

No. _____

**In The
Supreme Court of the United States**

JAMES P. CORNELIO,

Petitioner,

v.

THE STATE OF CONNECTICUT, ALARIC J. FOX,
in his official capacity as Commander of the
CONNECTICUT DEPARTMENT OF EMERGENCY
SERVICES AND PUBLIC PROTECTION, and
MATTHEW GARCIA, JOHN and/or
JANE DOE, in their individual capacity,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In what is an apparent issue of first impression is, as the district court ruled, ambiguous or unclear statutory language a condition for a challenge brought under the second test in *Hill v. Colorado*, 530 U.S. 703 (2000) for determining whether a statute is void for vagueness?
2. Does Conn. Gen. Stat. § 54-257(c) violate the requirement in *Smith v. Doe*, 538 U.S. 84 (2003) that sex offender registration schemes be nonpunitive in nature in order to avoid an *ex post facto* challenge?
3. Should a statute imposing criminal penalties on a strict liability basis shield law enforcement from a Fourth Amendment claim even when (i) that statute is determined to be impermissibly vague, (ii) such vagueness enables the Fourth Amendment violation, and (iii) there is a “compelling inference” that law enforcement acted with malice?

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OPINIONS BELOW

The unreported summary order of the second circuit court of appeals is reproduced at Pet. App. 1-6. The unreported decision of the district court for the district of Connecticut is reproduced at Pet. App. 7-39. The unreported order denying rehearing is reproduced at Pet. App. 40-41.

JURISDICTION

The second circuit court of appeals entered its order on January 12, 2018, Pet. App. 1, and denied a petition for rehearing on February 21, 2018. Pet. App. 40. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1 to the U.S. Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the U.S. Constitution provides: "No State shall pass any ex post facto Law."

Amendment IV to the U.S. Constitution provides: "The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Conn. Gen. Stat. § 54-257(c) (the “Relevant Statute”) provides that: “. . . the Department of Emergency Services and Public Protection shall verify the address of each registrant by mailing a nonforwardable verification form to the registrant at the registrant’s last reported address. Such form shall require the registrant to sign a statement that the registrant continues to reside at the registrant’s last reported address and return the form by mail by a date which is ten days after the date such form was mailed to the registrant. The form shall contain a statement that failure to return the form or providing false information is a violation of section 54-251, 54-252, 54-253 or 54-254, as the case may be. Each person required to register under section 54-251, 54-252, 54-253 or 54-254 shall have such person’s address verified in such manner every ninety days after such person’s initial registration date. In the event that a registrant fails to return the address verification form, the Department of Emergency Services and Public Protection shall notify the local police department or the state police troop having jurisdiction over the registrant’s last reported address, and that agency shall apply for a warrant to be issued for the registrant’s arrest under section 54-251, 54-252, 54-253 or 54-254, as the case may be. The Department of

Emergency Services and Public Protection shall not verify the address of registrants whose last reported address was outside this state.

STATEMENT OF THE CASE

Petitioner has been a home owner and part-time resident of the state of Connecticut since 1995 and has been a full-time resident since 2008. Having pled guilty to sex offenses at a NY trial in 2005, he was required to register as a sex offender under Conn. Gen. Stat. § 54-253. And, under the Relevant Statute, he is required to sign and return, within 10 days, a “nonforwardable verification form” mailed by the sex offender registration unit of the state police (SORU) every ninety days for the rest of his life (or, if less, his residence in the state) to verify his address.

In July 2015, Petitioner was pulled over near his home by a state trooper as a result of a routine traffic stop. Upon a search of databases coincident with such a stop, the trooper discovered that there was a warrant out for Petitioner’s arrest for failure to register under the Relevant Statute for two calendar quarters – that of June 2014, where Petitioner was 15-days late in returning the verification form, and September 2014, where he was 2-days late. He was arrested and released later that evening after posting bail.

In addition to the 2 late-delivered letters which led to his arrest, Petitioner had previously been late in signing/returning the initial letter on 6 separate

occasions. The first of those occurred in the final quarter of 2009 when Petitioner, planning to travel out-of-state for the Christmas holidays, contacted SORU to advise them that he would be unavailable to sign that year's final quarterly statement and wanted to make alternate arrangements to prove his residency. After a series of email exchanges, Petitioner, believing he had complied with his registration obligations, left the state only to discover in February 2010, while still out-of-state, that SORU had not only mailed to Petitioner the initial verification letter but had also mailed a "first violation" letter on or around 10 days after SORU had mailed the initial letter and a "final violation" letter on or around 10 days after SORU had mailed the "first violation" letter. With no response from Petitioner to any of the 3 letters, as he was then out-of-state, SORU then contacted the "state police troop having jurisdiction over the registrant's last reported address" to report the violation. Learning of the violation through a voice-mail left on Petitioner's home phone by a local state trooper, Petitioner, after various emails and phone calls and the forwarding of the "nonforwardable" letter to Petitioner where he was vacationing so that he could sign and return it to SORU, satisfied the trooper that he continued to reside at his home so no warrant was sought and Petitioner was deemed to be in compliance with the Relevant Statute.

