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## International Megan's Law as Compelled Speech

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## NOTE

### INTERNATIONAL MEGAN'S LAW AS COMPELLED SPEECH

Alexandra R. Genord\*

*“The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 United States Code Section 212b(c)(1).” International Megan’s Law (IML), passed in 2016, prohibits the State Department from issuing passports to individuals convicted of a sex offense against a minor unless those passports are branded with this phrase. The federal government’s decision to brand its citizens’ passports with this stigmatizing message is novel and jarring, but the sole federal district court to consider a constitutional challenge to the passport identifier dismissed the plaintiffs’ First Amendment claim, deeming the provision government speech. This Note argues that this passport identifier is more appropriately analyzed as a form of compelled speech, triggering strict scrutiny review that the IML’s passport identifier would not survive.*

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#### INTRODUCTION

On February 8, 2016, President Barack Obama signed “International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders” (“International Megan’s Law” or IML) into law.<sup>1</sup> In addition to several provisions securing advance notice of international travel by convicted child sex offenders,<sup>2</sup> the IML requires that passports issued to covered sex offenders bear a “unique identifier.”<sup>3</sup> In October 2017, the State Department announced this identifier would take the form of an endorsement, printed inside the back cover of the passport book: “The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 United States Code Section 212b(c)(1).”<sup>4</sup>

Though the IML impacts a tiny fraction of the millions of U.S. citizens applying for passports each year,<sup>5</sup> it has produced significant real-world con-

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1. Press Release, White House Office of the Press Sec’y, Statement by the Press Sec’y on H.R. 515, H.R. 4188, S. 2152 (Feb. 8, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/08/statement-press-secretary-hr-515-hr-4188-s-2152-0> [<https://perma.cc/JA45-58Y6>].

2. International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, §§ 4–6, 130 Stat. 15, 17–23 (2016) (codified at 18 U.S.C. § 2250 and in scattered sections of 42 U.S.C.).

3. International Megan’s Law §§ 8–9.

4. Laura Koran, *US Passports to Identify Convicted Child Sex Offenders*, CNN (Nov. 2, 2017), <https://www.cnn.com/2017/11/02/politics/us-passports-identify-child-sex-offenders/index.html> [<https://perma.cc/34WF-BT2N>]; *Passports and International Megan’s Law*, BUREAU CONSULAR AFF., U.S. DEP’T STATE, <https://travel.state.gov/content/travel/en/News/passports/passports-and-international-megans-law.html> [<https://perma.cc/F7MK-63VH>].

5. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-643, PASSPORT ISSUANCE: CURRENT SITUATION RESULTS IN THOUSANDS OF PASSPORTS ISSUED TO REGISTERED SEX OFFENDERS 5 (2010), <https://www.gao.gov/assets/310/305432.pdf> [<https://perma.cc/J4XQ-DKM9>] (noting that the State Department issued passports to approximately 4,500 registered sex offenders in fiscal year 2008, out of over sixteen million total passports issued). Of note, the State Depart-

sequences. In the first year alone, there were 2,060 preemptive notifications of international travel to foreign law enforcement in more than 80 countries and 1,276 denials of entry.<sup>6</sup> That number was expected to increase to 3,200 notifications to over 100 countries and 1,600 denials of entry in fiscal year 2019.<sup>7</sup>

Whatever the merits of the broader IML framework, the passport identifier exemplifies an uneasy truth for politicians looking to pass legislation with wide appeal: “[S]ex offenders are a great political target.”<sup>8</sup> Perhaps unsurprisingly, public perception of people convicted of sex offenses against children is not only negative but also tinged with antipathy towards their welfare. For example, 94 percent of people in a 2005 survey favored registration requirements for those convicted of child molestation, and 65 percent were either “not at all concerned” or “not too concerned” that public registries would lead to the harassment of registered people.<sup>9</sup> Recent studies confirm that the public’s “quite punitive” attitude towards sex offenders grows even more pronounced when offenses involve older offenders and younger victims.<sup>10</sup> This negative sentiment can translate into termination of employment, threats and harassment, and actual physical injury to those individuals after community notification.<sup>11</sup>

Politicians at all levels of government have taken an unusually punitive approach to postincarceration regulations on people with sex offense convictions—imposing ever-stricter registration requirements,<sup>12</sup> tightening residency and occupation restrictions,<sup>13</sup> limiting their internet access,<sup>14</sup> and

ment’s written response to the report argued that there was no indication that any of the thirty individuals included in a closer case study used his passport to travel abroad in order to commit a sex crime. *Id.* at 20.

6. S. REP. NO. 116-125, at 50 (2019).

7. *Id.* at 50–51.

8. *Measure Would Move Some from Sex Offender List to New Registry*, DAILY J. (June 19, 2006), [https://www.daily-journal.com/news/state/measure-would-move-some-from-sex-offender-list-to-new/article\\_0a7c8820-e40e-516c-9e2b-07b234cd24b1.html](https://www.daily-journal.com/news/state/measure-would-move-some-from-sex-offender-list-to-new/article_0a7c8820-e40e-516c-9e2b-07b234cd24b1.html) [<https://perma.cc/5BUE-774Y>] (quoting Illinois State Representative John Fritchey).

9. Lydia Saad, *Sex Offender Registries Are Underutilized by the Public*, GALLUP (June 9, 2005), <https://news.gallup.com/poll/16705/sex-offender-registries-underutilized-public.aspx> [<https://perma.cc/4GDN-ZAC8>].

10. Laura L. King & Jennifer J. Roberts, *The Complexity of Public Attitudes Toward Sex Crimes*, 12 VICTIMS & OFFENDERS 71, 84 (2017).

11. Jill S. Levenson et al., *Megan’s Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 594 (2007).

12. See Todd Spangler, *Treatment of Sex Offenders Depends on Whether They’ve Challenged Rules*, DET. FREE PRESS (June 7, 2018), <https://www.freep.com/story/news/local/michigan/2018/06/07/sex-offender-registry-michigan/607982002/> [<https://perma.cc/39JP-V8T4>] (“Michigan . . . has created one of the toughest registries in the country . . . result[ing] in . . . more than 31,500 people . . . being placed in tier 3, with a lifetime registration requirement.”).

13. In 2014, the City of Milwaukee prohibited individuals convicted of certain sex offenses “from living within 2,000 feet of any school, day care center or park”—leaving just *fifty-five* residential addresses in the city where offenders can legally reside. Jen Fifield, *Despite Con-*

requiring that other government-issued identification reveal the conviction.<sup>15</sup> By comparison, bills that would ease restrictions on this population are scorned as embodying positions that “no one in their right mind could agree with.”<sup>16</sup>

Recognizing this harsh political reality, affected individuals have turned to the courts. In the immediate years after the Supreme Court upheld the constitutionality of two state-level sex offender registration schemes,<sup>17</sup> lower courts rejected most constitutional challenges to registry laws.<sup>18</sup> But more

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*cerns, Sex Offenders Face New Restrictions*, PEW (May 6, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/06/despite-concerns-sex-offenders-face-new-restrictions> [<https://perma.cc/GUJ3-ZKEL>]. Milwaukee is not unique. In 2015 alone, similar types of residency restrictions were adopted in Wisconsin, Arkansas, Montana, Oklahoma, and Rhode Island. *Id.*

14. A recently invalidated Kentucky law banned sex offenders from “social networking websites or instant messaging or chat rooms that could be accessible to children.” Bruce Schreiner, *Judge Strikes Down Internet Restrictions for Sex Offenders*, SEATTLE TIMES (Oct. 20, 2017), <https://www.seattletimes.com/nation-world/judge-strikes-down-internet-restrictions-for-sex-offenders/> [<https://perma.cc/82Y2-V6CR>]. The statutory language could be read broadly enough to include websites that are the “principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.*

15. In addition to the IML passport identifier provision, Alabama, Delaware, Florida, Kansas, Louisiana, Mississippi, and West Virginia “label the applicable driver’s license, identification card, or registration card with an annotation that identifies the holder as a sex offender.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-116, CONVICTED SEX OFFENDERS: FACTORS THAT COULD AFFECT THE SUCCESSFUL IMPLEMENTATION OF DRIVER’S LICENSE-RELATED PROCESSES TO ENCOURAGE REGISTRATION AND ENHANCE MONITORING 11–12 (2008), <https://www.gao.gov/new.items/d08116.pdf> [<https://perma.cc/NY7G-AUEC>]. Oklahoma also requires a label to be placed on a sex offender’s driver’s license. Ryan Gallagher, *Court Upholds Special Sex Offender Driver’s License in Oklahoma*, DMV.ORG (Dec. 22, 2017), <https://www.dmv.org/articles/oklahoma-sex-offender-driver-license-upheld-by-us-court> [<https://perma.cc/TQ5D-P24L>].

