No. 23-107

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

PETITIONER'S REPLY

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PETITIONER'S REPLY

As we showed in the petition, the question presented has divided the courts of appeals. Whereas petitioner's claim was dismissed for lack of jurisdiction by the Eleventh Circuit, the claims of similarly-situated individuals in the Third Circuit are allowed to proceed.

Florida's opposition does not obscure the need for further review. It does not refute our showing, for example, that the federal Sex Offender Registration and Notification Act (SORNA) provides a comprehensive set of minimum requirements for state SORNA laws, that 18 states have adopted those requirements, or that the substance of those requirements applied in both this case and *Piasecki* v. *Court of Common Pleas*, 917 F.3d 161 (3d Cir. 2019). Nor does it deny that proper resolution of the question presented is a matter of great practical importance both because it arises frequently and because it leaves potentially innocent people subject to a humiliating stigma and significant limitations on their liberty for the remainders of their lives.

What Florida does say is unpersuasive. It asserts that *Piasecki* does not conflict with the decision below. But the arguments it offers in support of that position are either wrong or irrelevant. The state also asserts that this is a poor vehicle because petitioner's claim lacks merit and because the lower court did not consider Florida's residence restriction for sex offenders. Neither of those points would inhibit the Court's review, and certiorari is thus warranted.

A. The question presented has divided the circuits

1. The conflict between the Third Circuit, on the one hand, and the Fourth, Sixth, Tenth and Eleventh Circuits, on the other hand, is clear and expressly recognized. See, *e.g.*, Katherine A. Mitchell, *Of What Consequence?: Sexual*

Offender Laws and Federal Habeas Relief, 75 Miami L. Rev. 76, 93-95 (2020) (describing the "circuit split").

As we explained (Pet. 3), petitioner—like other sex-offender registrants in Florida—must report at the local sheriff's office, in person, every six months for the rest of his life (Fla. Stat. § 943.0435(14)), unless he becomes homeless, in which case the requirement is monthly (§ 943.0435(4)(b)(2)); report in person within 48 hours any change in address or vehicle registration (§ 943.0435(2)(b)(3), (4)(b)); and report in person his out-of-state travel plans, including 48 hours before out-of-state domestic travel and 21 days before international travel (§ 943.0435(7)).

The Pennsylvania requirements at issue in *Piasecki* are nearly identical: the petitioner there was required to "register in-person with the State police every three months for the rest of his life"; to "appear, in-person," to register again following changes to his name, address, employment status, or educational enrollment; and to "appear, in person," to report plans for "international travel * * * no less than 21 days before his anticipated departure." *Piasecki*, 917 F.3d at 164-165.

Given the self-evident similarities between these two highly intrusive schemes of government supervision, there is no serious dispute that the habeas petition in this case would have been allowed to proceed to the merits if it had been filed in the Third Circuit. It was instead dismissed for want of jurisdiction because the Eleventh Circuit below sided with the Fourth, Sixth, and Tenth Circuits and chose "not to follow the Third Circuit's contrary decision in *Piasecki*." Pet. App. 21a.

2. Florida says (BIO 11-12) there is no conflict because "Pennsylvania places significantly more onerous restrictions on an offender's 'liberty of movement'" than Florida does. We have just shown that to be incorrect; the requirements are nearly identical.

In support of its contrary claim, Florida notes (BIO 12-13) only that the petitioner in *Piasecki* had to report every three months rather than every six months; and that he had to update, in person, changes not only to his address and vehicle registration, but also his employment status, student enrollment, telephone number, and email address. Florida also observes (BIO 13) that the petitioner in *Piasecki* faced temporary restrictions on his internet usage as a condition of his probation, and not as an element of Pennsylvania's SORNA scheme.

The district courts applying *Piasecki* have not drawn the supposed distinctions that Florida raises in its opposition. These courts have considered monthly, quarterly, biannual, and annual reporting requirements, all without internet restrictions, and each time they have found "custody" for purposes of federal habeas review under *Piasecki*. For example:

- *Berg* v. *Delaware County Probation Department*, 2022 WL 17669004, at *5 (E.D. Pa. 2022) (in a case involving a Tier I offense requiring once-annual reporting and no internet limits, holding that petitioner was "in custody" under *Piasecki*);
- *Ackerman* v. *Pennsylvania*, 2022 WL 4082446, at *2 (W.D. Pa. 2022) (petitioner in custody even though his "registration and the frequency of periodic in-person appearances are less than those of Piasecki based on the level of his offense");
- *Tinsley* v. *Court of Common Pleas*, 2020 WL 13601694, at *8 (E.D. Pa. 2020) (pursuant to "*Piasecki*, I find that Mr. Tinsley is 'in custody' due to his continued reporting requirements under SORNA" despite no mention of computer limits), recommendation adopted, 2022 WL 17832917 (E.D. Pa. 2022);

- *Goodson* v. *New Jersey State Parole Board*, 2023 WL 4759510, at *2 (D.N.J. 2023) (citing *Piasecki* and holding that "[t]he restrictions imposed on Plaintiff under his sentence to community service for life" were similar to periodic SORNA reporting, amounting to "custody").

Each of these cases involved restraints *less* onerous than those here, and each nonetheless was allowed to proceed under *Piasecki*. There is thus no basis for asserting that the outcome here would have been unchanged if it had arisen in the Third Circuit.

2. Florida says (BIO 14-16) that *Piasecki* does not conflict with the decision below for a second reason: that the Pennsylvania registration requirement from *Piasecki* was "punitive" and imposed as part of the petitioner's sentence, whereas Florida's SORNA requirement is only "remedial" and imposed as a "collateral consequence" of conviction. That is a red herring.

As a starting point, it is irrelevant how Florida labels its registration scheme—punitive or remedial—because the question of custody does not turn on any such distinction. Some punishments, like fines or forfeitures, are obviously "insufficient to meet the 'in custody' requirement." *United States* v. *Ross*, 801 F.3d 374, 380 (3d Cir. 2015). Conversely, "the 'in custody' requirement may be satisfied by constraints other than criminal punishment." *Munoz* v. *Smith*, 17 F.4th 1237, 1242 (9th Cir. 2021). Indeed, habeas has traditionally been available for a variety of "pretrial and noncriminal detention[s]" that by definition are non-punitive. *Boumediene* v. *Bush*, 553 U.S. 723, 780 (2008). Thus, as the lower court held (Pet. App. 19a n.7), "custody under the habeas statutes does not require criminal punishment." See also *Corridore* v. *Washington*, 71 F.4th 491, 496 (6th Cir. 2023) (holding that "the 'in custody' analysis does not hinge on the

punitive nature of the statute"); *Demore* v. *Kim*, 538 U.S. 510 (2003) (non-punitive immigration detention).[1]

Nor does it matter whether the registration requirement is stated in or expressly imposed by the judgment of conviction. Habeas is an equitable remedy, and its availability does not turn on "formalis[ms]." *Boumediene*, 553 U.S. at 780 (quoting *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963)). The question posed by Section 2254's custody requirement is whether the petitioner "suffers [a] present restraint from a conviction" entered by a state court. *Garlotte* v. *Fordice*, 515 U.S. 39, 45 (1995). That is a functional inquiry, and a petitioner may be "'in custody' under his [state] conviction" even after his technical "sentence [is] nominally completed." *Ibid.*

As the trial-court records make clear, that is the case here. True, petitioner's registration obligation is not expressly stated in the judgment—but neither is his statutorily-mandated term of probation, which Florida does not deny would satisfy the custody requirement. See BIO 4, 24. Instead, *both* the probation requirement *and* the registration requirement are expressly imposed by the plea agreement, which bears the signature of the state trial judge and is effectively incorporated into the judgment by the judgment's reference to the plea. See Dist. Dkt. 25-1, at 113, 124-127.

