'constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property'" such that it could be "'"observed and read by the public,'" App. 18 (quoting *Wooley*, 430 U.S. at 713); *see also* *Wooley*, 430 U.S. at 715 (First Amendment "protects the rights of individuals" to "refuse to foster" government messages). Applying *Wooley*, the Louisiana Supreme Court reasoned that, "[e]ven more so than a license plate on a car, an identification card is personalized to such an extent that it is readily associated with the bearer" and that, therefore, the State's branded-identification scheme unconstitutionally compelled Hill

to broadcast a government message he did not wish to share. App. 22.

The Louisiana Supreme Court likewise correctly applied this Court's decision in *Riley* to confirm that "compelled speech (or compelled silence) does not turn simply on whether an ideological message is at issue." *See* App. 18. In *Riley*, this Court struck down a North Carolina statute that required professional fundraisers to disclose the percentage of charitable contributions they actually remitted to the charities for which they were soliciting funds. Although the statute mandated the disclosure of only factual information the government wished to convey to potential donors, the Court concluded that the State could not compel the fundraisers to speak on its behalf, 487 U.S. at 798, and it further noted that "compulsion" of either "compelled statements of opinion" or "compelled statements of 'fact' … burdens protected speech," *id.* at 797-798. Following that reasoning, the Louisiana Supreme Court concluded that the State's requirement that Hill advertise his "SEX OFFENDER" history constituted compelled factual speech. *See* App. 29 (distilling from *Riley* that, for purposes of First Amendment protection, "cases cannot be differentiated on whether they turn on compelled statements of opinion or on compelled statements of fact").

In short, the Louisiana Supreme Court properly applied this Court's precedent to conclude that the branded-identification provisions did not constitute government speech, but, instead, unconstitutionally compelled registrants to speak on the State's behalf. Louisiana's regime forced Hill and other registrants to make public statements about themselves that they otherwise would not have made, and the Louisiana Supreme Court correctly subjected those compelled statements

to strict scrutiny (which, as discussed below, the State failed, *see infra* pp. 21-24).[5]

2. The State faults the Louisiana Supreme Court for failing to apply a novel test for compelled speech that the State cobbled together from two footnotes and a single-Justice concurrence from 1943. *See* Pet. 8-9. In the State's view, the "government impermissibly compels a private person to be 'an instrument' of its message only" when: (1) the mandated speech is "publicly displayed, like a 'billboard,'" Pet. 8 (quoting *Wooley*, 430 U.S. at 715, 717 n.15); and (2) the individual forced to communicate the required speech is "closely linked with the expression in a way that makes them appear to endorse the government message," Pet. 8-9 (quoting *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 565 n.8 (2005) (emphasis omitted)). Pointing to a single-Justice concurrence that has never been cited by the Court for this proposition, the State then contends that "[s]ome Members of the Court" have also considered whether "'essential operations of government … require' the speech 'for the preservation of an orderly society,'" Pet. 9 (quoting *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)).

This is not the test, and the State's attempt to transform descriptive phrases and explanatory footnotes into conjunctive requirements should be rejected. Contrary to the State's view, nothing in this Court's

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[5] Even if the Louisiana Supreme Court's *application* of this Court's precedent was incorrect—which it was not—the State never argues that the Louisiana Supreme Court *misstated* the Court's precedent, rendering this case a poor candidate for review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law.").

jurisprudence limits compelled-speech claims to circumstances where the speech is conspicuously displayed publicly, like a "mobile billboard." That is simply how this Court described the unique statute at issue in *Wooley*. 430 U.S. at 715. The language the State cites from *Johanns* is dicta that responds to a point made by the dissent about an issue that was not even before the Court. *See Johanns*, 544 U.S. at 565 n.8 (quoting *id.* at 575-576 (Souter, J., dissenting)). Indeed, the Court specifically noted that its decision was about "compelled *subsid[ies]*" *not* "compelled *speech*." *Id.* at 564-565 (emphases in original). As for the "essential operations of government" factor, other than Justice Murphy, no member of this Court has ever so much as hinted that it is part of compelled-speech doctrine. No "essential operations of government" doctrine has ever been recognized by this Court to excuse otherwise unconstitutional compelled speech because such speech "preserv[es]" an "orderly society." *See* Pet. 9, 11 (quotation marks omitted).