On each of the 5 subsequent occasions after the 2009 late-mail violation either the signed initial letter returned late by Petitioner to SORU or an even later returned signed "first violation" letter or "final

violation" letter were, without more, sufficient for SORU to deem Petitioner in compliance with the Relevant Statute as those violations were, apparently, either not referred to the local police or local police ignored the referral; nor was Petitioner advised to "turn yourself in" as demanded in the violation letters as a result of such a violation.

On November 6, 2015, a state court judge dismissed the two Class "D" felony counts against Petitioner arising out of his June and September 2014 late-mail violations.

On August 9, 2016, Petitioner filed a complaint against Respondents in the Federal district court in Connecticut alleging: (i) that the Relevant Statute is void for vagueness in violation of the Fourteenth Amendment, and (ii) that certain of the Respondents engaged in the malicious prosecution of Petitioner violating his Fourth Amendment rights. On May 24, 2017, the district court dismissed Petitioner's complaint "with prejudice" and the court of appeals affirmed the district court's decision by summary order dated January 12, 2018 and denied a petition for rehearing on February 21, 2018

The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

ARGUMENT

I. The Relevant Statute is Void for Vagueness under the Second *Hill* Test.

A. The Second *Hill* Test Is Clear and Unambiguous.

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court held that a statute can be void for vagueness for either of two independent reasons. The second reason under *Hill*, which is the one at issue here, provides that if a statute “authorizes or even encourages arbitrary and discriminatory enforcement,” it is impermissibly vague. *Hill*, 530 U.S. at 732, citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999). That test, notably, has no qualifications or conditions other than, simply, authorization/encouragement of arbitrary/discriminatory enforcement as a result of statutory language, *not* authorization/encouragement of arbitrary/discriminatory enforcement as a result of ambiguous or unclear statutory language. Yet the district court, relying on *Small v. Bud-K Worldwide, Inc.*, 895 F. Supp. 2d 438 (E.D.N.Y. 2012), *aff’d*, 546 F. App’x ____ (2d Cir. 2013), held that “evidence [for arbitrary enforcement] needs to directly relate to the alleged vagueness and ambiguity of the statute at issue.” Pet. App. 25.

But the *Small* court did not, in fact, limit arbitrary/discriminatory enforcement challenges brought under *Hill*’s second test only to statutes which are vague or ambiguous. Whether there “needs to” be “vagueness and ambiguity” in the statute being challenged for the challenge to succeed under *Hill*’s second

test wasn't an issue in *Small* and the *Small* court did not rule on or even discuss the need for ambiguity in statutory language. *Small* involved the vagueness of certain words in a certain statute¹ and the language in *Small* on which the district court relied in its ruling² was descriptive of the facts in *Small* not prescriptive of the proper interpretation of *Hill*'s second test.

Consequently, the district court's reliance on *Small* for that condition to *Hill*'s second test is, simply, wrong. And, consequently, neither the appellate court nor Respondents offered any support for the district court's interpretation of *Small*. Instead, the appellate court, in its order, ignored the district court's mandatory link between ambiguous language and arbitrary enforcement and focused simply on statutory language arguing that the Relevant Statute is "clear" and "not vague" and that "notice" of prohibited behavior was not "insufficient." Pet. App. 4.³ But, again, those issues, while relevant for purposes of the first *Hill* test,⁴ they are not relevant for purposes of the second *Hill* test which, itself, couldn't be clearer or less ambiguous. That test is a *results-only* test focusing exclusively on whether a statute gives license to arbitrary/

¹ Specifically, whether the words "metal knuckles" include a "Black Cat Keychain" for purposes of the NY Penal Law.

² See Pet. App. 25.

³ While Respondents relied on quantity, rather than quality, of precedent. See Section D below.

⁴ That is, a statute is impermissibly vague if "it fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732.

discriminatory enforcement without regard to whether it does so as a result of unclear or vague statutory language.

Of course, this Court has the authority to rule that there is no constitutional protection from statutes which result in arbitrary/discriminatory enforcement unless such type of enforcement arises as a result of unclear/vague language. In such event, this claim by Petitioner would be moot inasmuch as the words of the Relevant Statute are undeniably clear. But if this Court is so inclined to rule, it should do so clearly and directly rather than indirectly and by relying on a case (*i.e.*, the *Small* case) as precedent for a proposition for which that case does not stand.

