Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **20th day of October, 2020** are as follows:

BY Genovese, J.:

2020-KA-00323 STATE OF LOUISIANA VS. TAZIN ARDELL HILL (Parish of Lafayette)

The district court's declaration that the statutes are unconstitutional and the district court's ruling granting defendant's motion to quash are affirmed. AFFIRMED.

Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4.

Weimer, J., concurs and assigns reasons.
Crain, J., dissents and assigns reasons.

10/20/20

SUPREME COURT OF LOUISIANA

No. 2020-KA-0323

STATE OF LOUISIANA

VERSUS

TAZIN ARDELL HILL

ON APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF LAFAYETTE

GENOVESE, J.*

This case involves the constitutionality of a statutory requirement that persons convicted of sex offenses carry an identification card branded with the words "SEX OFFENDER." This obligation is included as part of a comp``rehensive set of registration and notification requirements imposed on sex offenders in Louisiana. Other states (and the federal government) have enacted similar collections of laws. However, the specific requirement to carry a branded identification card distinguishes Louisiana from the rest of the country. Forty-one other states do not require *any* designation on the identification cards of sex offenders.

For the reasons below, we find that this requirement constitutes compelled speech and does not survive a First Amendment strict scrutiny analysis. Thus, we uphold the trial court's ruling striking this specific requirement as unconstitutional and quashing the prosecution of defendant for altering his identification card to conceal the "SEX OFFENDER" designation.

FACTS AND PROCEDURAL HISTORY

On April 10, 2017, the state filed a bill of information charging defendant, Tazin Ardell Hill, with altering an official identification card to conceal his designation as a registered sex offender, in violation of La. R.S. 15:542.1.4(C).

* Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4.

Defendant pleaded not guilty and filed a motion to quash, contending that La. R.S. 40:1321(J) and 15:542.1.4(C) are unconstitutional.

Defendant argued that La. R.S. 40:1321(J) and 15:542.1.4(C) violate the First Amendment[1] prohibition against compelled speech. In response, the state argued that defendant failed to meet his burden of proof in challenging the constitutionality of the statute. Additionally, the state alleged he lacked standing to challenge the requirement that he carry his branded identification card, as he was charged instead with altering it—not failing to carry it. Furthermore, the state asserted the alteration of his identification card lacked First Amendment protection for three reasons: (1) the statute regulates conduct, not speech; (2) regardless of the classification of the statute, defendant's actions fell outside of First Amendment protection because they constituted speech integral to criminal conduct; and, (3) defendant acted fraudulently, and fraud is not protected speech. Additionally, the state argued the First Amendment did not permit him to engage in "self-help" by illegally altering the card. Finally, the state averred that, even if a strict scrutiny analysis was required, it was satisfied.

On October 30, 2019, the district court provided a short statement quashing the state's bill of information against defendant and holding that La. R.S. 40:1321(J) and La. R.S. 15:542.1.4(C) are facially unconstitutional. Specifically, the court stated:

> I found the statute to be unconstitutional. [T]he requirement that the offender have "sex offender" written on his official state identification is not the least restrictive way to further the State's legitimate interest of notifying law enforcement. It could be accomplished in the same way that some other states utilize. Louisiana could use more discreet labels in the form of codes that are known to law enforcement.

The state appealed.

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[1] Defendant averred that the branded identification card requirement violated both the Louisiana and Federal constitutions' prohibitions against compelled speech; however, it is the Federal jurisprudence that will be primarily cited herein.

DISCUSSION

Before we reach the merits of this case, we must address certain preliminary issues. Specifically, we must determine that the case is properly before this court[2] and that defendant properly raised the constitutionality of the statute in the court below.

Defendant properly challenged the constitutionality of the statutes in the court below.

This court has held "that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below." *State v. Hatton*, 07-2377, p. 13 (La. 7/1/08), 985 So.2d 709, 718. In *Hatton*, this court described the challenger's burden as a three-step analysis. "First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *Id.*, 07-2377, p. 14, 985 So.2d at 719. Defendant has met this burden in this case.

The statute requiring defendant to obtain and carry a branded identification card and the statute setting forth the penalties for altering that card are so interrelated as to be non-severable, thus allowing defendant to challenge the constitutionality of the obtain-and-carry provision of the statute although he is charged with altering the identification.

Next, we must determine whether La. R.S. 15:542.1.4(C), which sets forth the penalties for altering a branded identification card, is severable from the obtain-and-carry provision found in La. R.S. 40:1321(J). The severability of La. R.S. 15:542.1.4(C) is important because it determines whether defendant has standing to challenge the underlying obtain-and-carry provision found in La. R.S. 40:1321(J).

[2] Pursuant to La. Const. art. V, § 5(D), this case is directly appealable to this court. The facts of the offense are not before this court, as the trial court's declaration of the statutes' unconstitutionality was made before trial.

The state argues that a ruling on the constitutionality of the obtain-and-carry provision is not essential, as the state did not charge defendant with violating the provision requiring him to obtain and carry a branded identification card. Instead, it charged him with altering an official identification document to conceal the designation that he is a registered sex offender, in violation of La. R.S. 15:542.1.4(C). Defendant counters that the statutes are so interrelated as to be non-severable, which affords defendant the standing to challenge the underlying requirement to carry a branded identification card.