16. Aaron Gould Sheinin, *Republicans Target Their Own over Bill Easing Sex Offender Restrictions*, ATLANTA J.-CONST. (Feb. 21, 2014), <https://www.ajc.com/news/state--regional-govt-politics/republicans-target-their-own-over-bill-easing-sex-offender-restrictions/aMkxzl nO0K0Cb6YG4u7uRj/> [<https://perma.cc/J8GM-WVCH>].

17. In *Smith v. Doe*, the Court deemed registration schemes regulatory in nature, rendering constitutional ex post facto principles inapplicable. 538 U.S. 84 (2003). In *Connecticut Department of Public Safety v. Doe*, the Court determined that offenders’ procedural due process rights do not require individualized assessment of risk before registrants’ information is disseminated to their communities. 538 U.S. 1 (2003).

18. Jules Epstein & Abigail Horn, *Constitutionality of Sex Offender Registration and Notification Acts*, in 1 THE PROSECUTION AND DEFENSE OF SEX CRIMES § 43.04 (Matthew Bender ed., 2019) (highlighting a range of state and federal cases rejecting constitutional challenges based on procedural due process, ex post facto, equal protection, and substantive due process claims); see also OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING & TRACKING, U.S. DEP’T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 11 (Dec. 2016), <https://www.smart.gov/caselaw/2016-final-case-law-update-with-index-cover.pdf> [<https://perma.cc/75YY-PFPY>] (“[T]he vast majority of constitutional challenges to sex offender registration and notification requirements have been unsuccessful.”).

recent constitutional challenges to registry schemes have fared better, including a First Amendment challenge to a law criminalizing accessing certain websites that permit minor children to become members or create personal pages.<sup>19</sup> With recent successes in the judicial arena, legal challenges are likely to continue.

This Note argues that the International Megan's Law passport identifier is a form of compelled speech that fails strict scrutiny. Part I summarizes the relevant First Amendment case law on the compelled speech and government speech doctrines. Part II identifies the major obstacle to successfully challenging the passport identifier as compelled speech: two federal district courts considering similar branded-identification provisions reached contradictory conclusions regarding whether the compelled speech or government speech framework applies. Part III identifies the shortcomings in lower courts' approaches to branded-identification provisions and argues that compelled speech, not government speech, is the most relevant First Amendment doctrine. Part IV then demonstrates how First Amendment interests should be invoked to make a persuasive compelled speech claim. When properly analyzed as compelled speech, the passport identifier would fail strict scrutiny.

## I. THE LEGAL BACKGROUND: THE COMPELLED SPEECH AND GOVERNMENT SPEECH DOCTRINES

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech."<sup>20</sup> These ten words are a broad umbrella, encompassing many related but largely self-contained concepts such as commercial speech, the public forum, symbolic speech, and other doctrines "colored by transcendent themes."<sup>21</sup> The two relevant here are the compelled speech and government speech doctrines.

### A. *Compelled Speech*

The compelled speech doctrine traces back to the Court's declaration in *West Virginia State Board of Education v. Barnette* that "[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>22</sup> This focus on forced expressions of ideology, politics, and other speech at the "core" of First Amendment protection was central in *Barnette*,

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19. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (holding that the North Carolina statute impermissibly restricts sex offenders' lawful speech, in violation of the First Amendment).

20. U.S. CONST. amend. I.

21. Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 850 (2011).

22. 319 U.S. 624, 642 (1943).

which involved a school board resolution requiring students to salute the American flag while reciting the Pledge of Allegiance.<sup>23</sup> It remained central in *Wooley v. Maynard* thirty years later, when the Court addressed the constitutionality of New Hampshire's "Live Free or Die" motto on state-issued license plates.<sup>24</sup>

In holding both instances of challenged speech to be violations of the First and Fourteenth Amendments, the Court's language and analysis were high-minded. The *Barnette* Court was seriously concerned about the impact the mandatory flag salute would have on the children's freedom of mind,<sup>25</sup> and it identified the students' injury as an invasion of the "sphere of intellect and spirit" that the First Amendment is meant to "reserve from all official control."<sup>26</sup> Building on that analysis, *Wooley* held that the First Amendment's protection for freedom of thought "includes both the right to speak freely and the right to refrain from speaking at all."<sup>27</sup> So, the Court concluded, New Hampshire's license plate implicated an individual's First Amendment right to refuse to "foster[] public adherence to an ideological point of view he finds unacceptable."<sup>28</sup>

In the years after *Wooley*, the Court expanded the doctrine beyond ideological speech to include, in at least some circumstances, compelled factual speech. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court reviewed a law requiring professional fundraisers to disclose to potential donors the actual percentage of funds collected in the previous twelve months that had been turned over to charities.<sup>29</sup> The Court acknowledged that the factual information conveyed through mandatory disclosures might benefit listeners and inform their decisionmaking.<sup>30</sup> Nonetheless, the Court concluded that compelled factual disclosures that "clearly and substantially burden . . . protected speech" alter the content of that speech and warrant strict scrutiny.<sup>31</sup> The Court held the disclosure law unconstitutional on this basis and suggested that the state itself publish professional fundraisers' fi-

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23. *Barnette*, 319 U.S. at 626–29.

24. 430 U.S. 705 (1977).

25. 319 U.S. at 637 (identifying the students' youth as "reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source").

26. *Id.* at 642.

27. *Wooley*, 430 U.S. at 714.

28. *Id.* at 715.

29. 487 U.S. 781 (1988).

30. *Riley*, 487 U.S. at 798.

31. *Id.* at 795, 798. The Court gives two examples where a government-mandated disclosure would burden protected speech: (1) a law requiring a speaker favoring a government project to state at the beginning of every speech regarding that project the average cost overrun in other, similar projects; and (2) a law requiring a speaker favoring an incumbent candidate to disclose the candidate's recent travel budget when making solicitations for donations. *Id.*

nancial disclosure forms to communicate the desired information to the public “without burdening a speaker with unwanted speech.”<sup>32</sup>

Not all compelled factual speech is treated equally. A speech-forcing requirement might be constitutional, for example, if the mandatory factual information does not distort the content of what the speaker intended to say.<sup>33</sup> But *Riley's* expansion of the compelled speech doctrine to mandatory factual disclosures was still an important development for the compelled speech doctrine, and the courts continue to identify different speaker interests that can trigger the doctrine's protections. Since *Riley*, for example, the Court struck down a state statute prohibiting the distribution of unattributed political campaign literature, holding that an individual's First Amendment interest to remain anonymous while debating ballot measures was particularly strong when self-identification carried a risk of retaliation or social ostracization.<sup>34</sup> Though the Court has not outlined a comprehensive typology for the compelled speech doctrine, it has repeatedly reaffirmed the doctrine's central role in First Amendment case law.<sup>35</sup>

### B. *Government Speech*

The government necessarily speaks every day. The executive branch's ability to govern would be hampered without the ability to “explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend with words.”<sup>36</sup> Proponents of the government speech doctrine argue requiring government speech to be viewpoint neutral would be crippling. Speech supporting any government initiative would have to not only address but disseminate opposing views.<sup>37</sup> A First Amendment doctrine shielding the government against that possibility developed with “grudging recognition” throughout the 1990s.<sup>38</sup>

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32. *Id.* at 800.

33. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 364, 379 (2018) (discussing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), which concerned factual speech like “[t]he U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.”).

34. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

35. See, e.g., *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376–78 (2018).

36. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001).

37. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?”).

38. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008).



In *Rust v. Sullivan*, the Court upheld a federal law prohibiting the distribution of funds to entities that provided patient counseling on abortion as a family planning option.<sup>39</sup> The Court treated the government's distribution decision as a logical consequence of administering a federal program with limited funds rather than as a form of viewpoint discrimination.<sup>40</sup> Because the government program merely utilized private speakers to counsel patients according to its chosen "family planning without abortion" message and was not meant to penalize or suppress viewpoints in favor of abortion, the First Amendment did not demand viewpoint neutrality in the government's allocation of funds.<sup>41</sup>

It was not immediately clear that *Rust* established a new First Amendment doctrine—although it is now generally accepted as the doctrine's origin,<sup>42</sup> the Court's opinion did not use the phrase "government speech."<sup>43</sup> But, as lower courts' interpretations of the case evolved, *Rust* was understood to immunize the government from free speech challenges when it spoke in a non-viewpoint-neutral manner or when it employed private individuals to convey a message about a federal program.<sup>44</sup> Even as the doctrine has broadened beyond challenges to government-funding decisions, lower courts have maintained the presumption that "when the government has a message to send, such a message need not be viewpoint-neutral, and other messages need not receive governmental support."<sup>45</sup>

Despite this relative consensus on the deference owed to government speech, courts struggle to identify when the government is actually speaking.<sup>46</sup> The Court was faced head-on with this issue in *Pleasant Grove City v. Summum*.<sup>47</sup> The city argued that its decision to display some privately donated monuments in a public park while rejecting others was protected under the government speech doctrine.<sup>48</sup> The Court agreed with the city, finding the decision to be protected government speech.<sup>49</sup> Not only have governments "long used monuments to speak to the public," but the city also "effectively controlled" the message sent by the monuments through its ownership and "final approval authority" of the monuments.<sup>50</sup>

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39. 500 U.S. 173 (1991).

40. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

41. *Rust*, 500 U.S. at 192–93.

42. Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374 (2009).

43. *Legal Servs. Corp.*, 531 U.S. at 541.

44. *Id.*

45. Olree, *supra* note 42, at 379.

46. Bezanson & Buss, *supra* note 36, at 1382–83.

47. 555 U.S. 460 (2009).

48. *Summum*, 555 U.S. at 467.

49. *Id.* at 472.

50. *Id.* at 470, 473.

Later, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,<sup>51</sup> a three-factor framework for identifying government speech emerged. This approach 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.<sup>52</sup> Applying this framework, the Court found specialty license plates constituted government speech because they are "government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech."<sup>53</sup> As such, Texas did not violate the First Amendment when it rejected a specialty license-plate design submitted by the Sons of Confederate Veterans.<sup>54</sup> And the Court arrived at an uneasy equilibrium—per *Wooley*, Texas could not compel members of the group to display a license plate with a particular ideological message on it, but neither could the group compel Texas to speak through approval of the group's desired design.<sup>55</sup>

Both the defenders of and challengers to different forms of branded government-issued identification claim victory under the First Amendment case law. But the Court is still figuring out how these two First Amendment doctrines interact and what guidance to give to the lower courts hearing such challenges.<sup>56</sup>

## II. COURTS DISAGREE ABOUT WHICH FRAMEWORK APPLIES TO THE IML PASSPORT IDENTIFIER

The IML's passport identifier sits at the intersection of the compelled speech and government speech doctrines. Section II.A uses the *Sons of Confederate Veterans* factors to analyze the passport identifier as government speech. Section II.B demonstrates that the passport identifier also fits within the compelled speech framework. But these outcomes are fundamentally incompatible: either the passport identifier is government speech, shielded from First Amendment challenges, or it is compelled speech, triggering strict scrutiny from the courts.

### A. *The Passport Identifier as Government Speech*

The government has wide latitude in deciding what to say and how to say it. The IML's proponents argue that such latitude should extend to the government's decision to include a factual disclosure of a prior conviction in

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51. 135 S. Ct. 2239 (2015).

52. *Sons of Confederate Veterans*, 135 S. Ct. at 2247–49.

53. *Id.* at 2250.

54. *Id.* at 2244.

55. *Id.* at 2252.

56. Bezanson & Buss, *supra* note 36, at 1380–81 ("It is only recently that the allegations of government speech as an abridgement of the rights of others under the First Amendment has begun to come into sharp focus.").

an individual's passport. And the *Sons of Confederate Veterans* factors support this seemingly intuitive result.

First, the passport has a long history as a medium for government messages. Early twentieth-century passports requested that the bearer be “permit[ted] safely and fairly to pass” and that the foreign country “give him all lawful Aid and Protection.”<sup>57</sup> At the time, the passport was simply a letter from the Secretary of State; the passport's bearer was treated as “a messenger, not as the owner of the document.”<sup>58</sup> There is also a well-established history of passports conveying expressive messages about American ideals, values, and history, from the images on the earliest passports of eagles or a woman holding a battle axe, to the most recent passport's “portraits of Americana ranging from a clipper ship to Mount Rushmore to a long-horn cattle drive.”<sup>59</sup> Passport design goes beyond the purely aesthetic to “reflect[] the breadth of America.”<sup>60</sup>

Second, a passport is strongly associated with the government. One early twentieth-century diplomat complained that “any big official looking paper written in English and bearing a pretentious seal will pass with many foreign officials for a passport.”<sup>61</sup> So the government took various measures, such as formalizing the appearance of the State Department seal, to demonstrate the federal government's imprimatur.<sup>62</sup> Modern passports bear the coat of arms and “United States of America” across the cover, carry a message from the Secretary of State within, and are issued only after a highly formalized application process.<sup>63</sup> There is no question that passports are government-issued documents.

Third, the government has near-total control over a passport's message. Government officials develop each new passport design and the Secretary of State gives final approval.<sup>64</sup> The government also maintains control over a passport's contents after issuance. Even in the early twentieth century, the marking of “one or two notes regarding foreign exchange” in an individual's passport was sufficient for it to be considered “mutilated,” rendering the passport invalid.<sup>65</sup> Today, instances of forgery, counterfeiting, mutilation, or

57. CRAIG ROBERTSON, *THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* 23 (2010).

58. *Id.*

59. Neil MacFarquhar, *Stars and Stripes, Wrapped in the Same Old Blue*, N.Y. TIMES (Apr. 29, 2007), <https://www.nytimes.com/2007/04/29/weekinreview/29macfa.html> [<https://perma.cc/SRE4-RL6K>].

60. *Id.*

61. ROBERTSON, *supra* note 57, at 29.

62. *Id.* at 39, 42.

63. *Apply in Person*, BUREAU CONSULAR AFF., U.S. DEP'T STATE, <https://travel.state.gov/content/travel/en/passports/need-passport/apply-in-person.html> [<https://perma.cc/V8FN-A8SE>].

64. MacFarquhar, *supra* note 59.

65. James Blanchard, Letter to the Editor, *Passport Troubles.*, N.Y. TIMES, Aug. 25, 1931, at 15.

alteration can invalidate a passport and expose the perpetrator to criminal liability.<sup>66</sup> Bearers have no editorial control over the standardized information that appears within the passport, including name, date and place of birth; dates of issue and expiration; and passport number.<sup>67</sup> Accordingly, all three prongs of the *Sons of Confederate Veterans* test point to passports constituting government speech.

The only federal district court to hear a First Amendment challenge to the IML came to the same conclusion. In *Doe v. Kerry*, a Northern District of California judge held that the passport identifier, like all other information contained within a passport, is “unquestionably government speech.”<sup>68</sup> The court reasoned that the federal government has monopolistic control over “every aspect of the issuance and appearance of a U.S. passport” and that, even after issuance, passports legally remain government property.<sup>69</sup>

The *Kerry* court acknowledged the compelled speech doctrine and the plaintiffs’ appeals to the *Wooley*, *Barnette*, and *Riley* precedents but insisted that the passport identifier does not implicate First Amendment interests.<sup>70</sup> Because a passport communicates information solely on behalf of the issuing government, as is necessary for “reliable government-issued identification,” the court maintained that the ideological or political speech at issue in cases like *Wooley* was fundamentally different from the straightforward, noncontroversial statement of fact at issue in the IML’s passport identifier.<sup>71</sup> This speech, the court concluded, is more akin to the descriptive identifiers like “name, date of birth, height, weight, or eye color” commonly placed on forms of government-issued identification.<sup>72</sup> As a result, there was no room for a compelled speech challenge.

### B. *The Passport Identifier as Compelled Speech*

Despite the intuitive appeal of the foregoing analysis, treating the IML passport identifier as a form of compelled speech is not only logical but the more persuasive approach. Generally, the compelled speech doctrine offers broad protection against mandatory disclosures—the *Wooley* Court declared, without qualification, that the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”<sup>73</sup> As

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66. 18 U.S.C. § 1543 (2018).