Even if the State's three-factor rubric did state the governing standard, it would support the decision below. First, the "SEX OFFENDER" label on registrants' identification cards was a public display of speech which, as the State highlights, was intended "to be noticed" and "clearly understood by the public." Pet. 16. If the New Hampshire license plate in *Wooley* constituted a forced public display of the "Live Free or Die" motto because "driving an automobile" was "a virtual necessity for most Americans," 430 U.S. at 715, the same is true of an identification card that is an *actual* necessity for many individuals seeking to interact with "landlords, employers, [and] volunteer organizations," Pet. 9. In fact, the myriad situations in which individuals are required to display their identification cards in

face-to-face interactions with others yield even stronger liberty concerns than simply being seen by strangers in passing cars.[6]

Second, Hill was in fact "closely linked" with the text on his identification card "'in a way that ma[de] [him] appear to endorse the government message.'" Pet. 10 (quoting *Johanns*, 544 U.S. at 565 n.8). Indeed, the information on his card was not just "closely linked" with Hill—it was squarely *about* him. An identification card may be a government-issued document, but as the district court in *Doe 1* put it, "[t]he dirty looks" that those with branded identification cards received were "not directed at the State." 367 F. Supp. 3d at 1326. What is more, the State's assertion that Hill could not be "closely linked" to the SEX OFFENDER phrase because "an ID card generally conveys information on behalf of the issuer, not the bearer," Pet. 10, is flatly contradicted by Louisiana's own laws. The State permits its residents to use their identification cards to proclaim their cultural heritage, *see* La. Rev. Stat.

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[6] The State argues that the "SEX OFFENDER" designation was "more akin to the 'In God We Trust' inscription on currency" than a license plate slogan "because currency 'is generally carried in a purse or pocket and need not be displayed to the public.'" Pet. 9 (quoting *Wooley*, 430 U.S. at 717 n.15). The Louisiana Supreme Court correctly rejected that argument, explaining that currency "differs in significant respects from a personal identification card." App. 22 n.4. Currency "is passed from hand to hand," whereas an identification card is "readily associated with its [holder]." *See Wooley*, 430 U.S. at 717 n.15. Individuals present identification cards in order to share information about themselves. Not so with currency. And identification cards—unlike currency—are shared in all sorts of public-facing situations aside from commercial transactions (*e.g.*, employment or emergency shelter). Transportability via "purse or pocket," Pet. 9, is an irrelevant similarity between the two.

§§ 32:412(L), 40:1321(L) (allowing residents to add the phrase "I'm a Cajun" to their State-issued driver's licenses or identification cards); promote their alma maters, *see id.* §§ 32:412(M), 40:1321(M) (permitting display of "a university logo" "in color" on State-issued driver's licenses and identification cards); and memorialize their military service, *see id.* §§ 32:412(K), 40:1321(K) (providing that, "[u]pon request" and documentation, "the word 'Veteran' shall be exhibited in the color black below the person's photograph"). Louisiana is not the entity announcing that it is Cajun, that it went to Louisiana State University, or that it served in the armed forces; the bearers of the identification cards are communicating those messages.[7] The mandated "SEX OFFENDER" language is no different.[8]

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[7] The state amici have attempted to distinguish the license plates at issue in *Wooley* from the identification cards at issue here by contending that there is no such thing as "vanity driver's licenses" and that they are not "aware of" any "personalized driver's license designs." Oklahoma Amici Br. 8. Louisiana itself offers these options.

[8] The State, in arguing that "an ID card generally conveys information on behalf of the issuer, not the bearer," notes that Louisiana licenses are required to include the phrase: "DON'T DRINK AND DRIVE; DON'T LITTER LOUISIANA." Pet. 10 (citing La. Rev. Stat. § 32:410(A)(3)(a)(ix)(c)). Then the State asserts that it "need not survive a strict-scrutiny analysis to place … slogans on its IDs any more than it must survive a strict-scrutiny analysis to place a person's height, or weight, or eye color, or hair color, or sex-offender status on them." *Id.* Those questions are not before the Court and the "slogans" one is particularly non-obvious. *See Wooley*, 430 U.S. at 713 (where the objector prevailed after refusing "'to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent'").

Finally, to the extent the necessity of the compelled-speech requirement for preservation of an orderly society is relevant to the analysis, as discussed immediately below, the State made no showing that the branded-identification requirement actually advanced that goal.