As mentioned at the outset, defendant was charged with altering an official identification card to conceal the designation that he was a registered sex offender in volition of La. R.S. 15:542.1.4(C), which provides as follows:

> (1) Any person who either fails to meet the requirements of R.S. 32: 412(I) or R.S. 40:1321(J), who is in possession of any document required by R.S. 32:412(I) or R.S. 40:1321(J) that has been altered with the intent to defraud, or who is in possession of a counterfeit of any document required by R.S. 32:412(I) or R.S. 40:1321(J), shall, on a first conviction, be fined not more than one thousand dollars and imprisoned at hard labor for not less than two years nor more than ten years without benefit of parole, probation, or suspension of sentence.

The obtain-and-carry provision, La. R.S. 40:1321(J), states in its entirety:

> (1) Any person required to register as a sex offender with the Louisiana Bureau of Criminal Identification and Information, as required by R.S. 15:542 *et seq.*, shall obtain a special identification card issued by the Department of Public Safety and Corrections which shall contain a restriction code declaring that the holder is a sex offender. This special identification card shall include the words "sex offender" in all capital letters which are orange in color and shall be valid for a period of one year from the date of issuance. This special identification card shall be carried on the person at all times by the individual required to register as a sex offender.
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> (2) Each person required to carry a special identification card pursuant to this Subsection shall personally appear, annually, at a field office of the office of motor vehicles to renew his or her special identification card[,] but only after he or she has registered as an offender pursuant to R.S. 15:542 *et seq.* Reregistration shall include the submission of current information to the department and the verification of this information, which shall include the street address and telephone number of the registrant; the name, street address and telephone number of the registrant's employer[;], and, any registration information that

> may need to be verified by the bureau. No special identification card shall be issued or renewed until the office of motor vehicles receives confirmation from the bureau, electronically or by other means, that the reregistration of the sex offender has been completed.
>
> (3) The provisions of this Subsection shall apply to all sex offenders required to register pursuant to R.S. 15:542 *et seq.*, regardless of the date of conviction.
>
> (4) Whoever violates this Subsection shall be fined not less than one hundred dollars and not more than five hundred dollars, or imprisoned for not more than six months, or both.

"The test for severability is whether the unconstitutional portions of the statute are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested by the legislature in passing the act." *State v. Baxley*, 93-2159 (La. 2/28/94), 633 So.2d 142, 144–45 (quoting *State v. Azar,* 539 So.2d 1222, 1226 (La.), *cert. denied,* 493 U.S. 823, 110 S.Ct. 82, 107 L.Ed.2d 48 (1989)).

Here, La. R.S. 40:1321(J) is not so distinct from La. R.S. 15:542.1.4(C) as to be severable. The state must first prove as an element of the crime that defendant is required by La. R.S. 40:1321(J) or La. R.S. 32:412(I) to carry an identification card branded with the word "sex offender." Louisiana Revised Statutes 15:542.1.4(C) applies only to people who are required to obtain and carry the branded identification card and criminalizes a person's failure to comply with this requirement. Because La. R.S. 15:542.1.4(C) depends on the obtain-and-carry requirement for an understanding of its meaning, severing them would destroy the intention manifested by the legislature.

Having found that defendant satisfied the initial hurdles presented by his case, we now address the merits.

The requirement to carry a branded identification card constitutes compelled speech and does not survive a strict scrutiny analysis.

A threshold question in assessing the constitutionality[3] of the branded-identification card requirement is determining whether this obligation amounts to government speech or compelled speech. If compelled speech, the branded identification card faces strict scrutiny. If government speech, the branded identification card faces little to no scrutiny. This analysis necessarily involves a review of First Amendment jurisprudence as it relates to government speech and compelled speech.

The First Amendment provides that "Congress shall make no law... abridging the freedom of speech." *U.S. Const. Amend. I.* The First Amendment protects against prohibitions of speech, and also against laws or regulations that compel speech. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See Board of Education v. Barnette*, 319 U.S. 624, 633–634, 63 S.Ct. 1178, 1182–1183, 87 L.Ed. 1628 (1943)[.]" *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, *infra*, the United States Supreme Court announced a three-factor analysis to identify government speech. This framework considers (1) a medium's history of communicating governmental messages, (2) the level of the public's association between that medium of speech and the government, and (3) the extent of the government's control over the message conveyed. In terms of how the Free Speech Clause affects government speech, the *Walker* court found as follows:

> When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum,* 555 U.S. 460, 467–468, 129 S.Ct. 1125, 172 L.Ed.2d 853

[3] As a general matter, statutes are presumed constitutional, and any doubt is to be resolved in the statute's favor. *State v. Fleury*, 01-0871, p. 5 (La. 10/16/01), 799 So.2d 468, 472. "Constitutional scrutiny favors the statute. Statutes are presumed to be valid, and the constitutionality of a statute should be upheld whenever possible. *State v. Brenner*, 486 So.2d 101 (La.1986); *State v. Rones*, 223 La. 839, 67 So.2d 99 (1953)." *State v. Griffin*, 495 So. 2d 1306, 1308 (La. 1986).

> (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 559, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (observing that "our constitutional system" seeks to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people").

Walker, 576 U.S. 200, 207, 135 S.Ct. 2239, 2245–46, 192 L.Ed.2d 274 (2015). Nevertheless, the ability of the government to express itself is not without restriction, as other constitutional and statutory provisions may limit government speech.