B. The District Court's Analysis Was Too Limited.

If this Court elects to not so rule, then the issue becomes whether the Relevant Statute, however clear and unambiguous its language, nonetheless authorizes/encourages arbitrary/discriminatory enforcement. Normally, as part of its assessment, this Court would look to the findings of the lower courts. Here, however, that would be insufficient as the appellate court's statement that the "district court performed a thorough analysis of [the Relevant Statute] and, as a result of that analysis, rejected" Petitioner's claim that the Relevant Statute "encourages arbitrary enforcement," Pet. App. 4, is belied by a closer reading of the district court's opinion.

That closer reading reveals that the district court's "thorough analysis" is, in fact, a limited analysis as, critically, once the district court ruled that evidence of arbitrary or discriminatory enforcement "needs to directly relate to the alleged vagueness and ambiguity of the statute at issue," that court had no need to, and in fact did not, consider any of the evidence presented by Petitioner in his district court papers establishing that, however clear and unambiguous the language of the Relevant Statute, it nonetheless not only authorizes/encourages arbitrary or discriminatory enforcement, it guarantees it. Instead, the district court's analysis focused exclusively and, if this Court agrees with Petitioner's argument above, inappropriately on the connection between ambiguity of statutory language and arbitrary/discriminatory enforcement in arriving at its decision without ever considering whether the constitutional right to be protected against arbitrary/discriminatory enforcement exists with respect to *any* statute which may give rise to such type of enforcement, not just vague or ambiguous statutes.

As proof of the district court's singular focus, the following represents every statement in the court's opinion which led to its holding that Petitioner failed to prove his claim of arbitrary enforcement under *Hill*'s second test:

- (i) "Plaintiff has not alleged that any specific vagueness or ambiguity in the statute . . . has led to the arbitrary or discriminatory enforcement of the statute." Pet. App. 25;

- (ii) "However, the statute itself is clear." Pet. App. 26;
- (iii) "Defendants are correct that the statute provides clear and explicit standards for its application." Pet. App. 26; and
- (iv) "[S]uch examples are not evidence of any arbitrary or discriminatory enforcement resulting from any vagueness in the statute itself. The statute, again, is clear and provides adequate standards for its enforcement." Pet. App. 27.

In every instance, the district court demanded a nexus between ambiguous statutory language and arbitrary enforcement and ignored all evidence of such type of enforcement in the absence of such language.

C. Arbitrary Enforcement Is Inescapable Under the Relevant Statute.

If this Court believes that proof of a statute's authorization/encouragement of arbitrary enforcement alone is sufficient to run afoul of the second *Hill* test, then it could refer this case back to the district court for an analysis of Petitioner's evidence consistent with that determination. Or this Court could issue its own ruling as Petitioner asserts that the Relevant Statute doesn't just authorize or encourage arbitrary or discriminatory enforcement, it guarantees it under any factual hypothetical other than one where the statute is never violated or one where every registrant whose mail is late is charged with a Class "D" felony. And

as neither of those hypotheticals are conceivable let alone likely, the Relevant Statute, *on its face*, is void for vagueness under the second *Hill* test in that it “is impermissibly vague in *all* of its applications” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, [494] (1982) (emphasis added), not just as-applied to Petitioner.

Here are some hypotheticals (and as-applied examples) to make the point:

- (i) Does SORU, as mandated, inform local law enforcement each time a registrant is late in returning the initial letter?⁵ In Petitioner’s case, they apparently did so only once out of his 8 late-delivered letters (the 1st one, which was *very* late as described in the Statement Section); or
- (ii) Does local law enforcement, as mandated, seek a warrant for the arrest of every registrant identified by SORU as having delivered a late letter? Petitioner’s local police didn’t do so for any of his 8 late letters (though SORU improperly sought a warrant for 2 of those letters); or
- (iii) If, as is likely to happen over a lifetime of quarterly registration obligations, a registrant is unavailable during the 10-day statutory grace period to sign an address

⁵ And with 24,000 quarterly address verification letters mailed every year to CT’s nearly 6000 registered sex offenders (See OLR Report 2017-R-0109), it’s not just concern for fair-mindedness which suggests they don’t.

verification letter, then what happens given that there is no discretion to be flexible in otherwise confirming the registrant's address? For Petitioner's 1st violation, both the 10-day grace period and the requirement that letters be "nonforwardable" were ignored. And in an interaction too recent to include in his lower court papers but known to SORU, when Petitioner, planning to travel in December 2017, sought to provide early confirmation of residency by offering to meet with the local police, SORU agreed to "delay" his signing the letter but only if he provided detailed travel information. When Petitioner questioned their right to that information, having none, they withdrew their offer, ignored Petitioner's and demanded compliance with the law as written; or

- (iv) Even if SORU were to refer every late-mail violation to local law enforcement and even if local law enforcement were to seek a warrant for each such late-mail violation and even if every neutral magistrate were to sign off on a warrant for no reason other than a registrant's late-mail, what then? Would any reasonable prosecutor believe they could, or would any fair-minded prosecutor want to, obtain a Class "D" felony conviction of a registrant simply because of late mail? Put to the test, they didn't in Petitioner's case.

Petitioner could go on but the point is that the Relevant Statute is impossible to practicably, and fairly-mindedly, be enforced in accordance with its terms. Consequently, SORU made up a 3-letter, 30-day protocol and makes up, on an *ad hoc* basis, standards as needed for registrant unavailability thus ignoring – in fact, contravening – the actual terms of the law. Except when it chooses to follow the law. And whether it follows or doesn't follow the law is decided with a discretion unfettered by any standards. In fact, given that SORU unilaterally implemented the 3-letter, 30-day protocol, they may have already modified, scrapped or replaced that protocol as decided, again, in their unfettered discretion – or may yet decide to do so.

The court in *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) wrote that: “The arbitrary enforcement prong [*i.e.*, the second *Hill* test] requires that a statute give ‘minimal guidelines’ to law enforcement authorities, so as not to ‘permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections’ (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks and brackets omitted in *Mannix*)).”

A few final questions to ask then are: (i) what are the standards, other than “personal predilections,” to determine how late is too late in returning the address verification letter before a warrant is sought, (ii) what happens when a registrant is unavailable during the 10-day window to sign and return that letter, and (iii) what is to prevent SORU (or local law enforcement) from just changing their minds?

Petitioner, given his lifetime obligations and the humiliating, costly and disagreeable consequences of an arrest warrant, sought answers to those questions in an email he sent to SORU after the dismissal of the two felony charges against him. Pet. App. 42-45. That SORU's response simply referred him back to the Relevant Statute should, perhaps, have been expected as there simply are no answers to certain of Petitioner's questions as there are no standards by which to formulate an answer. And to the extent there are standards under the Relevant Statute to answer certain other questions, inasmuch as SORU does not or cannot comply with those standards, they simply refused to provide an answer.

So, then, the only "answers" are provided by the real-life examples evidenced by Petitioner's case where, sometimes, 2 days after the 10-day statutory grace period is too late (see Petitioner's 7th late-mail violation for which a warrant was sought), at other times, you can go beyond even the 30-day SORU grace period without being too late (see Petitioner's 1st late-mail violation where no warrant was sought) and at even other times, SORU makes it up as they go (see Petitioner's most recent interaction with SORU). Then there were the 6 late-mail violations in between where one resulted in the issuance of a warrant, and the other 5 not. All subject to change in accordance with "personal predilections."

And as to whose "personal predilections" govern in a decision under a law where no discretion is even granted to make such a decision, it's apparently a

mish-mash of the officers of SORU deciding whether to refer the late-mail violation (or even to improperly seek a warrant themselves as they did in Petitioner's case), the discretion of each local police department whether to seek a warrant and, ultimately, a neutral magistrate's willingness to sign-off on that warrant for no greater crime than late mail, with each registrant being subject to the luck of the draw.

This muddled mess of enforcement procedures is confusing enough but CT's highest court, rather than adding clarity, instead contributed to the confusion. In *State of Connecticut v. T.R.D.*, 286 Conn. 191 (2008), that court noted, on the one hand, that the Relevant Statute entails a strict liability standard (*T.R.D.*, 286 Conn. at 225) but then also wrote, as if it were a simple statement of fact, that the defendant in that case was "in compliance with his registration responsibilities" even though he never returned the initial letter and only returned the first violation letter 19 days after SORU mailed the initial letter. *T.R.D.*, 286 Conn. at 196.

How could such a statement be made?

Though the district court adopted Respondents' argument that the *T.R.D.* court was simply silent on how their defendant went from "violation" to "compliance," Pet. App. 27,⁶ that's unlikely based on the care

⁶ In its district court papers, Respondents also claimed the statement was "dicta" but it's clear that the *T.R.D.* court saw the 'return to compliance' not as a non-essential legal issue but as a

and attention to detail which the *T.R.D.* court otherwise addressed the history and legal issues involved in the case. Far more critically, though, given the terms of the Relevant Statute and its strict liability standard which the *T.R.D.* court itself acknowledged, there is no logical way under that law, once the 10-day grace period has expired, for a registrant to somehow return to compliance.⁷ Logically then, the only rational explanation is that CT's highest court simply ignored the law and accepted the more reasonable standards under the 3-letter, 30-day protocol as dispositive of when a registrant is or isn't in compliance.