B. The Branding Requirements Do Not Satisfy Strict Scrutiny

Because the branded-identification laws compelled speech, they were subject to "exacting First Amendment scrutiny," and the State was required to demonstrate that they were narrowly tailored to serve a compelling government interest. *See Riley*, 487 U.S. at 798. As the State concedes, "it is the rare case" that satisfies strict scrutiny. Pet. 14 (quoting *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 444 (2015)). And as the Louisiana Supreme Court correctly concluded, *see* App. 32-33, this is not one of those cases.

To start, the State offered no evidence that the branding requirements furthered its interest in protecting the public from recidivist sexual offenders. The State "bears the risk of uncertainty" in a strict-scrutiny analysis, and "ambiguous proof will not suffice." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 799-800 (2011). But the State presented "*no evidence* proving that the branded identification card effectively alleviate[d] any harm that might be inflicted on the public, or that it [was] the least restrictive means of furthering its stated interest." App. 40-41 (Weimer, J., concurring) (emphasis added). On this record, the State certainly cannot satisfy strict scrutiny. *See United States* v. *Alvarez*, 567 U.S. 709, 725-726 (2012) (plurality opinion) (striking the Stolen Valor Act because, by offering "no evidence" of a "causal link between the restriction

imposed and the injury to be prevented," the government failed to carry its "heavy burden"); *see also Ashcroft* v. *American Civ. Liberties Union*, 542 U.S. 656, 668 (2004) (faulting the government for its "fail[ure] to introduce specific evidence proving that existing technologies [we]re less effective" than the content-based speech restrictions imposed by the Child Online Protection Act).

Recognizing its default, the State now propounds a series of hypotheticals. But those do not suffice. For example, the State suggests that a "SEX OFFENDER" imprint is necessary because a "church or Red Cross facility *may* need to know a person's status as a sex offender when providing shelter from a storm" and the State's online registry "*may*" be unavailable to check that status due to "power outages and interrupted internet connections." Pet. 15-16 (emphases added). Aside from stacking speculation on top of speculation, the State does not explain why a less explicit marking known to shelter operators would be insufficient to communicate sex-offender status; does not explain whether or why the State's existing requirement that sex offenders proactively disclose their status to shelter operators is ineffective, *see* La. Rev. Stat. § 15:543.2; and does not grapple with the fact that its neighboring States—which also experience storms and power outages—do not have similar laws.[9] Similarly, the State asserts that a "SEX OFFENDER" label is necessary because "[p]eople trick-or-treating on Hal-

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[9] Indeed, it is difficult to understand how the inclusion of "SEX OFFENDER" on identification cards could be necessary to support the "essential operations" of Louisiana's government, Pet. 10-11, when more than forty states operate their governments every day without those labels.

loween *may* need a quick way to verify that their children are safe from predators." Pet. 15 (emphasis added). The State presents no evidence suggesting that Louisiana trick-or-treaters (or any trick-or-treaters) ask for identification at each house they visit on Halloween, or that the "SEX OFFENDER" imprint on the candy distributor's identification card kept anyone safer than they otherwise would have been. In any event, registrants were and are already prohibited from "distribut[ing] candy or other gifts" to minors on Halloween. *See* La. Rev. Stat. § 14:313.1. The State has presented no evidence suggesting that its current laws regulating this conduct are ineffective (or even that this provision has ever been violated).[10]

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[10] During a recent legislative hearing about replacing the branded-identification provisions struck down by the Louisiana Supreme Court, a representative from the Louisiana State Police could not answer whether sex offenses had increased from the time the State was no longer permitted to require the "SEX OFFENDER" label on identification cards. *See Hearing on HB56 Before the H. Comm. on Transportation, Highways, and Public Works*, 2021 Leg., 47th Sess. (La. 2021) (video at 0:43:46-0:44:08) (testimony of Robert Burns, Lieutenant, Louisiana State Police), https://tinyurl.com/8v523kv7. Following testimony, the committee voted against a bill that would have required the placement of "T1," "T2," or "T3" (*i.e.*, a "symbol, code, or a letter designation" known only to law enforcement, as the Louisiana Supreme Court had described as a permissible alternative to the struck-down "SEX OFFENDER" branding, App. 32-33) on registrants' licenses. *See id.* at 1:52:30-1:52:40. Representatives expressed concern that adding any marking to identification cards would "open[] up people to potential serious harm that are just going about their business," and noted that, because Louisiana's law enforcement departments have other ways of protecting against sex offenses, the justification for branded identification cards is "covered already." *Id.* at 0:12:03-0:12:40.

