No. _____

In the Supreme Court of the United States

LOUIS MATTHEW CLEMENTS,

Petitioner,

v.

STATE OF FLORIDA;
FLORIDA ATTORNEY GENERAL;
SECRETARY, DOC,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KEITH W. UPSON
The Upson Law Group PL
2335 Stanford Court
Suite 503
Naples, Florida 34112
(239) 330-7551

MICHAEL B. KIMBERLY
Counsel of Record
EMMETT WITKOVSKY-ELDRED
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for petitioner

QUESTION PRESENTED

Federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). This case concerns the standard for an individual to be "in custody" within the meaning of that provision.

This Court has explained that, although an individual's custody may begin when he is placed "behind prison walls and iron bars" (*Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963)), it extends beyond those technical confines to any circumstance where the state actively supervises a person's movements such that "[h]e cannot come and go as he pleases." *Hensley* v. *Municipal Court*, 411 U.S. 345, 351 (1973) (limits attending presentence recognizance establishes "custody"). "What matters" is that the restrictions imposed on the petitioner "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones*, 371 U.S. at 243 (parole conditions establish "custody").

The question presented in this case, over which the lower courts are openly divided, is whether a person is "in custody" within the meaning of Section 2254 if that person remains subject for the rest of his life to a state-law sex-offender registration scheme that, among other things, compels his frequent physical appearances for in-person reporting at particular times and places and limits the circumstances under which he may travel, all under threat of criminal sanction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes and regulations

Statutes and regulations—continued

Other Authorities

INTRODUCTION

Under Florida law, petitioner must register as a sex offender for the rest of his life. Under threat of reincarceration for failure to comply, he must report in person to the local sheriff's office at least twice per year at specifically appointed times, appear in person to report each and any change to his address or vehicle registration, and give in-person notice prior to out-of-state travel, without which vacations are made felonies.

These are manifestly "conditions which significantly confine and restrain [petitioner's] freedom," which this Court has long said is "enough to keep him in the 'custody'" of the State. *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963). But when petitioner sought a writ of habeas corpus to challenge the conviction from which these lifelong burdens spring, the courts below dismissed his request on the ground that he is not "in custody" within the meaning of Section 2254.

That is wrong. It flouts this Court's holding that a person is "in custody" when subject to restrictions that "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones*, 371 U.S. at 243. It also conflicts squarely with the rule in the Third Circuit, which held that Pennsylvania's sex-offender registration scheme—a law in at least one respect *less* restrictive than Florida's—"easily" satisfied the in-custody requirement. See *Piasecki* v. *Court of Common Pleas*, 917 F.3d 161, 170 (3d Cir. 2019).

The Court should grant review to resolve the split and bring the Eleventh Circuit's precedent back in line with this Court's holdings. Proper resolution of the question presented has profound practical consequences for hundreds of thousands of individuals nationwide, who are denied federal habeas review of their state-court convictions despite facing lifetimes of significant restrictions on their liberty. The Court's guidance on section 2254's

custody requirement is sorely needed, as confusion surrounding its application has produced arbitrary and inconsistent results among the circuits.

OPINIONS BELOW

The Eleventh Circuit's opinion (App., *infra*, 1a-37a) is reported at 59 F.4th 1204 (11th Cir. 2023). The opinion of the United States District Court for the Middle District of Florida (App., *infra*, 38a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2023, and a timely petition for rehearing was denied on May 3, 2023 (App., *infra*, 48a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254 specifies that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT

A. Legal background

1. Florida law requires people residing in the state who have been convicted of certain sex offenses to register as sex offenders for the rest of their lives. See Fla. Stat. §§ 943.0435(1)(h), (11)(b). Sex offender status carries with it a number of substantial obligations, among them that registrants must:

- upon initial registration, provide the state with all personal and identifying information, including basic demographic and biographic data, descriptions of "tattoos or other identifying marks," fingerprints, employment information, address, a complete de-

scription and tag number of all vehicles owned, home telephone numbers, mobile telephone numbers, email addresses, and all internet profile information for all websites (Fla. Stat. §§ 943.0435(2)(b), (3));

- report to the local sheriff's office in person every six or three months, depending on the offense (*id.* § 943.0435(14), unless homeless, in which case the requirement is monthly (*id.* § 943.0435(4)(b)(2);
- report in person within 48 hours any change in address or vehicle registration (*id.* §§ 943.0435-(2)(b)(3), (4)(b));
- report in person out-of-state travel plans, including 48 hours before any out-of-state domestic travel lasting three days or more and 21 days before any international travel lasting five days or more (*id.* § 943.0435(7)); and
- report online within 48 hours any changes to employment, telephone number, email address, or internet identifiers (*id.* § 943.0435(4)(e)).

