No. 01-1231

In the Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, ET AL., PETITIONERS

v.

JOHN DOE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
LEONARD SCHAITMAN
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry unless it first affords such offenders an individualized hearing on their current dangerousness.

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INTEREST OF THE UNITED STATES

The court of appeals invalidated Connecticut's sex offender registration and community notification law—its Megan's law—on the ground that the Due Process Clause of the Fourteenth Amendment entitles convicted sex offenders to an individualized hearing on current dangerousness before a State may list them in a public sex offender registry.[1] The Connecticut law at issue meets the requirements concerning sex offender registration and notification laws established by Con-

[1] The Court has granted certiorari in *Godfrey* v. *Doe*, No. 01-729, to address a challenge to Alaska's Megan's law under the Ex Post Facto Clause, U.S. Const. Art. I, § 10, Cl. 1. The United States has filed a brief in support of petitioners in that case.

gress and the Attorney General for obtaining certain federal funding. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. 14071 (1994 & Supp. V 1999); 64 Fed. Reg. 572, 582 (1999); Pet. App. A4-A5 n.5. In addition, the Connecticut law employs a categorical notification approach that is similar to the one adopted by the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (42 U.S.C. 14071(j) (to be codified) and 20 U.S.C. 1092(f)(1)).

STATEMENT

1. Sex offenders inflict a terrible toll on this Nation and its citizens. See *McKune* v. *Lile*, 122 S. Ct. 2017, 2024 (2002) (plurality opinion). In 1995, nearly 355,000 rapes and sexual assaults were reported by victims older than 12 years of age. U.S. Dep't of Justice, Bureau of Justice Statistics (BJS), *Sex Offenses and Offenders* V (1997) (*Sex Offenses*); see U.S. Dep't of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* 24 (1999). Between 1980 and 1994, the average number of individuals imprisoned for sex offenses increased at a faster rate than for any other category of violent crime. *Sex Offenses* 18. In 1994, nearly 100,000 state inmates were imprisoned for rape or sexual assault; another 134,000 convicted sex offenders were under community supervision, such as probation or parole. *Id.* at 15.

More than two-thirds of the victims of rape and sexual assault are under the age of 18 years. BJS, *Sexual Assault of Young Children as Reported to Law Enforcement* 2 (2000) (*Young Children*); see *Sex Offenses* 24 (80% of sexual assault perpetrators had victims under 18 years). "[N]early 4 in 10" victims of imprisoned violent sex offenders are 12 years or younger. *Sex*

Offenses at iii; *Young Children* 2. Even more disturbing, 14% of all sexual assault victims are under the age of 6 years. *Young Children* 2.[2]

Even when they do not result in physical injury or death, sexual assaults inflict enormous harm on victims, especially children. Children who are sexually assaulted are more likely than other children to develop severe psychosocial problems, including depression, antisocial and suicidal behavior, and substance abuse. See J. Briere & M. Runtz, *Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. of Interpersonal Violence 312, 324 (Sept. 1993). In addition, children who are sexually assaulted are more likely than other youths to become sex offenders as adults, thus perpetuating a vicious cycle of abuse and violence. *Id.* at 312.

When they reenter society at large, convicted sex offenders have a much higher recidivism rate for their offense of conviction than any other type of violent felon. See *McKune*, 122 S. Ct. at 2024; see also *Sex Offenses* 27; BJS, *Recidivism of Prisoners Released in 1994*, at 10, Table 11 (2002); BJS, *Recidivism of Prisoners Released in 1983*, at 6 (1997). Those offenders who target children present an even greater risk of recidivism. BJS, *Child Victimizers: Violent Offenders and Their Victims* 9-10 (1996).

2. Responding to the gravity of the public safety threat posed by sex offenders, the federal government, all fifty States, and the District of Columbia have

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[2] These figures understate the incidence of sex offenses because nearly 70% of sex crimes and 90% of child molestation offenses go unreported. BJS, *Criminal Victimization in the United States, 1999 Statistical Tables*, Table 93 (2001); H.R. Rep. No. 392, 103d Cong., 1st Sess. 4 (1993).

adopted sex offender registration and notification laws to enable citizens better to protect themselves and children from sexual predation and to facilitate law enforcement investigations. See 01-729 U.S. Br. App. A (listing Megan's laws). In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999), in an effort to stem the tide of sex offenses directed against children in particular, and to galvanize state efforts to enact and bolster registration and community notification provisions with respect to sex offenders.

The Wetterling Act, as amended, establishes minimum national standards for Megan's laws in order for States to qualify for certain federal funding. 42 U.S.C. 14071(g)(2)(A) (Supp. V 1999). Among other things, the Act requires States to register all persons convicted of a criminal sex or (non-parental) kidnaping offense against a minor, and all persons convicted of a sexually violent offense, upon their release, parole, or probation into the community. 42 U.S.C. 14071(a)(1), (3) and (b) (1994 & Supp. V 1999). Registered offenders must provide current addresses, fingerprints, and a photograph. In most cases, they must verify their addresses annually, and must remain registered for a minimum of ten years. See 42 U.S.C. 14071(b)(3) and (6) (1994 & Supp. V 1999). With respect to notification, the Act directs States to "release relevant information that is necessary to protect the public concerning a specific person required to register under [the Act]." 42 U.S.C. 14071(e)(2) (Supp. V 1999).

The Wetterling Act was amended in 2000 to require States, beginning in October 2002, to ensure community notification with respect to registered sex offenders who become students or employees at institutions of

higher education. Campus Sex Crimes Prevention Act (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (42 U.S.C. 14071(j) (to be codified) and 20 U.S.C. 1092(f)(1)); H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 110 (2000). To meet that requirement, States must ensure that covered institutions advise campus communities where information about registered sex offenders may be obtained, "such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address." 20 U.S.C. 1092(f)(1)(I).

The Attorney General, at the direction of Congress (42 U.S.C. 14071(a) (1994 & Supp. V 1999)), has issued guidelines implementing the Wetterling Act. 64 Fed. Reg. 572 (1999). The guidelines afford States leeway in formulating their own sex offender registration and notification programs. In particular, they provide that "States * * * are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." *Id.* at 582. They also permit States to make "particularized risk assessments of registered offenders," and to notify the community of such risk assessments. *Ibid.*

3. Like every other State, Connecticut has enacted a Megan's law designed to protect its communities from sex offenders and assist in apprehending repeat sex offenders. The Connecticut law applies to persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose. Covered offenders are required to register with the Connecticut Department of Public Safety (CDPS or State) upon their release into the community. They must provide their name and

address, identifying information such as a photograph and DNA sample, and certain other information. The registration requirement runs for ten years in most cases; those convicted of sexually violent offenses must register for life. Covered individuals must re-register when they move, and periodically submit an updated photograph. See Conn. Gen. Stat. Ann. §§ 54-251, 54-252, 54-254 (West 2001); Pet. App. A5-A7.[3]

The Connecticut law requires the CDPS to compile the information gathered from registrants and to share it with law enforcement authorities and the public. In particular, the law requires CDPS to post a sex offender registry on an Internet website and make it available to the public in certain state offices. See Conn. Gen. Stat. Ann. §§ 54-257, 54-258 (West 2001); Pet. App. A7-A10. Whether made available in person or via the Internet, the registry must be accompanied by the following warning: "Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution." Conn. Gen. Stat. Ann. § 54-258a (West 2001).

The State's Internet website enabled citizens to obtain the name and address, photograph, and description of any registered sex offender by entering a zipcode or town. Pet. App. A8-A9. The following disclaimer appeared on the first page of the website:

> The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The [CDPS] has not considered or assessed the specific

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[3] In certain instances not at issue here, a court may determine that "registration is not required for public safety." Conn. Gen. Stat. Ann. § 54-251(b) and (c) (West 2001); see Pet. App. A10.

> 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 date on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.

Id. at A9.

4. Respondent is a convicted sex offender who is subject to the Connecticut Megan's law. In 1999, he filed this action pursuant to 42 U.S.C. 1983 on behalf of himself and similarly situated sex offenders, claiming that the Connecticut law, *inter alia*, violates the Due Process Clause of the Fourteenth Amendment. Respondent alleged that he is not a "dangerous sexual offender," and that the Connecticut law "deprives him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard." Pet. App. A11. The district court granted summary judgment for respondent on his due process claim. *Id.* at A41-A66. Shortly thereafter, the court certified a class of individuals subject to Connecticut's Megan's law, and permanently enjoined the public notification provisions of that law. *Id.* at A67-A69.

The Court of Appeals for the Second Circuit affirmed. Pet. App. A1-A40. The court stated that the due process claim is "govern[ed]" (*id.* at A14) by *Paul* v. *Davis*, 424 U.S. 693 (1976). The court held that, to prevail under *Paul*'s "'stigma plus' test," respondent must show that the State made a "stigmatizing statement" about him that he claimed was false; and "some

tangible and material state-imposed burden or alteration of his * * * status or of a right in addition to the stigmatizing statement." Pet. App. A14. The court concluded that respondent satisfied both elements of that test. See *id.* at A14-A35.

The court of appeals acknowledged that the information listed in the State's sex offender registry is "concededly true." Pet. App. A15. But the court reasoned that such information—that those listed on the registry "are persons convicted of crimes characterized by the State as sexual offenses"—nonetheless conveys the "stigma," claimed by respondent to be false, that "each person listed is more likely than the average person to be currently dangerous." *Id.* at A15, A18. According to the court, instead of negating such stigma, the contrary disclaimer on the State's website contributed to it. See *id.* at A17 ("Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' clearly implies that some may be.").

Although the court of appeals stated that "the import of the 'plus' component [of *Paul*] remains somewhat unclear," Pet. App. A20, it concluded that the "registration duties" established by Connecticut's Megan's law, which it characterized as "extreme and onerous," "easily qualify as a 'plus' factor under *Paul*," *id.* at A30-A31. The court rejected the State's argument that the registration duties could not serve as the requisite "plus factor," because the alleged "stigma arises not from the registration requirement but rather from the publication of the registration information." *Id.* at A33. In the court's view, "the temporal nexus between the stigma and the 'plus' factor in this case is sufficiently close to support a liberty interest." *Id.* at A34.

Under the permanent injunction affirmed by the court of appeals, respondent and other registered sex offenders "are entitled to the opportunity to have a hearing consistent with due process principles to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry." Pet. App. A39; see *id.* at A38.[4]

SUMMARY OF ARGUMENT

Sex offenders pose a unique public threat: they have a much higher recidivism rate with respect to their crimes than any other type of felon; they prey on the most vulnerable members of society; they inflict devastating, life-altering injuries; and they often act with impunity because many sex offenses, particularly those against children, go unreported. The Connecticut law at issue here is part of a nationwide effort to confront that threat by making truthful information of public record more readily available to concerned citizens so that they may educate and protect themselves, and their children. Nothing in the Fourteenth Amendment's Due Process Clause stands as an obstacle to this common sense response to a serious national problem.

Connecticut's community notification provision does not implicate any interest protected by the Fourteenth Amendment. It simply calls for notification of the fact of registration for a sex offense, *i.e.*, the fact of an individual's prior conviction and related truthful information. The release of that information does not implicate any interest protected by the Due Process Clause.

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[4] Respondent also alleged that the Connecticut law violates the Ex Post Facto Clause. U.S. Const. Art. I, § 10, Cl. 1. The district court rejected that claim, Pet. App. A57, and the court of appeals did not reach it, see *id.* at A38.

The Constitution's due process guarantee is not triggered unless, "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Paul* v. *Davis*, 424 U.S. 693, 711 (1976) (emphasis added). The notification provision at issue—the state action complained of—does not extinguish or materially alter any state right or status. It does not, for example, result in the loss of government employment or a driver's license. As a result, the Due Process Clause does not entitle respondent to a hearing on his claim of reputational injury.

Moreover, even if respondent could show the deprivation of a protected interest, he still would not be entitled to the hearing he seeks because he has clearly received all the process he is due. Unlike the plaintiff in *Paul*, who was publicly listed as an "Active Shoplifter" based simply on his *arrest* for shoplifting, respondent was listed as a sex offender only after he had received the panoply of procedural protections guaranteed to persons accused of crimes, and was *convicted* of a sex offense. Whatever alleged "stigma" may result from the community notification of the truthful fact of respondent's status as a convicted sex offender, nothing in the Constitution entitles respondent to a post-conviction hearing to attempt to disprove such stigma. See *Codd* v. *Velger*, 429 U.S. 624 (1977) (per curiam). The conviction of a criminal offense may deprive an individual of numerous protected interests, including foremost his liberty to remain at large. The process that is due is afforded in the underlying criminal proceedings resulting in conviction, not in the sort of post-conviction, name-clearing hearing that respondent demands in this case.

Finally, to the extent that the State's decision to notify the public of *all* convicted sex offenders (without first conducting any individualized risk assessments) implicates a constitutionally protected interest, respondent's challenge to that determination is more suited to review under substantive rather than procedural due process. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion). But Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives, and therefore readily satisfies any substantive due process review. Indeed, experience shows that criminal history is the single best predictor of future criminal behavior, especially in the case of sex offenses. States such as Connecticut may reasonably conclude that individualized risk assessments are costly, cumbersome, and even unreliable. The Constitution does not require a State to conduct such individualized assessments before it may make a registry of convicted sex offenders available to its citizens.

ARGUMENT

A STATE MAY LIST CONVICTED SEX OFFENDERS IN A PUBLICLY AVAILABLE REGISTRY WITHOUT FIRST CONDUCTING INDIVIDUALIZED POST-CONVICTION RISK ASSESSMENTS

A. Respondent Has Not Been Deprived Of Any Interest Protected By The Fourteenth Amendment

In *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court established the framework for determining whether a claim that state action has injured one's reputation triggers the procedural guarantee of the Fourteenth Amendment. Respondent has failed under that standard to identify the deprivation of any constitutionally

protected interest due to his inclusion in the State's sex offender registry.

1. *Paul* involved an individual, Davis, whose name and photograph were included on a police flyer of "Active Shoplifters," following his arrest—but not conviction—for shoplifting. 424 U.S. at 695. After the flyer was circulated to local merchants, the shoplifting charge was dismissed. *Id.* at 695-696. Davis then brought suit under 42 U.S.C. 1983 against the officers responsible for preparing and circulating the flyer, claiming that the flyer, and "in particular the phrase 'Active Shoplifters' appearing at the head of the page upon which his name and photograph appear[ed]," inflicted a stigma on his reputation that would "seriously impair his future employment opportunities," and thereby deprived him of a "'liberty' protected by the Fourteenth Amendment." *Id.* at 697.

This Court disagreed, and held that the interest in one's reputation, standing alone, is not protected by the Due Process Clause. See 424 U.S. at 711-712. The Court explained that the customary recourse for "the infliction by state officials of a 'stigma' to one's reputation" is state defamation law. *Id.* at 701. To trigger due process guarantees, an individual must show that he has been deprived of an interest that is "recognized and protected by state law." *Id.* at 710. That is, an individual must show that "*as a result of the state action complained of*, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711 (emphasis added). Davis failed to make that showing, the Court held, because he did not "assert denial of any right vouchsafed to him by the State." *Id.* at 712.

In so holding, the Court in *Paul* contrasted the situation in *Wisconsin* v. *Constantineau*, 400 U.S. 433

(1971), where the Court concluded that the plaintiff *had* suffered a change in status under state law—due to an alleged harm to reputation—triggering due process. *Constantineau* involved a challenge to a state law that required the "posting" of the names of individuals deemed to pose a community risk by reason of "excessive drinking." *Id.* at 434-435. The law further made it unlawful for others to sell or give liquor to "posted" individuals. *Id.* at 434-435 n.2. As the Court explained in *Paul*, the "posting" at issue in *Constantineau* "significantly altered [an individual's] status as a matter of state law" by depriving him of "the right to purchase or obtain liquor in common with the rest of the citizenry," and "it was *that alteration of legal status* which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-709 (emphasis added).

In *Siegert* v. *Gilley*, 500 U.S. 226 (1991), this Court reaffirmed the important constitutional principles established by *Paul*. See *id.* at 233-234. *Siegert* involved a claim brought by a former employee against a federal government employer under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on an allegedly defamatory letter sent by the former employer to a prospective employer. 500 U.S. at 228-229. In holding that the plaintiff failed to state a claim under the Fourteenth Amendment, the Court reiterated that "[d]efamation, by itself, is * * * not a constitutional deprivation," and concluded that, under *Paul*, the plaintiff had failed to state a claim, even though "[t]he statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects." *Id.* at 233-234.

2. Respondent's inclusion in Connecticut's sex offender registry and the resulting public notification of that fact does not remotely implicate the kind of interest required by this Court's precedents. It essentially provides the public with notice of the fact that an individual has been convicted of a crime triggering the registration requirements and related truthful information. Connecticut provides no additional commentary, but rather includes a disclaimer on its Internet website allowing members of the public to draw their own inferences from this information. See pp. 6-7, *supra*. The publication of such truthful information flowing from the fact of a prior conviction does not meaningfully implicate respondent's reputational interest, let alone deprive him of the kind of right or entitlement required by *Paul*.

Under *Paul*, respondent must show the material alteration in a state entitlement or right "as a result of the state action complained of." 424 U.S. at 711. In holding that respondent met that test, the Second Circuit pointed to the "registration duties imposed by Connecticut's sex offender law." Pet. App. A30. But that analysis confuses cause and effect. The "state action complained of" in this case is facilitating public awareness of respondent's inclusion in the State's sex offender registry, and the alleged stigma resulting therefrom. See *id.* at A18.[5] Registration is not a result

[5] Accordingly, the permanent injunction affirmed by the court of appeals below is "limited to public disclosure of the sexual offender registry." Pet. App. A13; see *id.* at A39 ("[I]t is the *communication to the public* of the fact that the plaintiff (and other members of the class) is in the registry, without a hearing as to the current danger that the plaintiff (and other member[s] of the class) poses, that is both central to the constitutional infirmity of the

of—or a "plus factor" under *Paul* that flows from—such community notification. Registration, as respondent's complaint recognizes, is "solely" the result of one's conviction for a sex offense. See Br. in Opp. App. 2 ("[R]egistration is required solely on the basis of a conviction for one of the offenses listed in the statute.").

The effect on respondent—and alleged stigma—would be no different if the State notified the community of the fact of his conviction for a sex offense, rather than the fact of his registration as a sex offender. Indeed, under Connecticut's categorical approach, they are one and the same. In either case, respondent has not suffered any denial of a state right or entitlement (as required by *Paul*) as a result of such notification. Notification has not, for example, resulted in "loss of government employment," "loss of tax exemption," loss of a "right to purchase or obtain liquor in common with the rest of citizenry," loss of a driver's license, or loss of parole. *Paul*, 424 U.S. at 705, 708, 711. In short, like the plaintiff in *Paul*, respondent was not "deni[ed] * * * any right vouchsafed to him by the State" as a result of the complained of action, and he was not deprived of any interest protected by the Fourteenth Amendment. *Id.* at 712.

3. The Second Circuit held that *Paul*'s "plus factor" is met if a plaintiff "points to an indicium of material government involvement unique to the government's public role that distinguishes his or her claim from a traditional state-law defamation suit." Pet. App. A29. But that is a substantial deviation from the requirements of *Paul*, and provides no limiting principle to prevent transforming simple defamation claims against

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statute and the principal object of the injunction.") (emphasis added).

the State into constitutionalized defamation claims. Indeed, if the touchstone were simply "an indicium of material government involvement unique to the government's public role," then a State's public role in notifying the community that state officers have apprehended the person they believe "to be responsible for a particular crime in order to calm the fears of an aroused populace," not to mention a listing of those arrested for shoplifting, would give rise to "a claim against such officers under § 1983." *Paul*, 424 U.S. at 698. But *Paul* teaches that the contrary is true. See *id.* at 699 (noting that such consequences "would come as a great surprise to those who drafted" the Fourteenth Amendment).

In *Paul*, 424 U.S. at 701, the Court was careful to avoid any "reading" of the Due Process Clause that would make "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (discussing the "frequent admonition that the Due Process Clause is not merely a 'font of tort law.'") (quoting *Paul*, 424 U.S. at 701); *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). As this case illustrates, the Second Circuit's amorphous "indicium of material government involvement" test would permit counsel to convert practically any defamation claim against the State into a Fourteenth Amendment claim suitable for federal adjudication pursuant to Section 1983. The Court should reject the Second Circuit's expansive, limitless, and unfounded reading of the Fourteenth Amendment and, instead, reaffirm the ground rules established by *Paul*.

B. Respondent Received Any Process That He Was Due When He Was Convicted Of His Sex Offense

Even assuming that the Second Circuit correctly concluded that respondent alleged the deprivation of a protected liberty interest, respondent received all the process that he was due when he was convicted of a sex offense.

1. This case is distinguishable from *Paul* in a fundamental respect that makes respondent's due process claim even more attenuated than the claim in *Paul*. The police flyer in *Paul* identified Davis as an "Active Shoplifter," even though he had only been *charged* with shoplifting when the flyer was distributed. 424 U.S. at 696. Justice Brennan emphasized that point in his dissent, stating that "[t]he stark fact is that the police here have officially imposed on respondent the stigmatizing label 'criminal' without the salutary and constitutionally mandated safeguards of a criminal trial." *Id.* at 718; see *id.* at 718-719 & n.5 (respondent was "never convicted of any criminal activity"). In his view, "[i]n the criminal justice system, [an individual's interest in his reputation] is given concrete protection through the presumption of innocence and the prohibition of state-imposed punishment unless the State can demonstrate beyond a reasonable doubt, at a public trial with the attendant constitutional safeguards, that a particular individual has engaged in proscribed criminal conduct." *Id.* at 724; see *id.* at 735 n.18 ("[T]he State may not condemn an individual as a criminal without following the mandates of the trial process.").

The logical corollary of that observation is that, as even the dissenters in *Paul* recognized, there is nothing constitutionally problematic about labeling someone as

a criminal if they have been convicted after receiving "the salutary and constitutionally mandated safeguards" of the criminal justice system. 424 U.S. at 718 (dissent). Such safeguards provide all the process that an individual is due before a State publishes information concerning the fact of his past criminal behavior, and individuals lack any constitutionally cognizable reputational interest in avoiding such publication.

Connecticut has not publicly identified respondent as a sex offender based on his *arrest* for a sex offense. Rather, respondent was listed on the State's registry based "solely" on the fact of his conviction of a sex offense. Pet. App. A9; see Br. in Opp. App. 2 (Complaint). In other words, unlike the plaintiff in *Paul*, respondent received the panoply of procedural protections guaranteed criminal defendants by the Constitution, see *Herrera* v. *Collins*, 506 U.S. 390, 398-399 (1993), and was *convicted* of a sex offense before he was listed on the State's sex offender registry.[6] Whatever stigma may stem from respondent's conviction of a sex offense, nothing in the Constitution prohibits the State from publicly recognizing the fact of that conviction by way of its sex offender registry—or entitles respondent to any additional hearing before it does so.

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[6] In addition to the procedural protections afforded individuals in the underlying criminal proceedings, convicted sex offenders may collaterally attack their convictions in state and federal habeas proceedings. The federal guidelines governing Megan's laws state that registration may be discontinued "if the underlying conviction is reversed, vacated, or set aside or if the registrant is pardoned." 64 Fed. Reg. at 573; see *id.* at 582-583 ("[I]f the underlying conviction is reversed, vacated, or set aside, or if the registrant is pardoned, registration (or continued registration) is not required under the [Wetterling] Act.").

2. Any stigma that could reasonably result from inclusion on a public sex offender registry such as Connecticut's stems from the fact of the individual's conviction for a sex offense. Indeed, the Internet website containing the registry at issue in this case explicitly stated: "Individuals included within the registry are included *solely by virtue of their conviction record and state law*." Pet. App. A9 (emphasis added). Furthermore, far from labeling convicted sex offenders as "active" (like the flyer in *Paul*), the disclaimer stated: "The [State] 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." *Ibid.* (emphasis added).

The court of appeals nonetheless accepted respondent's assertion that Connecticut's sex offender registry not only truthfully discloses the fact of his prior conviction for a sex offense, but also *falsely* implies that he is a "presently dangerous sex offender." Pet. App. A15. Furthermore, the court held—after determining that respondent was deprived of a protected interest—that respondent was entitled to a hearing to determine whether he was "particularly likely to be currently dangerous before being labeled as such by [his] inclusion in a publicly disseminated registry." *Id.* at A39. That analysis is flawed under this Court's precedents.

Even when protected interests are at stake, the Fourteenth Amendment does not entitle individuals to a hearing to dispute an alleged stigma stemming from the publication of truthful information about them, or to clear their names. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (per curiam). In *Codd*, a New York City patrolman, Velger, brought a Section 1983 action challenging

his dismissal from the police force after his employer discovered from his personnel file that "he had put a revolver to his head in an apparent suicide attempt" during his training. *Id.* at 626. Velger argued that that information had a stigmatizing effect that would prevent him from securing future employment, and that he was entitled under the Fourteenth Amendment "to a hearing [on his dismissal] due to the stigmatizing effect of * * * material * * * in his personnel file." *Id.* at 625. The court of appeals agreed, emphasizing the stigmatizing effect of the material. See 525 F.2d 334, 336 (2d Cir. 1975) (The charge of attempted suicide "suggests to most of us such severe mental illness that it deprives one of the capacity to do any job well.").

This Court reversed. The Court explained that Velger had not "affirmatively asserted that the report of the apparent suicide attempt was substantially false." 429 U.S. at 627. The Court continued: "[T]he hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him." *Id.* at 627-628.

So too here. Respondent does not dispute that he has been convicted of a sex offense. Even if he were deprived of a protected interest, he would not be entitled to a hearing to try to refute any alleged stigma flowing from the fact of his prior conviction, or his inclusion in the State's sex offender registry based "solely" on that conviction. Pet. App. A9; see *State* v. *Cook*, 700 N.E.2d 570, 579 (Ohio 1998) ("'The harsh consequences [of] classification and community notification come not as a direct result of the sexual offender law, but instead as a

direct societal consequence of [the offender's] past actions.'"), cert. denied, 525 U.S. 1182 (1999). That conclusion makes particular sense given that respondent has already had an opportunity to contest the fact that ultimately results in the alleged stigma. Unlike the report of a suicide attempt in a personnel file or an arrest for shoplifting, the fact of a criminal conviction is necessarily the product of a process in which the accused has had an opportunity to contest the government's view of the facts.

Under a contrary regime, a plaintiff could invariably identify some stigma on his reputation that allegedly flows from the State's dissemination of a truthful fact and—if he can show the deprivation of a protected interest—demand a hearing in federal court to try to dispel that *stigma*. There is no evidence whatever that the Framers of the Fourteenth Amendment intended to open the federal courts to such name-clearing hearings. Moreover, such a regime would require this Court to develop a set of constitutional rules to enable courts to discern which alleged stigmas (stemming from truthful facts) are of constitutional dimension, and which are not. Such fine and factbound distinctions are better left to the state law of defamation.

3. The *Codd* approach is particularly appropriate with respect to the government's dissemination of information—such as the fact of a criminal conviction—that is both of public record and of public concern. Indeed, in *Paul* itself the Court rejected the argument that the Constitution prevents a State from "publiciz[ing] a record of an official act such as an arrest." 424 U.S. at 713; see *Department of the Air Force* v. *Rose*, 425 U.S. 352, 389 (1976) (Rehnquist, J., dissenting) ("In [*Paul*] custodians of public records chose to disseminate them, and one of the subjects of the record claimed that

the Fourteenth Amendment to the United States Constitution prohibited the custodian from doing so.").

Similarly, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975), the Court stated that it was "convinced" that a State could not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records." "Public records," the Court explained, "by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records." *Id.* at 495; see *Florida Star* v. *B.J.F.*, 491 U.S. 524, 532 (1989).[7]

In several cases, this Court has considered the extent to which the State may place restrictions on the ability of the press to publish truthful information in the public record. See, *e.g.*, *Butterworth* v. *Smith*, 494 U.S. 624 (1990); *Florida Star*, *supra*; *Cox Broad. Corp.*, *supra*; *Oklahoma Publ'g Co.* v. *Oklahoma County Dist. Court*, 430 U.S. 308 (1977). But the Court has never suggested that the Constitution compels the State *not* to disseminate truthful information in the public record, especially when, as here, that information pertains to a matter of public safety. To the contrary, the Court has recognized that States have discretion to determine when to disseminate such information. See *Florida Star*, 491 U.S. at 535; *Paul*, 424 U.S. at 713. Given the unique threat posed by sex offenders, States have an obvious—indeed, compelling—interest in making available the

[7] Criminal trials and convictions are a matter of quintessential public interest. See *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in a court room is public property."); *Cox Broad. Corp.*, 420 U.S. at 492-493.

sort of truthful, public record information at issue in this case. See pp. 2-3, *supra*.[8]

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[8] To be sure, dissemination of even public record information may raise legitimate privacy concerns. Congress and the States have passed numerous laws protecting the confidentiality of information that is (or has been) in the public record, including criminal records. In *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), this Court held that federal "rap sheets" are exempt from disclosure under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C), which prevents the government from disclosing to others information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Citing this Court's decisions in *Paul* and *Cox Broadcasting*, however, the Court carefully distinguished between "the statutory meaning of privacy under the FOIA," at issue in *Reporters Committee*, and "the question whether an individual's interest in privacy is protected by the Constitution." 489 U.S. at 762 n.13. *Paul* and *Cox Broadcasting* establish that the Constitution does not prevent a State from disclosing arrest or conviction records. See pp. 21-22, *supra*; *National Fed'n of Fed. Employees* v. *Greenberg*, 983 F.2d 286, 294 (D.C. Cir. 1993) (*Paul* held in "the clearest possible terms that no constitutional right of privacy is violated by the disclosure 'of an official act such as an arrest'"); *Paul P.* v. *Verniero*, 170 F.3d 396, 403-404 (3d Cir. 1999) (same). In any event, this case does not present a claim of an invasion of any right to *privacy*. Respondent objects to the publication of the sex offender registry *without an individualized hearing* on his current dangerousness, not to publication of the registry *vel non*. Similarly, respondent has not challenged (on privacy or any other ground) the fact that Connecticut's sex offender registry includes the addresses and certain other identifying information with respect to those listed, see Br. in Opp. App. 20-21, and the court of appeals did not rely on the publication of such information in finding a due process violation. Instead, the court focused on the alleged stigma that it believed existed in being publicly listed as a convicted sex offender. Pet. App. A18.

C. Connecticut's Megan's Law Readily Satisfies Any Substantive Due Process Review

In many respects, respondent's objection to the State's public sex offender registry—both with respect to the requirement of registration and the resulting notification—sounds more in substantive than procedural due process. Traditionally, courts have analyzed and rejected challenges to the categorical operation of laws systematically imposing consequences based on a fact, such as a prior conviction, under principles of substantive due process. Respondent has avoided styling his claim in terms of substantive due process, presumably because of the high hurdle that any such claim would face, but this Court's cases clearly allow States to make rational legislative judgments based on the sort of categorical approach employed by Connecticut.

As the plurality recognized in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), States are not barred by principles of "*procedural* due process" from establishing a "conclusive presumption" or "general classification[]" that "foreclose[s] the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate." *Id.* at 120 (emphasis in original). Rather, such classifications, even when they implicate protected interests, are limited only by *substantive* due process. *Id.* at 120-121.

Michael H. involved a challenge brought by the putative natural father to a state law establishing a conclusive presumption that the husband of the mother who was living with the mother was the "father" of the mother's child. 491 U.S. at 116-118. The plurality rejected the putative father's procedural due process

argument that he was entitled to an "opportunity to demonstrate his paternity in an evidentiary hearing" before the State applied the rule to him, and terminated his parental rights. *Id.* at 119. Instead, the plurality reasoned that such a challenge "must ultimately be analyzed" under principles of substantive due process by looking to "the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.* at 121.[9]

Similarly, here, to the extent that the State's decision to notify the public of *all* registered sex offenders (without any individualized risk assessments) implicates any liberty interest enjoyed by respondent, that determination is, at best, limited by substantive due process. When, as here, a challenged classification does not infringe a fundamental right or discriminate against a suspect class, it is subject only to rational basis review, which looks deferentially to the "the 'fit' between the classification and the policy that the classification serves." *Michael H.*, 491 U.S. at 121. See *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997); see also *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (states have "the widest latitude in drafting" civil remedial statutes); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). Connecticut's decision to notify communities of all registered sex offenders is clearly rationally related to legitimate state objectives and, thus, easily passes that check.

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[9] Justice Stevens, who concurred in the judgment in *Michael H.*, joined the portion of the plurality decision rejecting the procedural due process claim. See 491 U.S. at 132.

Megan's laws serve the vital government objectives of protecting the public from sex offenses and assisting law enforcement. See Pet. App. A17; see also *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."). The notification provision at issue in this case directly promotes those objectives. Indeed, experience teaches that the fact that an individual has been convicted of a sex offense is perhaps the most significant factor for gauging his risk of committing another sex offense upon his release. See *McKune* v. *Lile*, 122 S. Ct. at 2024; see also U.S. Sentencing Comm'n, *Report to the Congress: Sex Offenses Against Children* 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sexual offenses, is the most important and accurate predictor of the risk of future sexual offending."). The notification provision allows citizens and law enforcement to assess those risks accurately.

The Court has recognized that the government may take much greater steps based on the fact of a prior conviction. In *Lewis* v. *United States*, 445 U.S. 55, 66 (1980), for example, the Court held that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." Indeed, as the Court noted in that case, "[t]his Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." *Ibid.* (citing *Richardson* v. *Ramirez*, 418 U.S. 24 (1974) (voting); *De Veau* v. *Braisted*, 363 U.S. 144 (1960) (holding a union office); *Hawker* v. *New York*, 170 U.S. 189 (1898) (practicing medicine)). So too, a legislature may rationally conclude that a conviction for a sex

offense warrants registration and community notification with respect to that offense.[10]

At the same time, a State may reasonably conclude, as Connecticut has (Pet. 4-5), that attempting to assess the particular degree of danger posed by each convicted sex offender before providing community notification would prove "costly, cumbersome, and inaccurate." Cf. *Kansas* v. *Crane*, 122 S. Ct. 867, 870 (2002). Indeed, numerous States have passed Megan's laws adopting a categorical notification approach similar to Connecticut's,[11] the federal guidelines specifically permit that

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[10] The substantive due process claim in this case is particularly weak because the only consequence of any presumption in Connecticut's categorical approach is notification of "concededly true" (Pet. App. A15) information, leaving those who access the State's registry free to draw their own conclusions from that information. Following a categorical notification approach with respect to all registered sex offenders may encourage citizens to make their own judgments about the risks posed by particular sex offenders, without the imprimatur of a state determination that a particular offender poses a particular danger to his community based on the outcome of an individualized hearing.

[11] See, *e.g.*, Ala. Code §§ 15-20-25(b), 15-20-21(1) (2001); Alaska Admin. Code tit. 13, § 09.050(a) (2000); D.C. Code Ann. § 22-4001 (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1)(a) (West 2001); Ga. Code Ann. § 42-9-44.1 (1997); Haw. Rev. Stat. § 846E-3 (Supp. 2000) (invalidated in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001)); Ind. Code Ann. § 5-2-12-11(b) (Michie 2001); Kan. Stat. Ann. § 22-4909 (1995); Ky. Rev. Stat. Ann. § 17.580(1)-(2) (Michie Supp. 2001); La. Rev. Stat. Ann. § 15:546 (West Supp. 2002); 2001 Md. Laws 367 (to be codified at Md. Code Ann., Crim. P. § 11-717(b)); Mich. Comp. Laws Ann. § 28.728(2) (West Supp. 2002); Miss. Code Ann. § 45-33-49 (Supp. 2001); Mo. Ann. Rev. Stat. § 589.417(2) (West Supp. 2002); N.H. Legis. 241 (2002) (amending N.H. Rev. Stat. Ann. § 651-B:7(IV) (2001)); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (Supp. 1998); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (Supp.

approach, 64 Fed. Reg. at 582, and Congress itself has followed a similar path in the CSCPA. In any event, the determination whether to adopt a categorical or individualized notification approach with respect to convicted sex offenders is a policy judgment that the Constitution leaves to the State.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
LEONARD SCHAITMAN
MARK W. PENNAK
Attorneys

JULY 2002

2001); S.D. Codified Laws § 22-22-40 (Michie 1998); Tenn. Code Ann. § 40-39-106(f) (1997); Tex. Code Crim. P. Ann. art. 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (Supp. 2001); see also *Helman* v. *State*, 784 A.2d 1058, 1065-1066 & n.2 (Del. 2001).