Against the background, there is no gainsaying that petitioner's obligation to appear routinely for registration as a sex offender is a restraint arising directly from the judgment of conviction. Again, courts applying *Piasecki* have taken just this approach. See, *e.g.*, *Ackerman*, 2022

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[1] Courts "evaluate the punitive nature of a requirement when [they]'re doing an Ex Post Facto Clause analysis." *Corridore*, 71 F.4th at 496. See, *e.g.*, *Coppolino* v. *Noonan*, 102 A.3d 1254, 1265 (Pa. Commw. Ct. 2014), summarily affirmed, 125 A.3d 1196 (Pa. 2015) (per curiam). That is not the question here.

WL 4082446, at *2 (although "the sentencing court did not order registration" expressly, petitioner was in custody because "it is certain that he is subject to the current SORNA registration requirements as a direct consequence of the conviction being challenged"). There is no doubting that a court within the Third Circuit would have allowed petitioner's habeas claim to proceed.

B. This is a clean vehicle

The custody question was the focus of the parties' arguments below, and it occupied all the attention of the Eleventh Circuit, which had eyes wide open to the circuit split. The Eleventh Circuit's resolution of the issue drove the outcome below, and there are no barriers to this Court's resolution of it.

1. Florida disagrees, asserting (BIO 17-20) that this is a poor vehicle because petitioner cannot win on the merits. But the question whether petitioner would be entitled to relief on the merits if this Court reverses the Eleventh Circuit's jurisdictional determination is a logically subsequent matter. It's our whole point that a fact-dependent issue like equitable tolling cannot be summarily dismissed for lack of jurisdiction in cases like this one, but must instead be tested and resolved by the district court in the first instance, following full merits briefing and development of a record.

The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2408 (2019) (expressly reserving subsequent issues for remand); *Department of Transportation* v. *Association of American Railroads*, 575 U.S. 43, 56 (2015) (same). That is the proper course here; if the Court reverses the Eleventh Circuit's jurisdictional holding, it should leave the merits for remand.

2. Florida further asserts (BIO 20-21) that review should be denied because the court of appeals declined to address Florida's residence restrictions for registered sex offenders. That is mistaken for two reasons.

First, it is not necessary for the Court to address Florida's residence restriction. As the Third Circuit held, the recurring, lifelong, in-person reporting requirements to which petitioner is subject under Fla. Stat. § 943.0435 are independently sufficient to establish custody under Section 2254. It bears emphasis that these legally-mandated, in-person encounters are not quick stop-bys. *Each and every time*, multiple times every year, persons subject to reporting must undergo full reprocessing at the sheriff's office. This means that, each time, "the sheriff shall take a photograph, a set of fingerprints, and palm prints of the offender," and the offender must report anew the minute facts of his daily life—details like his tattoos and birthmarks; employment information and home-address; the make, model, color, and VIN of any cars owned; and internet identifiers for every website or application where the person has an account. Fla. Stat. § 943.0435(2)(c). All of this is mandated by law to take place in person, at particular times and places, several times every year. And interstate and international travel is illegal without re-registration.

The Third Circuit held that the question presented is "easily" resolved in favor of habeas jurisdiction on facts just like these, without considering a residence restriction like Florida's. *Piasecki*, 917 F.3d at 170. The Court thus would not need to consider any such restriction to rule for petitioner.

Conversely, Florida argues (BIO 23-24) that the decision below should be affirmed because SORNA registration is not an element of a registrant's criminal sentence. That is a categorical legal argument as to which a residence restriction likewise has no relevance. The Court thus need not consider the issue either way.

Second, and regardless, this Court is not obligated to take the same approach to the residence restriction as did the Eleventh Circuit. At every level of review, petitioner has argued that he is "in custody" within the meaning of Section 2254, not just because he must appear regularly at the sheriff's office, but also because of "all the other restrictions that come with being a registered sex offender" under Florida law. Dist. Ct. Dkt. 37, at 27. As he argued to the Eleventh Circuit, he is in custody in part because, "[i]n Florida, a sex offender can't live within 1000 feet from a school, a daycare, a playground, or a park where children play." C.A. Opening Br. 13.