Other provisions of Florida law restrict where registrants are permitted to live. Registrants are forbidden, in particular, from residing within 1,000 feet of any school, childcare facility, park, or playground. See Fla. Stat. § 775.215(2)(a). The Eleventh Circuit has recognized that such provisions create vast "exclusion zones" in which registrants are barred from residing—a condition that especially burdens those with families. *McGuire* v. *Marshall*, 50 F.4th 986, 1009 (11th Cir. 2022).

Failure to comply with any of these reporting requirements and other restrictions is a felony, punishable by up to five additional years in prison and a fine of $5,000. See Fla. Stat. § 943.0435(9).

2. Florida's registration scheme substantially implements the federal Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, 120 Stat. 587

(2006) (codified at 34 U.S.C. § 20901 *et seq*.). The federal SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. These requirements include reporting in-person to authorities once, twice, or four times each year depending on the offense (34 U.S.C. § 20918); reporting in person any updates to name, residence, employment, or student status (*id*. § 20913(c)); reporting international travel 21 days in advance (*id*. § 20914(a)(7), 28 C.F.R. § 72.7(f)); and that the state make failure to comply a criminal offense punishable by a maximum sentence of at least one year (34 U.S.C. § 20913(c)).

Florida is one of 18 states that have substantially implemented all aspects of the federal SORNA. See *Jurisdictions That Have Substantially Implemented SORNA*, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), https://perma.cc/N64U-9Z2C. Four territories and 137 federally recognized tribes have done the same. *Ibid*. Three other States and Puerto Rico comply with every requirement described above.[1]

B. Factual and procedural background

1. Petitioner pleaded guilty to a charge of lewd or lascivious conduct in violation of Fla. Stat. § 800.04(6)(b). App., *infra*, 3a. Petitioner has long maintained that his lawyer and family pressured him into making a confession contrary to fact. App., *infra*, 39a.

After entering this plea, petitioner was sentenced to five years of sexual offender probation. App., *infra*, 3a. The terms of petitioner's probation stated that he "qualifie[d] and shall register with the Florida Department of

---

[1] Those three are Hawaii, Iowa, and Nebraska. See generally *Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check*, SMART (Jan. 25, 2022), https://perma.cc/7E2E-4M7X.

Law Enforcement as a sexual offender pursuant to [Fla. Stat.] § 943.0435." App., *infra*, 3a. Petitioner's probation ended in 2013. App., *infra*, 3a. But petitioner remains a registered sex offender and must comply with all registration and reporting requirements for the rest of his life. App., *infra*, 13a.

2. In 2017, petitioner filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, pursuant to Section 2254. The state moved to dismiss, arguing that the district court lacked jurisdiction because petitioner was no longer "in custody" by the state. App., *infra*, 3a. Petitioner replied that the burdens of sex offender registration, "along with all the other restrictions that come with being a registered sex offender," should be sufficient to establish custody. App., *infra*, 3a-4a.

The district court agreed with the state and dismissed the case. App., *infra*, 38a-47a. In doing so, it observed that the circuits are divided on the issue. App. *infra*, 43a (citing *Piasecki* v. *Court of Common Pleas*, 917 F.3d 161 (3d Cir. 2019)). "Notwithstanding the Third Circuit's considered opinion," the district court found the noncustodial side of the split "more persuasive." App., *infra*, 44a.

3. Petitioner appealed *pro se*,[2] and the court of appeals affirmed. App., *infra*, 1a-37a.

The court acknowledged its own "hesitation" to affirm (App., *infra*, 18a) and recognized that "Supreme Court and Eleventh Circuit cases make this a hard question to answer." App., *infra*, 15a.