The Free Speech Clause itself may constrain government speech—for instance, in seeking to compel private persons to "convey the government's speech." *Id.*, 576 U.S. at 208, 135 S.Ct. at 2246. "But, as a general matter, when the government speaks[,] it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." *Id.*

The state asserts the obtain-and-carry provision amounts to permissible government speech not regulated by the First Amendment for three primary reasons: (1) defendant is not required to publically display his state identification card "like a billboard;" (2) people viewing defendant's state identification card are unlikely to conclude that defendant endorses the message "sex offender"; and, (3) requiring defendant to report basic facts on his state identification (including that he is a sex offender) is necessary to conduct essential operations of government. The state also argues that while people may be embarrassed about some information on their license, like their age or weight, this court has explained that "an imposition of

restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *State v. Trosclair*, 11-2302, p. 13 (La. 5/8/12), 89 So.3d 340, 349 (citing *Smith v. Doe*, 538 U.S. 84, 93, 123 S.Ct. 1140, 1147, 155 L.Ed.2d 164 (2003)).

We do not find the state's arguments persuasive. In *Barnette*, *supra*, the United States Supreme Court found that the children of Jehovah's Witnesses could not be compelled by the school board to salute the flag and to pledge allegiance at school without violating the First Amendment. About 30 years later, *Barnette* was cited in the analysis in *Wooley v. Maynard*, *supra*, wherein the United States Supreme Court found 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. Maynard was found guilty in state court of violating a misdemeanor statute on three separate charges. He refused to pay the mandated fines, which resulted in 15 days in jail. Maynard and his wife then brought an action to enjoin the state from arresting and prosecuting them in the future. Ultimately, the United States Supreme Court held that the state could not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id*., 430 U.S. at 713, 97 S.Ct. at 1434–35. Furthermore "'persons who observe' designs on IDs 'routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf.'" *Walker*, 576 U.S. at 212, 135 S.Ct. at 2249 (quoting *Summum*, 555 U.S. at 471, 129 S.Ct. at 1133). While the Supreme Court did not identify its standard of review, it clearly applied strict scrutiny to find that the driver could not be compelled by the government to display an ideological message with which he disagreed.

However, compelled speech (or compelled silence) does not turn simply on whether an ideological message is at issue. In *Riley v. National Federation of the*

Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), the Supreme Court left the realm of the political and the religious and expanded its compelled speech doctrine to the realm of facts. Specifically, the United States Supreme Court noted that *Wooley*, amongst other cases, could not be distinguished simply because they involved compelled statements of opinion, while *Riley* dealt with compelled statements of fact: "[E]ither form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797–98, 108 S.Ct. at 2678. While analyzing North Carolina's content-based regulation governing the solicitation of charitable contributions by professional fundraisers, the United States Supreme Court noted:

> Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

Id., 487 U.S. at 798, 108 S.Ct. at 2678. It further observed, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.*, 487 U.S. at 795, 108 S.Ct. at 2677. Thus, the court found that the North Carolina content-based regulation, wherein the state had adopted a "prophylactic rule of compelled speech, applicable to all professional solicitations[,]" was subject to exacting First Amendment scrutiny. *Id.*, 487 U.S. at 798, 108 S.Ct. at 2678. Ultimately, the court concluded the state's interest in the importance of "informing donors how the money they contribute is spent to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity" was not as weighty as the state asserted. *Id*. Additionally, the chosen means to accomplish it was unduly burdensome and not narrowly tailored, as the state's interest was not sufficiently related to a percentage-based test and not sufficiently tailored to such interests. *Id*. Government regulation

of speech "must be measured in minimums, not maximums." *Id.*, 487 U.S. at 790, 108 S.Ct. at 2674. Therefore, the court found the regulation infringed upon freedom of speech.

In *Walker*, *supra*, the United States Supreme Court observed that "specialty license plates issued pursuant to Texas's statutory scheme conveyed government speech." *Walker,* 576 U.S. at 208, 135 S.Ct. at 2246. Relying on its analysis from *Summum*, the court first noted that, "the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States." *Walker*, 576 U.S. at 210–11, 135 S.Ct. at 2248. Furthermore, the "Texas license plates designs 'are often closely identified in the public mind with the [State].'" *Id.*, 576 U.S. at 212, 135 S.Ct. at 2248 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1133). The plates serve the governmental purpose of vehicle registration and identification, and the governmental nature is clear from their faces. *Id.* Further, Texas requires all vehicle owners to display license plates, Texas issues every license plate, and Texas owns the designs (including the patterns and designs proposed by organizations and private individuals). *Id.* Texas even dictates the procedure for disposing of them. *Id.* Thus, "Texas license plates are, essentially, government IDs. And issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated.'" *Id.*, 576 U.S. at 212, 135 S.Ct. at 2249 (citing *Summan*, *supra*, at 471, 129 S.Ct. at 1133). The court noted that Texas "maintains direct control over the messages conveyed on its specialty plates[,]" allowing Texas to choose how to present itself and its constituency. *Id.*, 576 U.S. at 213, 135 S.Ct. at 2249. The court also noted that there are other features on the Texas specialty license plates that also indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas selects each design, and presents these designs on "government-mandated, government-controlled, and government-issued

IDs that have traditionally been used as a medium for government speech." *Id.*, 576 U.S. at 214, 135 S.Ct. at 2250. Furthermore, it also places the designs directly below the large letters identifying "Texas" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id*., 576 U.S. at 214, 135 S.Ct.at 2250 (quoting *Summum*, 555 U.S. at 472, 129 S.Ct. at 1134).