In addition, the residence restriction is just one element of a supervision scheme that petitioner has consistently argued puts him in custody, taken as a whole. "Once a federal claim is properly presented," as is petitioner's claim that he is in custody, a party before this Court is "not limited to the precise arguments [he] made below." *Hemphill* v. *New York*, 595 U.S. 140, 149 (2022) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)). Rather, the "traditional rule" is that parties may expand upon and refine their arguments, so long as they are fairly subsumed by the question presented and raised "to support what has been [a] consistent claim" before the lower courts. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). See also *Citizens United* v. *FEC*, 558 U.S. 310, 330 (2010) (applying this rule). There is thus no barrier to the Court considering this point.

Florida separately notes (BIO 21) "the lack of a record" concerning the residence restriction, but that is another red herring. The statute speaks for itself: Florida law bars SORNA registrants from living within a 1,000-foot radius of a playground, daycare, or school, creating 72-acre exclusion zones around commonplace facilities. Either a hard residence restriction like this is a custodial restraint on registrants' "liberty to do those things which

in this country free men are entitled to do" (*Jones*, 371 U.S. at 243), or it is not. No other court has believed a factual record necessary to resolve that question. See, *e.g.*, *Hautzenroeder* v. *DeWine*, 887 F.3d 737, 742 (6th Cir. 2018) (holding a residence restriction non-custodial without case-specific evidence like maps or plats).

3. Finally, although the question presented arises frequently, clean vehicles are exceedingly rare. In cases emerging from of the Third Circuit, state authorities will have standing to appeal only in the 0.35% of cases that involve grants of habeas relief. See Nancy J. King, et al., *Habeas Litigation in U.S. District Courts*, at 9, U.S. Department of Justice (Aug. 2007), https://perma.cc/-8NHY-2SKG. And in other jurisdictions aligned with the Eleventh Circuit on the question presented, registrants generally will not bother to file habeas petitions at all, because jurisdiction is foreclosed by circuit precedent.

The only real possibilities for future vehicles are the courts that have not yet addressed the question presented. But on that front, petitioners very often will be *pro se*, making suitable presentation of a certiorari petition less likely. For instance, the petition pending in *Morse* v. *Clerk Clinton District Court*, No. 23-5761, presents the same question as the petition here. But the *pro se* petitioner in that case failed to obtain a certificate of appealability, making the case an unsuitable vehicle for this Court's review. See *Morse* v. *Clerk of Clinton District Court*, 2023 WL 6130289 (1st Cir. 2023).

Despite the frequency with which the question presented controls outcomes, therefore, clean opportunities for review are few and far between. The Court thus should seize this one and resolve this important question now.

C. Florida does not deny the profound importance of the question presented

Florida does not dispute the importance of this case. Registration under state SORNA laws is shockingly common, imposed for often unremarkable crimes. See Pet. 11-13. And when it is imposed, it has profound and highly damaging effects. The public record is replete with examples of registrants experiencing "profound humiliation and isolation as a result" of state SORNA laws. *E.B.* v. *Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997). The damage "rang[es] from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson." *Doe* v. *Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997).

As we noted in the petition, none of this is to say that SORNA laws are inherently bad policy, or that the Court should be concerned to spare predatory sex offenders from embarrassment or isolation. It is only to say that, if Florida is to impose such profound restrictions on the liberty of so many of its citizens, threatening such real harms to them, those citizens must have the benefit of federal habeas review.

This Court's cases provide that such review is available "where—as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally." *Lehman* v. *Lycoming County Children Services Agency*, 458 U.S. 502, 510 (1982). Thus, a petitioner who is "obligat[ed] to appear at all times and places as ordered," and whose "disobedience is itself a criminal offense," is in custody. *Hensley* v. *Municipal Court*, 411 U.S. 345, 351 (1973). It would beggar belief to say that the restrictions at issue here are insufficient to satisfy that standard—petitioner must appear for re-registration multiple times every year, upon pain of reincarceration if he does not. He is not free to travel, buy a car, or move his home without doing so.

The Court's immediate intervention is thus imperative. Section 2254 is being administered in conflicting ways in scores of cases every year across the Nation. The availability of habeas relief should not turn on the arbitrariness of location in this way.

Respectfully submitted.

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