Like the district court, the court of appeals called out the circuit split on the question whether "persons subject

---

[2] Petitioner briefed the appeal *pro se*. Appointed counsel presented oral argument without rebriefing the appeal. App., *infra*, 5a.

to sexual offender registration and reporting statutes are * * * 'in custody' for purposes of habeas corpus relief." App., *infra*, 12a. It noted that the Third Circuit had come to a "contrary conclusion" from the decisions of other circuits and ultimately "cho[se] not to follow the Third Circuit's" approach. App., *infra*, 21a.

As the court of appeals framed it, "the proper inquiry" for resolving the question presented "is whether Florida's registration and reporting requirements substantially limit Mr. Clements' actions or movement." App., *infra*, 16a-17a. The court concluded that they do not. It reasoned that petitioner is "not at the beck and call of state officials," because his reporting requirement is periodic and predictable. App., *infra*, 18a. Furthermore, he "is not required to live in a certain community or home and does not need permission to hold a job or drive a car." App., *infra*, 18a. And lastly, while he must provide "in-person advance notice of trips outside the state and outside the country," "the trips themselves do not require permission or approval by state officials." App., *infra*, 19a.

The court did not consider Florida's residency restriction, faulting petitioner (a *pro se* litigant) for not fully briefing the issue. App., *infra*, 6a.

Judge Newsom concurred. App., *infra*, 22a-37a. In his view, this Court's decision in *Jones* was wrongly decided and should be "scrap[ped]." App., *infra*, 30a. The Court's reasoning, in his view, was full of "glaring textual and historical deficiencies," calling for a "course correction." App., *infra*, 34a, 36a.

Petitioner sought rehearing *en banc*, which the court denied on May 3, 2023. App., *infra*, 48a.

REASONS FOR GRANTING THE PETITION

The Court's review is needed to resolve an acknowledged circuit split on an issue of widespread practical importance concerning whether nearly one million people nationwide are powerless to challenge significant burdens on their liberty related to sex offender registration under Section 2254. This is a suitable vehicle for review, and the decision below is wrong and should be corrected.

A. The courts of appeals are divided

As the lower court forthrightly acknowledged, the courts of appeals are divided on the question presented. While some circuits to consider the question have concluded that state sex-offender registration requirements like Florida's do not constitute "custody," "the Third Circuit has come to a contrary conclusion." App., *infra*, 13a. The Court should resolve the split and clear up the confusion among the lower courts on the nature of Section 2254's in-custody requirement.

1. The Eleventh Circuit expressly chose not to follow the **Third Circuit**'s decision in *Piasecki*. That case concerned whether Pennsylvania's sex offender registration scheme satisfied section 2254's "in custody" requirement. Unlike the court below, the Third Circuit held that it did, "easily." *Id*. at 170.

Pennsylvania's SORNA law is in all relevant respects the same as Florida's. It required the petitioner to "register in-person with the State police every three months for the rest of his life." *Piasecki,* 917 F.3d at 164 (citing 42 Pa. C.S. §§ 9799.15(a)(3), 9799.15(e)(3)). Similar to the Florida scheme, "the statute also required him to appear, in-person" to notify authorities of changes to his name, address, employment status, or educational enrollment. *Id*. at 164-165. And "[p]rior to any international travel, Piasecki had to 'appear in person at an approved registration site no less than 21 days' before his anticipated

departure." *Id.* at 165. If he were to become homeless, he would have to report monthly. *Ibid.* Failing to satisfy any of these requirements meant criminal liability. *Ibid.*

Analyzing this Court's section 2254 precedents, the Third Circuit concluded that "those requirements * * * clearly rise to the level of 'custody' for purposes of our habeas corpus jurisdiction." 917 F.3d at 173. The court noted "that Piasecki was subject to severe restraints on his liberty not shared by the public generally," focusing on how the "law required him to physically appear at a State Police barracks" for "banal" tasks like "taking a week's vacation" and "compelled" him to "report to a police station every three months for the rest of his life." *Id.* at 172-173. Such restrictions meant he "was not free to 'come and go as he please[d]." *Id.* at 170 (quoting *Hensley* v. *Municipal Court*, 411 U.S. 345, 351 (1973)).