The State also fails to explain why the myriad other disclosure laws still on the books in Louisiana, *see supra* pp. 2-3, are insufficient to serve its purposes without forcing registrants to carry branded identification cards on their persons at all times. The State does not dispute, for example, that the Louisiana Supreme Court's decision had no effect on the State's ability to collect information from sex offenders for its online registry nor the ability of any person in Louisiana to access that information with a simple search. The State protests that registries are insufficient because offenders "can easily give a false name" that will not show up in the registry. Pet. 16. But the State has never provided any evidence that this has actually happened nor has it explained why non-branded identification cards—like those used in forty-seven States—would be insufficient for someone who wishes to verify the name given by a suspected offender. As the State itself points out, multiple "Louisiana laws … penalize fraudulently altering State IDs," Pet. 4 n.2, so Louisiana's existing system already guards against precisely the harms the State identifies.

C. The Fraudulent-Alteration Provision Falls With The Obtain-And-Carry Provision

In its second question presented, the State asks the Court to opine on whether—even if the requirement to obtain and carry an identification card stamped with "SEX OFFENDER" is unconstitutional—Hill can nevertheless be prosecuted for "fraudulently altering" his card to remove the compelled phrase. *See* Pet. i, 16-21. The State contends that "the First Amendment does not protect fraudulent speech or conduct," Pet. 7, but as the Louisiana Supreme Court correctly recognized, that facile argument misses the mark. Putting aside

the fact that the State does not so much as gesture to a split of authority, the second question presented does not merit this Court's review.

As the Louisiana Supreme Court observed, the fraudulent-alteration provision Hill was charged with violating was "intertwined" with the unconstitutional obtain-and-carry provision such that the two provisions had to rise and fall together. *See* App. 33-36. Indeed, a threshold element of the fraudulent-alteration statute was that the defendant fall into the class of Louisiana citizens required to carry a branded identification card. *See* La. Rev. Stat. § 15:542.1.4(C) (criminalizing "possession of any document *required by … R.S. § 40:1321(J)* [(the obtain-and-carry provision)] that has been altered with the intent to defraud" (emphasis added)). If the mandate to carry an identification card marked with unconstitutional compelled speech is not enforceable, any penalty for altering that speech is similarly infirm.

It is black-letter law that "[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery* v. *Louisiana*, 577 U.S. 190, 204 (2016); *see also id.* ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional."); *Ex parte Siebold*, 100 U.S. 371, 376 (1880) ("An unconstitutional law is void, and is as no law."). If it was unconstitutional to require Hill to state that he is a "SEX OFFENDER" on his identification card, it makes little sense that he could be criminally prosecuted for removing that illegal phrase.

The State argues that the provision's "fraud" element saves it, pointing to this Court's decision in *Riley*. *See* Pet. 19-20. Louisiana misreads that case. Again, in

Riley, this Court struck down a North Carolina law that required "professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations." 487 U.S. at 784. The State's asserted interest in its disclosure regime was "preventing fraud"—North Carolina wanted its citizens to know how much of their charitable donations actually went to the cause they were supposedly supporting—but because "the solicitation of charitable contributions [wa]s protected speech," the Court held that the State's interest was not sufficiently tailored to its stated goal. *Id.* at 789-790. The Court further noted that it was not "suggest[ing] that States must sit idly by and allow their citizens to be defrauded" by professional fundraisers; instead, the Court observed that "North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it." *Id.* at 795.

All this means is that, should North Carolina fundraisers *choose to* (rather than be *compelled to*) make a statement about the percentage of donations they retained, fraud statutes bar them from providing false information in an effort to part donors from their funds. This Court struck down the fundraisers' obligation to say anything; if they opted to make statements to elicit donations, North Carolina's fraud statutes stood at the ready to guard against false statements. The same is true here. Striking the obtain-and-carry provision simply meant that Hill had no legal obligation to advertise his "SEX OFFENDER" history on his identification card. If he misrepresented his status in an effort to obtain money or property—by, for example, affirmatively stating that he was *not* an offender—presumably Louisiana's fraud statutes could be readily deployed.

What is more, the State's position—that "[s]triking down a statute because it compels speech does not immunize any *fraudulent* conduct," Pet. 19—leads to absurd results. In *Wooley*, if New Hampshire's law barred the "fraudulent" obscuring of the state's motto, Louisiana's position would be that, even after the Supreme Court found the requirement unconstitutional, Wooley could be prosecuted and punished for his prelitigation violation of an otherwise illegal statute. It cannot be so easy to circumvent this Court's First Amendment jurisprudence.