67. For an overview of which forms and documentation are necessary for a passport bearer to change even the name that appears within her passport, see *Change or Correct a Passport*, BUREAU CONSULAR AFF., U.S. DEP’T STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-correct.html> [<https://perma.cc/4N4N-FDFF>].

68. No. 16-cv-0654-PJH, 2016 WL 5339804, at \*16 (N.D. Cal. Sept. 23, 2016).

69. *Kerry*, 2016 WL 5339804, at \*16.

70. *Id.* at \*16–18.

71. *Id.* at \*18.

72. *Id.* at \*18.

73. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

*Wooley* itself demonstrates, the fact that speech is conveyed through a government-controlled medium does not by itself abrogate all claims based on the impairment of individual speech rights. Although the doctrine has become increasingly nuanced, the Court continues to affirm the basic notion that laws compelling speech must be justified on “even more immediate and urgent grounds” than laws compelling silence.<sup>74</sup>

A federal district court in Alabama recently agreed that branded identification fits the compelled speech framework and used the doctrine to strike down such a requirement as unconstitutional as applied to the plaintiffs.<sup>75</sup> The *Doe v. Marshall* plaintiffs challenged the Alabama Sex Offender Registration and Community Notification Act (ASORCNA)—“one of the most ‘comprehensive, debilitating’ sex offender statutes in the country”<sup>76</sup>—and its requirement that the driver’s licenses of individuals convicted of sex offenses display the phrase “CRIMINAL SEX OFFENDER” in bold, red letters on the face of the card.<sup>77</sup> Unlike in *Doe v. Kerry*, the Alabama court accepted the premise that “simply because a speech act is by the government does not mean that private speech interests cannot be implicated.”<sup>78</sup> Largely dismissing the distinction between government speech and government-compelled speech as “two sides of the same pancake,”<sup>79</sup> the *Marshall* court concluded that “[j]ust as *Wooley* applies to compelled statements of fact, it also applies to government speech.”<sup>80</sup> The court then borrowed a four-factor compelled speech test from the Tenth Circuit and applied it to conclude that Alabama’s law was impermissible.<sup>81</sup>

The IML passport identifier parallels the facts of the paradigmatic compelled speech cases and the *Marshall* branded-identification challenge in significant ways. Just like a state motto written on a license plate or a state-issued warning on a driver’s license constitutes speech, the passport identifier is also speech.<sup>82</sup> Individuals with IML-compliant passports must, as a condition of international travel and other routine activities requiring government-issued identification, act as “mobile billboard[s]” that convey the government’s chosen warning.<sup>83</sup> Like the mandatory disclosures in *Riley* and

74. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

75. *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1318–26 (M.D. Ala. 2019).

76. *Doe v. Marshall*, No. 2:15-CV-606-WKW, 2018 WL 1321034, at \*1 (M.D. Ala. Mar. 14, 2018) (quoting *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1236 (M.D. Ala. 2015)).

77. *Id.* at \*5.

78. *Id.* at \*13.

79. *Id.*

80. *Marshall*, 367 F. Supp. 3d at 1324–25.

81. *See infra* notes 97–99.

82. *See, e.g., Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (“In *Wooley*, the objectionable content was printed words, which the Court had no trouble finding was speech.”).

83. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). It is tempting to conclude that the passport identifier’s infringement on affected individuals’ First Amendment rights is less se-

*Marshall*, the passport identifier conveys a factual message that the government has adjudged relevant to a particular audience. But, as in those cases, the factual nature of the speech at issue alone does not preclude it from First Amendment protection.

Further, the speech inherent to the passport identifier is consequential in a way that the speech in cases like *Wooley* and *Riley* was not, strengthening the claim for First Amendment protection. The speech in those cases certainly impacted the speakers' ability to choose a message that aligned with their personal beliefs. But disclosing the fact of a prior conviction for a sex offense against a minor creates a more immediate type of harm: not only the intense stigma associated with such offenses but also the risk of denial of entry into a foreign country and perhaps physical assault and injury. The factual disclosure at issue here can prompt retaliation and social ostracization.<sup>84</sup>

The lack of consensus among federal district courts as to how to treat branded-identification provisions like the IML's passport identifier creates an important choice for courts hearing future challenges. Although both frameworks appear justifiable, the passport identifier cannot simultaneously be government speech and compelled speech—the application of these respective frameworks leads to diametrically opposed conclusions.

### III. THE ANALYTICAL SHORTCOMINGS IN COURTS' CONCLUSIONS SO FAR

The two district courts that have analyzed branded-identification challenges reached incompatible outcomes: the *Kerry* court concluded that the IML passport identifier is permissible government speech while the *Marshall* court found that driver's licenses, branded with functionally the same message, constitute impermissible compelled speech. This Part argues that the Supreme Court's case law directs lower courts to analyze branded-identification provisions as compelled speech. Section III.A argues that Supreme Court case law should be read to narrow the government speech doctrine's scope, preventing its application in the branded-identification context. Section III.B then argues that *Marshall's* four-factor test is an unpersuasive tool for identifying compelled speech.

#### A. *Clarifying the Boundaries of the Government Speech Doctrine*

The *Kerry* opinion exemplifies how the government speech doctrine poses an obstacle for plaintiffs challenging statutes like the IML. This Section

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vere than, say, that posed by compelled speech on a drivers' license or license plate, which are both more public and more frequently used. But infrequent constitutional violations are still problematic, and passports are necessary for international travel. Though a luxury for many, the Court has recognized the freedom of international travel as "basic in our scheme of values" and an "important aspect of the citizen's 'liberty.'" *Califano v. Aznavorian*, 439 U.S. 170, 175–76 (1978) (quoting *Kent v. Dulles*, 357 U.S. 116, 126–27 (1958)).

84. Cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995) (discussing how fear of social ostracism is a consideration the Supreme Court has offered in favor of protecting various forms of anonymous speech).

argues, however, that the *Kerry* court's analysis ignored a salient Court-imposed limit on the government speech doctrine.

An individual who disagrees with particular instances of government speech will typically have no recourse outside of the regular democratic process.<sup>85</sup> In a limited set of circumstances, however, where the government disregards a statutory or constitutional limitation on its ability to speak,<sup>86</sup> the government's speech is vulnerable to a legal challenge. This may be a relatively narrow limitation on the scope of the government speech doctrine. But for IML purposes, it is an important one: the Court has indicated that "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."<sup>87</sup>

This language offers lower courts guidance on how to approach speech-compelling provisions that sit at the intersection of the two doctrines. *Sons of Confederate Veterans* suggests that if the government compels private persons to convey its chosen speech, the government forfeits the deference it is normally afforded under the government speech doctrine. That is precisely how the IML passport identifier provision functions. Although the government has near-exclusive control over the passport identifier's message, from the time of issuance through the presentation at a port of entry, the legally relevant speaker for purposes of constitutional analysis is the passport bearer. And because the passport bearer is forced to speak rather than remain silent, the individual's First Amendment rights are implicated.

### 1. Limiting the Scope of Government Speech: An Easier Case

Consider the following illustration of the principle that control over a speaker's message does not equate to ownership of the speech act itself—a critical distinction for IML plaintiffs seeking to establish ownership of the speech created by the IML passport identifier. Suppose the executive branch affixes the passport identifier to a t-shirt instead of a passport. The government designs the t-shirt's wording and the color and font of the text—every last detail. After receiving the necessary approvals, the t-shirts are sent out, reading, "The wearer of this t-shirt was convicted of a sex offense against a minor" in big letters.

Nothing up to this point offends the First Amendment. The government's decision to speak in this way with this message falls squarely within the government's discretion to "explain, persuade, . . . [and] inspire" support

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85. See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) ("[I]t is the democratic electoral process that first and foremost provides a check on government speech. . . . [M]embers of the public . . . influence the choices of a government that, through words and deeds, will reflect its electoral mandate.").

86. See, e.g., *id.* at 2246 ("Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) ("For example, government speech must comport with the Establishment Clause.").

87. *Sons of Confederate Veterans*, 135 S. Ct. at 2246.

for its policies.<sup>88</sup> Some might disagree with the message and be unhappy with the government's decision, but the Court's decisions in *Rust* and *Sons of Confederate Veterans* would foreclose a First Amendment challenge.<sup>89</sup>

But the government's initial ownership of the message does not mean that every speech act involving the t-shirt will be attributable to the government. T-shirts are "a significant medium of communicating political ideas and political protest" and a physical manifestation of a person's identification "with an entity or a cause,"<sup>90</sup> and so can convey a constitutionally protected "core First Amendment message[]." <sup>91</sup> An individual who voluntarily wears the t-shirt speaks in her own right—perhaps communicating what the government intended, but perhaps communicating an alternative message of satire, protest, or disagreement. In either case, the government does not own the new speech.

Crucially, the speaker's identity changes from government to individual even if the government compels the recipients to wear the t-shirts publicly to convey the government's message broadly. The government can claim responsibility for the literal message on the t-shirt but, just as when an individual wears the shirt voluntarily, the new speech created through public display is attributable to the wearer, not to the government.<sup>92</sup> Whether coerced or voluntary, the public speech act belongs to and would not exist without the individual—and the wearer's ability to speak, or not, is implicated.

## 2. The More Difficult Cases

Cases become increasingly difficult when the government is more closely associated with the medium of speech than with, say, a t-shirt. Even then, government and private speech can be distinguished. A passport is just one

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88. Nathan Murphy, *Context, Not Content: Medium-Based Press Clause Restrictions on Government Speech in the Internet Age*, 7 U. DENV. SPORTS & ENT. L.J. 26, 32 (2009).

89. As the Court has noted, "[t]he mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'" *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 456 (1984)).

90. *Ayres v. City of Chicago*, 966 F. Supp. 701, 715 (N.D. Ill. 1997). The court in this case went so far as to say that, in a sense, "message bearing T-shirts serve the same purpose as the pamphlet did when this country was merely a British colony." *Id.* at 716 (quoting *Friends of the Viet. Veterans Mem'l v. Kennedy*, 899 F. Supp. 680, 684 (D.D.C. 1995)).

91. *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990). The t-shirt message here would likely fall under the "core First Amendment" umbrella that encompasses political, religious, and philosophical messages. T-shirts and other merchandise with messages affixed with "informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues" are afforded the full protection of the First Amendment. *Id.* at 1064 (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980)).

92. *Masonry Bldg. Owners of Or. v. Wheeler*, 394 F. Supp. 3d 1279, 1295 (D. Or. 2019) ("Although the Ordinance is a government-mandated script . . . the government itself is not the speaker.").



example—the same issue has already arisen in the context of a public-school uniform.<sup>93</sup> And it is easy to imagine similar challenges that could be brought by government employees, members of the military, individuals subject to certain probation requirements,<sup>94</sup> and more. But in all of these contexts, the limits on the government speech doctrine's scope will lead courts to arrive at the same conclusion as the easier example: that, once the government employs an individual to convey a message on its behalf, it forfeits its protections because it is no longer performing the legally salient speech act. The IML passport identifier and other government-mandated speech might still survive strict scrutiny if there is a compelling government interest and the measure is narrowly tailored. But it is critically important to recognize that a private individual's speech rights are implicated by such measures, even if they pass constitutional muster.

A properly limited government speech doctrine animated the outcomes in *Wooley* and *Sons of Confederate Veterans*. The Court concluded that private individuals “cannot force Texas to include a Confederate battle flag on its specialty license plates,” but, in turn, “Texas cannot require [the Sons of Confederate Veterans] to convey ‘the State’s ideological message’” on a license plate or any other government-issued medium.<sup>95</sup> A government can make non-viewpoint-neutral decisions in selecting among proposed designs to ensure that its license plate conveys only messages that the government wants to promote. But it cannot use government-issued media to compel private ideological or factual speech, and the public display of a government-endorsed message is, despite the government's involvement, an act of private speech.

The limitation functions similarly in the IML context. The Free Speech Clause does not restrict the government's decision to directly warn foreign allies about international travel by individuals convicted of these offenses. Nor could an individual challenge the substantive message the government has chosen—an assessment of an individual's intent to commit a sex offense abroad, for example—or force the government to adopt a different message. Those decisions fall squarely within the government speech doctrine's pro-

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93. *Frudden v. Pilling*, 742 F.3d 1199, 1204 (9th Cir. 2014) (recognizing, based on the compelled speech doctrine, that public school students' First Amendment rights were implicated by the inclusion of the motto “Tomorrow's Leaders” on a mandatory school uniform).

94. Judges have effectuated the same type of factual disclosure mandated by the IML passport identifier by requiring individuals with sex offense convictions to disclose those convictions through signs posted around their residences. *See, e.g., State v. Schad*, 206 P.3d 22 (Kan. Ct. App. 2009) (requiring signs on house and car); *State v. Jordan*, 716 So. 2d 36 (La. Ct. App. 1998) (requiring sign in yard); *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996) (requiring sign reading, “Warning, all children. [Defendant] is an admitted and convicted child molester. Parents beware,” to be placed in front yard while defendant was on house arrest). Courts considering these probation conditions have typically struck them down under state sentencing statutes without reaching any constitutional challenges. *See Schad*, 206 P.3d at 35; *Jordan*, 716 So. 2d at 41; *Burdin*, 924 S.W.2d at 87.

95. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

tection. But in the same way that displaying a license plate is a private speech act, so too is an individual's presentment of their passport at a port of entry. The passport holder might convey the government's chosen message, but that conveyance is made possible only by the individual's decision to speak at all. As a result, the passport holder's First Amendment rights are implicated—the government speech doctrine is simply not an applicable defense.

B. *The Marshall Court's Inadequate Four-Factor Test for Identifying Compelled Speech*

A successful IML challenge must additionally persuade a court that the passport identifier is compelled speech. The *Marshall* court's opinion presents one avenue for doing so, through its adoption of a four-factor test for identifying compelled speech.<sup>96</sup> This Section examines that four-factor test and concludes it should be abandoned, despite its use securing a favorable outcome for IML plaintiffs.

At least two federal courts utilize a multi-factor test to determine whether the compelled speech doctrine should bar government action. The framework originated in a 2015 Tenth Circuit case, *Cressman v. Thompson*,<sup>97</sup> and four years later the federal district court of Alabama explicitly applied the *Cressman* factors to strike down portions of that state's sex offender statute.<sup>98</sup> The test analyzes whether a mandatory disclosure (1) is speech, (2) to which a plaintiff objects, (3) that is compelled, and (4) that is readily associated with the plaintiff.<sup>99</sup>

From the outset, a four-factor compelled speech test where two of the elements are compelled speech is hard to take seriously. Once a challenged provision clears this bare definitional threshold, the Tenth Circuit's test relies on the two other factors—whether the disclosure is readily associated with the plaintiff, and whether the plaintiff objects to the speech at issue—to discern meritorious claims.<sup>100</sup> The *Marshall* opinion demonstrates this test's shortcomings. The test fails to illustrate the serious constitutional harm that results when individuals are required to speak in the manner that branded-identification provisions demand. Even worse, this test invites unengaging analysis, risks skeptical courts using the latter two factors to shut out factual compelled speech claims, and is at odds with Supreme Court case law. Moving forward, courts should not apply it.

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96. *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1324 (M.D. Ala. 2019).

97. 798 F.3d 938 (10th Cir. 2015).

98. *Marshall*, 367 F. Supp. 3d at 1326.

99. *Id.* In October 2019, a federal district court in Georgia adopted a version of the "readily associated" factor to analyze a similar compelled speech claim, distinguishing between government speech and compelled speech "based on the facts of the case, the government speech appeared to be endorsed by, adopted by, or, again, depending on the facts, whether the speech is sufficiently associated with a plaintiff." *Reed v. Long*, 420 F. Supp. 3d 1365, 1376 (M.D. Ga. 2019).

100. See *Cressman*, 798 F.3d at 948–49.

The *Marshall* court's perfunctory analysis under these two factors made its reasoning and conclusion unconvincing. The court concluded that the branded license's disclosure was sufficiently associated with license carriers because "[t]he words 'CRIMINAL SEX OFFENDER' are *about* Plaintiffs," the licenses are "chock-full of Plaintiffs' personal information," and "[w]hen people see the brand on Plaintiffs' IDs" they direct their "dirty looks" at them, not at the state.<sup>101</sup> Similarly, because "even a minor disagreement with a message is enough for constitutional purposes,"<sup>102</sup> the court deemed the final *Cressman* factor satisfied because "[p]laintiffs do not agree that they are 'criminal sex offenders,'" and felt humiliated when they presented ASORCNA-compliant licenses.<sup>103</sup>

The court's observations as to both factors are undoubtedly true. But noting that the contested speech here is *about* plaintiffs does not explain why the speech is properly *attributable to* or *associated with* them as speakers in a way that jeopardizes a protected speech interest. And because even speech that is properly attributed to a speaker might not receive First Amendment protection,<sup>104</sup> the fourth factor functions only to filter out the weakest possible claims. Moreover, the court's analysis does not explain the constitutional significance of identifying a "minor disagreement" with a factually accurate message. The court seems to conflate two distinct issues: objections to the content of speech and objections to being forced to speak at all. At least one *Marshall* plaintiff "vehemently denies" that he is a criminal sex offender,<sup>105</sup> but others—in that case and in future challenges—may acknowledge that a piece of factual speech is accurate but still wish to challenge the government-mandated disclosure of that fact. The four-factor test offers no relief to these plaintiffs.

Rigorously applying these factors would not make the *Cressman* test more useful. In fact, it might heighten the risk that the "objects to" factor is applied in a way that undermines factual compelled speech claims. For example, a skeptical court might credit a plaintiff's objection only if the challenged disclosure is factually incorrect. Doing so would increase the test's filtering function but would be unduly restrictive—as noted, an individual's objection can validly lie in the fact of compulsion itself, not only with the compelled message's content.<sup>106</sup> Or a court could, in the spirit of *Barnette* or *Wooley*, require that plaintiffs specify a political, religious, or ideological objection to the factual disclosure.<sup>107</sup> But requiring that type of objection to facially neutral language would mean a plaintiff must identify and lodge a

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101. *Marshall*, 367 F. Supp. 3d at 1326.

102. *Id.* at 1325 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001)).

103. *Id.*

104. *See supra* Section I.A.

105. 367 F. Supp. 3d at 1325.

106. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

107. *See supra* Part I.

persuasive objection to the legislature's intended subtextual message.<sup>108</sup> This heightened requirement would raise the already high barriers that factual compelled speech plaintiffs face.

Finally, the *Cressman* test's "objects to" factor is incompatible with Supreme Court compelled speech case law. Opposition to the mandated message might be a common feature of compelled speech claims, but it is not a necessary one.<sup>109</sup> The Supreme Court's approach is predicated on the notion that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."<sup>110</sup> In *Riley*, for instance, the Court's analysis turned on whether "a law compelling [factual information's] disclosure would clearly and substantially burden the protected speech,"<sup>111</sup> not on whether the speaker disputed the truth of what she was being forced to say. The mandated disclosure might even have a desirable impact such as encouraging a political donation<sup>112</sup>—in which case, the compelled speaker would presumably *approve of* the message. Still, such a law might be subject to "exacting First Amendment scrutiny."<sup>113</sup> The Court's precedents do not suggest that a speaker who agrees with a compelled message is precluded from making a compelled speech claim.

#### IV. BUILDING A MORE PERSUASIVE COMPELLED SPEECH CHALLENGE

Finally, this Part outlines a more persuasive compelled speech challenge to the IML passport identifier. Section IV.A discusses various speaker interests implicated by the IML that should afford affected individuals First Amendment protection. Section IV.B argues that, appropriately analyzed as compelled speech, the IML passport identifier would likely fail strict scrutiny.

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108. Identifying a political or religious objection to the factual information disclosed through a facially neutral branded-identification provision would likely be more difficult than in *Barnette* and *Wooley*, which both involved comparatively ideological, symbolic speech. See *supra* Part I. Legislators may use branded-identification provisions to send a message that people convicted of the targeted offenses are morally bad, are unusually dangerous, or are worthy of condemnation; requiring an individual to identify the correct message and then to object to it on political, religious, or other similarly ideologically based grounds would be almost prohibitive for compelled speech claims.

109. See *Cressman v. Thompson*, 798 F.3d 938, 963–64 (10th Cir. 2015). One cited authority actually undermines the Tenth Circuit's proposition—the court's parenthetical explains that in *Little Sisters of the Poor*, it rejected a compelled speech challenge "because 'the regulations [did] not require an organization . . . to engage in speech it finds objectionable or would not otherwise express.'" *Id.* at 963 (emphasis added) (quoting *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1203 (10th Cir. 2015), *vacated*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

110. *Riley*, 487 U.S. at 795.

111. *Id.* at 798.

112. *Id.*

113. *Id.*

### A. Identifying the Relevant Speaker Interests

Without the benefit of a neat four-factor test, the compelled speech inquiry will instead boil down to whether the factual disclosure mandated by the IML passport identifier is the type of compelled speech that the First Amendment cares about. And, as this Note's discussion of the compelled speech case law has demonstrated, identifying the right type of speech interest is not a straightforward task. Although the Court has identified compelled speech in a wide variety of circumstances, it has done a poor job explaining what the compelled speech doctrine is designed to protect against<sup>114</sup> and why individuals should be granted relief from some types of mandatory factual disclosures but not others. But despite the case law's lack of cohesiveness and, at times, its internal contradictions,<sup>115</sup> courts have gestured toward a range of speaker interests that, when implicated by mandatory speech provisions, result in the type of compelled speech that triggers constitutional protection. Instead of relying on an overly simplistic and counterproductive multifactor test, judges should determine whether the passport identifier implicates the types of important speaker interests (some previously recognized, and some novel) that are foundational to compelled speech claims.

At a minimum, the IML passport identifier "interfere[s] with a speaker's autonomy"—the speaker interest that Professor Eugene Volokh argues actually motivates the Court's paradigmatic "pure speech compulsion[]" cases like *Wooley* and *Barnette*.<sup>116</sup> The identifier undermines individuals' ability to tailor important messages regarding "statements of fact the speaker would rather avoid" in the same way that those same individuals are able to tailor

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114. The earliest compelled speech cases like *Barnette* and *Wooley* focused on the impact that compelled speech had on the speaker's "freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); see also *supra* Part I. This concern continues to echo through compelled speech cases. See, e.g., *Burns v. Martuscello*, 890 F.3d 77, 89 (2d Cir. 2018). But the justification feels hollow: few would argue that requiring drivers to display "Live Free or Die" on a license plate materially influences those drivers' beliefs. See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 332 (2008). Compelled individuals must speak the government's chosen message but remain free to mentally protest against it. See, e.g., *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting). A justification rooted in the listener's freedom of mind is not any stronger. Most people realize that the content of coerced speech is distorted and discount the speech accordingly. See Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 152–53 (2006). The Court has also offered the alternative, somewhat conclusory observation that government compulsion necessarily alters speech's content, triggering strict scrutiny. E.g., *Riley*, 487 U.S. at 782. But the Court does not explain its concern with content alteration in some scenarios but not in others. Compare *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018), with *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61–62 (2006).

115. See Volokh, *supra* note 33.

116. *Id.* at 368–70.

their “expressions of value, opinion, or endorsement.”<sup>117</sup> A speaker’s decision to stay silent, like a speaker’s decision to stay anonymous or tailor a message to an audience, “may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”<sup>118</sup> Because those decisions are animated by private and individualized considerations, that autonomy should be respected.

And the harm here is more serious than the inability to tweak or tailor a message that passport holders intended to deliver anyway—the IML passport identifier completely strips covered individuals of the particular autonomy of self-identification to third parties.<sup>119</sup> At least one federal court has recognized that robbing individuals of the discretion to decide how, when, and with whom to share a critically serious piece of personal information is a “unique affront to personal dignity.”<sup>120</sup> Personal dignity is similarly threatened here. In the absence of a mandatory disclosure, passport bearers would likely guard information about their past criminal convictions in the same way they would guard their medical history, sexual history and orientation, gender identity, religious and political affiliation, disability status, income, and other factual but deeply personal (and not otherwise easily ascertainable) information from indiscriminate disclosure. With information available in public registries, third parties may have easier access to information about an individual’s sex offense conviction than, in comparison, their medical history. But that does not defeat an individual’s compelled speech claim—the relevant speaker interest is not only keeping sensitive information secret but also the ability to refuse to disclose that information to third parties at the government’s direction, particularly through a document designed to be reviewed by others.

In the IML context, an individual’s autonomy to self-identify is about more than personal dignity. Because the criminal conviction at issue is so stigmatizing, disclosure might carry the type of “extreme risk” associated

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117. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

118. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995).

