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No. 01-1231

In The
Supreme Court of the United States

CONNECTICUT DEPARTMENT 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 FOR RESPONDENTS

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QUESTION PRESENTED

Whether Connecticut's sex offender registration scheme denied respondents due process in violation of the Fourteenth Amendment, under the test of *Paul v. Davis*, 424 U.S. 693 (1976), because it stigmatized respondents as sex offenders who pose a danger to public safety, plus imposed intrusive reporting obligations on threat of felony prosecution, and eliminated their state law remedies, without notice and an opportunity to be heard on whether they pose a danger to public safety.

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STATEMENT

1. *The Parties*

Respondent John Doe represents a class of plaintiffs certified by the district court under Federal Rule of Civil Procedure 23(b)(2). Pet. App. A67-A68. The class consists of "all persons who are subject to the registration and public disclosure requirements" of the Connecticut sex offender registration statute, Conn. Gen. Stat. §§ 54-250 *et seq*., "without notice and an opportunity to be heard on the question of whether they are dangerous." Pet. App. A67.

Petitioners are the Connecticut Department of Public Safety, the Connecticut Office of Adult Probation, the Commissioner of Correction, and supervisory officials of those agencies, which are charged under the Connecticut statute with collecting the sex offender registration information, establishing and maintaining the sex offender registry, and posting the registry on the Internet. *Id*. at A6-A8.

2. *The Statutory Framework*

The Connecticut legislature originally enacted a sex offender registration statute in 1994 and, as petitioners have explained, since then "has incrementally taken steps in the interest of public safety to expand the registration and notification requirements of the original Act, and to make such registry information more readily available to the public, in order to permit the public to protect itself." Pet. C.A. Br. 1. Certain provisions of the statute also were enacted to comport with a federal statute that conditions the availability of designated federal funds on a state's establishing a sex offender registration system. *See* 42 U.S.C. § 14071 (1994 & Supp. V 1999) (the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act)). The Wetterling Act requires states to release "relevant information that is necessary to protect the public concerning a specific person required to register under" that statute. 42 U.S.C. § 14071(e)(2) (Supp. V 1999). It does not, however,

mandate the aspect of Connecticut's sex offender registration scheme challenged here: the publication of a sex offender registry that includes all persons, (their names, photographs, and current whereabouts), who have been convicted of any crime involving a sexual component or a minor victim, without any determination of whether those persons pose a danger to public safety.

The current version of the Connecticut statute was enacted in 1998 as "An Act Concerning the Registration of Sexual Offenders." 1998 Conn. Pub. Acts 111 (Reg. Sess.). The statute has been amended several times since, including after this suit was filed in February 1999. *See* 1999 Conn. Pub. Acts 183 (Reg. Sess.) (An Act Concerning the Registration of Sexual Offenders); 2001 Conn. Pub. Acts 211 (Reg. Sess.) (An Act Concerning Crime Victims); 2002 Conn. Pub. Acts 7, §§ 78-84 (Spec. Sess.) (An Act Concerning State Expenditures).

The Connecticut statute mandates that all persons convicted of certain offenses comply with various registration requirements, and that petitioner Department of Public Safety make the registry publicly available, including on the Internet. Conn. Gen. Stat. §§ 54-250 *et seq*. The statute also established a "Sexual Offender Registration Committee" to make recommendations about implementing the registration requirements. *Id.* § 54-259.

a. *Persons subject to registration and public disclosure requirements*

Registrants under the Connecticut statute include persons convicted of a wide variety of offenses. The statute identifies the following categories of persons by reference to the statutory provisions under which they were convicted, and states that such persons "shall" register.[1]

[1] The statute imposes the same registration and public disclosure requirements on individuals who have been found not guilty of one of the listed offenses by reason of mental disease or defect. *See* Pet. App.

(Continued on following page)

(i) Nonviolent misdemeanors. Registration is required for any person who has been convicted of a "nonviolent sexual offense" and released into the community on or after October 1, 1998 (the effective date of the current registration statute). Conn. Gen. Stat. § 54-251(a). Nonviolent sexual offenses include all fourth degree sexual assaults, which are class A misdemeanors punishable by not more than one year in prison. *Id.* §§ 54-250(5); 53a-73a(a), (b); 53a-36(1). Fourth degree sexual assaults include, *inter alia,* intentional "sexual contact" with a minor under fifteen, a person unable to consent because of mental incapacity, or a person with whom the actor has a relationship of trust like a psychotherapist or teacher. *Id.* §§ 53a-73a(a)(1), (4), (5), (6). "Sexual contact" is defined as "any contact with the intimate parts" of another person for the purpose of "sexual gratification" of the actor or "for the purpose of degrading or humiliating" the other person. *Id.* § 53a-65(3); s*ee In re Mark R.*, 757 A.2d 636, 638-639 (Conn. 2000) ("sexual contact" includes "smacking" another person's buttocks in a school hallway, in front of several people, with the intent to degrade or humiliate the victim).

(ii) Crimes against a minor, including nonsexual crimes. Registration is required for any person convicted of a "criminal offense against a victim who is a minor" and released into the community on or after October 1, 1998. Conn. Gen. Stat. § 54-251(a). "Criminal offenses against a victim who is a minor" include violations of any of thirteen listed criminal statutes, and violations of any of seven other listed criminal statutes if the victim were under eighteen at the time of the offense. *Id.* §§ 54-250(2)(A), (B). The seven listed offenses against victims under eighteen generally do not involve a sexual component. *See, e.g., id.* §§ 53a-92 (kidnapping); 53a-95 (unlawful restraint). They

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A2-A3 n.1. We follow the practice of the court of appeals and use the term "conviction" to include a "finding of not guilty by reason of mental disease or defect." *Id*. at A2-A3 n.1.

also include offenses ranging from violent felonies to the nonviolent Class B misdemeanor of public indecency, punishable by a term of imprisonment not to exceed six months. *Id.* §§ 53a-186; 53a-36(2); 54-250(2).

(iii) Sexually violent offenses. Any person convicted of a "sexually violent offense," and released into the community any time within the ten years prior to October 1, 1998 or thereafter, must register. Conn. Gen. Stat. § 54-252. A "sexually violent offense" is a violation of any of eight listed criminal statutes. *Id.* § 54-250(11). Those offenses include sexual assaults involving the use of threats or force, and kidnappings that a court finds were committed with the intent to sexually abuse the victim. *Id.* §§ 54-250(11) (referencing, *inter alia*, *id*. §§ 53a-70a (aggravated first degree sexual assault); 53a-92 (kidnapping)).

(iv) Persons required to register under the repealed registration statute. Any person "who has been subject to the registration requirements of [repealed] section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of public act 97-183" also must register under the current registration statute. Conn. Gen. Stat. § 54-252(b). Registration under now-repealed Section 54-102r was required for those persons convicted of one of seven listed criminal offenses, designated as "sexual assaults," and any crime committed in another jurisdiction if the essential elements were the same as any of the listed offenses. *Id.* § 54-102r(a) (1997).[2]

(v) Convictions in other jurisdictions. Registration also is required for any person convicted in another state,

[2] Respondent John Doe was convicted in 1994 of violating Conn. Gen. Stat. § 53a-71(a)(1) (1994). That offense is designated a "criminal offense against a victim who is a minor." *Id.* §§ 54-250(2); 54-251. Thus, petitioners err in asserting that Doe was convicted of a crime designated by Connecticut law as a "sexually violent offense." Pet. Br. 3.

federal, military or foreign court "of any crime, the essential elements of which are substantially the same as any of the crimes" defined as a "criminal offense against a victim who is a minor," "nonviolent sexual offense," or "sexually violent offense," if the person resides in Connecticut on or after October 1, 1998. Conn. Gen. Stat. §§ 54-253(a); 54-250(2), (5), (11). And registration is required for a person who is not a resident of Connecticut if the person is registered as a sex offender under the laws of another state and "regularly travels into or within" Connecticut or "temporarily resides" in the state, or is "employed," "carries on a vocation," or "is a student" in the state. *Id*. § 54-253(b); 2002 Conn. Pub. Acts 7, § 81 (Spec. Sess.). A nonresident who is registered as a sex offender and travels in Connecticut "on a recurring basis for periods of less than five days," must notify the Public Safety Commissioner of his temporary residence in the State. *Ibid*.

(vi) Discretionary registration for felonies committed for a sexual purpose. An additional category of persons, although not categorically mandated to register, "may be required" by a court to register. Conn. Gen. Stat. § 54-254(a). Those include persons convicted on or after October 1, 1998, of any felony committed for a purpose of engaging in "sexual contact" or intercourse with another person without that person's consent. *Id*. §§ 54-250(12); 54-254(a).

b. Registration upon release into the community

Registration generally must occur within three days of the registrant's "release[ ] into the community." Conn. Gen. Stat. §§ 54-251(a); 54-252(a); 54-254(a). "Release[ ] into the community" includes a number of situations. A person must register when he is released by a court after conviction, a sentence of probation, or other sentence that does not result in any term of imprisonment, *id*. § 54-250(10)(A), or when he is released from prison to a halfway house or upon completion of the maximum term of a

sentence. *Id*. §§ 18-100c; 54-250(10)(B). Registration is also required when a person is released on parole, which occurs only if "(1) it appears from all available information * * * that there is reasonable probability that such inmate will live and remain at liberty without violating the law, and (2) such release is not incompatible with the welfare of society." *Id*. § 54-125a; *see id*. §§ 54-125 (same for prisoners serving indeterminate sentences); 54-250(10)(B).

Finally, registration is required when a person is released from "a hospital for mental illness or a facility for persons with mental retardation by the Psychiatric Security Review Board on conditional release pursuant to section 17a-588 or upon termination of commitment to the Psychiatric Security Review Board." *Id*. § 54-250(10)(C). A person committed following a finding of not guilty by reason of mental illness or defect (*see* note 1, *supra*), may obtain a "conditional release" from commitment only if the Psychiatric Security Review Board finds that the person has shown, by a preponderance of the evidence, that he "can be adequately controlled with available supervision and treatment on conditional release," and the Board prescribes "such conditions as are necessary to prevent the acquittee from constituting a danger to himself or others." *Id*. §§ 17a-584(2); 17a-580(9); 17a-596(f). In addition, a person can be completely discharged from a term of commitment only if he can show a court, by a preponderance of the evidence, that he "does not have psychiatric disabilities or is not mentally retarded to the extent that his discharge would constitute a danger to himself or others." *Id*. §§ 17a-593(f) & (g); 17a-580(11). In making that determination, a court is to consider "that its primary concern is the protection of society." *Id*. § 17a-593(g).

c. *Registration and public disclosure requirements*

(i) Every registrant must provide to the Commissioner of Public Safety his "name, identifying factors, criminal history record and residence address." Conn. Gen. Stat. §§ 54-251(a); 54-252(a); 54-254(a). "Identifying factors"

include fingerprints, a photograph, and a description of other identifying characteristics. *Id*. § 54-250(3). Each registrant must provide a blood sample to the Commissioner for DNA analysis. *Ibid*. In addition, registrants convicted of a sexually violent offense must provide "documentation of any treatment received for mental abnormality or personality disorder." *Id*. § 54-252(a). Any registrant who is "employed at, carries on a vocation at or is a student at a trade or professional institution or institution of higher learning" in Connecticut must notify the Commissioner of that status and any change in that status. 2002 Conn. Pub. Acts 7, §§ 79-82 (Spec. Sess.) (adding requirement under Conn. Gen. Stat. §§ 54-251 to 54-254). Nonresident registrants must provide the Commissioner with "locations visited on a recurring basis or resident address, if any, in the state, and residence address in such person's home state." Conn. Gen. Stat. § 54-253(b).

Registrants must report in writing, within five days, every change of address to the Commissioner. *Id*. §§ 54-251(a); 54-252(a); 54-254(a). If the registrant's new address is in another state, or if the registrant is employed by, carries on a vocation, or attends school in another state, he must notify the Commissioner, and must register with the appropriate agency in the other state if it has a registration requirement for such offenders. *Ibid*.; 2002 Conn. Pub. Acts 7, §§ 79-82 (Spec. Sess.). The Commissioner must verify the address of each registrant "every ninety days." 2002 Conn. Pub. Acts 7, § 84. The Commissioner must send a nonforwardable form to each registrant which the registrant must complete and return. Conn. Gen. Stat. § 54-257(c). If a registrant fails to return the form within ten days of mailing, the Department "shall" notify local law enforcement authorities who "shall" apply for an arrest warrant for violation of the registration requirements. *Ibid*.

Registrants must submit to the retaking of a photograph upon request of the Commissioner of Public Safety. *Id*. §§ 54-251(a); 54-252(a); 54-254(a). The Department of Public Safety is required to retake every registrant's photograph "at least once every five years." *Id*. § 54-257(d).

(ii) A person convicted of a sexually violent offense must register and report to the State for the rest of his life. Conn. Gen. Stat. § 54-252(a). A person convicted of a nonviolent sexual offense, a criminal offense against a victim who is a minor, or a felony committed for a sexual purpose, must register and report to the State for ten years. *Id*. §§ 54-251(a); 54-254(a). Any person in either of the first two groups who "has one or more prior convictions of any such offense," and any person convicted under § 53a-70(a)(2) (sexual intercourse with person under 13 years of age and actor is more than two years older), must register and report to the State for life. *Id.* § 54-251(a).

Any person who violates the registration provisions "shall be guilty of a class D felony," punishable by one to five years in prison. *Id*. §§ 54-251(e); 54-252(d); 54-253(c); 54-254(b); 53a-35a(7).

(iii) The Department of Public Safety must establish and maintain a registry of all persons required to register under the Connecticut statute. Conn. Gen. Stat. § 54-257(a). The Department must notify the local police department or state police troop having jurisdiction where the registrant resides and, in addition, the law enforcement agency with jurisdiction over an institution of higher education if a registrant is a student or employee there. *Ibid*.; 2002 Conn. Pub. Acts 7, § 84 (Spec. Sess.). The Department also must transmit all registration information to the Federal Bureau of Investigation for inclusion in a national database. Conn. Gen. Stat. § 54-257(a); 42 U.S.C. § 14072(j) (Supp. V 1999) (information disclosed to FBI is released only to local law enforcement).

The sex offender registry is a public record, available at the Department and local police stations. Conn. Gen. Stat. § 54-258(a)(1). In addition, the Department must "make registry information available to the public through the Internet." *Ibid*. Viewers gaining access to the registry on the Internet through the Department's homepage would first see the Department's "mission" statement declaring that the Department "provides a coordinated, integrated program for the protection of life and property

within this state. The Department of Public Safety is charged to prevent crime, apprehend criminals, enforce motor vehicle laws, investigate crimes and traffic accidents and perform other regulatory and safety functions to benefit all citizens of this and other states," and also provide various safety and emergency services. J.A. 92.

Beneath that mission statement, in large type, was a set of links to other webpages, one of which was labeled "Sex Offender Registry." J.A. 92. Choosing that link (by clicking on it with a computer mouse) displayed a webpage with the same title. J.A. 93. Directly beneath the page's title was a bolded link labeled "Search Database for Offenders." J.A. 93.[3] Selecting that link displayed a new page, entitled "Sex Offender Registry," containing a form that allowed one to view all offenders, or to search by last name, town name or zip code. J.A. 15 ¶ 18. Selecting the

[3] After the bolded link, the page continued for seven paragraphs of text (over 700 words) providing various information about the site. J.A. 93-96. The second sentence of the fifth paragraph initially stated that "[t]his information is made available for the purpose of protecting the public." Pet. App. A10; Resp. Local Rule 9(C)1 Stmt., Exh. F. Sometime after March 1999, the Department removed that sentence and inserted in its place a lengthy exposition, including the following: "This information is made available for the purpose of complying with Connecticut General Statutes § 54-250, *et seq*. * * *. The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual 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 data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." Pet. App. A47-A48; J.A. 16 ¶ 21, 94-95. Although the Department subsequently made minor formatting changes to the page, the substance of the text was the same at the time the district court enjoined the registry's publication until respondents are given an opportunity to be heard. Pet. App. A48 n.14.

"Show Offenders" button yielded a direct link to another page entitled "Registered Sex Offender." Pet. App. A9; J.A. 15 ¶ 19. Under that label was displayed an individual registrant's name, current photograph, date of birth, current resident address, identifying information (including race, height, weight, scars or tattoos), registration date, the statutory citation to the offense of conviction and title of offense, and the date of conviction requiring registration. J.A. 15-16 ¶ 19, 56, 61.

The Department must, at least four times a year, issue notices to the media informing them of the availability and means of gaining access to the registry. Conn. Gen. Stat. § 54-258(a)(1); J.A. 97, 98 (media websites providing links to the sex offender registry website). Real estate agents and persons selling their homes also are required to inform prospective home buyers in writing that the Department "maintains a site on the Internet listing information about the residence address of persons required to register" under the statute. Conn. Gen. Stat. § 20-327b(d)(2)(G). In addition, any state agency, court, or law enforcement office "may, at its discretion, notify any government agency, private organization or individual of registration information" when it "believes such notification is necessary to protect the public or any individual in any jurisdiction from any person who is subject to registration" under the statute. *Id*. § 54-258(a)(2). Whenever registry information is disseminated to the public, it must be accompanied by a warning that using the information to harass, injure, or commit a criminal act against a registrant is subject to criminal prosecution. *Id*. § 54-258a.

The Department of Public Safety has a procedure for a registrant to challenge the accuracy or completeness of registry information, but no state agency conducts any individualized assessment of the public safety threat posed by a registrant or has discretion to determine whether an individual must register. Pet. App. A47.

d. ***Exemptions from, restrictions on, and suspension of registration and dissemination requirements***

A court is authorized in two instances to exempt some persons from the registration requirements. A person convicted of engaging in sexual intercourse with someone between thirteen and sixteen years of age by an actor who is more than two years older may be exempted, but only if the actor were under nineteen at the time of the offense. Conn. Gen. Stat. §§ 53a-71(a)(1); 54-251(b). A person convicted of subjecting another person to "sexual contact" without the other person's consent (which is one of the covered misdemeanors) also may be exempted. *Id*. §§ 53a-73a(a)(2); 54-251(c). In both instances, exemptions are conditioned on a court finding that "registration is not required for public safety." *Id*. § 54-251(b), (c).

The statute also provides that, in order to avoid revealing the identity of the victim in certain circumstances, a court may order, *sua sponte*, that the Department of Public Safety restrict the dissemination of a person's registration information only to law enforcement. *Id*. § 54-255(a), (b). A court first must find that making the information public "is not required for public safety." *Id*. § 54-255(a), (b). A court "shall remove" the restriction on dissemination if, "at any time," it finds that "public safety requires" that the information be made available to the public. *Id*. § 54-255(a), (b). Such a court-ordered restriction on dissemination is authorized only in cases involving a conviction for compelling a spouse or cohabitor to engage in sexual intercourse by use or threat of force; or a conviction for a nonviolent sexual offense, offense against a victim who is a minor, or a sexually violent offense, if the victim is under eighteen years of age and related to the person (within certain specified degrees of kindred). *Id*. §§ 53a-70b; 54-255(a), (b). If the court "at any time" finds that changed circumstances make publication of the registration information "no longer likely to reveal the

identity of the victim," the court must remove the restriction. *Id*. § 54-255(a), (b).

Courts also may consider petitions from certain persons, convicted before the year 2000, to restrict the dissemination of their registry information by providing it only to law enforcement. *Id*. § 54-255(c). A person convicted on or after July 1, 1999 (or October 1, 1998, in one instance), is not eligible to petition for a restriction. A restriction petition may be filed only by persons in five categories: (1) persons under nineteen at the time of the offense who were convicted, before July 1, 1999, of engaging in sexual intercourse with a person between the ages of thirteen and sixteen years if actor were more than two years older, *id*. § 53a-71(a)(1); (2) persons convicted, before July 1, 1999, of the misdemeanor of subjecting another person to sexual contact without that person's consent, *id*. § 53a-73a(a)(2); (3) persons convicted, before July 1, 1999, of a nonviolent sexual offense, an offense against a minor, or a sexually violent offense, where the victim was under eighteen years of age and related to the actor within specified degrees of kindred; (4) persons convicted, before July 1, 1999, of compelling a spouse or cohabitor to engage in sexual intercourse by use or threat of force, *id*. § 53a-70b; and (5) persons convicted, before October 1, 1998, of any crime requiring registration, if the person did not serve any time in jail or prison as a result of the conviction, has not subsequently been convicted of any crime requiring registration, and has registered with the Department as required. A court may grant such a petition only if it finds that dissemination of the registry information "is not required for public safety." *Id*. § 54-255(c).

The Department of Public Safety may suspend registration and reporting for a person who is incarcerated, civilly committed, or residing outside the State. *Id.* § 54-257(b). The Department may preclude public access to the person's registry information during the suspension period. *Ibid*.

e. *Governmental immunity from liability*

The State, its political subdivisions, and its officers and employees, may not be held civilly liable to a registrant for carrying out the Connecticut statute's registration and public disclosure provisions. Conn. Gen. Stat. § 54-258(b). The State and its political subdivisions are immune from civil liability for conduct in notifying an organization or individual of registration information, based on a good faith belief that notification is necessary to protect the public or an individual. *Ibid*. State officers and employees are immune from liability in such instances except in cases of wanton, reckless or malicious conduct. *Ibid*.

3. Proceedings Below

a. Respondent Doe, on behalf of himself and a class of similarly situated persons, filed this action against petitioners under 42 U.S.C. § 1983, seeking declaratory and injunctive relief. J.A. 112-133. Respondent alleged that the Connecticut sex offender registration scheme violated his and the class members' due process rights by stigmatizing them as currently dangerous sex offenders through the State's publicly disseminated "Sex Offender Registry," and altering their legal rights and status, without giving them prior notice and an opportunity to be heard on whether they pose a danger to public safety. *Id.* at 118-131. Respondent also alleged that the Connecticut statute imposed an additional punishment for past offenses in violation of the *Ex Post Facto* Clause, U.S. Const., Art. I, § 10. J.A. 131-132.

On March 31, 2001, on cross-motions for summary judgment, the district court held that the Connecticut sex offender registration scheme deprived respondent of his right to due process under the Fourteenth Amendment. Pet. App. A41-A57. The court rejected petitioners' claim that Connecticut's sex offender registry did no more than disseminate to the public "truthful and accurate information" about convicted sex offenders. Pet. App. A50-A53. The court held that the registry conveyed the stigmatizing

and, with respect to nondangerous registrants, false message that they were presently dangerous people from whom the public needs to protect itself. *Ibid.* The court explained that the Connecticut statute and registry's stated purpose of protecting the public, and the publication of current, identifying information about registrants and their whereabouts, intentionally broadcasted the message that nondangerous registrants are dangerous. *Ibid.*

Recognizing that "stigmatizing conduct must be accompanied by some tangible injury or material alteration of legal right or status" to warrant due process protection, the district court held that the Connecticut statute's registration obligations constitute such an alteration. *Id.* at A53 (citing *Paul v. Davis*, 424 U.S. 693 (1976)). The Connecticut statute "requires nondangerous registrants to take specific actions to facilitate the government's ongoing defamatory communications. This is no small matter." *Id*. at A56 "Because the registration requirements alter the offenders' status under state law, they satisfy the plus element," required under *Paul v. Davis*, for a constitutionally protected interest. *Ibid*. The court concluded that, because "it is undisputed that the [Connecticut statute] provides no procedure to determine a person's dangerousness before he is included in the registry[,]" "nondangerous registrants do not have an adequate opportunity to be heard before the deprivation of their liberty interest and thus are denied their Fourteenth Amendment right to due process." *Id*. at A57. The court rejected respondent Doe's *ex post facto* claim. *Id*. at A57-A66.

On May 18, 2001, the district court certified a plaintiff class, under Federal Rule of Civil Procedure 23(b)(2), of persons similarly situated to respondent Doe whose due process rights were violated by the Connecticut sex offender registration scheme. J.A. 5; Pet. App. A67-A68. The court then entered an order enjoining petitioners from "(1) disclos[ing] or disseminating to the public, either in printed or electronic form (a) the Registry or (b) Registry

information concerning a member of the due process class if the information identifies the class member as being included in the Registry; and, (2) identifying any member of the due process class as being included in the Registry." *Id*. at A68. The court specified that "nothing in [the] order shall: "impair access to the Registry by law enforcement agencies and officers[;]" "preclude law enforcement agencies and officers * * * from using information contained in the Registry in specific criminal investigations and prosecutions, so long as [respondents] are not described to the public as being included in the Registry;" preclude law enforcement from "disclosing or disseminating to the public information necessary to protect the public concerning a specific person, so long as members of the due process class are not described to the public as being included in the Registry[;]" or "affect the public's ability to obtain individual criminal conviction history records" pursuant to applicable Connecticut statutes. *Id*. at A68-A69. The district court entered judgment for respondents on the due process claim and dismissed respondent's *ex post facto* claim. J.A. 207-208. The court denied petitioners' request for a stay of the injunction pending appeal. J.A. 5.

b. The court of appeals affirmed. Pet. App. A1-A40.[4] The court held that, because "the State [chose] these particular [offenders] about whom to disseminate information, a record as to their sex offenses, and information as to their current whereabouts," it "implies that each person listed [in the registry] is more likely than the average person to be currently dangerous." *Id*. at A18. "This implication stigmatizes every person listed on the registry." *Ibid*. Applying the test of *Paul v. Davis*, the court reasoned that the "extensive and onerous" registration

[4] The court of appeals also denied petitioners' request for a stay of the injunction pending appeal. J.A. 230-231.

obligations, which registrants must fulfill or face prosecution for a five year felony, altered the registrant's legal status and were "'governmental in nature,' * * * insofar as they could not be imposed by a private actor." *Id.* at A29-A30 (internal citation omitted). Those attributes distinguished respondents' due process claims "from a traditional defamation claim brought under state law." *Ibid.* The court concluded that, because public notification of registry information "without a hearing as to the current danger that the plaintiff (and other members of the class) poses, * * * is both central to the constitutional infirmity of the statute and the principal object of the injunction, the injunction is properly tailored to fit the nature and extent of the violation." *Id.* at A39.[5]

SUMMARY OF ARGUMENT

A. The State of Connecticut's sex offender registration scheme, *see* Conn. Gen. Stat. §§ 54-250 *et seq*., stigmatized respondents as individuals who pose a danger to public safety. The registry did not include conviction information alone. It also listed each registrant's current home address, and a photograph that was updated regularly for at least ten years, and did so in the context of individually labeling each registrant a "Registered Sex Offender." The State published the registry on the Internet through its Department of Public Safety website, which declares that the Department's mission is to protect life and property and to prevent crime.

The State published the message that respondents were currently dangerous without having determined whether any of respondents, in fact, posed a danger to public safety. Moreover, the registry did not differentiate

[5] The court of appeals did not reach respondent Doe's individual cross-appeal on his *ex post facto* claim because of its affirmance of the judgment in favor of respondents on the due process claim. Pet. App. A38.

the listed offenders from one another in any way that would indicate varying levels of dangerousness; the registry did not even reflect the fact that many registrants were convicted of misdemeanors rather than felonies. The scheme mixed misdemeanants with felons, nonviolent offenders with violent ones, persons who committed sexual crimes with those whose offenses had no sexual component, persons who served substantial prison time with those who served none, offenders who received treatment with those who did not, and those convicted with those acquitted by reason of mental illness.

The stigmatizing message that respondents are currently dangerous is precisely the message that the State intended to convey. The legislative record makes clear that the statute was enacted as Connecticut's version of "Megan's Law," referring to a child victim of a sexual assault and murder by a recidivist sex offender. Such laws are intended to publicize the current whereabouts and appearances of offenders who are dangerous, especially to children. That is a much narrower category of offenders than those included in the Connecticut registry.

The statute's text, structure, and history confirm that the registration scheme was designed to identify for the public currently dangerous individuals. For example, the statute allows for certain exemptions (in extremely limited circumstances) which are expressly conditioned on a court finding that registration, or public dissemination of the registry information, "is not required for public safety." *See* Conn. Gen. Stat. §§ 54-251(b), (c); 54-255(a), (b), (c). The purported disclaimer that petitioners cite to justify the defamatory message of the registry does not, in fact, indicate that the registry includes individuals who are not dangerous. Moreover, it was far from prominently displayed, and, as a matter of law, could not eliminate the registry's defamatory message. The fact that each registrant was individually named and labeled defeats petitioners' attempt to recast the case as a group defamation claim.

B. Such a state-imposed stigma warrants procedural due process protections under *Paul v. Davis*, 424 U.S. 693 (1976), if it is in the course of state conduct that alters the legal rights or status of those stigmatized. The sex offender registration scheme imposes upon respondents burdensome registration and reporting requirements that are not imposed on other citizens, or even other offenders, and compels compliance through felony sanctions. Also, the statute eliminated respondents' causes of action against the State and its officials that could have redressed any injury that was caused by the State's publication of the registry information. Thus, respondents' rights and status were altered in significant ways by virtue of the sex offender registration scheme. The State's failure to provide notice and an opportunity to be heard before publishing the defamatory statements violated respondents' federal constitutional right to procedural due process.

C. Petitioners err in contending that compliance with the requirements of procedural due process is not feasible because determinations of dangerousness are problematic and unreliable. Petitioners' claim cannot be squared with the fact that the statute elsewhere requires courts to make just such determinations in assessing whether to grant exemptions. In addition, the Connecticut legislature requires state courts and agencies to assess future dangerousness in a variety of other contexts, including during parole hearings and proceedings for release from civil commitment. Moreover, numerous other states have sex offender registration schemes that require notice and an opportunity to be heard.

As petitioners acknowledge, the Wetterling Act, 42 U.S.C. § 14071, does not require public dissemination of every registrant's information. To the contrary, the Wetterling Act, which conditions certain federal funding on states having a sex offender registration scheme, also envisions individualized assessments regarding the likelihood of a person engaging in sexually violent offenses in certain circumstances.

D. Petitioners' *amici* suggest that the Court resolve the case on grounds of substantive due process, rather than procedural due process. Petitioners did not raise such a claim in their petition or in their opening brief on the merits. Neither the court nor the parties below addressed the claim. Petitioners thus have waived it. The Court should also decline to address the new claim because it would require the Court to address complex arguments in the first instance, including the level of constitutional review warranted where legislative classifications deprive individuals of their reputational interest. *Amici* also ignore the substantial over-inclusive and under-inclusive nature of the sex offender registration scheme, which undermines a claim that it could survive even rational basis review, absent some form of individualized assessment.

ARGUMENT

Connecticut has a compelling interest in protecting its residents, especially children, from crime. Recognizing that fact, the district court specified that nothing in its injunction shall impair: law enforcement's access to the sex offender registry; law enforcement's use of registry information in criminal investigations and prosecutions; or law enforcement's disclosure of information that is necessary to protect the public concerning a specific person. Pet. App. A68-A69. The district court also specified that the public would continue to have access to criminal conviction information as authorized under state law. *Id*. at A69. Thus, contrary to petitioners' repeated suggestions, *see, e.g.,* Pet. Br. 17, 22-23, this case is not about preventing the publication of truthful conviction information. Nor is it about avoiding the opprobrium attaching to a prior conviction, *see, e.g*., Pet. Br. 23-24; that information already is publicly available. *See* Conn. Gen. Stat. § 54-142k(b).

This case is about petitioners publicly branding each respondent a "Registered Sex Offender" and tracking and publicly disclosing his current whereabouts and appearance via the Internet for at least a decade, thereby conveying the message to the public that he poses a continuing

danger to public safety. This case is about petitioners doing so while also altering respondents' legal rights and status, and without first affording them notice and an opportunity to be heard on whether they are currently dangerous.

THE CONNECTICUT SEX OFFENDER REGISTRATION SCHEME VIOLATED RESPONDENTS' PROCEDURAL DUE PROCESS RIGHTS UNDER *PAUL V. DAVIS* BECAUSE IT STIGMATIZED RESPONDENTS AS A DANGER TO PUBLIC SAFETY AND ALTERED THEIR LEGAL RIGHTS AND STATUS, WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD ON WHETHER THEY POSE SUCH A DANGER

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court considered the applicability of that protection in an action alleging that public officials had violated an individual's constitutional rights by defaming him.

As the *Paul* Court recognized, there is something particularly powerful about a defamation inflicted by the government acting as the sovereign: "[W]e have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts." 424 U.S. at 701. But to avoid making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," the Court held that "reputation alone, apart from some more tangible interests," is not sufficient to "invoke the procedural protection of the Due Process Clause." *Ibid.* Such protection is warranted, however, where, "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; *see also id*. at 708-709 ("alteration of legal status * * *, combined with the injury from [a state

imposed] defamation, justifie[s] the invocation of procedural safeguards"). Those requirements for alleging a constitutional injury to reputation are commonly referred to in the lower courts as the "stigma plus" test. Pet. App. A14-A15.

The Connecticut sex offender registration scheme meets both requirements. By mandating that respondents' names, current whereabouts and appearances be published in the Department of Public Safety's "Sex Offender Registry" and posted on the Internet for the purpose of protecting public safety, the scheme stigmatized respondents as currently dangerous. The registration scheme also altered respondents' legal status and rights by compelling them to provide certain personal information, (including their current whereabouts), on threat of felony prosecution, and by eliminating their state law causes of action against the State and its officials, such as defamation and invasion of privacy, that could have redressed an injury caused by the State's publication and dissemination of registry information.

A. Publishing Respondents' Current Whereabouts And Appearances, And Other Personal Information On The Sex Offender Registry Stigmatized Respondents As Currently Dangerous

1. The registry's content, and the context and manner in which it was published, demonstrates that the registry stigmatized respondents

To determine whether respondents suffer from a "'stigma' result[ing] from defamation by the government," *Paul*, 424 U.S. at 701, the Court must assess whether petitioners made a defamatory statement, that is, a statement that harms an individual's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990) (quoting *Restatement (Second) of Torts* § 559 (1977)).

It is not sufficient to insist, as petitioners do, that the sex offender registry could not be stigmatizing because it contains only information that is literally true. Pet. Br. 13, 15-24. The question is whether the relevant statements created a "defamatory impression," *Codd v. Velger*, 429 U.S. 624, 628 (1977), which can be achieved by "juxtapos[ing] a series of facts so as to imply a defamatory connection between them." *Toney v. WCCO Television*, 85 F.3d 383, 387 (8th Cir. 1996) (White, J., sitting by designation); *see Milkovich*, 497 U.S. at 20 n.7 (examining "defamatory facts implied by a statement"); *Restatement*, *supra*, § 565 cmt. b ("It is enough that the communication is reasonably capable of being understood as charging something defamatory."); 1 R. Smolla, *Law of Defamation* § 4:21, at 4-38.6 (2d ed. 1997) ("many courts * * * apply a healthy measure of common sense to find material actionable when the innuendo carried by the true facts is both apparent and clearly defamatory").[6] Petitioners concede as much by acknowledging that a communication that includes only "materially true facts" is nonetheless defamatory if "the particular manner or language in which the true facts are conveyed[ ] supplies additional, affirmative evidence suggesting that the defendant intends or endorses [a] defamatory inference." Pet. Br. 19-20 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990)) (emphasis omitted).[7]

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[6] Petitioners complain that respondents do not "point to any 'undisclosed facts' that would eliminate any purported implication of dangerousness." Pet. Br. 20. But such a showing is not required. *See* W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 116, at 117 (5th ed. Supp. 1988). In any event, respondents have identified such "undisclosed facts;" the registry "does not provide sufficient information for members of the public to determine whether any particular person who appears on the registry poses a threat to public safety." J.A. 127 ¶ 69.

[7] This case does not implicate the First Amendment limitations on regulation of truthful speech involved in the media cases cited by petitioners. *See* Pet. Br. 22-23. The district court did not enjoin the publication of any individual's conviction information; that information

(Continued on following page)

To decide whether the statements made through the operation of Connecticut's statutory registration scheme were stigmatizing, it is necessary to examine (as did the courts below) the reasonable understanding of the recipients of the communication, as evidenced by the words used in light of the context in which they are made, the manner in which the communication was conveyed, and the intent of the speaker. *See Milkovich*, 497 U.S. at 16-17, 21; *Restatement*, *supra*, § 563 cmt. c-e.

a. *The language used to publish registry information, and the manner in which that information was presented, stigmatized respondents as a danger to public safety*

The language used by the Department of Public Safety to publish sex offender registry information, and the manner in which that information was displayed, demonstrate that the registry conveyed the message that registrants pose a danger to public safety.

First, each registrant's separate page on the Internet was accessible through the Connecticut Department of Public Safety's webpage entitled "Sex Offender Registry." J.A. 93. Each individual's page, with his name, picture and other identifying information, expressly labeled the person a "Registered Sex Offender" Pet. App. A9; J.A. 15-16 ¶ 19. The language selected by petitioners to convey their communications – "Sex Offender Registry" and "Registered Sex Offender" – is far from neutral. Those terms do not merely indicate that a person has been convicted of a crime involving sex. Sex offenders are viewed as "the scourge of modern America, the 'irredeemable monsters'

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remains available to the public today. See pp. 30-31, *infra*. The injunction addressed the misleading message of current dangerousness conveyed by petitioners' publication of the sex offender registry in the course of altering respondents' legal rights and status.

who prey on the innocent." Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 88 J. Crim. L. Criminology 1167, 1167 (1999). The classification as a sex offender "implicitly announces that, in the eyes of the State, the plaintiff presents a risk of committing a sex offense." *Doe v. Attorney Gen.*, 686 N.E.2d 1007, 1013 (Mass. 1997).

Using the term "Registered" underscored the message that a registrant is currently dangerous. Compelling an offender to register his whereabouts with the State on an ongoing basis, and promptly publishing that information, announced to the world that the State believed that the offender needed to be watched. *Cf*. *Restatement*, *supra*, § 568 cmt. d, illus. 1 (notorious "shadowing" of person in public can be defamatory).[8] A viewer's understanding of the nature of the Department of Public Safety's interest in the listed offenders was informed by the prominently displayed "mission" statement that appeared before the Internet user reached the "Sex Offender Registry" link. That statement announced that the Department "provides a coordinated, integrated program for the protection of life and property within this state" and "is charged to prevent crime, apprehend criminals, * * * and perform other regulatory and safety functions." J.A. 92.

[8] Petitioners acknowledge that publishing each registrant's current address was part of the statement's "context," but then suggest that it was included to reduce the number of persons who viewed any individual's registry page. Pet. Br. 21 n.16. But the number of persons exposed to the information does not alter the effect on the viewer created by posting a current address (along with the other personal information) under the title "Registered Sex Offender." Moreover, to the extent that petitioners suggest the site was designed to "preclud[e] persons" from viewing the page of any registrant not in their "proximity," *ibid.*, that is innacurate. The registry was available to any Internet user, regardless of location, as petitioners elsewhere acknowledge. Pet. Br. 7; J.A. 15 ¶ 8, 109 ¶ 8.