However, the United States Supreme Court also explicitly noted that its "determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs." *Id.*, 576 U.S. at 219, 135 S.Ct. at 2252 (citing *Wooley*, 430 U.S. at 717 n.15, 97 S.Ct. at 1436). Furthermore, the court recognized the following:

> [W]e have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey 'the State's ideological message,' SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

Id., 576 U.S. at 219, 135 S.Ct. at 2253 (citations omitted).

Thus, while license plate designs are government speech, it is possible that government speech can implicate private speech interests. Returning to *Wooley*, the issue was whether the government's message is "readily associated" with the private person compelled to propound it. *Wooley*, 430 U.S. at 717 n.15, 97 S.Ct. at 1436. Even 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.[4]

[4] Additionally, the *Wooley* court noted that currency differs in significant respects from an automobile. Currency, while passed from hand to hand, is not as readily associated with its operator, like an automobile. Thus, while "[c]urrency is generally carried in a purse or pocket and need not be displayed to the public[,]" [and] "[t]he bearer of currency is thus not required to publicly advertise the national motto," it differs in significant respects from a personal identification card as well. *Id*. Although not displayed as prominently as a billboard or a license

We find instructive a recent ruling by a federal district court in Alabama, which determined that a branded-identification requirement unconstitutionally compels speech. The ruling in *Doe 1 v. Marshall*, 367 F.Supp.3d 1310 (M.D. Ala. Feb. 11, 2019), pertained to the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA" or "the Act"), which applied to adult offenders convicted of any of 33 infractions designated as sex offenses under Alabama law. There, a sex offender must abide by certain registration and notification requirements and must carry a branded identification card. Those registrant-specific identifications must bear the inscription "criminal sex offender" in bold, red letters, which enable law enforcement to identify the licensee as a sex offender.

In February 2019, the Alabama court granted summary judgment for the plaintiffs on the as-applied compelled speech challenge, declaring that the branded identification requirement under Alabama law was unconstitutional under the First Amendment. It specifically found that the branded identification requirement unnecessarily compels speech, and it was not the least restrictive means of advancing a compelling state interest. *Id.* at 1324. The court, citing to *Cressman v. Thompson*, 798 F.3d 938, 949–51 (10th Cir. 2015), observed there was a four-part test to determine whether the state has compelled speech. "There must be (1) speech; (2) to which the plaintiff objects; (3) that is compelled; and[,] (4) that is readily associated with the plaintiff." *Id.* The court found all four elements were satisfied. *Id.*

First, comparing the words "criminal sex offender" to the "Live Free or Die" license plate in *Wooley*, *supra*, the court found there was speech. *Id.* The court further observed that while the branded identification cards involved government speech, that designation did not immunize it from a compelled speech analysis. While no one can force the state to print a specific design on a license plate, like in

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plate, an identification card is not as pervasive yet unnoticed as currency either, and often must be displayed to handle every day, mundane duties.

Walker, *supra*, neither can the state force someone to display a certain message on their license plate, like in *Wooley*. *Id*. at 1325.

Next, the *Doe I* court recognized that the plaintiffs strongly objected to the message on their identification card, but they were compelled to display the message. Carrying and displaying identification is a virtual necessity in contemporary society; and, thus, the court found the branded identification comparable to *Wooley*, where a license plate is both required by the state and required to be displayed to others. *Id.* Furthermore, the message on the branded identification card is associated with the plaintiffs, as the cards are "chock-full of Plaintiffs' personal information[.]" *Id.* at 1326. Additionally, much like how Maynard in *Wooley* was associated with his vehicle, the plaintiffs here were associated with their drivers licenses. The court noted, "[t]he dirty looks that Plaintiffs get are not directed at the State." *Id.* The court also differentiated between identification cards and currency, as a person is not identified with their currency, which is not displayed, but rather exchanged. Identification cards are personalized and never meant to be given away, unlike currency. *Id.*

The *Doe I* court determined that the branded identification requirement compelled speech and imposed a content-based regulation on speech; therefore, the requirement must pass strict scrutiny. *Id.* While noting that the state has a compelling interest in identifying a person as a sex offender, it found that Alabama had not adopted the least restrictive means of doing so, such as using a single letter that law enforcement would know but the general public would not, and therefore it went beyond what was necessary to achieve that interest. *Id.* at 1326–27. Thus, the court found the statute, as applied by the state, unconstitutional. *Id.*

Also noteworthy is the case from the northern district of California, which is helpful in our analysis. That case pertained to the International Megan's Law ("IML") codified in 34 U.S.C. § 21501 *et seq.*, requiring that passports issued to sex

offenders convicted of a sex offense against a minor display a unique identifier indicating the bearer's conviction. *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016). The plaintiffs in that case challenged both the "passport identifier" and "notification" provisions, the latter pertaining to international travel plans that required individuals to report their future travel plans 21 days in advance of international travel. Under the procedures that existed at the time, a sex offender could travel to one country, but then travel from that destination to another country without detection by U.S. authorities, and the "IML prevents such offenders 'from thwarting I[ML] notification procedures by country hopping to an alternative destination not previously disclosed,' by directing the State Department to 'develop a passport identifier' that would allow such individuals to be identified once they arrive at their true destination." *See id.* at 5 (citing 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith)).

Once an individual was determined to be a convicted sex offender, the Secretary of State would not issue a passport to them unless it included a "unique identifier" and could revoke passports issued without such an identifier. In this case, however, the unique identifier to be used had not been determined at the time of the suit, and therefore the court found that the plaintiffs had failed to establish standing, as the case was not ripe for consideration.