119. See Complaint at 27, *Rogers v. Va. State Registrar*, No. 1:19-cv-1149 (E.D. Va. Oct. 11, 2019), ECF No. 1 (“Plaintiffs deem the requirement of racial labeling to be . . . an invasion of personal privacy compelling an unwanted public categorization of oneself . . .”); Plaintiffs’ Response to Defendant’s Motion To Dismiss at 12–13, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (No. 15-cv-11834), ECF No. 26; Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 191–92 (2002) (“[S]uch compulsion interferes with an individual’s ability to define the persona she presents to the world, depriving her of the opportunity to control . . . her public identity by choosing what to say or what not to say. The essence of the injury is the deprivation of the individual’s freedom to decide how she will present herself to the world, by depriving her of the ability to control the messages she presents.” (footnote omitted)).

120. *Burns v. Martuscello*, 890 F.3d 77, 85 (2d Cir. 2018) (holding that the First Amendment protects a prison inmate’s refusal to disclose to guards illegal activity within the prison).

with the disclosure of inculpatory information.<sup>121</sup> Several *Doe v. Kerry* plaintiffs alleged that disclosure would risk serious injury or death, not just denial at a foreign port of entry.<sup>122</sup> For example, one *Kerry* plaintiff alleged that the IML passport identifier jeopardized his ability to travel to Iran to receive his inheritance from his father, because Iran “believes in and practices the death penalty for sex offenders,” leaving him at risk of being “killed upon entry into that country if the United States . . . adds a conspicuous unique identifier to his passport.”<sup>123</sup> Although there may be situations where mandating disclosure of factual information directly to the government is necessary and justifiable,<sup>124</sup> the compelled speech doctrine presumptively protects an individual’s discretion to self-identify to third parties.

Finally, courts should recognize new speaker interests that are similarly weighty to those identified in the compelled speech case law. Speakers have an interest in refusing to make factual disclosures that are motivated by the government’s desire to publicly shame and to foster “disgust . . . [and] foment ostracism, banishment, and even violence.”<sup>125</sup> The government has ample latitude to warn necessary parties of an individual’s conviction.<sup>126</sup> Especially given the government’s ability to convey its message through other channels, individual speakers should not be forced to subject themselves to public humiliation or stigmatization through their own speech acts.

The Court has previously upheld the constitutionality of community notification provisions, but recognized that “notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity.”<sup>127</sup> It seemed outlandish at that time that the government would actually implement a “scheme forcing an offender to appear in public with some visible badge of past criminality.”<sup>128</sup> But the IML passport identifier does just that. Like Alabama’s driver’s license provision, the passport identifier requirement “appear[s] to serve no other purpose than to humiliate offenders who have already atoned for their crimes.”<sup>129</sup>

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121. *Id.* at 91.

122. *See, e.g.*, First Amended and Verified Complaint for Injunctive and Declaratory Relief at 7–8, *Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016), ECF No. 31.

123. *Id.*

124. *See, e.g.*, *United States v. Arnold*, 740 F.3d 1032, 1034–35 (5th Cir. 2014) (upholding the registration requirements integral to the Sex Offender Registration and Notification Act); *United States v. Sindel*, 53 F.3d 874, 877–78 (8th Cir. 1995) (rejecting a challenge to court-ordered completion of an IRS form for cash transactions in excess of \$10,000).

125. Alexandra Stuppel, *Disgust, Dehumanization, and the Courts’ Response to Sex Offender Legislation*, 71 NAT’L LAW. GUILD REV. 130, 134 (2014).

126. 34 U.S.C. § 21503 (2018).

127. *Smith v. Doe*, 538 U.S. 84, 98–99, 105–06 (2003).

128. *Id.* at 99.

129. *Doe v. Strange*, No. 2:15-CV-606-WKW, 2016 WL 1079153, at \*17 (M.D. Ala. Mar. 18, 2016) (order granting in part and denying in part motion to dismiss first amended complaint).

The Court's prior assertions that the government does not consider "the publicity and the resulting stigma an integral part of the objective of the . . . scheme,"<sup>130</sup> no longer ring true, and this seeming shift in governmental purpose should trigger First Amendment protection for individuals compelled to speak.

### B. *Subjecting the Passport Identifier to Strict Scrutiny*

Once a judge concludes that the passport identifier presents a fundamental threat to speaker autonomy and constitutes compelled speech, the provision should fail under strict scrutiny analysis. The IML's laudable goal is to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism."<sup>131</sup> And the passport identifier is designed to work as one piece of a broader statutory scheme to achieve it.<sup>132</sup>

But while a court could reasonably conclude that the animating government interest is sufficiently compelling,<sup>133</sup> the passport identifier provision is not narrowly tailored—either in the scope of individuals affected or in the government's method of conveying the selected message. The passport identifier provision applies to "covered sex offenders."<sup>134</sup> This label encompasses a diverse group of people with convictions for a wide range of offenses.<sup>135</sup> The sole unifying feature is that all covered individuals are required to register under their home jurisdiction's sex offender registration programs for an "offense against a minor."<sup>136</sup>

The passport identifier uses an individual's previous conviction for a sex offense against a minor, broadly defined, as a proxy for future risk to chil-

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130. *Smith*, 538 U.S. at 99. The *Smith* Court's conclusion that state registry schemes are not punitive rested, in part, on this basis. *Id.* at 97–99. See also MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 153, 175, 194–96 (2004) (describing "shame penalties" and proponents' belief that public branding "vividly and surely expresses society's disapproval of the offender").

131. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (2016) (codified at 18 U.S.C. § 2250 and in scattered sections of 42 U.S.C.).

132. See 162 CONG. REC. H387, H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith); Press Release, Richard Shelby, U.S. Senator for Ala., Shelby Introduces International Megan's Law to Prevent Child Exploitation (July 27, 2015), <https://www.shelby.senate.gov/public/index.cfm/2015/7/shelby-introduces-international-megan-s-law-to-prevent-child-exploitation> [<https://perma.cc/5HUU-HMRF>].

133. *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1326 (M.D. Ala. 2019).

134. International Megan's Law § 8.

135. Daniel Cull, Note, *International Megan's Law and the Identifier Provision—An Efficacy Analysis*, 17 WASH. U. GLOBAL STUD. L. REV. 181, 195–99 (2018); see generally *Q&A: Raised on the Registry*, HUM. RTS. WATCH (May 1, 2013), <https://www.hrw.org/news/2013/05/01/qa-raised-registry#> [<https://perma.cc/MBT8-RBNM>] (noting that public registration laws can apply to those "who have committed any of a wide range of sex offenses, from the very serious, like rape, to the relatively innocuous, such as public nudity").

136. 22 U.S.C. § 212b(c)(1) (2018); 34 U.S.C. § 21503(f) (2018). See also Cull, *supra* note 135, at 195.



dren overseas. But actual evidence supporting the predictive power of these types of prior convictions is limited. A recent global study on child sexual exploitation concluded that there is “no such thing as a ‘typical’ offender”—there are “‘situational’ offenders, who travel with no intention of abusing a child” but nonetheless do so in environments where the sexual exploitation of children has been normalized and carries little risk of consequences.<sup>137</sup> And people convicted of sexual offenses have low rates of reoffending. In nearly 96 percent of sex offenses, the perpetrator is a first-time offender.<sup>138</sup> The passport identifier provision sweeps well beyond the subset of individuals who might pose an actual threat to children overseas.

Further, a plain text declaration of the individual’s prior conviction is in no way a narrowly tailored method of conveying the government’s chosen message. The law’s supporters argue that the passport identifier provides a backstop in situations where the individual fails to report international travel or the government fails to send timely notification abroad.<sup>139</sup> But there are alternative ways to convey that message without requiring an individual to disclose their convictions to any person who views their passport. After the *Marshall* court struck down the analogous Alabama driver’s license provision, for example, the state modified compliant licenses to instead display a series of numbers and letters—the meaning of which would be known only to law enforcement.<sup>140</sup> An even more discreet and effective alternative would

137. ANGELA HAWKE & ALISON RAPHAEL, OFFENDERS ON THE MOVE: GLOBAL STUDY ON SEXUAL EXPLOITATION OF CHILDREN IN TRAVEL AND TOURISM 53 (2016), <https://www.ecpat.org/wp-content/uploads/2019/06/Offenders-on-the-move-Global-Study-on-the-Sexual-Exploitation-of-Children-in-Travel-and-Tourism.pdf> [<https://perma.cc/A78R-RUC3>]; see also Katie Weiner, *The Trouble with Tourists*, HARV. POL. REV. (Nov. 30, 2016), <http://harvardpolitics.com/world/tourism-sexual-exploitation-of-children/> [<https://perma.cc/TXU5-5V3L>] (“[T]he study found that the majority of perpetrators do not travel with the intention or sole purpose of committing these crimes. . . . Empowered by a sense of anonymity and impunity, perpetrators who would not necessarily exploit children under normal circumstances commit acts of sexual violence while traveling.”).