But then why and how did SORU seek, and obtain, a warrant for Petitioner's arrest for his two late-letter violations returned well within the protocol period?

Perhaps the only "answer" to that question and to the related question of why no warrant was sought for any of Petitioner's 6 previous late-mail violations is the one offered by Respondents in their district court papers, and accepted by the district court, Pet. App. 26 – that a registrant who satisfies SORU's 30-day response period but misses the Relevant Statute's 10-day response period is somehow *both* "in compliance with" *and* "in violation of" the Relevant Statute.⁸

simple fact given that their defendant complied with SORU's protocol.

⁷ Nor have Respondents, some of whom were participants in the *T.R.D.* case, offered an explanation.

⁸ As to how Petitioner could return a letter after the 30 days with no warrant sought, silence.

With that tortured, paradoxical formulation, the police are given license to do whatever they want including the license to submit a warrant application for any registrant with previous uncharged late-mail violations.⁹ And the only limitation to a warrant actually being issued for the arrest of that registrant would be the statute of limitations or a neutral magistrate's willingness to ignore the provisions of the Relevant Statute and say, "enough is enough."

The enforcement of the Relevant Statute in accordance with its terms is practicably and equitably impossible and, given that, it is a textbook example of a law destined to authorize/encourage arbitrary/discriminatory enforcement and should be held to be in violation of *Hill's* second test.

D. An Issue of First Impression.

Though Respondents, in their lower court papers, cite a series of void for vagueness cases involving unclear/ambiguous statutory language to make the argument that such type of language is essential for a claim under *Hill's* second test, the fact is that neither party nor either court uncovered any case (other than the inapt citation to *Small*) which specifically addresses the issue of whether a statute can be ruled impermissibly vague when the statutory language is itself clear and unambiguous. Hence, this case appears to involve an issue of first impression.

⁹ Of which Petitioner still has several outstanding.

Helpfully, the district court offers one clue as to why this may be so. When the court suggested that a more appropriate (but still unsuccessful) challenge in Petitioner's case would have been one claiming "selective enforcement," Pet. App. 30, the court called attention to features of the Relevant Statute which are sufficiently unique that it could easily give rise to unique issues. Selective enforcement (or, as Respondents less precisely call it, "inconsistent application of the law") presupposes that there are times when a law is enforced and times when it isn't, which is common, especially for laws which fall out of favor (like sodomy laws) or laws which are impractical to enforce against all violators (like jaywalking laws).

Here, however, a registrant's address verification obligation under the Relevant Statute will *always* be enforced. The question is *how* will it be enforced – by using the standards under the law or as made up by SORU or by local law enforcement or by a neutral magistrate or by the *T.R.D.* court or, perhaps, by confirming residency by simple common sense? Moreover, unlike most laws which prohibit certain types of behavior, the Relevant Statute affirmatively obligates a citizen to take an action or face criminal penalties. And even for those laws which do require affirmative action, it is seldom, if ever, required with the frequency, time duration and limited window demanded by, or with the criminal penalty and strict liability standard provided under, the Relevant Statute.

A useful analogy would be the tax law where citizens are required, once a year, to file a tax return and

pay any taxes owed. Under that law, the date set for that action is comfortably beyond the date most citizens need to prepare and file their returns, but even then, extensions are routinely granted. Now try to imagine the unimaginable and it becomes clear as to how this case likely involves an issue of first impression – imagine that under the tax law (or, frankly, any law not involving a serious and immediate threat to public safety), IRS agents are mandated to inform local law enforcement should they fail to receive a filing by April 15 from a citizen, local law enforcement is then mandated to seek a warrant for that citizen's arrest and the citizen is to be held strictly liable for a Class "D" felony as a result of nothing more than their late (or even lost) mail.

If such a law were to be enacted, then hopefully the IRS would follow in the footsteps of SORU by ignoring the law and developing a more reasonable protocol. But they better follow that protocol without fear or favor or a no-longer grateful citizen who is caught up in the snares of arbitrary decision making by the IRS might very well assert a challenge under the second *Hill* test.

Of course, it's not a risk the IRS is ever likely to face.