Nonetheless, the *Kerry* court did briefly address the compelled speech claims and noted that a Federal Rule of Civil Procedure 12(b)(6) dismissal would be appropriate, as the passport identifier would constitute government speech, and not speech by the individual passport holder. The court noted the government controls every aspect of its issuance and appearance, and that a passport is a government-issued document. The court even specifically noted that, "[t]he function of a passport is to serve 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 identity and proof of allegiance to the U.S.'" *Id.* at 16 (quoting *Haig v. Agee*, 453 U.S. 280, 292–93 (1981)). Even while in the passport holder's hands, a passport remains government property and must be surrendered upon demand. Furthermore, individuals have no editorial control over the information in the passport, and only the U.S. government may amend passports. Criminal penalties are imposed upon those who mutilate or alter them. *Id.* at 17. Ultimately, the court found that the passport identifier constituted government speech, and therefore, the "unique identifier" requirement did not implicate First Amendment interests, as the Free Speech Clause limits government regulation of speech that is considered private, but does not regulate government speech. *Id.* at 18. Further, a passport communicates information on behalf of the issuing government, not the passport holder. The court stated that "[i]f federal law permitted individuals to communicate their own messages in their passports, or control the information that passports contain, those documents would cease to function as reliable government-issued identification." *Id*.

The *Kerry* court differentiated the *Kerry* case from the *Wooley* jurisprudence by stating that those "involved government speech containing an 'ideological message' or a political position which implicated the First Amendment because the government's point of view would be attributed to—or deemed to be endorsed by—the private party." *Id.* The court found the yet-to-be-determined mark on the passport was a statement of fact to be placed by the government—who can speak for itself—on the passport and did not communicate any ideological or political message. *Id.* The court further noted that registered sex offenders had had the opportunity to challenge criminal charges, and that a person would not reasonably interpret the identifier to convey agreement with the government's opinion of sex trafficking. *Id.* Additionally, while the court noted that in some cases, the compulsion of "factual" speech may be unconstitutional, citing to *Riley*, *supra*, it determined that "those

cases are distinguishable because the laws or regulations at issue required the speaker to communicate the government's message relating to controversial social or political issues, not mere facts relating to criminal convictions." *Id*. Ultimately the court found that, "contrary to plaintiffs' arguments, the identifier is not a public communication and will not even be displayed to the public. The U.S. passport itself is not speech, and the passport identifier does not suggest or imply that the passport-holder has adopted or is sponsoring an ideological or political point of view." *Id.*

Bringing the analysis back to the facts of this case, we are faced with the question of whether Louisiana's identification 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. Defendant clearly objects to showing others an identification that reads "SEX OFFENDER" in big orange letters because of the social consequences of that message rather than for religious or political reasons. The federal district court's opinion in California with regard to passports notwithstanding, *Walker*, *supra*, suggests that if the government compels private persons to regularly convey its chosen speech, the government forfeits the deference it is normally afforded under the government speech doctrine.

Thus, we find the attempt by the *Kerry* court to distinguish the facts of that case from the *Riley* jurisprudence unpersuasive, as *Riley* did not differentiate between statements of facts that relate to controversial or political facts, as opposed to simply facts. Like in *Wooley* where the government-issued license plate read "Live Free or Die," the identification card branded with "sex offender" is speech. The fact that a license plate was found to be government speech did not immunize it from a compelled speech analysis. Thus, even though an identification card is government speech, a compelled speech analysis may still be required. While *Wooley* involved an ideological statement, *Riley* observed that cases cannot be

differentiated on whether they turn on compelled statements of opinion or on compelled statements of fact. Further, the First Amendment does not turn on whether a person is speaking or being forced to speak, rather than remaining silent. While no one can force the state to print a certain design on its license plate, like in *Walker*, neither can the state force someone to display a particular message on his or her license plate either, like in *Wooley*.

Notably, the state also argues that requiring defendant to report basic facts on his state identification card is necessary to conduct essential operations of government. In other cases, the courts have more explicitly addressed compelled speech when it pertains to essential government operations. In *United States v. Sindel,* 53 F.3d 874 (8th Cir. 1995), the federal Eighth Circuit rejected a claim that compelled disclosure of information on an IRS form was unlawful compelled speech: "There is no right to refrain from speaking when 'essential operations of government require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.'" *Id.* at 878 (quoting *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 645, 63 S.Ct. 1178, 1189, 87 L.Ed. 1628 (1943)).

In addition, in *United States v. Arnold*, 740 F.3d 1032 (5th Cir. 2014), the federal Fifth Circuit found the registration requirements of the Sex Offender Registration and Notification Act ("SORNA") did not compel speech in violation of the First Amendment. There, the court noted that in 2011, Arnold moved from Marshall County, Mississippi, to Tennessee, but did not notify Marshall County of his move, update his registration with Mississippi, or register as a sex offender in Tennessee. While observing that Arnold had not urged that SORNA either requires him (a) to affirm a religious, political, or ideological belief he disagrees with, or (b) to be a moving billboard for a governmental ideological message, the court noted that it appeared Congress enacted SORNA as a means to protect the public from sex

offenders by providing a uniform mechanism to identify those convicted of certain crimes.

However, *Sindel* pertains to information provided solely to the government, and *Arnold* concerned SORNA's requirement that sex offenders register their residence. In *Riley*, the Supreme Court noted that the state may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This specific procedure "would communicate the desired information to the public without burdening a speaker with unwanted speech [.]" *Riley*, 487 U.S. at 800, 108 S.Ct. at 2679. The court suggested the state could "vigorously enforce" its antifraud laws, and these more narrowly tailored rules were "[i]n keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.* 487 U.S. at 800, 108 S.Ct. at 2679–80.

Returning to *Wooley*, the Supreme Court analyzed whether the state's countervailing interest was sufficiently compelling to justify requiring appellees to display the state motto on their license plates. There, the state argued that the display of the motto (1) facilitated the identification of passenger vehicles; and (2) promoted appreciation of history, individualism, and state pride. *Wooley*, 430 U.S. at 716, 97 S.Ct. at 1436. The court found that even if the government's purpose in requiring them to display the plate was "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id*., 430 U.S.at 716–17, 97 S.Ct. at 1436 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

Here, defendant is not just required to register his residence, nor solely to provide information to the government. Defendant is instead also required to display

the words "sex offender" on his identification card. In performing everyday tasks, he will have to show that identification card to the public. That identification card is branded with the words "sex offender," and, along with his name, picture, address, and other identifying characteristics, that branded identification card is "readily associated" with him. *Wooley*, *supra*. Further, a state identification card is not like a passport or currency. Passports are not routinely viewed by the public, and they serve 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." *Haig v. Agee*, 453 U.S. 280, 292–93 (1981). While currency may have the words "In God We Trust" printed on it, that message is not personalized, as is the case with an identification card. Furthermore, currency is simply exchanged, as the currency passes through many hands. Identification cards, on the other hand, are proof of identity and are frequently displayed for examination by a cashier, bank teller, grocery store clerk, new employer, or for air travel, hotel registration, and so forth.

The branded identification card is compelled speech, and it is a content-based regulation of speech that consequently must pass strict scrutiny. While the state certainly has a compelling interest in protecting the public and enabling law enforcement to identify a person as a sex offender, Louisiana has not adopted the least restrictive means of doing so. A symbol, code, or a letter designation would inform law enforcement that they are dealing with a sex offender and thereby reduce the unnecessary disclosure to others during everyday tasks. The sex offender registry and notification is available to those who have a need to seek out that information, while also not unnecessarily requiring disclosing that information to others via a branded identification. As Louisiana has not used the least restrictive means of advancing its otherwise compelling interest, the branded identification requirement is unconstitutional.

The state's final argument is that defendant's alteration of his identification card is fraudulent conduct, which is not protected by the First Amendment. The state cites *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.672 (1968), in support of this assertion; however, we do not find the state's argument persuasive.

In *O'Brien*, the Supreme Court addressed a 1965 Amendment concerning Selective Service registration certificates, which "subject[ed] to criminal liability not only one who 'forges, alters, or in any manner changes[,]' but also one who 'knowingly destroys (or) knowingly mutilates' a certificate." *Id.*, 391 U.S. at 375, 88 S.Ct. at 1678. The Supreme Court stated the government had a substantial interest in assuring the continuing availability of issued Selective Service certificates, the 1965 Amendment specifically protected that interest, and the court "perceive[d] no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction." *Id.*, 391 U.S. at 381, 88 S.Ct. at 1681. Specifically, the Supreme Court noted:

> The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

Id., 391 U.S. at 382, 88 S.Ct. at 1681–82. However, the court differentiated this case from ones "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* As an example, the court cited to *Stromberg*, *supra*, noting, "this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing

communication[,] it could not be sustained as a regulation of noncommunicative conduct." *O'Brien*, 391 U.S. at 382, 88 S.Ct. at 1682.

We find *Wooley*, *supra*, to be more applicable than *O'Brien*, *supra*. In *Wooley*, Maynard repeatedly covered the motto "Live Free or Die" on his license plate, and, in response, was repeatedly charged with and convicted of a misdemeanor offense that prohibited obscuring the letters on a license plate. The court declared the statute unconstitutional and enjoined New Hampshire from enforcing it on the grounds that forcing their residents to display the state motto violated their First Amendment rights. Similarly, we find that the designation on the identification card is compelled speech, and a similar result must follow. This outcome is in contrast with the *O'Brien* ruling, wherein the Supreme Court found the governmental interest and the scope of the 1965 Amendment were limited to preventing harm to the Selective Service System. When O'Brien deliberately rendered his registration certificate unavailable, he willfully frustrated this governmental interest. Additionally, "[f]or this noncommunicative impact of his conduct, and for nothing else, he was convicted." *O'Brien*, 391 U.S. at 382, 88 S.Ct. at 1682. However, in the instant case, because it compels speech, the identification requirement is a content-based regulation of speech, which targets speech based on its communicative content.

Furthermore, this requirement cannot be severed from the rest of the statute. As discussed above, La. R.S. 40:1321(J) is not distinct from La. R.S. 15:542.1.4(C). The statute which defendant was charged under, La. R.S. 15:542.1.4(C), specifically states "[a]ny person who either fails to meet the requirements of La. R.S. 32:412(I) or La. R.S. 40:1321(J), who is in possession of any document required by La. R.S. 32:412(I) or La. R.S. 40:1321(J) that has been altered . . . ." Thus, in order to convict defendant of violating La. R.S. 15:542.1.4(C), the state must first prove as an element of the crime that he is required by La. R.S. 40:1321(J) or La. R.S. 32:412(I) to carry an identification card branded with the words, "sex offender." Therefore,

the statute still requires unconstitutional compelled speech, and this requirement cannot be severed from the rest of the statute. The statutes are intertwined so that we cannot simply strike the provision requiring sex offenders to have "sex offender" written on their identification card. Otherwise, the meaning of that statute is lost. However, the state has an alternative method discussed herein for preventing fraud, through other provisions in the Louisiana Revised Statutes that prohibit altering a government identification generally. *See* La. R.S. 14:70.7; 40:1131. Thus, the state still has a content-neutral way to prevent fraudulently altering identification cards.

CONCLUSION

In conclusion, the district court did not err when it declared La. R.S. 40:1321(J) and La. R.S. 15:542.1.4(C) unconstitutional. The statute that defendant was charged under, La. R.S. 15:542.1.4(C), cannot be severed from La. R.S. 40:1321(J), because in order to prosecute defendant under La. R.S. 15:542.1.4(C), the state must first prove as an element of the crime that he is required by La. R.S. 40:1321(J) or La. R.S. 32:412(I) to carry an identification card branded with the word, "sex offender." Furthermore, the branded identification card is compelled speech. As a content-based regulation of speech, it must pass strict scrutiny. While the state certainly has a compelling interest in protecting the public and enabling law enforcement to identify a person as a sex offender, Louisiana has not adopted the least restrictive means of doing so. As Louisiana has not used the least restrictive means of advancing its otherwise compelling interest, the branded identification card requirement is unconstitutional. Nor does the inclusion of fraud as an element of La. R.S. 15:542.1.4(C) salvage the statute, as the statute's requirement that defendant carry the branded identification card cannot be severed from the remainder of the statute. However, the state has a content-neutral way to prevent fraudulently altering identification cards, through other provisions in the Louisiana Revised Statutes

which prohibit altering a government identification generally. *See* La. R.S. 14:70.7; 40:1131.

DECREE

The district court's declaration that the statutes are unconstitutional and the district court's ruling granting defendant's motion to quash are affirmed. **AFFIRMED.**

10/20/20

SUPREME COURT OF LOUISIANA

No. 2020-KA-0323

STATE OF LOUISIANA

VERSUS

TAZIN ARDELL HILL

On Appeal from the Fifteenth Judicial District Court, Parish of Lafayette

WEIMER, J., concurring.

I agree with the majority's determination that the branded identification card required by La. R.S. 40:1321(J) and La. R.S. 15:542.1.4(C) is compelled speech and, as content-based regulation of speech, will survive constitutional analysis only if it passes the strict scrutiny test. I write separately to emphasize the failure of the state, on the present record, to meet its evidentiary burden under a strict scrutiny analysis.

As set forth in detail in **In re Warner**, 05-1303 (La. 4/17/09), 21 So.3d 218, which is another decision of this court addressing the constitutionality of a rule effecting a content-based regulation of speech, the strict scrutiny analysis involves a two-part inquiry. "Under strict scrutiny the government bears the burden of proving the constitutionality of the regulation by showing (1) that the regulation serves a compelling governmental interest, and (2) that the regulation is narrowly tailored to serve that compelling interest." **Warner**, 05-1303 at 37, 21 So.3d at 246. As we cautioned in **Warner**, "[a] law subject to strict scrutiny because it regulates speech based on its content is presumptively invalid, 'and the Government bears the burden to rebut that presumption.'" ***Id.***, 15-1303 at 43, 21 So.3d at 250 (quoting **United States v. Playboy Entertainment Group. Inc.**, 529 U.S. 803, 817 (2000)).

As **Warner** explains, in connection with the first prong of a strict scrutiny analysis–the statement of a compelling governmental interest which is served by the regulation in question–"[t]he state's role is to assert an interest served by the regulation at issue and to submit evidence to establish the compelling nature of that interest." **Warner**, 15-1303 at 44, 21 So.3d at 250. In this endeavor, mere speculation of harm will not suffice; rather, the state must effectively demonstrate "that the harms it recites are real and that its restriction [of speech] will in fact alleviate them to a material degree." ***Id.*** (quoting **Playboy Entertainment Group**, 529 U.S. at 817).

If the state meets this burden and succeeds in setting forth an interest which qualifies as "compelling," then we must analyze "whether the law in question is precisely drawn or narrowly tailored to serve that compelling interest." **Warner**, 15-1303 at 47, 21 So.3d at 253. "The purpose of this analysis 'is to ensure that speech is restricted no further than necessary to achieve the [state's] goal ....'" ***Id.***, 15-1303 at 48, 21 So.3d at 253 (quoting **Ashcroft v. American Civil Liberties Union**, 542 U.S. 656, 666 (2004). To this end, the court must consider: (1) whether the rule actually advances the interest asserted; (2) whether it is reasonably necessary to serve the state interest; (3) whether the rule is underinclusive; *i.e.*, whether it leaves appreciable damage to the supposedly vital state interest unprohibited; (4) whether the rule is overinclusive; *i.e.*, whether it suppresses more speech than is necessary to accomplish the compelling goal; and (5) whether there are less speech restrictive alternatives available that would serve the compelling state interest as well. **Warner**, 15-1303 at 48-49, 21 So.3d at 253-54.

As the foregoing discussion illustrates, the burden that falls on the state in a case such as this one, requiring a strict scrutiny analysis, is a substantial one, which

will not be satisfied simply by argument and speculation. However, that is essentially all that the record below offers.