The *Piasecki* court "recognize[d] that several of [its] sister circuit courts of appeals have found that various sex offender registration schemes were not sufficiently restrictive to constitute 'custody.'" 917 F.3d at 172. But the court "d[id] not find those cases compelling" and therefore rejected them for two reasons. *Ibid. First*, several of those cases concerned pre-SORNA laws with less "onerous" restrictions, such as laws that allowed for "registration by mail" rather than in person. *Id.* at 172 n. 86-87 and accompanying text (citing examples). *Second*, the panel was bound by circuit precedent finding that "that custodial 'restraint does not require 'on-going supervision' or 'prior approval,'" whereas other circuit courts were not likewise bound. *Id.* at 172 (quoting *Barry* v. *Bergen County Probation Department*, 128 F.3d 152, 161 (3d Cir. 1997)).

If this case had arisen in the Third Circuit, the district court would not have dismissed the habeas petition and instead would have resolved petitioner's request for relief on its merits.

2. A number of other circuits, reviewing sex offender registration schemes on all fours with Florida's and Pennsylvania's, have reached the opposite conclusion. The **Sixth Circuit**, in *Hautzenroeder* v. *Dewine*, 887 F.3d 737 (6th Cir. 2018), concluded that Ohio's sex offender registration scheme was not custodial despite that it required an in-person appearance every 90 days for life, and to report, in person, any changes in residence, educational enrollment, and place of employment. *Id.* at 741. Just like in Florida and Pennsylvania, the Ohio law also made noncompliance a felony. *Id.* at 743. And as in Florida (but not Pennsylvania), the law prohibited offenders from residing within 1,000 feet of any school or daycare. *Id.* at 742. Nonetheless, the court found that the petitioner's "freedom of movement is unconstrained, her registration and reporting obligations notwithstanding," *id.* at 741, and thus "her statutorily mandated obligations are [not] custodial." *Id.* at 744.

The Sixth Circuit recently reaffirmed this holding in *Corridore* v. *Washington*, 71 F.4th 491 (6th Cir. 2023), dismissing any "argument based on *Piasecki*" as "unpersuasive. *Id.* at 499 n.5. Judge Moore, in dissent, acknowledged the circuit split, describing the Third Circuit's approach in *Piasecki* as "particularly instructive" and "well-reasoned"; she thus would have sided with the Third Circuit. *Id.* at 509-510.

The **Fourth Circuit** came to the same conclusion as the Sixth, with respect to analytically identical Texas registration requirements. In *Wilson* v. *Flaherty*, 689 F.3d 332 (4th Cir. 2012), the petitioner faced similar in-person reporting requirements and limitations on travel. Despite all this, the court held that the Texas requirements "lack[ed] the discernible impediment to movement that typically satisfies the 'in custody' requirement." *Id.* at 338 (quoting *Williamson* v. *Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998)).

The **Tenth Circuit** has held that Colorado's sex offender registration scheme also does not establish custody. *See Calhoun* v. *Attorney General of Colorado,* 745 F.3d 1070, 1074 (10th Cir. 2014). Though Colorado law required the petitioner to reregister annually in person and to provide in-person updates for any changes to address, employer, or vehicle ownership, the circuit concluded that he was "free to live, work, travel, and engage in all legal activities without limitation and without approval by a government official" and thus Colorado's regime was "insufficient to satisfy the custody requirement." 745 F.3d at 1074. See also *Dickey* v. *Allbaugh*, 664 F. App'x 690, 693 (10th Cir. 2016) (applying *Calhoun* to Oklahoma's "more restrictive" regime and holding it to be noncustodial).

The **Eleventh Circuit** below acknowledged the split, siding with the decisions of the Fourth, Sixth, and Tenth Circuits and "cho[osing] not to follow the Third Circuit's contrary decision."[3]

3. Behind the circuit split in this case lurks more fundamental confusion among the lower courts about how properly to construe and apply the in-custody requirement in circumstances similar to SORNA registration.

---

[3] The **Seventh** and **Ninth Circuits** have held pre-SORNA schemes that do not require in-person reporting to be noncustodial. See *Virsnieks* v. *Smith*, 521 F.3d 707, 720 (7th Cir. 2008); *Williamson* v. *Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998) (Washington); *Henry* v. *Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999) (California); *McNab* v. *Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam) (Oregon). The **Fifth Circuit** has held sex offender registration schemes noncustodial in three unpublished decisions. See *Lempar* v. *Lumpkin*, 2021 WL 5409266, at *1 (5th Cir. 2021) (disagreeing with *Piasecki*'s reasoning, 917 F.3d 161, to find Texas's sex offender registration law was noncustodial); *Johnson* v. *Davis*, 697 F. App'x 274, 275 (5th Cir. 2017); *Sullivan* v. *Stephens*, 582 F. App'x 375, 375 (5th Cir. 2014).