III. REVIEW OF LOUISIANA'S IDIOSYNCRATIC BRANDING REGIME IS UNWARRANTED

Consistent with this Court's precedent, the decision below invalidated Louisiana's outlier branding requirements, and it did so in precisely the same manner as the only other court to have considered the issue. That suffices to deny the petition, and the State's additional arguments do not salvage its cause. First, contrary to the State's speculation, *see* Pet. 21–23, the Louisiana Supreme Court's decision has no impact on other sex-offender monitoring programs—like passport identifiers, state sex offender registries, or the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*—in Louisiana or any other jurisdiction. Second, even if the Court were interested in restructuring First Amendment doctrine, this case offers a faulty vehicle through which to do so.

1. The petition warns that the sky will fall because the decision threatens the federal government's placement of a "sex-offender designation on passports" and "mark[s] the path for future litigation challenging the legality of every State's SORNA registration program." Pet. 22. Not so. Louisiana's unconstitutional

branded-identification requirement posed distinct First Amendment issues that do not bear on those programs.

As described above, *see supra* pp. 10-11, the passport designations at issue in *Kerry* present very different issues than do identification cards. Passports facilitate inter-sovereign (*i.e.*, government-to-government) communication in the context of border control and are not intended to be "displayed to the public." *See Kerry*, 2016 WL 5339804, at *16, *18. An identification card, however, is used to conduct personal business—frequently business that is wholly separate from any government program or interest—in myriad day-to-day instances, including housing, employment, commercial purchases, and financial transactions.

Nor does the court's ruling threaten SORNA regulations or state sex-offender registries. As this Court has observed, obtaining information from a registry requires targeted searching. Specifically, an individual "must take the initial step of going to the [applicable state's] Web site, proceed to the sex offender registry, and then look up the desired information." *Smith* v. *Doe*, 538 U.S. 84, 99 (2003). This Court analogized that process to "a visit to an official archive of criminal records," and contrasted it with seeing someone who "appear[s] in public with some visible badge of past criminality," *id.*—which is exactly what happened to registrants with the branded identification cards at issue here. Registries facilitate information storage and targeted disclosure in certain important situations. *See United States* v. *Fox*, 286 F. Supp. 3d 1219, 1224 (D. Kan. 2018) (although SORNA "compelled [a sex offender] to speak," it survived strict First Amendment scrutiny because it "serve[d] a compelling government interest and d[id] so in a narrowly tailored fashion"). The

problem with a branded identification card, for First Amendment purposes, is the unremitting and diffuse broadcast of its holder's criminal history to everyone who comes into contact with the holder. This difference alone renders inapposite the State's comparison between Louisiana's unconstitutional statutory scheme and state sex-offender registries.

2. The State's appeal of Hill's fraudulent-alteration charge offers a poor vehicle for the Court to address the questions presented.

First, Hill, as noted above, was never charged with violating the obtain-and-carry provision. Until the State changed its position before the Louisiana Supreme Court, the State actually argued that Hill did not have standing to challenge the obtain-and-carry provision. *See* App. 8. Similarly, the State faulted Hill for "engag[ing] in 'self-help' by illegally altering the card" and challenging the constitutionality of his criminal charge rather than bringing a facial or as-applied challenge to the law. App. 9. The state courts rejected Louisiana's procedural arguments, but the State could nonetheless reprise them before this Court and preclude adjudication on the merits of the questions presented. *See United States* v. *Hays*, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" (alteration in original)).

Second, Louisiana's branded-identification requirement was an outlier among sex-offender regulations, inconsistent with rules in almost every other State. The Louisiana Supreme Court has now brought the State into the mainstream.

Finally, even though the State had every opportunity in the lower courts to build a factual record in support of the branded-identification provisions, it failed to do so. The State elected to gather no evidence to support its assertion that the "SEX OFFENDER" label was narrowly tailored to serve its interests. No statistics were measured, no experts were called, no alternatives were surveyed. *See* App. 40-41 (Weimer, J., concurring) (noting that "essentially all that the record below offers" is "argument and speculation" and explaining that the State "offered no evidence proving that the branded identification card effectively alleviates any harm that might be inflicted on the public"). Should the Court take this case to answer the questions presented, it would be asked to remake First Amendment law with nothing in the record to ground its decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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