Before this court, the state asserts that the Louisiana Legislature's findings and purpose with regard to the state's sex offender registration requirements, codified in La. R.S. 15:540(A), are sufficient to prove a "compelling governmental interest." Pretermitting the question of whether broad statements of legislative purpose involving the sex offender registration requirements as a whole (and in absence of empirical evidence of the type outlined in **Warner**) are sufficient to establish a compelling governmental interest, what is at issue in this case is not the entire registration scheme, but a specific provision thereof, and the state has offered no evidence proving that the branded identification card effectively alleviates any harm that might be inflicted on the public, or that it is the least restrictive means of furthering its stated interest.

On the present record, the state has clearly failed to meet its evidentiary burden under the strict scrutiny test. Therefore, I respectfully concur.

10/20/20

SUPREME COURT OF LOUISIANA

NO. 2020-KA-0323

STATE OF LOUISIANA

VERSUS

TAZIN ARDELL HILL

ON APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, PARISH OF LAFAYETTE

CRAIN, J., dissenting.

The majority finds it unconstitutional to require a convicted sex offender to be identified as such on a government-issued identification card. Louisiana Revised Statutes 40:1321J requires a registered sex offender to procure a special identification card that includes the words "sex offender" in all capital, orange letters. That phrase is the speech at issue. It is not First Amendment protected speech. The speaker is the government: the words are stamped by a governmental agency on a government-issued identification card in accordance with a government-enacted statute. This is the embodiment of government speech.

The only issue is whether this government speech is presented so as to lead an observer to incorrectly conclude the speaker is the cardholder. If so, the government speech crosses the line into "compelled speech," which is subject to strict constitutional scrutiny. The First Amendment stringently limits a state's authority to compel a private party to express a view with which the private party disagrees. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219; 135 S.Ct. 2239, 2253; 192 L.Ed.2d 274 (2015). However, "the Government is not uniformly barred from passing laws that might call on private parties to literally *carry* an item containing Government speech." *New Doe Child #1 v. Cong. of United States*, 891 F.3d 578, 593 (6th Cir. 2018) (emphasis in original). As

explained by the Supreme Court, the test is whether the private parties "are closely linked with the expression in a way that makes them appear to endorse the government message." *Johanns v. Livestock Mktg. Association*, 544 U.S. 550, 565 n.8, 125 S.Ct. 2055, n.8, 161 L.Ed.2d 896 (2005) (internal quotation marks omitted); *New Doe Child*, 891 F. 3d at 593. Under this "attribution analysis," the question is whether observers would attribute, or actually have attributed, the speech to the individual rather than to the government. *See New Doe Child*, 891 F.3d at 593-94.

Here, nothing about the placement or content of the subject speech remotely suggests it is made or endorsed by the defendant. It declares the defendant is a sex offender. It appears on a state-issued identification card. "[P]ersons who observe designs on IDs routinely—and reasonably—interpret them as conveying some message on the *issuer's* behalf." *Walker*, 576 U.S. at 212; 135 S.Ct. at 2249 (internal punctuation omitted; emphasis added). That is particularly true in this case given the pejorative nature of the speech. No reasonable observer, when looking at the identification card, will conclude the defendant chose to promote his status as a convicted sex offender by voluntarily procuring and personalizing a state-issued identification card to declare that information for the world. "In this context, there is little chance that observers will fail to appreciate the identity of the speaker." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471; 129 S.Ct. 1125, 1133; 172 L.Ed.2d 853 (2009).

The majority uses a truncated standard that asks only if the speech is "associated with," rather than "endorsed [by]," the defendant.[1] The majority

[1] The "associated with" phrase appears in *Wooley* where the Supreme Court was "faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an *ideological message* by displaying it on his private property." *Wooley v. Maynard*, 430 U.S. 705, 713; 97 S.Ct. 1428, 1434; 51 L.Ed.2d 752 (1977) (emphasis added). The Court distinguished such messages on currency, which is "passed from hand to hand," from a message appearing on the license plate of an automobile "which is readily associated with its operator." *Wooley*, 430 U.S. at 717 n.15; 97 S.Ct. at 1436 n.15. We are not confronted with speech conveying an ideological message, nor are we addressing compelled verbal communication, which is inherently identified with the speaker, as in *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781; 108 S.Ct. 2667; 101 L.Ed.2d 669 (1988). The Supreme Court's more recent and

determines the defendant's identification card is "associated with" the defendant, an unavoidable conclusion given the whole purpose of an identification card is to *identify the defendant*. It is certainly his ID; however, that fact alone does not attribute the speech on the ID to the defendant instead of the government. Absent attribution to the defendant, the speaker remains the government. Under the majority's approach, any and all information appearing in government-issued documents that are "associated with" a person--a driver's license, passport, social security card, birth certificate, etc.--is compelled speech subject to strict constitutional scrutiny. A driver's weight, age, height, and address are all compelled speech that, if challenged on constitutional Free Speech grounds, requires the state to prove the inclusion of the information is the least restrictive means of achieving a compelling state interest.

This case turns on a single determinative question: who is the speaker? Any reasonable observer of the defendant's state-issued identification card would readily ascertain the speaker is the government, not the defendant. I respectfully dissent from the majority's holding declaring Louisiana Revised Statutes 40:1321J and 15:542.1.4C unconstitutional.

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refined approach to identifying permissible government speech appears in *Walker*, *Pleasant Grove City*, and *Johanns*, as set forth herein.