The Third Circuit's decision in *Piasecki*, for example, turned largely on its decision in *Barry*. There, the court held that a community service obligation renders someone "in custody" because "an individual who is required to be in a certain place * * * is clearly subject to restraints on his liberty not shared by the public generally." 128 F.3d at 161.

Other circuits have held the same, that requirements to report periodically for community service amounts to custody. The Sixth Circuit has held that, because "[p]robation's restraints on liberty suffice to satisfy the 'in custody' requirement," "the same [must be] true for community service." *Lawrence* v. *48th District Court*, 560 F.3d 475, 480-481 (6th Cir. 2009).

The Second Circuit, too, has held that community service requirements constitute custody because they periodically require the individual's "physical presence at particular times and locations." *Nowakowski* v. *New York*, 835 F.3d 210, 217 (2d Cir. 2016).

These holdings are in considerable tension with the holding below. Sex-offender registration schemes that mandate occasional physical presence at particular times and locations upon threat of reimprisonment constrain liberty in the same way that periodic community service requirements do. This is further evidence that the in-custody requirement is being applied in inconsistent ways. The court's immediate intervention is thus needed to clarify what constitutes "custody" for habeas purposes.

B. The Court's intervention is crucial

As described above, the split of authority is producing variable results on analytically identical facts. In the Third Circuit, state SORNA registrants are permitted to challenge their underlying convictions through Section 2254, but in numerous other circuits, the opposite is true despite substantively identical registrations schemes.

There is no doubting that this case would have been allowed to proceed if it had arisen in the Third Circuit. It ended prematurely because it arose in the Eleventh.

Review is thus necessary to restore uniformity on this frequently recurring issue. Every state has had some form of sex offender registration since at least 1996, and following passage of the federal SORNA a decade later, the number of required registrants ballooned in every state. See Emanuella Grinberg, *5 years later, states struggle to comply with federal sex offender law*, CNN (July 28, 2011), https://perma.cc/LRX4-5W25.

Nationwide, an astounding 800,000 people are now registered as sex offenders.[4] That is because lawmakers have dramatically expanded the range of offenses requiring lifetime registration. Some states require lifetime registration for offenses as minor as public urination[5] or sex between consenting teenagers.[6] Commission of such offenses sometimes reflects poor judgment, but these crimes are not markers for dangerous sexual deviance. Also relevant here, these low-level offenses are less likely to involve either fastidious adherence to constitutional rules or incarceration or parole, which would give rise to other forms of "custody" for habeas purposes.

This issue is as profound as it is widespread. Many registered sex offenders, just like petitioner, experience daily restrictions on their liberty. That includes where they may travel, where they may live, and where they may

---

[4] Rob Gabriel, *Sex Offender Registry Rates: 2023 Report*, SafeHome.org (June 5, 2023), https://perma.cc/LH3Z-DU4L.

[5] Chanakya Sethi, *Sex Offender Laws Have Gone Too Far*, Slate (Aug. 11, 2014), https://perma.cc/8QA2-67VJ.

[6] Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, Slate (Aug. 12, 2014), https://perma.cc/6G5J-8X5T.

work.[7] But whether they can access a federal habeas court to challenge these restrictions on liberty turns on nothing else but whether they happen to live in the right (or wrong) federal circuit.

To be sure, not all sex-offender registration laws are perfectly identical, and sometimes courts have attempted to distinguish state registration schemes on their facts. But the federal SORNA establishes minimum national standards that are held in common among Florida and 17 other states and scores more Indian tribes and territories. See *supra* at 3-4. And many other states implement some or all of the portions of the federal SORNA salient to the in-custody question. These common standards are at the heart of Florida's registration scheme and formed the basis for the Eleventh Circuit's decision below.

The time for review is now. The issue has been fully ventilated in numerous published opinions, with circuits on both sides of the divide having opportunities to consider the views on the other side. Yet the conflict among the courts has persisted. Only this Court can restore uniformity on this issue.