E. A Final Note.

Perhaps what is most revealing in all this is that, despite their protestations that the Relevant Statute is "clear" and otherwise "not vague," neither

Commander Fox (a named party) nor either lower court were prepared to simply order that the police enforce that “clear” law in accordance with its “not vague” terms and, thereby, eliminate the issue of police ignoring that law and, consequently, unconstitutionally exercising discretion unfettered by any standards other than the “personal predilections” of particular police personnel in the enforcement of that law.¹⁰

Why didn’t they issue that order? Most likely it’s because they recognized that we don’t live in an artificial world governed by theoretical constructs but do live in a real world populated by real people trying, for the most part, to do the right thing when dealing with other real people. And in that world, the Relevant Statute can’t – and shouldn’t – be enforced in accordance with its terms. Thus, indirectly, they also recognized that:

II. The Relevant Statute, if Enforced as Written, Violates *Smith v. Doe*.

A. Procedural Issues.

Even though he referred to it multiple times in his lower court papers, Petitioner acknowledges that, as a result of a misapprehension that he lacked standing to do so, he did not specifically challenge the Relevant Statute on the grounds that it violated the ruling in *Smith v. Doe*, 538 U.S. 84 (2003). Consequently, neither

¹⁰ This alternative remedy was not addressed in the district court opinion even though the court acknowledged it was raised by Petitioner in his complaint, Pet. App. 16.

Respondents nor the lower courts addressed the issue. And Petitioner knows that the rule against raising new issues on appeal is one that is “deeply embedded in our jurisprudence,” *Nat’l Ass’n of Social Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995). But he also knows that, in the end, whether to consider new issues “is a matter of discretion,” *id.*, with some scholars going so far as to point out that the discretion has been exercised in a way that is . . . well, completely unfettered.¹¹

Accordingly, Petitioner begs this Court to consider, and rule on, this challenge to the Relevant Statute for the following reasons:

First, Petitioner’s misapprehension was reasonable in that it was grounded in a paradox inasmuch as, if the CT sex offender registration law, of which the Relevant Statute is a part, results in a scheme which is “regulatory” and not “punitive” (as required under *Smith*), then Petitioner does not have standing to challenge the law as it was in effect prior to his conviction and would be considered merely incidental to his July 2005 conviction and, thus, not part of his punishment. *Smith*, 538 U.S. at 93. If, however, he can establish that CT’s sex offender’s address verification requirement under the Relevant Statute results in a scheme which is, in fact, punitive in a way that violates *Smith*, then he does have standing as he was, thus, deprived of the right at his trial to negotiate the length of time he

¹¹ Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023 (1987).

would remain on the sex offender registration list (and, thus, have to verify his address) as he did with the other aspects of his punishment (*i.e.*, prison, probation and parole). And though it was a NY trial, CT abides by the determination of the state in which the sex offender was convicted to set the time for how long the sex offender would remain on the sex offender list and, so, have to verify his address.

Second, Judicial economy. As there is nothing not already in the record which this Court would need to review nor are there any facts or complex legal issues which a lower court would need to parse, consider or better define, to require that Petitioner bring a new action asserting this particular challenge and that the district court and appellate court weigh in on that challenge before giving this Court the opportunity to do so would not serve to maximize judicial resources.

Third, and most important: No assessment of Petitioner's challenge that the Relevant Statute is void for vagueness would be complete without an assessment of whether the Relevant Statute, if enforced as written, would be punitive in a way which would violate *Smith*, as that type of enforcement may well be a consequence of this case, whether Petitioner wins or loses.

B. Substantive Issues.

First, it's important to note that this case is distinguishable from most if not all prior sex offender registration cases asserting an *ex post facto* challenge which

have been heard by this Court in that Petitioner is making no claim that the quarterly address verification requirement, itself, is punitive. Instead, what he's asserting is that it is the mandates under the particular address verification requirements set forth in the Relevant Statute which are punitive.

With prophetic foresight, the *Smith* Court, while ruling that the Alaska sex offender registration law was regulatory and not punitive in nature, wrote that "Our conclusion [that the law is nonpunitive] is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety." *Smith*, 538 U.S. at 96.¹²

But here we now have the Relevant Statute which not only ignores the no-mandate preference set forth in *Smith* but does so harshly and unforgivingly by: (i) mandating that SORU refer any late-mail to local law enforcement, (ii) mandating that local law enforcement seek an arrest warrant for any such late mail, and (iii) mandating, as confirmed by the *T.R.D.* court, that guilt for a Class "D" felony is a given once an address verification letter is late regardless of actual residency.

¹² Moreover, unlike the Relevant Statute, under Alaska Sess. Laws ch. 41: (i) to be found in violation, a registrant must "knowingly" violate the registration laws, and (ii) any violation is a misdemeanor, not a felony.

With those mandates, CT lawmakers undermined any credible assertion that the address verification requirements set forth in the Relevant Statute, and the scheme of which those requirements are an integral part, can somehow be intended as nonpunitive, civil and regulatory as required under *Smith* to avoid running afoul of the *ex post facto* clause. And with the *Smith* Court's laser-like focus in upholding the Alaska registration law on how that law was intended to "assist in protecting public safety," *id.* at 93, and in how that nonpunitive purpose was a "most significant factor" in their decision, *id.* at 102, the traditional deference by courts to stated legislative intent where the "clearest proof" is required to override that stated intent, *id.* at 92, is seriously tested in this case as any rational observer would ask, how does the criminalization of late mail protect the nonpunitive purpose of public safety when that purpose can be satisfied – better – in a host of nonpunitive ways? After all, SORU, itself, ignored the Relevant Statute and devised the protocol, and the *T.R.D.* court blessed that protocol, precisely because it tempered the costly, unworkable, ineffective and punitive regime under the Relevant Statute without sacrificing public safety.

But even if this Court remains hesitant to question a legislation's stated regulatory intent, the *Smith* Court noted that "we must further examine whether the scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* at 92 (internal quotations and citations omitted). For that examination, the Court relied on five factors set forth

in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), two of which are critical here: the first – whether the law “has a rational connection to a nonpunitive purpose”; and the second – whether it “is excessive with respect to this purpose.” *Smith*, 538 U.S. at 97.

For that analysis, consider this – is the procedure under the allegedly regulatory scheme of which the Relevant Statute is a part more “rational” and less “excessive” for confirming residency than that under the admittedly punitive regime of parole? Under parole, a parole officer visits the parolee’s home to confirm residency. Under the Relevant Statute, late mail is a strict liability Class “D” felony without regard to residency.

Petitioner, himself, no expert in the art of crafting legislation, proposed another possible rational/moderate address verification procedure in his appellate court papers. Inspired by a case cited by Respondents which contained a presumption standard, Petitioner asked why not enact an address verification law which incorporates SORU’s 3-letter, 30-day protocol and then provide that any registrant who fails to return one of the letters within such period would be *presumed* to have absconded entitling SORU to seek a warrant for such registrant’s arrest.

Surely, as stated above, there are likely a host of other more “rational” and less “excessive” alternatives to confirm the residence of sex offenders than the strict liability criminalization of late mail. Moreover, a properly drafted alternative would: (i) pose no additional risk to

public safety,¹³ (ii) be more effective in ascertaining residency, (iii) not violate the *ex post facto* clause, and (iv) likely enhance public safety, at least if there's value to the idea that reintegrating sex offenders into society is a better approach for enhancing public safety than treating them like modern day pariahs by subjecting them to a harshly punitive law for something as simple as verifying their address where a more rational/moderate law would serve exactly the same purpose.

Unfortunately, given the public's fear of sex offenders, punishment not reintegration is foremost in the minds of their elected representatives. Hopefully, this Court will agree that, if the purpose is punishment, do so at a trial subject to the safeguards and standards of criminal law jurisprudence which have been molded over centuries. If, however, the purpose is the regulation of sex offenders after punishment through the relatively new sex offender registration schemes, then this case gives this Court the opportunity to help mold the safeguards and standards of this new jurisprudence in a way consistent with the holding in *Smith*.

¹³ After all, the Relevant Statute simply *confirms* a registrant's address. Another section of the law, Conn. Gen. Stat. § 54-253, makes it a crime to *actually move* without notifying proper authorities.

III. Fourth Amendment Rights Should Not Be Subverted by an Unconstitutionally Vague Statute.

As framed by the district court citing *Golino v. City of New Haven, Conn.*, 950 F.2d 864, 870 (2d Cir. 1991), Petitioner, facing a “heavy burden” in order to prevail on his claim that SORU acted without probable cause in violation of his Fourth Amendment rights, had to show that SORU “knowingly and intentionally, or with reckless disregard for the truth, made a false statement in [the] affidavit” submitted to the judge who signed his arrest warrant. Pet. App. 33.

But Petitioner didn’t even try to make that showing as Petitioner was relying on the next statement by the *Golino* court that “[i]ntentional or reckless *omissions* of material information” in a warrant affidavit may also serve as a basis to challenge the existence of probable cause. *Id.* (emphasis added).

As both lower courts ignored that test despite Petitioner’s focus on it, they consequently also ignored the issue of whether the following information, undeniably omitted from the affidavit and undeniably known (or which should have been known) by SORU, was intentional/reckless/material – *i.e.*: (i) SORU had developed a 3-letter, 30-day protocol; (ii) SORU had on 6 prior occasions followed that protocol; (iii) Petitioner continued to reside at his registered address, the confirmation of which is the purpose of the Relevant Statute; (iv) per *Smith*, sex offender registration laws must be regulatory, not punitive in nature; and (v) per *T.R.D.*,

compliance with the protocol is compliance with the Relevant Statute.

Petitioner continues to believe that a neutral magistrate aware of that information would not have issued an arrest warrant especially since SORU wasn't even authorized under the Relevant Statute to seek a warrant. That, along with the evidence presented by Petitioner questioning the motives of SORU's officers, should have spurred the district court to order a trial to fully uncover the facts, and its decision should be reversed on that basis alone.

But it is Respondents' analysis of probable cause which highlights the broader constitutional question on Fourth Amendment protections. They argued that there is no need to even apply for a warrant as, given that the Relevant Statute has a strict liability standard, once a registrant is one day late in returning the address verification letter, they are guilty of a Class "D" felony, a position seemingly accepted by the district court.¹⁴

So the question here becomes, even if there is legal precedent stating that probable cause is a given and police malice is irrelevant when a law containing a strict liability standard is violated, does that precedent hold should it be decided that the law under which the warrant was issued is void for vagueness precisely because the standards thereunder for seeking the arrest

¹⁴ That is, the court's failure to consider material omissions in the warrant affidavit becomes understandable if it had accepted this argument on probable cause by Respondents.

– *i.e.*, the standards for determining probable cause – are inadequate to protect the citizen subject to that law from arbitrary/discriminatory enforcement? Or, put another way, should a citizen’s Fourth Amendment rights be trumped in a situation where the language in a statute is unconstitutionally vague and, as a result, actually serves to empower the trampling of those rights by officers motivated by malice?

Hopefully, this Court will agree that’s a bridge too far, especially as Petitioner believes he has offered “compelling inference,” Pet. App. 35, that SORU’s officers acted with malice. Petitioner acknowledges, however, that the district court disagrees with his assessment that the motive was malice. Pet. App. 35-36.

But as more fully discussed in Petitioner’s lower court papers, the district court also: (i) relied on the *Small* case as precedent for a proposition for which that case clearly did not stand and, by so doing, rendered Petitioner’s evidence of arbitrary enforcement irrelevant; (ii) claimed, by relying on a case which was also clearly inapt, that Petitioner didn’t even have the standing to challenge the Relevant Statute, Pet. App. 28, fn. 5, a claim shunned by both Respondents and the appellate court; (iii) ignored well-established precedent that material omissions in warrant affidavits are as germane in determining probable cause as material misstatements; (iv) accepted, without inquiry, Respondents’ tenuous argument that the *T.R.D.* court was silent on an issue of obvious legal significance and Respondents’ untenable argument that one can

somehow simultaneously both be in compliance with and in violation of a law; and (v) decided to leave unexamined: (A) why SORU sought an arrest warrant despite the fact they knew Petitioner (x) continued to reside at his registered address and (y) had likely come to rely on the protocol inasmuch as SORU had followed that protocol for 6 previous late-delivered letters, (B) why SORU, in violation of the Relevant Statute, submitted the warrant affidavit for Petitioner's late-mail violations rather than refer the matter to local police as required under the law, (C) why the magistrate approved that improperly submitted affidavit, (D) why SORU omitted certain pertinent information from the warrant affidavit and the effect of those omissions on the issuance of the warrant, (E) why SORU, even when given the easy opportunity to do so, failed to advise Petitioner to "turn yourself in" for his late-mail violations as provided in the violation letters SORU, itself, developed, and (F) whether Petitioner's multiple interactions with SORU over multiple years, including his multiple un-charged previous late-mail violations, may have caused SORU's officers to act with pique rather than professionalism in seeking the warrant.

To state an obvious but uncomfortable truth, judges, too, are part of the public and, so, justice, too, is not always blind.

If this Court is not yet convinced that Petitioner should get his day in court to prove that SORU's improperly submitted warrant application was not because SORU sought to bring "an offender to justice," Pet. App. 32, but was because they sought to teach that

offender a lesson by causing him “distress and confusion,” Pet. App. 31, in violation of his Fourth Amendment rights . . . well, there’s more. On Sunday, April 22, 2018 while Petitioner was in the midst of preparing this Petition, two State troopers showed up at Petitioner’s home and arrested him on a warrant issued in July 2016¹⁵ for failing to notify SORU of his email address, the email address through which Petitioner has been corresponding with SORU over the past *ten* years. As Petitioner is aware, the facts in that case must await another possible trial for another Class “D” felony charge and, perhaps, another civil rights action. The question which Petitioner would like to raise here is when does someone with more authority than a neutral magistrate say, “enough is enough.”

◆

CONCLUSION

Petitioner respectfully requests that this Court: (i) reverse the lower courts and hold that the Relevant Statute is void for vagueness, (ii) hold that the Relevant Statute violates *Smith v. Doe*, and (iii) remand to the district court, for a trial-by-jury on the merits, Petitioner’s Fourth Amendment claim.

Respectfully submitted,

JAMES P. CORNELIO

¹⁵ Which was several months after the 2 late-mail felony charges against Petitioner were dismissed in state court but 1 month before Petitioner commenced this action in the federal district court.