No. 01-1231

In The
SUPREME COURT OF THE UNITED STATES

CONNECTICUT DEPT. OF PUBLIC SAFETY, *et al.*

Petitioners,

v.

JOHN DOE, *et al.,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Association for the Treatment of Sexual Abusers (ATSA) is a non-profit international organization of professionals specializing in research into sexual abuse and in the treatment, assessment and supervision of sexual abusers. ATSA has more than 2000 members, drawn from all fifty states and nine foreign countries. Its membership includes the most prominent clinicians and researchers in the field. ATSA

has previously submitted briefs as *amicus curiae* in support of the State of Kansas in *Kansas v. Crane*, 534 U.S. 407 (2002), and *Kansas v. Hendricks*, 521 U.S. 346 (1997), both cases, like this one, involving the assessment and treatment of sexual abusers.

ATSA's Code of Ethics and Practice Standards comprise an internationally recognized guide for the evaluation and treatment of sex offenders. *See, e.g., Turay v. Seling*, 108 F.Supp. 2d 1148, 1155 (W.D. Wash. 2000) (citing ATSA Code as applicable professional standard). ATSA's guiding principles are:

- Community safety takes precedence over other considerations and ultimately over the interest of sexual abusers and their families.
- Inadequate or unethical treatment damages the credibility of all treatment and presents an unnecessary risk to the community.
- Although many, if not most sexual abusers are treatable, there is no known cure. Management of sexually abusive behavior is a life-long task for some sexual abusers.
- Many sexual abusers will not comply with treatment or supervision requiring external motivation. Internal motivation improves the prognosis for completing a treatment program, but in and of itself, may not be sufficient to ensure compliance in treatment engagement.
- Criminal investigation, prosecution and a court order requiring specialized treatment are important components of effective intervention and management.
- It is imprudent to release untreated sexual abusers into the community without specialized evaluation, treatment, and/or supervision.
- Providers should work cooperatively with others involved in the prevention of sex offenses, such as

probation/parole officers, child abuse clients' support persons, and therapists who work with victims.

ATSA promotes the effective treatment and supervision of sexual abusers who have been released from custody. ATSA also strives to clarify common misunderstandings about sexual abusers, and to increase public awareness of the benefits of modern approaches to treating them. "Undifferentiated" notification requirements, such as that authorized by the Connecticut Sex Offenders' Registration Law, *see Doe v. Lee*, 132 F.Supp.2d 57, 61 (D.Conn. 2001) , may, in ATSA's judgment, do more harm than good. Instead, community notification can and should be limited to individual sexual abusers who are determined to be most likely to sexually re-offend. *See* ATSA, Community Notification Position Statement (1996), *available at* http://www.atsa.com/ppnotify.html.[1]

STATEMENT

Connecticut's Sex Offender Registration Law (SORL) establishes a mechanism to monitor convicted sex offenders who have been released from prison, probation, or parole through a combination of governmental and private action.[2] The SORL requires persons convicted of sex offenses in Connecticut, and persons convicted elsewhere but residing in or visiting Connecticut, to register by "name, identifying

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Letters from the parties consenting to submission of this brief have been filed with the Clerk. Sup. Ct. R. 37.3.

[2] The SORL applies to persons found not guilty by reason of mental disease or defect as well as those found guilty. We follow the petitioner in referring to registrants as "convicted" for purposes of this brief. *See* Brief for Petitioners at 5 & n.6 (hereinafter "Pet. Br. at __").

factors, criminal history record, and residence address." Conn. Gen. Stat. §§ 54-251(a), 54-252(a), 54-253 (a) & (b), 54-254(a) (2002). Persons convicted of a sexually violent offense must also provide "documentation of any treatment received for mental abnormality or personality disorder." Conn. Gen. Stat. § 54-252(a) (2002). The Commissioner of Public Safety maintains a registry of the information submitted by convicted sex offenders, periodically verifies home addresses, and takes photographs of registered sex offenders at least once every five years. Conn. Gen. Stat. § 54-257 (2002). Registry information is made available to local law enforcement agencies and to the Federal Bureau of Investigation. The sex offender registry aids law enforcement agencies in the detection and prevention of sex offenses by registrants.[3]

In addition to providing information to law enforcement agencies, SORL also calls for the distribution of information about convicted sex offenders to private citizens. SORL directs the Department of Public Safety to publish registration information over the Internet. Conn. Gen. Stat. § 54-258(a) (2002). Before the district court enjoined its operation, Connecticut's Sex Offender website published a registry containing the ordinarily private home addresses, mental health treatment information, and photographs obtained through compulsory registration, as well as matters of public record derived from court proceedings. SORL also deems the private information provided by registrants a public record. *Id*.[4]

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[3] In addition to allowing the police to monitor the activities of registered sex offenders, the SORL also requires registrants to provide fingerprints and DNA samples, which may aid the police in identifying the person responsible for an unsolved crime. *Doe v. Dep't of Public Safety*, 271 F.3d 38, 43 (2d Cir. 2001) .

[4] This statutory *ipse dixit* does not change the fact that, but for the felony penalties compelling sex offenders to register and to provide information to the Department of Public Safety, the information provided would ordinarily remain private.

Public notification is intended to advance the governmental interest in public safety by warning members of the public who may encounter a registered sex offender in the work place or in their neighborhoods.[5] Viewers of the Sex Offender website established pursuant to the SORL may search the registry by name or by location, enabling members of the public to identify the convicted sex offenders with whom they are most likely to have contact. *See Doe v. Lee,* 132 F.Supp.2d at 61. Before the district court enjoined its operation, the website included the following "disclaimer":

> This information is made available for the purpose of complying with Conn. Gen. Stat. § 54-250 *et seq*… The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sex offenses. The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this [sic] data on the Internet is to make the information more

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[5] At present, there is little evidence that notification actually prevents recidivism by sex offenders. Although they found that sex offenders were arrested more quickly for new offenses after community notification, researchers found no appreciable reduction in re-offense rates after notification. *See* Donna Schram & Cheryl D. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism (1995). A more recent study of sex offenders in Iowa reached a similar conclusion. *See* Geneva Adkins, *et al*., The Iowa Sex Offender Registry and Recidivism (2000), *available at* http://www.state.ia.us/government/dhr/cjjp/pdfs/SexOffenderReport.pdf.

> easily available and accessible, not to warn about any specific individual. Anyone who uses this information to injure, harass, or commit a crime against any person included in the registry or any other person is subject to criminal prosecution.

Doe v. Dep't of Public Safety, 271 F.3d at 44-45.

SORL recognizes that disclosure of registry information and, in particular Internet publication of the registry, may cause harm not posed by the existence of public records of a conviction. For this reason, SORL allows a narrow category of convicted sex offenders to petition to restrict the public dissemination of registration information, even though information about a prior conviction already exists in the public record. Conn. Gen. Stat. § 54-255 (2002).[6] For example, notwithstanding the existence of

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[6] The Second Circuit explained:

> Certain people who would otherwise fall within the scope of the law are eligible for relief from these provisions. Two narrow categories of offenders need not register at all if a court so orders upon a finding that "registration is not required for public safety": anyone who was convicted of engaging, while under nineteen years of age, in sexual intercourse with a victim who was between thirteen and sixteen years old but at least two years younger than the perpetrator; and anyone who was convicted of subjecting another person to sexual contact without the victim's consent. *See* Conn. Gen. Stat. § 54-251(b) , (c).
>
> A court has discretion to order the DPS [Department of Public Safety] to restrict public dissemination of information about two other classes of registrants -- those who were convicted either of sexual assault in a spousal or cohabiting relationship or of any crime involving a victim under the age of 18 to whom the offender is related -- if the court finds that publication is not required for public safety and would reveal the

public court records, subsection 54-255(a) authorizes the court to deny public access to registration information for persons convicted of fourth degree sexual abuse, if "the court finds that dissemination of the registration information is not required for public safety and that publication of the registration information would be likely to reveal the identity of the victim within the community where the victim resides." Conn. Gen. Stat. § 54-255(a) (2002). The SORL does not provide a similar procedure, however, to limit access to registry information when disclosure would only harm the registrant or innocent members of the registrant's family, even when dissemination of the registration information is not required for public safety.

The district court held that the SORL's failure to allow an individual to contest the appropriateness of notification violated the due process clause of the Fourteenth Amendment. *Doe v. Lee,* 132 F.Supp.2d 57, 66 (D. Conn. 2001). The Court of Appeals affirmed. *Doe v. Dep't of Public Safety,* 271 F.3d 38, 62 (2d Cir. 2001).

> identity of the victim. *See id.* § 54-255 (a), (b). A registrant who has committed one of several specified offenses between October 1, 1988 and June 30, 1999 may petition the court for an order limiting the dissemination of his or her registration information to law enforcement purposes, provided that the court finds that such a limitation would not threaten public safety. *See id.* § 54-255(c). This right of petition is also afforded to a person who had been convicted between October 1, 1988 and September 30, 1998 of a crime within the purview of the sex offender law provided that he or she did not serve jail time for the original conviction, has not subsequently been convicted of another crime covered by the law, and has registered with the DPS.

Doe v. Dep't of Public Safety, 271 F.3d at 45. *See also Doe v. Lee,* 132 F.Supp.2d at 61 & nn. 12, 13.

SUMMARY OF THE ARGUMENT

Community notification should be limited to individual sex offenders who have been determined, through the use of reliable and professionally accepted risk assessment techniques, to be likely to commit new sexual offenses. Many states rely on risk assessments to determine the scope of community notification. The indiscriminate publication of information concerning all convicted sex offenders, as provided in the SORL, inflicts harm on many convicted offenders who do not present a significant risk of recidivism, without enhancing public safety.

Because the registry provides only limited information from which to form judgments about a registrant's potential dangerousness, the result of the SORL's notification requirements is that members of the public are unable to distinguish non-dangerous sex offenders from highly dangerous offenders. This surfeit of information disserves the public safety rationale for publication, by reducing the caution that would be exercised with regard to the most dangerous sexual abusers on the basis of more targeted notification. Unnecessarily broad publication may also harm innocent members of the offender's family, who are affected by the loss of employment and housing opportunities and community hostility. Finally, the SORL may create disincentives for convicted sex offenders to seek and maintain treatment, and may interfere with their successful reintegration, thereby increasing the risk of sexual re-offending.

ARGUMENT

NOTIFICATION SHOULD BE LIMITED TO HIGH RISK PREDATORY SEX OFFENDERS.

The notification requirements of the SORL, and other state laws like it, are aimed at enhancing public safety by

giving ordinary citizens the ability to protect themselves and their families from people who may live or work in the community and who are predisposed to commit sexual offenses. *See E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997) (describing background of New Jersey's original Megan's Law). This rationale for notification is inapplicable to a convicted sex offender who is not likely to re-offend and whose community reintegration, risk management and personal safety could be needlessly jeopardized by publication of registry information over the Internet. It is also inapplicable to other categories of sex offenders who do not pose a threat to the wider community served by Internet notification. *See id*. at 1085 (notification under New Jersey law is appropriately tailored to the risk presented by the offender, for example, sex offenders who have only victimized members of their own household may not pose a threat to the community at large). Connecticut's SORL nevertheless provides for the undifferentiated publication of information concerning all convicted sex offenders within its purview, denying any person who has been convicted of an eligible offense the opportunity to contest notification and to avoid its stigmatizing consequences.

Citizens are aware that the legislature does not require most people to register their addresses with the police and be photographed for publication over the Internet.[7] The ordinary viewer of the Sex Offender website is therefore likely to conclude that although the Department of Public Safety has made no determination as to the dangerousness of any particular individual, the state legislature has done so with respect to the group as a whole. *See Doe v. Lee,* 132 F.Supp.2d at 63 ("[T]he undifferentiated nature of the registry

[7] The United States draws an apt analogy between sex offender registries and wanted posters in its *amicus curiae* brief in *Godfrey v. Doe* (No. 01-729) at 19. The form and content of the Connecticut Sex Offender website resembles that of wanted posters and conveys the same unmistakable warning that the person depicted is a menace to the community.

and the undisputed purposes of the CT-SORA make it reasonable for a viewer of the registry to conclude that any particular registrant is dangerous."). Indeed, the ordinary person consulting the Sex Offender website is likely to share the Solicitor General's view that all "[s]ex offenders pose a unique public threat," Brief for the United States as Amicus Curiae Supporting Petitioners at 9 (hereinafter "U.S. Br. at __"), rather than distinguishing between those who present a significant threat and those who do not. The website admonishes viewers against using the information to "injure, harass, or commit a criminal act against" a registrant, but it does not discourage viewers from refusing employment and housing to a registered sex offender or from ostracizing a registrant and his family. Indeed, the public safety rationale for the SORL presumes that – armed with the registry information – individual citizens will protect themselves and their families from sex offenders by avoiding or limiting contact with them.

Congress did not require states to publish registration information about all convicted sex offenders as a condition for full federal funding, as Connecticut has done. The Wetterling Act, as amended, requires participating states to "release relevant information to protect the public *concerning a specific person required to register*." 42 U.S.C. § 14071(e)(2) (2002) (emphasis added). That language implies that whether and how much information is made public, and to whom, should depend upon the individual, and should not be the same for all persons subject to registration.

The Department of Justice ("DOJ") guidelines implementing the notification provisions of the Wetterling Act likewise envision that states will retain and exercise "discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes." 64 Fed. Reg. 571, 582 (Jan. 5, 1999). The DOJ guidelines describe three permissible approaches: (1) the particularized risk assessment of individual offenders, with

notification requirements tied to the degree of risk; (2) limiting notification to offenders based on certain characteristics or offense categories; and (3) providing information to the public on request. *Id.* States that opt to provide information on request, as Connecticut did in the SORL, "may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning those offenders." *Id*. In short, there is nothing in the federal law that requires or even encourages states to treat all sex offenders alike for purposes of notification.

Many states, unlike Connecticut, have chosen to tailor notification requirements to the degree of risk posed by individual sex offenders or categories of sex offenders.[8] For example, Arizona requires prompt risk assessments for all newly released sex offenders and limits its sex offender website to higher risk level two and three offenders. Ariz. Rev. Stat. §§ 13-3825, 13-3827 (2002). Connecticut, by contrast, has opted for an extreme approach that avoids any risk assessment. Not only does the SORL require publication of registration information without regard to risk; it also imposes the same obligations on any person convicted of what the state classifies as a "sexually violent offense" that federal law requires for persons determined to be "sexually violent predators." *See* Pet. Br. at 6 n. 8. *See also* Conn. Gen. Stat. § 24-252(a) (2002) (requiring collection of mental health treatment information because Connecticut does not designate sexually violent predators); Brief of Amici Curiae the District of Columbia and Thirty-Five States and

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[8] The United States identifies 22 states, in addition to Connecticut, that it says have adopted a similar categorical scheme for notification (U.S. Br. at n.11). Of those 22 states, Hawaii's law has been invalidated. *See State v. Bani*, 36 P.3d 1255 (Haw. 2000). According to a Justice Department study of notification regimes as of February 2001, however, few states publish registry information concerning all convicted sex offenders, as Connecticut does. *See* Devon Adams, Bureau of Justice Statistics, Summary of State Sex Offender Registries, 2001 at table 4 (March 2002).

Territories in Support of the Petitioners at 12 n.8 (representing that the Justice Department waived this requirement). In effect, Connecticut has thrown up its hands and decided that because it will not make judgments about the risk that individual sex offenders may present, its citizens should be warned about dangerous and non-dangerous convicted sex offenders alike.

Proponents of indiscriminate notification rely on two myths. First, they claim that all sex offenders are so likely to commit new offenses that community notification is appropriate without exception. Second, they argue that techniques for predicting the future dangerousness of sex offenders are too unreliable to be used to differentiate offenders on the basis of risk. Both propositions are contradicted by empirical evidence and experience.

1. Not All Sex Offenders Are Likely to Re-Offend.

Popular and political mythology lumps all sex offenders together. Consistent with that view, the United States argues as *amicus* that Connecticut's SORL is constitutional because it is reasonable for the state to treat all sex offenders as dangerous, even if some are not. *See* U.S. Br. at 25. The reality is that there are many distinct categories of sex offenders, with different motivations and different prognoses. *See* W.L. Marshall & Howard E. Barbaree, Outcomes of Comprehensive Cognitive-Behavioral Treatment Programs, Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender, 363-385 (W.L. Marshall, et al., eds. 1990). Indeed, in this case, Connecticut did "not dispute that within the group of persons required to register as sex offenders there is significant variation in the likelihood of particular offenders committing another 'sex offense.' " *Doe v. Lee,* 132 F.Supp. 2d at 64. Recidivism rates for incestuous offenders, for example, are quite low. *See* R. Karl Hanson & Monique T. Bussiere, Predictors of Sexual Offense Recidivism: A Meta-Analysis (User Report 1996-04) (Public

Works and Government Services Canada 1996) (4% recidivism rate for incest offenders); R. Karl Hanson, et al, Long Term Recidivism of Child Molesters, 61 J. Consulting & Clin. Psychology 646, 649 (1993); L. Motiuk & S. Brown, Factors Related to Recidivism Among Released Federal Sex Offenders, presented at the XXVI Int'l Cong. Of Psychology (1996). Recidivism rates for certain types of sex offenders also diminish significantly with age. *See* R. Karl Hanson, Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters. (User Report No. 2001-01), *available at* http://www.sgc.gc.ca/Epub/ Corr/ eAge 200101/ eAge 200101.htm; R. Karl Hanson, Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders, __ J. of Interpersonal Violence __ (forthcoming 2002).

The misconception that *all* sex offenders are highly likely to commit new sex offenses is based on recidivism rates reported in studies of particular high-risk categories of sex offenders, not the full range of offenders covered by the Connecticut SORL. One study relied on by *amici* National Governors Association*, et al*., estimated a 52% rate of sex offense recidivism for a narrower class of predatory pedophiles, using a predicted cumulative "failure rate" over 25 years.[9] By comparison, another recent study found a recidivism rate for a sample of child molesters that included incestuous offenders of 12.7% over a five-year period. R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. of Consulting & Clin. Psych. 348 (1998). Most sex offenses against children are committed, not by strangers, but by family members and others the child knows and trusts. *See* Bureau of Justice Statistics, Sexual Assault of Young

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[9] *See* Robert A. Prentky, *et al.,* Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis, 21 L. & Hum. Beh. 635, 644 (1997). The actual observed recidivism rate was 32% (37/115 child molesters were charged with new sex offenses following release; of these 29 were convicted and 26 were imprisoned for the new sex offenses).

Children as Reported to Law Enforcement: Victim, Incident and Offender Characteristics (2000). Studies focused on predatory pedophiles magnify the danger presented by released sex offenders in general.[10]

To be sure, recidivism rates calculated on the basis of new convictions can understate the true number of new sex offenses because many sex offenses are not reported or prosecuted. *See* American Psychiatric Association, Dangerous Sex Offenders, 129 (1999). On the other hand, many studies of recidivism focus on sex offenders released from prisons or secure treatment programs, rather than offenders placed on probation. The use of prison and secure treatment program populations in these studies tends to skew the sample towards serious and repeat sex offenders, who generally present the greatest risk of re-offending upon release. Recidivism rates reported in these studies may not be relevant to the entire class of sex offenders covered by laws such as Connecticut's SORL, which includes offenders sentenced to probation.[11]

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[10] "Predatory" refers to an act directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship is established or promoted for the primary purpose of victimization. *Cf.* 64 Fed. Reg. at 583 (similar definition adopted by the Department of Justice).

[11] Even studies of prison and secure treatment populations report recidivism rates that belie the popular misconception that all sex offenders re-offend. *See* California Department of Justice, Effectiveness of Statutory Requirements for the Registration of Sex Offenders (1988) (19.7% of sex offenders released in 1973 were arrested for a new sex offense over 15 year study period); Hanson and Bussiere, 66 J. of Consulting and Clin. Psych. 348 (13.4% aggregate recidivism rate over 4-5 year period after release); Arizona Department of Corrections, Fact Sheet 98-06, *available at* http://www.adc.state.az.us/FACTSHEETS/Fact%20Sheet% 2098-06.htm (reported a 3.7% rate of recidivism for new felony sex offenses among sex offenders released from prison over a ten year period). Overall, 20.8% of the sample returned to prison over the study period.

Older studies may also underestimate the impact of treatment on recidivism. Today, "[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism." *McKune v. Lile*, 536 U.S. ___, 122 S.Ct. 2017, 2024 (2002) (citing U.S. Dept. of Justice, National Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988)); *accord* 536 U.S. at __, 122 S.Ct. at 2043 (Stevens, J., dissenting) (Mental health professionals agree "that treatment programs can reduce the risk of recidivism by sex offenders.") (citing Winn, Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sex Offenders, 8 Sexual Abuse: J. Research and Treatment 25, 26-27 (1996)).

The recidivism rates cited by advocates of indiscriminate notification do not reflect current policies towards sex offenders. Many of the studies cited involved sex offenders released before the widespread use of new and more effective treatment techniques, and before prison-based treatment programs were common. The belief that sex offender treatment does not work is largely based on a 1989 review that found no evidence that clinical treatment reduces rates of sex offenses.[12] That review did not in fact conclude that sex offender treatment is futile, as commonly believed, but rather that methodological weaknesses in then-existing studies of sex offender treatment precluded finding a statistically significant treatment effect. A more recent statistical analysis of 43 studies found a significant reduction in recidivism among treated sex offenders. Offenders treated using modern cognitive-behavioral techniques re-offended at a 10% rate over a 46 month study period, compared with a

[12] Furby, *et al*., Sex offender Recidivism: A Review 105 Psych. Bull. 3 (1989).

17% rate for untreated offenders.[13] Similarly, historical data on recidivism do not reflect the impact of longer prison sentences and civil commitments of the most dangerous sex offenders. In short, it is wrong to extrapolate from studies of sub-populations of sex offenders to generalizations about all sex offenders.

The argument that high recidivism rates for a broad class of offenders justifies restrictions on liberty without affording individual due process also cannot be limited to sex offenders. Sex offenders are not uniquely prone to re-offend, or to commit serious offenses after release. For example, although rapists are statistically more likely to commit rape after release than other felons, they had a *lower* rate of re-arrest for violent felonies overall than most other categories of offenders convicted of crimes of violence. *See* Lawrence A. Greenfield, Bureau of Justice Statistics, Sex Offenses and Offenders vi, 25-26 (1997); Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, Recidivism of Prisoners

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[13] R. Karl Hanson, et al., First Report of the Collaborative Outcome Data Project on the Effectiveness of Treatment for Sex Offenders, 14 Sexual Abuse: A Journal of Research & Treatment 169 (2002). Other recent research also suggests that treatment may be effective for high risk offenders. *See* J.K. Marques, et al., Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism, 21 Crim. Just. & Behavior 28 (1994); W.L. Marshall & W.D. Pithers, A Reconsideration of Treatment Outcomes with Sex Offenders, 21 Crim. Just. & Behavior 10 (1994); J.V. Becker & J.A. Hunter, Jr., Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse, 19 Crim. Just. & Behavior 74 (1992); G. Hall, Sex Offender Recidivism Revisited: A Meta-analysis of Recent Treatment Studies, 63 J. Consulting & Clin. Psych. 802 (1995). *See also* Oregon Department of Corrections, Outcome Evaluation of the Jackson County Sex Offender Supervision and Treatment Program (June 1997) *available at* http:// *w*ww.doc.state.or.us/research /jackrpt2.pdf) (reduction of recidivism in study of community supervision); M.S. Black, E. Parks, P. Konicek, Ohio Dept. of Rehabilitation and Corrections, Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases (April 2001), *available at* http://www.drc.state.oh.us/web/Reports/ Ten_Year_Recidivism.pdf) (showing reduction in recidivism by sex offenders who participated in prison treatment program).

Released in 1994, 9, table 10 (2002) (re-arrest rate for all violent felons for a new violent felony was 27.5%, for rapists the re-arrest rate for all violent felonies was 18.6%, and for rape 2.5%). To accept the contention that states can deprive former offenders of their liberty based solely on aggregate recidivism statistics would mean that similar regulatory schemes could be imposed on many other classes of offenders with high recidivism rates, regardless of the risk presented by an individual.

2. Risk Assessment Can Identify Dangerous Sex Offenders.

It is unnecessary and inappropriate to base notification standards on generalizations about all sex offenders, as Connecticut does. In recent years, researchers have developed actuarial risk assessment instruments. Through studies identifying risk factors that are correlated with sexual recidivism, researchers have shown that it is possible to identify a subset of sexual offenders at highest risk for sex offense recidivism. Empirical research has shown that it is possible to distinguish sex offenders who are most likely to commit new sex offenses from those who are unlikely to re-offend. *See, e.g.* W.L. Marshall & Howard E. Barbaree, Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders, 28 Crim. Just. & Behavior 490 (2001).[14] Yet Connecticut denies a convicted sex offender any process by which to demonstrate that he is

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[14] Other important studies include: Epperson, et al., Minnesota Sex Offender Screening Tool-Revised (MnSost-R): Development, Performance and Recommended Risk Level Cut Scores (1999), *available at* http://psych-serve.iastate.edu/faculty/epperson/MnSost-R.htm; R. Karl Hanson & D. Thornton, Department of the Solicitor General of Canada, Static 99: Improving actuarial risk assessments for sex offenders (User report 1999-2002); R. Karl Hanson & D. Thornton, Improving risk assessments for sex offenders: A comparison of three actuarial scales, 24 L. & Hum. Behavior 119 (2000).

not dangerous and should not be subject to Internet publication.[15]

Connecticut defends its refusal to afford any process arguing that risk assessments are inherently unreliable. *See, e.g.,* Pet. Br. at 25. This argument ignores the fact that Connecticut's SORL does provide for judicial determinations that Internet notification is not necessary for public safety in a limited class of cases in which disclosure would harm the victim, and for offenses committed before the effective date of the statute requiring Internet publication. Thus, Connecticut recognizes that its courts are competent to make determinations about whether the level of risk presented by an individual justifies publication of registry information.

The argument that the state should avoid all individual assessment of risk also ignores the pervasive reliance on predictions of future dangerousness to make decisions about criminal offenders, from the decision whether to order detention before trial, to the decision to impose a sentence of imprisonment or probation, to determinations whether to permit release on parole. Similar predictions must also be made in non-criminal proceedings, such as civil commitments, where a court must determine whether a

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[15] The courts below did not impose any particular method of assessing the risk presented by an individual. Different instruments and assessment methods may be most appropriate for different types of sex offenders. Actuarial risk assessments are typically used in conjunction with clinical judgment. "Static" (unchanging) factors measured by most of the actuarial instruments can be combined with "dynamic" data concerning the offender's current state. *See* R. Karl Hanson & Andrew Harris, The Sex Offender Need Assessment Rating (SONAR): A Method for Measuring Change in Risk Levels 2000-1 (1999), *available at* http://www.sgc.gc.ca/ Epub/Corr/e20001b/e2001b.htm. Empirical research can also play a role in helping states to establish classification schemes that appropriately protect the community without needless harm to registrants and their families. Connecticut, however, has declined to limit dissemination of registry information even in the face of the most compelling possible demonstration that an individual is not a danger to the community.

mentally ill person is dangerous to self or others, and child abuse and neglect cases, where the court must assess the risk to a child from remaining in parental custody. Predictions of future dangerousness are neither theoretically nor practically impossible.

Experience in the many states that require risk assessments and use them to determine notification requirements rebuts the contention that risk assessments are inherently unreliable and worthless. For example, New Jersey, the progenitor of Megan's Law, has developed comprehensive guidelines for the assessment of sex offenders to determine the need for and scope of community notification. *See* Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws (March 2000), *available at* http://www.state.nj.us/lps/dcj/megan1.pdf. *See, generally,* R. Karl Hanson, ATSA, Risk Assessment (Jan. 2000).

Indeed, the practical feasibility of identifying those sexual offenders who are most likely to commit new sex offenses is the logical predicate for civil commitment statutes such as the law the Court upheld in *Hendricks,* 521 U.S. at 357-58 . *See* Brief of ATSA as Amicus Curiae in Support of Petitioner, (No. 95-1469) at 8-10. The Court's decision in *Hendricks* also accepted the feasibility of determining that a once-dangerous sex offender is no longer dangerous and is "safe to be at large." *See Hendricks,* 521 U.S. at 363-64. If such a judgment can be made about the return of a violent sexual predator to the community, then surely one can be made about whether Internet publication of a person's home address and other private information is necessary for public safety.

The lower courts did not require Connecticut to adopt any particular process to determine whether a particular registrant's information should be published. They struck the SORL down because it did not allow any process at all. *See Doe v. Dep't of Public Safety,* 271 F.3d at 62; *Doe v. Lee,* 132

F.Supp.2d at 66. The decisions below did not prescribe any particular risk assessment instrument, or indeed any formal risk assessment whatsoever. They did not allocate the burden or set a standard of proof, allowing Connecticut considerable latitude in defining what levels of risk, and what types of risk, would trigger what kind of notification. What they did require is that a convicted sex offender have some opportunity to be heard before being subjected to registration and notification requirements that deny that any possibility of redemption.

It is no answer to say that the state may deny any individual process, even if the class subject to notification under the Connecticut SORL is substantially over-inclusive, because "attempting to assess the particular degree of danger posed by each convicted sex offender before providing community notification would prove 'costly, cumbersome, and inaccurate.'" *See* U.S. Br. at 27. The cost and efficacy of additional procedures are factors to be considered in deciding how much process is due, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), not reasons to deny process altogether. And even imperfect predictors are more accurate than a website that portrays all sex offenders as dangerous without exception. Universal notification means that the state issues warnings about sex offenders that will be inaccurate far more often than not.[16]

3. Indiscriminate Notification May Be Counter-productive.

Indiscriminate notification can contribute to unnecessary vilification of individuals who do not pose a risk to the community, as well as inadvertently escalate

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[16] *See* Center for Sex Offender Management, Recidivism of Sex Offenders, 6 (May 2001), *available at* http://www.csom.org./pubs/recidsexof.pdf (for population with low overall base recidivism rate, the best prediction is that no one will re-offend, not that everyone will).

community risk. Indiscriminate notification is harmful to sex offenders whose risk to re-offend is manageable in the community. Notification may result in loss of housing or employment and social stigmatization and condemnation that could impair the offender's ability to successfully function in and contribute to the community. Family members also fall victim to indiscriminate notification, as they must contend with the direct and indirect consequences of such notification, on both the offender and themselves. *See, generally,* Zevitz & Farkas, Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance? 18 Behavioral Science and the Law 375 (2000). Notification and its humiliating and stigmatizing consequences can produce great stress, which may trigger potential risk factors (*e.g.,* the experience of emotions such as rejection, isolation, anger, resentment, fear; along with the corresponding negative cognitions about themselves and others). Stress and instability make it much more difficult for sex offenders to adhere to the regimen called for in cognitive-behavioral treatment. *See* R. Karl Hanson and Andrew Harris, Dynamic Predictors of Sexual Recidivism 1. Indiscriminate community notification makes it extremely difficult for low-risk sex offenders to reintegrate into the community in a stable and effective manner and could potentially trigger risk factors associated with re-offending, diminishing rather than enhancing community safety. *See* Candace Kruttschnitt, *et al.*, Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls, 17 Justice Quarterly 61, 81 (March 2000) (stable employment and treatment found to reduce recidivism).

Indiscriminate notification requirements may also undermine community safety by producing an illusion of security without providing citizens with enough information to assess risk. Viewers of the Connecticut Sex Offender website received similar information about extremely high risk and extremely low risk offenders. That presentation

diminished the value of notification, as compared to a notification scheme limited to higher risk predatory offenders.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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