---

[7] At least 31 states restrict where sex offenders may live, creating no-go zones as great as 3,000 feet from any school, daycare, or playground. See Miss. Code. Ann. § 45-33-25(4)(a); Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 Aggressive and Violent Behavior 13, 14-15 (2018). And many states do not even allow registered sex offenders to work close to places children may be found, while most, understandably, prohibit them from working directly with children. See, *e.g.*, Ala. Code § 15-20A-13 (banning employment within 2,000 feet of a school or childcare facility); Ga. Code § 42-1-15(c) (1,000 feet); La. Rev. Stat. § 14:91.2 (1,000 feet); Tenn. Code § 40-39-211 (1,000 feet); Mont. Code § 45-5-513 (300 feet); N.C. Gen. Stat. § 14-208.18 (300 feet).

C. The decision below is wrong

The court below recognized that this was a "hard" case in light of "Supreme Court and Eleventh Circuit" precedent. App., *infra*, 15a. And it resolved the case against petitioner "admittedly with some hesitation." App., *infra*, 18a. This hesitation was well warranted: the Court's cases make plain that Florida's sex offender registration regime surely amounts to "custody."

1. Section 2254's in-custody requirement asks not whether the person is subject to "immediate physical imprisonment," but whether the legal limitations placed on his freedom "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963)). A person is in custody whenever the state actively supervises that person's movements such that, whether or not physically restrained, "[h]e cannot come and go as he pleases." *Hensley* v. *Municipal Court*, 411 U.S. 345, 351 (1973). So, a habeas petitioner who is "obligat[ed] to appear at all times and places as ordered," or whose "[d]isobedience is itself a criminal offense" is in custody. *Ibid.*

Thus, for example, a parolee is "in custody," no matter that he is no longer behind bars. That is because he remains obligated to "periodically report to his parole officer," and the terms of his parole may "confine[]" him "to a particular community, house, [or] job" or instruct him to "keep away from undesirable places." *Jones*, 371 U.S. at 242. And "he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison." *Ibid.* These are "conditions which significantly confine and restrain his freedom," *id.* at 243, and are "not shared by the public generally," *id.* at 240. They thus establish custody.

Likewise, a person released on his own recognizance following his conviction is in custody, though his sentence has not yet commenced. See *Hensley,* 411 U.S. at

351. The petitioner in *Hensley* was under no direct control by the state, save the legal requirement that he must "appear at all times and places as ordered by the court." *Id.* at 348. *Hensley* recognized that such a person suffers far lesser "restrictions on his liberty of movement" than a parolee like in *Jones*. *Ibid*. Nonetheless, he could not "come and go as he pleases," as a court order might compel his appearance at a particular place and at a particular time. *Id*. at 351. Thus, "[h]is freedom of movement rested in the hands of state judicial officers." *Ibid*. See also *Strait* v. *Laird*, 406 U.S. 341 (1972) (Army reservist was in custody despite the Army exercising no control over the petitioner beyond denying his request for discharge).

This concept of "custody" in the habeas context is one of venerable legal vintage. For instance, the British Habeas Corpus Act of 1679 provided that "any Sheriffe or Sheriffes Goaler Minister or other Person whatsoever for any person in his or their Custody" could be required to bring a "party soe committed *or restrained*" before a magistrate to review the legality of his custody. Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (Eng.) (emphasis added). And "the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will," applying simply the test of "whether she was 'at her liberty to go where she please(d).'" *Jones*, 371 U.S. at 238–39 (citing *Rex* v. *Clarkson*, 93 Eng. Rep. 625 (K.B. 1722)). See also Matthew Bacon, Henry Gwyllim, & Charles Edward Dodd, 4 A New Abridgment of the Law 570 (1876) (collecting early examples of habeas corpus relief being granted outside of cases involving traditional physical custody).

2. Under these principles, the burdens of registering as a sex offender in Florida plainly amount to "custody." Petitioner is "subject to restraints 'not shared by the

public generally.'" *Hensley* 411 U.S. at 351 (quoting *Jones*). And he will carry those burdens the rest of his life. In particular, he has an "obligation to appear at all times and places as ordered" by Florida law. *Ibid* (quotation marks omitted). That means, at a minimum, physically appearing twice a year to authorities, and appearing any other time he changes his address or vehicle registration. Fla. Stat. § 943.0435(14). If he becomes homeless—a common fate for sex offenders considering the stigma and legal restrictions that attach—that obligation increases to monthly. *Id.* § 943.0435(4)(b)(2).