138. Guy Hamilton-Smith, *We’re Putting Sex Offender Stamps on Passports. Here’s Why It Won’t Curb Sex Tourism & Trafficking.*, APPEAL (Nov. 9, 2017), <https://theappeal.org/were-putting-sex-offender-stamps-on-passports-heres-why-it-wont-curb-sex-tourism-trafficking/> [<https://perma.cc/MDZ8-PW4N>]. Similarly, a recent California Corrections Department report found that only 0.8 percent of registered sex offenders who returned to prison after release did so due to the individual committing another sex crime—instead, close to 92 percent of those who returned to prison did so because of a parole violation. Anat Rubin, *This Is What Happens to Registered Sex Offenders on Halloween*, MIC (Oct. 28, 2015), <https://www.mic.com/articles/127414/this-is-what-happens-to-registered-sex-offenders-on-halloween> [<https://perma.cc/9HCZ-FJ2>].

139. See *supra* note 132.

140. In a motion to amend or alter the judgment, Alabama state officials noted that the court had suggested that a sex offender designation of just a letter or a reference to a statute, as the designation appears in Delaware and in Florida, respectively, might be narrowly tailored. Defendants’ Motion to Alter or Amend Judgment at 4–5, *Doe v. Marshall*, No. 2:15-CV-606-WKW (M.D. Ala. Mar. 15, 2019), 2019 WL 3369551. The filing explains that the new designation for ASORCNA-compliant licenses will be a combination of letters and numbers that will

be to include information about an individual's conviction in the Radio Frequency Identification (RFID) chip, which is already used to carry information such as the passport bearer's name, date and place of birth, other biographical information, and a biometric identifier.<sup>141</sup> Precisely the same message would be shared with foreign border officials. But the individual would be able to convey it in a way that minimizes the risk of inadvertent disclosure to those who have no right or need to know the information.<sup>142</sup>

#### CONCLUSION

When the IML was signed into law, a handful of observers saw it for what it was: bad policy. The sole representative to object to the passport identifier during congressional debate worried that the provision could lead to unintended consequences, including persecution and the risk of bodily harm.<sup>143</sup> Others denounced the IML's provision as "vindictive and petty" and "premised on a profound and consequential misunderstanding of how sex crimes against minors are usually perpetrated."<sup>144</sup>

This criticism of the passport identifier as policy is valid and important. But this Note argues further that the passport identifier is unconstitutional compelled speech. The government cannot validly claim that the passport identifier is owed the protection that courts normally afford to government speech. By conscripting passport-bearing Americans into warning others about their own prior convictions on the United States' behalf, the government has run afoul of the Constitution.<sup>145</sup> The compelled speech doctrine protects passport holders who suffer this egregious violation to their speaker autonomy, particularly in light of the serious—even deadly—ramifications of the factual speech the passport identifier compels.

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appear in the same color and font as other identifying information. *Id.*; see also *Doe v. Marshall*, 367 F. Supp. 3d 1310, 1327 (M.D. Ala. 2019).

141. *E-Passport: All About the Electronic Passport*, U.S. PASSPORT SERV. GUIDE, <https://www.us-passport-service-guide.com/e-passport.html> [<https://perma.cc/9QLM-M5RU>].

142. *RFID – Radio Frequency Identification Chips in U.S. Passports*, U.S. PASSPORT SERV. GUIDE, <https://www.us-passport-service-guide.com/rfid-radio-frequency-identification-chip.html> [<https://perma.cc/P8R7-99C8>] (noting that the RFID technology embedded in passports does not include any personally identifying information, suggesting that the information regarding an individual's conviction could be associated with a unique number tied to a record in a secure government database rather than with the individual's name or other personally identifying information).

143. 162 CONG. REC. H393 (daily ed. Feb. 1, 2016) (statement of Rep. Scott).

144. Leon Neyfakh, *Obama Just Signed a Really Bad Criminal Justice Law*, SLATE (Feb. 9, 2016, 3:20 PM), <https://slate.com/news-and-politics/2016/02/the-international-megans-law-obama-just-signed-is-bad-law.html> [<https://perma.cc/6FMZ-JH3D>]; Jacob Sullum, *Scarlet Letter Passports Are Unjust and Irrational*, CHI. SUN TIMES (Nov. 2, 2017, 12:56 PM), <https://chicago.suntimes.com/columnists/sullum-scarlet-letter-passports-are-unjust-and-irrational/> [<https://perma.cc/2UVT-5C33>].

145. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

The compelled speech doctrine might not threaten federal and state governments' use of sex offense registries altogether.<sup>146</sup> But law enforcement officers, judges, and politicians at all levels of government continue to find innovative ways to force individuals to publicly disclose prior convictions (for sex offenses and other criminal conduct) under the guise of public safety.<sup>147</sup> And not just those with criminal convictions are at risk—it is an unfortunate fact of American history that legislatures have tried to use the shame or danger associated with mandatory public factual disclosures to discourage the exercise of certain constitutional rights, like receiving an abortion<sup>148</sup> or engaging in other socially unpopular conduct.<sup>149</sup> If the government speech doctrine is not narrowly construed, such measures could escape constitutional scrutiny so long as the disclosures are made through government-controlled media. It is important, therefore, that courts recognize these measures for what they are and subject them to appropriately searching judicial scrutiny.

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146. See *supra* note 124.

147. In 2018, for example, a county sheriff placed signs reading, “Warning! No trick-or-treat at this address!! A community safety message from Butts County Sheriff Gary Long,” in offenders’ yards. Aris Folley, *Sheriff’s Office Posts Signs in Yards of Registered Sex Offenders for Halloween*, HILL (Oct. 31, 2018, 2:28 PM), <https://thehill.com/blogs/blog-briefing-room/news/414113-sheriffs-office-posts-signs-in-yards-of-registered-sex> [https://perma.cc/WCL2-ZBCL]. In 2019, several affected individuals filed a putative class action that included First Amendment compelled speech claims. Complaint for Declaratory Relief, Injunctive Relief and Damages at 14–15, *Reed v. Long*, No. 5:19-cv-385-MTT (M.D. Ga. Sept. 24, 2019). Using a slightly different test from the *Marshall* court, the district court determined that the plaintiffs had a substantial likelihood of succeeding on the merits of their First Amendment compelled speech claims and granted a preliminary injunction. *Reed v. Long*, 420 F. Supp. 3d 1365 (M.D. Ga. 2019). For a history and multistate discussion of probation conditions mandating individuals to make public factual disclosures, see Phaedra Athena O’Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C.L. REV. 783 (1999).

148. The Pennsylvania legislature enacted a reporting requirement that obligated physicians performing abortions after the first trimester to file a report with detailed information about the woman seeking the abortion, like state of residence, age, race, marital status, number of prior pregnancies, date of last menstrual period and probable gestational age, and method of payment for the abortion. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 765–69 (1986). The report also had to include the basis for a finding of nonviability or medical emergency. *Id.* at 765. Most egregiously, the reports were available for public inspection and copying for more than two weeks, and there were no statutory restrictions on how those reports could be used. *Id.* at 766.

149. Florida’s 2001 Adoption Act required pregnant women or adoption agencies to give constructive notice to a child’s biological father before a pending adoption was finalized, even if the identity and location of the biological father was unknown. Claire L. McKenna, Note, *To Unknown Male: Notice of Plan for Adoption in the Florida 2001 Adoption Act*, 79 NOTRE DAME L. REV. 789, 792 (2004). Women were required to place weekly ads in a newspaper in every county where conception could have occurred with a physical description of the expectant woman’s age, race, hair and eye color, and approximate height and weight, along with a similar description of any person reasonably believed to be the father. *Id.* The ad also had to include any date and any city in which conception may have occurred. *Id.*