When the registry was first posted on the Internet, the Department was candid with the public about the registry's purpose. The "Sex Offender Registry" page stated: "This information is made available for the purpose of protecting the public." Pet. App. A10. That language was removed after this litigation began, and replaced with a longer description of the purpose. *Id*. at A48. Petitioners now describe that new language as a "disclaimer" and argue that it repudiated any message conveyed about registrants posing a danger to public safety. Pet. Br. 17-19. But that language appeared far below the highlighted link one would select to gain access to the registry database, J.A. 93, so an Internet user was most likely to go straight to the registrants' personal information without reading those later paragraphs.

Moreover, the language followed four paragraphs discussing a long list of other issues related to the registry. It was not until the middle of the fifth paragraph that the registry stated that the Department had not "considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion on the registry, and has made no determination that any individual included in the Registry is currently dangerous." *Id*. at 95. The user also was informed that the registrants were listed "by virtue of their conviction record and state law" and that the "main purpose" of the data was to make the information accessible, "not to warn about any specific individual." *Ibid*.[9]

[9] Petitioners contend that the language was "prominently displayed on the initial screen." Pet. Br. 8. To the extent petitioners suggest that a person viewing that page on a computer would perceive the statements they rely upon as prominent, that contention cannot be sustained. The webpage as it then existed can be viewed on the website of a non-profit organization that regularly archives the Internet. *See* web.archive.org/19990508/http://www.state.ct.us/dps/sor.htm. It confirms that the language so critical to petitioners was anything but prominently displayed.

That purported "disclaimer" never informed the Internet user that the registry included offenders who did not pose a danger to public safety. In any event, even if the Department had added a meaningful disclaimer to the website that would actually be read by the user, the registry's defamatory message would not have been eliminated. *See Restatement*, *supra*, § 571 cmt. c ("If the imputation is sufficiently made, the defamer is liable although he expresses his own doubt as to the truth of the charge or even if he expressly states his disbelief in it."); *id.* § 563 cmt. c ("A conditional or alternative statement may be defamatory if, notwithstanding its conditional or alternative form it is reasonably understood in a defamatory sense.").

b. *The statutory framework created a defamatory context for publication of registry information*

The context surrounding the publication of respondents' registry information, as directed by the statutory text and structure, *see* Conn. Gen. Stat. §§ 54-250 *et seq.,* demonstrates that the registration scheme did, and was intended to, transmit the message that registrants pose a danger to public safety. As the Supreme Court of Connecticut has explained, the Connecticut sex offender registration statute was enacted to "protect the public from sex offenders." *State v. Kelly*, 770 A.2d 908, 954 (Conn. 2001).

The registry did not, contrary to petitioners' claim, simply publish truthful information about convictions. Pet. Br. 17, 20 n.15, 23-24. The statute requires that a registrant submit, and the Department of Public Safety publish on the Internet, not only the individual's criminal conviction, but also his current residential address and appearance. *See* pp. 6-7, *supra.* The current whereabouts and appearance of a previously convicted person who has completed his criminal sentence is not part of a conviction or criminal history record. *See* C.A. July 12, 2001, Oral Arg. Tr. 2-3 (State Attorney General acknowledging that

"[s]ome of [the registry] information would not be obtainable but for the [sex offender registration] statute").

The sex offender registry did not convey the same information or message as does conviction information. In Connecticut, "conviction information" is limited to information that "discloses that a person has pleaded guilty or nolo contendere to, or was convicted of, any criminal offense, and the terms of the sentence." Conn. Gen. Stat. § 54-142g(c). Connecticut law dictates that "[c]onviction information shall be available to the public for any purpose." *Id*. § 54-142k(b); *cf. id*. § 54-142g (defining broader categories of criminal history record information that are not publicly available). Conviction information tells the public that a particular person was convicted of a particular crime or crimes in the past, and was punished by service of the listed sentence. By contrast, the sex offender registry, by publishing information about a previously convicted person's *current* whereabouts and appearance, told the public that a registrant was *currently* dangerous and that his current whereabouts should be widely known. *See id*. § 20-327b(d)(2)(G) (requiring that prospective home buyers be informed in writing by sellers that the Department of Public Safety "maintains a site on the Internet listing information about the residence address of persons required to register").

The registry did not include types of information typically seen in conviction information that helps a viewer discern the comparative severity of convictions, such as the length of the sentence imposed and whether the offense were a misdemeanor or a felony. *See* Pet. App. A52 (registry provides "neither absolute nor relative information regarding the dangerousness" of any particular registrant). The statute also separates respondents from all other persons previously convicted of other crimes, even violent ones. Despite its avowed public safety goals, the State has not deemed the current appearances and whereabouts of other violent offenders to be information the public needs to

know. And the statute allows for suspension of registration and the dissemination of registry information whenever an offender is reincarcerated, civilly committed, or residing out of state. *See* Conn. Gen. Stat. § 54-257(b). The message is clear: the public needs to be told about those who the State believes are dangerous only when those persons are in the community.

The statute's requirement that the Department of Public Safety notify "all print and electronic media in the state," at least four times a year, about how to gain access to the registry, *see id*. § 54-258(a)(1), confirms that the registry sent a message about current dangerousness, not past conduct. If the purpose of the registry were to provide the public registrants' past conviction information, a current address and photograph would be irrelevant, and there would be no need to remind the public repeatedly of the registry's availability.

Finally, the statute's allowance for offenders to be exempt from registration in certain circumstances, and for restriction on public dissemination of registry information in other circumstances, *see* pp. 11-12, *supra*, reinforces the intended message that the individuals about whom registry information is published are currently dangerous. The exemptions and restrictions on public dissemination of registry information all are conditioned on a court finding that registration or public dissemination, as the case may be, "is not required for public safety." *Id*. §§ 54-251(b), (c); 54-255(a), (b), (c). Here again, the statute says that those on the registry were put there to protect against the danger they pose to public safety.

c. *The State intended that the registry convey the message that registrants are currently dangerous*

The circumstances surrounding the enactment of the Connecticut sex offender registration statute confirm the above analysis. As petitioners acknowledge, the statute

was enacted as Connecticut's "Megan's Law," "referring to Megan Kanka, a 7-year old raped and murdered by her neighbor." Pet. Br. 12-13; *see also* Pet. App. A4 & n.4; J.A. 210 (petitioners identifying statute as "our law known commonly as our Megan's Law"). The very name conjures images of violent, recidivist child molesters (a much narrower category of offenders than is included in Connecticut's sex offender registry). Like the original Megan's Law, which was enacted in New Jersey "'to identify potential recidivists and alert the public when necessary for the public safety,'" (Pet. App. A4 n.4 (quoting *Paul v. Farmer*, 227 F.3d 98, 99 (3d Cir. 2000)), the "avowed" purpose of the Connecticut statute is to "disclos[e] the identity of persons who are currently a threat to public safety." Pet. App. A17.

The Connecticut lawmakers sponsoring the bill made clear that they intended the registry to convey the message that registrants pose a danger to public safety. Legislators explained, for example, that the law's purpose was to "provide a data base to law enforcement officials and to citizens as a whole containing the names of sexual offenders who are, in fact, predators and in particular, sexual offenders who tend to victimize young children." Resp. Local Rule 9(C)1 Stmt. (*see* J.A. 21), Exh. L at 55 (statement of Rep. Lawlor); *id*. Exh. M at 342-343 (Rep. Amann) ("What we're going after are * * * the ones who are going to feed on the sexual gratification and possibly harming or the murder of a child"); *id.* at 313 (Rep. Farr) ("I think because of Megan's law we now recognize that there are dangerous people within the community.").

The statements and conduct of petitioners themselves, who are state agencies charged with implementing the registry requirements, undermine their argument that the registration scheme did not stigmatize respondents. When the district court enjoined publication of the registry, petitioners sought to stay the injunction, even though the

injunction left law enforcement use of the registry information unchanged. At oral argument on their stay request, the state Attorney General argued that the injunction caused "very dramatic and drastic harm, ongoing harm, to the State," citing the "very high recidivism rate that characterizes this group of offenders and poses an ongoing danger to the state's citizens." J.A. 210; *see also id*. at 230 (Attorney General further arguing that registry should continue to be available "so that public safety may be served"); Pet. C.A. Motion to Stay 24 ("prohibiting public disclosure of registry information will have a detrimental effect on public safety"). Even as recently as their brief on the merits in the court of appeals, petitioners expressly declared that the Connecticut sex offender registration statute is intended to "make * * * registry information more readily available to the public[ ] in order to permit the public to protect itself." Pet. C.A. Br. 1.

In sum, the language used in, and the stated purpose behind, Connecticut's sex offender registration scheme vitiates petitioners' claim that the registry did not stigmatize respondents. If public safety were served by publishing updated information about what respondents look like and where they live, as petitioners urged so forcefully below, *e.g.*, J.A. 210, that would be only because respondents are currently dangerous, something petitioners have not determined to be true. The State's public defamation of respondents as "Registered Sex Offenders" stigmatized them as currently dangerous offenders who threaten the safety of the public.

2. Petitioners are incorrect that the injunction limits release of conviction information, and that the defamatory registry is justified because respondents' individual information was posted as part of a group

a. The district court's injunction does not restrict public access to conviction information. Conviction

information was accessible to the public under state law before the sex offender registration scheme was adopted, Conn. Gen. Stat. § 54-142k, and remains so today. The injunction does not "affect the public's ability to obtain individual criminal conviction history records," which includes conviction information. Pet. App. A69. Indeed, the injunction does not preclude law enforcement officials from publicly disseminating information necessary to protect the public concerning a particular individual, "so long as members of the due process class are not described to the public as being included in the [r]egistry." *Ibid*.

Petitioners attempt to justify the stigmatizing nature of the sex offender registration scheme by suggesting that respondents challenge the publication of the fact of their prior convictions as the stigmatizing communication. Pet. Br. 22-24. They claim that the message that respondents pose a danger to public safety arises from the fact of those convictions, not from the message communicated through the registration scheme. They argue that the case is about respondents' attempt to avoid the opprobrium attached to those convictions. Pet. Br. 23-24; *see also* U.S. *Amicus* Br. 21. But the registry did not simply provide access to conviction information; it published a registrant's current appearance and whereabouts and labeled him currently dangerous.

Furthermore, although respondents do suffer opprobrium because of their convictions, the degree suffered varies widely depending on the nature of the conviction. Misdemeanants certainly do not suffer the same opprobrium as convicted felons. And, notwithstanding the fact that a registrant may be known as a convicted felon, he still has an interest in not being labeled currently dangerous. *Cf. Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.) ("It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. * * * Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential."), *vacated and remanded on other grounds*, 477 U.S. 242 (1986);

Sibron v. New York, 392 U.S. 40, 56 (1968) ("It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable.").

b. Petitioners and their *amici* also claim that, because respondents were all convicted of the criminal offenses that required them to register, their due process claims fail because each respondent "received any process that he was due when he was convicted" of that offense. U.S. *Amicus* Br. 17-23; *see* Pet. Br. 34. But a criminal proceeding typically does not address whether a convicted defendant will be a continuing danger to public safety after his sentence is completed. And the fact that a criminal defendant receives constitutionally required due process during the prosecution that led to his conviction does not give the State license to single him out, after he has served his criminal sentence, and deprive him of a constitutionally protected liberty or property interest without affording him procedural due process.

c. Petitioners argue that, because they labeled more than 2000 individuals as "Registered Sex Offenders," any defamatory statement of dangerousness applied only to the group as a whole. Pet. Br. 27-30. It is true that in determining whether a defamatory statement made about a group gives rise to liability to individual members of the group, the size of the group is an important factor. *See Restatement*, *supra*, § 564a. That doctrine applies, however, only in cases like those cited by petitioners, where a defamatory statement was made about a large group and no individual was personally named, so that the communication would not be understood to refer to any particular person. *See* Pet. Br. 27-30. Here, by contrast, each respondent was specifically named on the registry on a separate page (which could be located by entering the individual's name) under the label "Registered Sex Offender," in a context and manner, and with an intent, that conveyed the message that the individual presented a current danger to public safety.

B. The Connecticut Sex Offender Registration Scheme Alters Respondents' Legal Rights And Status

The Connecticut sex offender registration scheme does more than stigmatize respondents. It alters their legal rights and status so that the constitutional protections of procedural due process apply under *Paul v. Davis*, 424 U.S. 693. The registration scheme does that in two ways. First, the law compels a respondent to register and report his current residential address and provide a photograph and other details about his current physical appearance for publication by the State as a registered sex offender. It imposes those registration and reporting requirements on threat of felony prosecution for noncompliance. Second, the registration scheme eliminates a respondent's state law causes of action, such as defamation and invasion of privacy, that could hold the State or its officials liable for an injury caused by the registry's publication.

1. Requiring respondents to report their current whereabouts and appearances to the State, on pain of felony prosecution, alters respondents' legal rights and status

Connecticut does not require members of its general populace to keep it apprised of their current whereabouts by verifying their address every ninety days. Nor does Connecticut insist that its inhabitants inform it if they enroll at a private college. Nor does Connecticut demand that its citizenry submit to photographs or supply DNA samples and fingerprints. In Connecticut, as in any free society, the government does not unilaterally demand those things of its citizens. *Cf. Brown v. Texas*, 443 U.S. 47 (1979) (absent reasonable suspicion of criminal conduct,

individuals cannot be criminally punished for refusing to provide name and address).[10]

Respondents, unlike the general populace (including those who were once convicted of an offense, but have completed any parole or probation terms), are subject to those very registration and reporting obligations upon threat of felony prosecution. *See* pp. 6-8, *supra*. Imposing felony sanctions on respondents for not providing such information alters their legal rights and status compared to other Connecticut residents, who are free to move and enroll in school without notifying the State. The court of appeals correctly concluded that, "imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a 'change of [that person's] status' under state law." Pet. App. A31 (quoting *Paul*, 424 U.S. at 712).

Petitioners suggest that the registration scheme does not alter a respondent's legal rights or status because, unlike the suspension from school for less than ten days, *Goss v. Lopez*, 419 U.S. 565 (1975), or loss of a tax exemption, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), registration does not extinguish a right

[10] Although most states require drivers to provide a residential address and photograph to be licensed, an individual can elect not to drive and dissemination of that information to the public is strictly limited by federal law. *See Reno v. Condon*, 528 U.S. 141, 143-145 (2000). And the national decennial census's request for personal information is attended by unprecedented confidentiality requirements. We are aware of no state that has required all of its residents to report when they move residences. In suggesting to the contrary, petitioners point to two cases in which courts held that individuals could not excuse their delay in filing lawsuits on the ground that they did not receive notice of government agency decisions on their claims because they failed to tell the agencies they had moved. *See* Pet. Br. 40 (citing *Tadros v. Commissioner*, 763 F.2d 89 (2d Cir. 1985) and *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984)). The obligation to tell an agency of a change in mailing address during the course of a dispute is distinct from this case where the registrants have not invoked or sought a benefit from the state's legal process.

created by statute or regulation. Pet. Br. 39-42. But the Court's cases applying this legal doctrine have not been limited to statutory or regulatory rights. *See, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (at-will employment).

Registration under a sex offender statute is "a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government." *Doe v. Attorney Gen.*, 686 N.E.2d at 1016 (Fried, J., concurring). The burden of registration is all the greater when a felony sanction can be imposed. For example, whenever a registrant fails to return an address verification card within ten days, he is subject to felony prosecution, even if he were required to register because of a misdemeanor conviction. *See* Conn. Gen. Stat. § 54-257(c); *see also* 2002 Conn. Pub. Acts 7, § 84 (Spec. Sess.) (registrants must verify their residential addresses every ninety days).

Petitioners claim that the foregoing change in legal rights and status does not meet a causation requirement that petitioners read into *Paul v. Davis*. *See* Pet. Br. 35-37. Petitioners' reading of *Paul* is inconsistent with the reasoning in that opinion, which is based not on tort principles like causation, but on injury to reputation, occurring in the course of a change in legal rights or status, as a means of distinguishing a constitutionally protected liberty or property interest from those interests that are left to state defamation law. *Cf. Albright v. Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., joined by Thomas, J., concurring in judgment) (explaining that the Court's varied holdings regarding redress for injuries caused by state actors were designed "to respect[ ] the delicate balance between state and federal courts").

The *Paul* Court's analysis of *Roth*, *supra*, also undermines petitioners' causation theory. In *Roth*, a state university failed to renew an employee's contract and the

Court concluded that the employee had no property interest in his job warranting due process protections. The *Paul* Court explained that the employee in *Roth* did not allege that, in declining to rehire him, the state imposed upon him a stigma or other disability that diminished his standing in the community or foreclosed other employment opportunities. *Paul*, 424 U.S. at 709-710. The Court recognized that, had there been a government action defaming the employee, he would have been "entitle[d] * * * to notice and an opportunity to be heard as to the defamation" if "the governmental action defaming [him]" had occurred "in the course of declining to rehire him." *Id.* at 709. The government-imposed defamation need not have caused the job termination, but could have been "in the course of" the termination.

Similarly, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court relied on *Paul* and *Roth* to hold that even though a decision to terminate an employee had been made by a public official before a defamatory statement was released to the public, the employee was "deprived of a protected 'liberty' interest" because, "even if [the statements] did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly '[occurred] in the course of' the termination of employment." *Id*. at 633 n.13. Here, the information conveyed in the stigmatizing message was "obtained by means of the registration requirement." Pet. App. A34. Petitioners conceded that some of the information that the State disseminates to the public on the registry "would not be obtainable but for the statute." C.A. July 12, 2001, Oral Arg. Tr. 2-3. It is clear that the state-imposed stigma from the registry's publication occurred "in the course of" the state-imposed "plus" of registration and reporting. No more is required to warrant due process protections.[11]

[11] The obligation that a person continually submit and verify personal information to the government that the government then uses

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2. Eliminating respondents' state law causes of action against Connecticut and its officials for injuries caused by publication of registry information alters respondents' legal rights and status

Connecticut's sex offender registration scheme also alters respondents' legal rights and status by eliminating respondents' recourse against the State or its officials for any injury that they may cause by the publication and dissemination of registry information.[12] Like all states, Connecticut tort law provides for individual redress for injuries to reputation. S*ee Paul*, 424 U.S. at 699. Moreover, Connecticut law generally permits such tort suits to be brought against the State itself (once certain preconditions are met), as well as against state actors in their official and individual capacities. *See Shay v. Rossi*, 749

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to stigmatize that person distinguishes this case from *Paul*, petitioners' assertions notwithstanding. *See* Pet. Br. 34; U.S. *Amicus* Br. 18. In *Paul*, the government compiled and distributed a list of names of "active shoplifters" based on information it collected from them at the time of an arrest based on probable cause. There was no suggestion in *Paul* that any of the information released was obtained through compulsory reporting. *See Paul*, 424 U.S. at 706 n.4 (distinguishing *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969), which held that due process requirements were triggered by action of fact-finding commission created for sole purpose of "brand[ing]" individuals "as criminals in public"). Of course, state-imposed stigmas that do not occur in the course of the alteration of a right or status do not require due process under *Paul*. Thus, the states are free to notify the public regarding arrests, to publicize the names of at-large fugitives, or to announce the names of persons wanted for questioning in connection with a criminal investigation.

[12] Respondents' arguments below focused on the registration scheme's imposition of the registration and reporting requirements, but the elimination of respondents' cause of action also satisfies the *Paul* test for establishing the alteration of a legal right or status under state law and, thus, can also be relied upon by the Court to affirm the judgment. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

A.2d 1147, 1165-1166, 1172 (Conn. 2000); *see also Chotkowski v. Connecticut*, 690 A.2d 368, 381-383 (Conn. 1997) (Berdon, J., concurring in part and dissenting in part) (tracing history of sovereign immunity in Connecticut).

The Connecticut sex offender registration scheme denies registrants (and only registrants) access to the foregoing state law remedies. The State, its political subdivisions, and its officials shall not be "held civilly liable" to a registrant based on "disclosure of any information regarding the registrant that is released or disclosed in accordance" with the statutory requirement that the Department of Public Safety make the registry accessible to the public and available through the Internet. Conn. Gen. Stat. § 54-258(b). The registration scheme eliminates any state law cause of action, such as defamation or invasion of privacy, that would provide a respondent equitable or legal redress against public officials for any injuries caused by the State's publication of the registry.

It cannot be disputed that eliminating such state law causes of action altered respondents' rights under state law.[13] It is true that a state may normally grant immunity

[13] It is not necessary to show that an individual would have prevailed absent the immunity; simply being deprived of the opportunity to prevail is sufficient to constitute a deprivation of a state-recognized right. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 & n.5 (1981). But here it is beyond dispute that many colorable civil claims by respondents on the registry were extinguished by the Connecticut statute's abolition of state civil liability. *See, e.g., Matos v. AFSCME*, No. CV980578747, 2001 WL 1044632, at *6, *8-*9 (Conn. Super. Aug. 13, 2001) (finding that defendants' literally true statement on their website that they were "investigating" a complaint that plaintiff misused funds was libelous because the statement, in context, "conveyed a defamatory implication"); *Director v. Freedom of Information Comm'n*, 775 A.2d 981, 989 n.11, 992-993 (Conn. 2001) (ruling that, under the State Freedom of Information Act (which adopted the definition of the state law tort action for invasion of personal privacy for the statutory personal privacy exemption), individuals, "who through

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to itself and its officers without offending due process, *Martinez v. California*, 444 U.S. 277 (1980), but that does not mean that granting such immunity against only one discrete group of individuals does not alter those individuals' legal rights. A state may also fire an at-will employee without offending due process, yet *Paul* and *Owen* both recognized that a legal status or right in such government employment could trigger procedural due process protections in connection with a state-imposed stigma, even if the status or right alone did not rise to the level of a constitutionally protected liberty or property interest.[14]

C. Providing Notice And An Opportunity To Be Heard Is Feasible And Consistent With The Wetterling Act

1. Individualized assessments of dangerousness are feasible and common

Petitioners suggest that providing notice and an opportunity to be heard to determine whether an individual poses a danger to public safety before publicly declaring that he does, is not feasible because such assessments are "largely problematic" if not "wholly unreliable." Pet.

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significant efforts, have made a conscious attempt to insulate their addresses from the public domain," may claim an invasion of privacy).

[14] In light of that fact, petitioners' challenge to the limitation of the district court's injunction that prohibits the defamatory conduct but not the registration obligation (Pet. Br. 38; *see* U.S. *Amicus* Br. 16-17 & n.5) is misplaced. *Cf. Codd v. Velger*, 429 U.S. 624, 627-628 (1977) ("the 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;'" it does not include "a determination of whether or not * * * the employee was properly refused re-employment"); *Paul*, 424 U.S. at 709 (explaining that *Roth* "recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation").

Br. 24-26. Petitioners' claims cannot be squared with the Connecticut legislature's decision to require state courts and agencies to engage in precisely such determinations in a variety of settings. Indeed, the Connecticut sex offender registration statute itself provides that certain individuals can, in very limited circumstances, be exempt from registration and reporting, or can have public dissemination of their registry information restricted, if a court finds that the registration or the dissemination "is not required for public safety." Conn. Gen. Stat. §§ 54-251(b), (c); 54-255(a), (b), (c); *see* pp. 11-12, *supra* (detailing limited availability of exemptions and restrictions).

Connecticut law relies on similar findings in determining when individuals (including those convicted of sex offenses) can be released into the community. The parole board may release an inmate only if it determines that "there is reasonable probability that such [parolee] will live and remain at liberty without violating the law." *Id*. §§ 54-125; 54-125a. Similarly, the Psychiatric Security Review Board may grant conditional release and a court may completely discharge a person who is committed to a mental hospital, including those committed after being acquitted by reason of mental disease or defect, only if the board or court determines that the person would not "constitute a danger to himself or others." *Id*. §§ 17a-584(2); 17a-593(f); 17a-580(9) & (11). There are respondents who have been found by the State in such proceedings not to pose a danger to others, but who still must register and be publicly stigmatized as "Registered Sex Offenders."

In addition, the federal Wetterling Act normally requires a state to make an individualized assessment of future dangerousness (using a board of experts) in determining whether the state can designate a person as a "sexually violent predator." 42 U.S.C. § 14071(a)(2)(A) (Supp. V 1999). That term means (based on a series of statutory definitions): a person convicted of a sexually violent offense who suffers a "congenital or acquired condition * * * that predisposes that person to the commission of criminal sexual acts to a degree that makes the

person a menace to the health and safety of other persons," if that condition "makes the person likely to engage" in "sexually violent offenses" that are "directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization." *Id*. § 14071(a)(2)(A), (a)(3)(C), (a)(3)(D) & (a)(3)(E) (1994 & Supp. V 1999).

The designation "sexually violent predator" under the Wetterling Act triggers special requirements regarding the length and conditions of registration. *See id*. § 14071(b)(1)(B) (Supp. V 1999) (must provide documentation of medical treatment), (b)(3)(B) (must verify address every 90 days), (b)(6)(B)(iii) (Supp. V 1999) (must register for life). According to one of petitioners' *amici*, Connecticut obtained a waiver from the federal government to avoid performing those individualized assessments. *See* District of Columbia and 35 States *Amicus* Br. 12 n.8; *cf*. Pet. Br. 6 n.8. Connecticut does not use individualized assessments to impose those harsher requirements on sexually violent predators; instead, Connecticut treats everyone convicted of a sexually violent offense as if they had been designated a predator.

According to the United States, the "Megan's laws" in more than half the states have not adopted Connecticut's categorical notification approach. *See* Brief for the United States as *Amicus Curiae* in *Godfrey v. Doe*, No. 01-729, App. A (listing twenty-six states that have declined to rely on "[c]ategorical [d]isclosure of [o]ffenders"); *see also* U.S. *Amicus* Br. 27-28 n.11 (listing twenty-one states that have adopted an approach similar to Connecticut's). As described in the *amicus* brief of the Office of the Public Defender for the State of New Jersey, *et al*., that majority of states have elected to use a variety of different approaches in their sex offender registry schemes to assess risk: some require notice and an opportunity to be heard on the question of dangerousness for every registrant; others limit the right to be heard, but also limit public disclosure of registration information to those who have been determined to pose a safety risk after notice and an opportunity to be heard. *See* Office of the Public Defender

of NJ *Amicus* Br. There is no indication that those states have had problems in administering such systems.[15]

That it is feasible to assess whether an individual poses a danger to public safety is consistent with the Court's decisions, which indicate that "there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention * * * 'that it is impossible to predict future behavior and that the question is so vague as to be meaningless.'" *Schall v. Martin*, 467 U.S. 253, 278-279 (1984) (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (footnote omitted)); *accord Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding constitutionality of state statute that authorizes civil commitment of a person who "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence"); *United States v. Salerno*, 481 U.S. 739 (1987) (upholding constitutionality of federal law that permits a court to deny bail to an individual if the court determines the individual may "pose a danger to any other person or the community").

2. Individualized assessments of dangerousness are consistent with the Wetterling Act

State sex offender registration systems that condition publication of registry information on dangerousness assessments are entirely consistent with the Wetterling

[15] Connecticut declines to respect the legislative judgments of other states that their own residents can be adequately categorized without endangering public safety. A registrant from a State (such as New Jersey or West Virginia), where the public dissemination of the person's sex offender registry information is not required because the state determined that he did not pose a danger to public safety, would, nonetheless, have his sex offender registry information disseminated on Connecticut's Internet registry. *See* Conn. Gen. Stat. § 54-253(b); 2002 Conn. Pub. Acts 7, § 81 (Spec. Sess.).

Act. The Wetterling Act provides that states that do not enact sex offender registration and public notification laws are ineligible for ten percent of a federal formula grant that they otherwise would receive. 42 U.S.C. § 14071(g)(2)(A) (Supp. V 1999). To be eligible for the full amount of the grant, each state must require registration, for periods of time ranging from ten years to life, by persons convicted of certain designated offenses. *Id*. § 14071(a)(1) (Supp. V 1999). From that registration information, states must only release "relevant information that is necessary to protect the public concerning a specific person required to register under this section." *Id*. § 14071(e)(2) (Supp. V 1999). As both petitioners and the United States acknowledge, compliance with the Wetterling Act does not require public dissemination of the name of every registered offender. Pet. Br. 4; U.S. *Amicus* Br. 5. Instead, compliance can be achieved (as many states have done) by using an individualized assessment to determine whether releasing information about a specific offender is "necessary to protect the public." *See also* 64 Fed. Reg. 582 (1999).

Petitioners and the United States err in suggesting that the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (2000), alters that regime. *See* Pet. Br. 5 n.5; U.S. *Amicus* Br. 4-5. That Act simply amends the Wetterling Act to condition federal funds on a state requiring registrants to report whether they attend or work at any higher education institution, entering that information into the state's existing system, and making it available to the law enforcement agency with jurisdiction over that institution. *See* Pub. L. No. 106-386, *supra*, § 1601(b) (to be codified at 42 U.S.C. § 14071(j)); 67 Fed. Reg. 10,758 (2002) (explaining that the states' only new obligation regarding disclosure is to inform the campus police department (if there is one) of the presence of registrants at the school).

The statutory provision cited by petitioners and the United States regarding a purportedly new obligation to disclose the names and information of all registered offenders is not directed to the states. That provision

requires public and private colleges and universities that receive federal education funds to inform the campus community where information about sex offenders enrolled at, or working on, campus "may be obtained." Pub. L. No. 106-386, *supra*, § 1601(c) (amending 20 U.S.C. § 1092(f)(1)). It does not require a college or university (much less the state) to provide all the information in its possession to the public. *Cf.* 146 Cong. Rec. H4184, H4188 (daily ed. June 12, 2000) (earlier version of bill, which Congress chose not to enact, that would have mandated disclosure by federal fund recipient of the names and information of all persons on the registry). There is no unambiguous statement in the statutory text, such as the Court has required to impose a condition on federal fund recipients, limiting the recipients' discretion regarding which offenders' registry information is made available to the public. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

D. *Amici*'s Substantive Due Process Argument Was Not Raised By Petitioners, Would Require The Court To Address Complex Arguments In The First Instance, And Is Unpersuasive

Some of the *amici* supporting petitioners suggest that this case be resolved on the grounds of substantive due process, rather than procedural due process. That suggestion should be rejected.

1. Petitioners did not raise any substantive due process claim in their petition for certiorari. *See* Pet. i (question presented is whether the court of appeals "erroneously conclude[d]" "in a manner inconsistent with the Court's ruling in *Paul v. Davis*" that the registry implicated a liberty interest and violated due process). Petitioners' opening brief in this Court contains no mention of the interaction between substantive due process and the *Paul v. Davis* inquiry. *Cf.* Pet. Br. 29-30 (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), only in support of its argument that registry constitutes, at most, nonactionable group defamation). The case was briefed and

argued at every stage below as involving only whether respondents have identified a liberty interest that would entitle them to procedural due process. *See, e.g.*, Pet. App. A14 ("[t]he parties agree," as did the court of appeals and district court, that the *Paul* test "governs" the appeal); Pet. Cross-Motion for Summ. Jdgmt. 1 n.1 ("defendants' understanding of the legal question to be brought before the court * * * was the existence of the threshold requirement for a federal due process claim, that is, whether or not [the] 'stigma' aspect of the 'stigma plus' test [of *Paul*] exists").

Because a substantive due process defense was not pressed or passed upon below, and was not raised in the petition for certiorari or petitioners' opening brief, it has been waived. *See United States v. United Foods, Inc.,* 533 U.S. 405, 416 (2001); *United States v. Williams*, 504 U.S. 36, 42 (1992). For the Court to decline to address the newly raised claim is particularly appropriate in this case because of the complexity of the issues it implicates.

2. *Amici*'s substantive due process claim relies on the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). The United States contends that, under that opinion, so long as there is an adequate "fit" between the legislative classification and a legitimate state interest, no individual has the right, as a matter of procedural due process, to demonstrate that the governmental interest would not be served by imposing on him the reputational injury imposed on other members of the class. *See* U.S. *Amicus* Br. 24-27; *see also* Crim. Justice Legal Found. *Amicus* Br. 4-15. That novel approach to the case is based on a number of erroneous assumptions.

The argument is premised on the claim (*see* U.S. *Amicus* Br. 27 n.10) that the only function of the Connecticut sex offender registration scheme is to disseminate truthful information to the public. But the Connecticut sex offender registration scheme branded each respondent a danger to public safety, even though Connecticut had not determined whether a particular respondent posed any danger to anyone. S*ee* pp. 23-30, *supra*. As another of

petitioners' *amici* acknowledges, the Government has no legitimate interest in depriving a person of his reputation by conveying false stigmatizing messages about a particular individual. *See* Criminal Justice Legal Found. *Amicus* Br. 9-10.

Amici's substantive due process argument also assumes that classifications that impinge on reputation are subject to only rational-basis review. U.S. *Amicus* Br. 25. But the Court has never been confronted with a statutory scheme that publishes statements branding individuals as dangerous based on their membership in a class, without providing any opportunity for an individual to show otherwise. To assess the constitutionality of such a scheme, the Court would first have to address the question it expressly left open in *Paul*, 424 U.S. at 711 n.5, regarding what protection is afforded to reputation as a matter of substantive due process. That difficult question was not addressed by the courts or parties below. Given the history surrounding one's interest in reputation, there is a strong basis for arguing that an individual's right to be free from false stigma, like his right to be free from physical restraint, is a component of liberty protected by due process. *Cf. Albright v. Oliver*, 510 U.S. at 283-284 (Kennedy, J., concurring in judgment) (assuming "that some of the interests granted historical protection by the common law of torts (such as the interest[] in freedom from defamation * * *) are protected by the Due Process Clause").[16]

[16] *Paul* limited its assessment of whether reputation was a component of "liberty" by virtue of its status as an interest "recognized and protected by state law" or a right "incorporated" from the Constitution's first eight amendments. 424 U.S. at 711 & n.5. The term "liberty," however, also extends to interests "which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citations omitted). The *Paul* Court expressly disclaimed any intention to resolve whether reputation fell within that category, *see* 424 U.S. at 711 n.5, and it may in fact meet both elements articulated by this Court. *See* L. Eldridge, *Law of Defamation* § 53, at 293-294

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Injury to reputation almost inevitably affects the willingness of others to associate or do business with an individual, thus limiting an individual's choices about where to live, what job to hold, and who will be his friends and acquaintances. *See* 1 W. Blackstone*, Commentaries* *134 (without one's reputation "it is impossible to have the perfect enjoyment of any other advantage or right"). Therefore, although it does not restrain an individual from physically interacting with the world at large, an injury to reputation can lead to a similar result by causing those around the individual not to interact with him. In situations involving deprivations of other liberty interests (such as the right to be free from physical restraint) based on predictions of dangerousness, the Court has required individualized assessments after notice and an opportunity to be heard. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001); *id*. at 721 (Kennedy, J, dissenting) ("Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns * * * on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large."). *Compare Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (due

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(1978) ("There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago, and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection."); 1 W. Blackstone*, Commentaries* *134, *127 (describing a person's "security of his reputation or good name from the arts of detraction and slander" as one of the "absolute rights of every Englishman which, (taken in a political and extensive sense, are usually called their liberties)"); *cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("the individual's right to the protection of his good name 'reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty' ").

process requires individualized assessments when a rule burdens an interest that "enjoys" a "constitutionally protected status"), *with Michael H.*, 491 U.S. at 122-129 (plurality opinion) (holding that plaintiff had no protected liberty interest).

3. In any event, the substantial over-inclusive and under-inclusive nature of the Connecticut sex offender registration scheme undermines any claim that it could survive even rational basis review, absent some form of individualized assessment. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). The breadth of the scheme, which includes nonviolent misdemeanants, draws into question the rationality of its presumption that all registrants share the characteristic of current dangerousness that is somehow different from that of the general population of convicted felons and misdemeanants. Indeed, some of the crimes included have no sexual component, Pet. App. A8 n.13, and the recidivism rates vary significantly among persons convicted of different types of offenses. *See* U.S. *Amicus* Br. 3 (contrasting recidivism rates of offenders that target children with other sex offenders); National Governors Ass'n *Amicus* Br. 12 (discussing study describing the "marked hetrogeneity of sexual offenders"); Ass'n for the Treatment of Sexual Abusers *Amicus* Br. 11-14 (collecting studies); Office of the Public Defender of NJ *Amicus* Br. 6-7 (same).

The lack of a rational nexus between means and ends is further exacerbated by the capricious nature of the exemptions. For example, a first offender convicted today cannot seek an exemption that is available to those convicted of the same offense before July 1, 1999. *See* p. 12, *supra*. Also, an adult convicted of the misdemeanor of nonconsensual "sexual contact" with a sixteen year-old can be exempted from registering if the court finds that it is "not required for public safety," *id*. §§ 53a-73a(a)(2); 54-251(c), but an adult who lewdly exposes his body to the same child, thus committing the misdemeanor of "public indecency," *id*. § 53a-186, cannot be exempted. The over-inclusiveness of the Connecticut statutory registration scheme is further evidenced by inclusion on the publicly

disseminated registry of individuals who the State has determined in parole or mental health hearings should be released from confinement because they will *not* pose a danger to public safety and will *not* violate the law. *See* p. 6, *supra*.

The Connecticut sex offender registration scheme also ignores the ability of offenders to be successfully treated. For example, when it requires a court to determine, at sentencing, whether a person convicted of a felony committed for a "sexual purpose" should be required to register after completion of his sentence, *see* p. 5, *supra*, the scheme deprives the court of the ability to assess any treatment the offender receives while incarcerated. But as the Court recognized in *McKune v. Lile*, 122 S. Ct. 2017 (2002), "[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." *Id.* at 2024. The rate of recidivism of sex offenders who are treated is significantly lower than those who are not. *Ibid.* Yet offenders who have undergone such treatment may, based on a pre-treatment assessment, be required to register and have their registry information publicly disseminated in the same manner as those who have not received treatment.

Absent the opportunity for a registrant to be heard on whether he is a danger to public safety, the stated purpose of the Connecticut statute – to protect the public by informing them of the whereabouts of those offenders who are dangerous – will not be achieved. Instead of providing a tailored list of persons whom the State has determined pose a danger to public safety, the State provides a long list of names and faces about whom the public is told to "beware." The overbroad category overloads the public by including information about offenders who do not pose a danger, thereby frustrating the purpose of the State's warning. In the absence of such individualized assessments, moreover, many respondents will remain falsely stigmatized as "Registered Sex Offenders" who are dangers to public safety, while having their legal rights and status altered by intrusive, state-compelled reporting

obligations, and by elimination of their state law remedies against state officials for any injury suffered due to the registry's publication. Those burdens on liberty should not be borne by those who have no opportunity to demonstrate that, in fact, they are not dangerous.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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