Nor may he "come and go as he pleases." *Hensley*, 411 U.S. at 351. To the contrary, travel out of state requires in-person notice ahead of time, and international travel is conditioned on weeks of advanced warning. See Fla. Stat. § 943.0435(7). While the purpose of giving notice is not to obtain permission, that is not the same as his "freedom of movement rest[ing]" in his hands alone, rather than in those of "state judicial officers." *Hensley*, 411 U.S. at 351. A spontaneous trip abroad—one of "those things which in this country free men are entitled to do," *Jones*, 371 U.S. at 243—for petitioner would be a felony punishable by five years in prison. See Fla. Stat. § 943.0435(9).

For that matter, harsh criminal sanction over a "single deviation, however slight" is a "constant fear," built into Florida's sex offender registration scheme to make sure petitioner "faithfully obey[s] these restrictions and conditions." *Jones*, 371 U.S. at 242. Violating any of Florida's registration requirements carries the same potential penalty; "[d]isobedience is itself a criminal offense." *Hensley*, 411 U.S. at 351. The threat that petitioner "can be rearrested at any time," for incorrectly doing things an ordinary citizen may do without giving them a second thought, such as buying a car, leaving the country, or moving across town, "significantly confine[s] and

restrain[s] his freedom." *Jones*, 371 U.S. at 242-243. "[T]his is enough to keep him in the 'custody' of the" state of Florida. *Id.* at 243.

Moreover, Florida sex offenders—including petitioner—are subject to onerous residency restrictions not considered by the lower court. Fla. Stat. § 775.215(2)(a). Under *Piasecki*, Florida's scheme would be custodial either way, but the presence of a residency restriction makes that conclusion all the more clear.

A command for petitioner to "keep away," *Jones*, 371 U.S. at 242, obviously constrains his "freedom of movement." *Hensley*, 411 U.S. at 351. In practice, a 1,000-foot buffer from any school, daycare, park, or playground means that many population centers are completely off limits to Florida sex offenders. This can carry severe consequences on a person's livelihood, relationships, and safety. Indeed, reporting has shown that a combination of state and local residency requirements has rendered nearly all of Miami-Dade County off limits to registered sex offenders, leading to "roving encampments" of people crowding into the few parking lots or slivers of public land at the correct remove. See, *e.g.*, Beth Schwartzapfel & Emily Kassie, *Banished*, The Marshall Project (Oct. 3, 2018), https://perma.cc/TC3D-ABSV.

To be sure, Florida's sex offender registration scheme "imposes conditions which significantly confine and restrain [petitioner's] freedom" (*Jones*, 371 U.S. at 243) even absent these severe residence restrictions, as the Third Circuit held in *Piasecki*. But such restrictions go further to show the level of control that states typically exert over registered sex offenders, frequently for life—and they resolve all doubt (if there were any) as to whether petition is "in custody" within the meaning of Section 2254.

This petition in no way challenges the validity of sex-offender registration laws or the need to assure com-

munity safety. Sex offenses sometimes warrant curtailing freedoms. But for precisely that reason, it is imperative that accused sex offenders be able to challenge their convictions through habeas corpus review. This is even more vital given that forensic technology is more and more often uncovering wrongful convictions—which happens more often in sex-offense cases than any other. See *National Registry of Exonerations*, https://perma.cc/S5AW-HWZJ (cataloguing 581 DNA exonerations since 1989, 264 of which occurred in sex offense cases).

Petitioner was convicted of a sex offense and was accordingly ordered to serve five years of probation and to register as a sex offender for the rest of his life. His probation has ended, but his registration obligation never will. That requirement makes constant demands on him—on his person, to appear twice a year and as otherwise directed by law; on his diligence, to promptly notify authorities of changes in life circumstance that others need not give a second thought; and on his liberty, to travel only after inviting the state to peer over his shoulder. And all of this under pain of felony prosecution if he falters. That constitutes "custody," plain and simple.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

KEITH W. UPSON
The Upson Law Group PL
2335 Stanford Court
Suite 503
Naples, Florida 34112
(239) 330-7551

MICHAEL B. KIMBERLY
Counsel of Record
EMMETT WITKOVSKY-ELDRED
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner