No. 20-940

In the Supreme Court of the United States

ALASKA,

Petitioner,

v.

SEAN WRIGHT,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred by finding, in an unpublished and nonprecedential memorandum opinion, that respondent satisfies the custody requirement of 28 U.S.C. § 2254.

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STATEMENT

Respondent Sean Wright was convicted in Alaska state court of sexual abuse of a minor. Pet. App. 2. He was sentenced to a term of imprisonment and required to register as a sex offender for the rest of his life. *Id.* His conviction was affirmed on direct appeal. *Id.* at 10-12.

Wright promptly filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge his Alaska conviction. Pet. App. 12. By that time, his term of imprisonment in Alaska had ended, but he was still required to register as a sex offender. *Id.* at 2. Indeed, when he filed his habeas petition, he had already pled guilty in Tennessee to the federal charge of failing to update his registration after he moved there. *Id.* Wright was sentenced on that charge to time served and five years of supervised release, a term that will expire in 2024. *Id.*

The District Court dismissed the habeas petition on two alternative grounds—that Wright was no longer "in custody pursuant to the judgment of a State court" as required by § 2254, and that even if he did satisfy this custody requirement, he had filed his habeas petition in the wrong district. *Id.* at 7-17. On the first ground, the court held that Wright "fails to establish that he meets the 'in custody' requirement of 28 U.S.C. § 2254," because his Alaska prison term had ended. *Id.* at 16. On the second ground, the court held that "[e]ven assuming that Wright may be considered currently in custody, it appears that the proper procedure for Wright to challenge his current federal custody would be a motion filed in the Eastern District of Tennessee," *id.*, the location of his su-

pervised release, rather than in the District of Alaska.

In a short unpublished opinion, the Court of Appeals reversed on the first of the District Court's alternative holdings and remanded for further litigation on the second. *Id.* at 1-6.

First, the Court of Appeals held that Wright *was* "in custody pursuant to the judgment of a State court" under § 2254, because he was serving a term of supervised release attributable to his state conviction. *Id.* at 2-3. The court noted that "[a] petitioner subject to probation is in custody under the statute." *Id.* at 3. The court observed that Wright's supervised release (which is similar to probation) was "positively and demonstrably related to the Alaska conviction." *Id.* (brackets and quotation marks omitted). The Court of Appeals thus concluded that "the district court erred in ruling that Wright was not in custody." *Id.*

Second, the Court of Appeals remanded the case to the District Court for further consideration of the District Court's alternative holding that Wright should have sought relief in the Eastern District of Tennessee rather than in the District of Alaska. *Id.* at 4 n.1. "[T]he district court did not provide any detailed analysis of this alternative ruling and it does not appear that the parties focused on this issue in the district court," the Court of Appeals explained. *Id.* "Rather than addressing the issue as part of this appeal, we leave it to the district court to more thoroughly consider the issue on remand." *Id.*

Judge Murguia concurred to address the District Court's alternative holding. *Id.* at 5-6. She concluded

that the habeas petition was properly filed in the District of Alaska. *Id.* at 5.

The Court of Appeals denied Alaska's petition for rehearing en banc. *Id.* at 23. No judge even requested a vote. *Id.*

REASONS FOR DENYING THE PETITION

The certiorari petition should be denied, for four reasons.

First, this case would be an exceptionally poor vehicle for answering the Question Presented. The Court of Appeals' opinion is unpublished and nonprecedential. There is no final judgment below. And the Court of Appeals' decision rested on just one of the two grounds offered by Wright, so this Court's intervention would be unlikely to affect the outcome of this case.

Second, there is no conflict among the Courts of Appeals. Alaska misconstrues the holdings of the cases which it claims conflict with the decision below.

Third, the decision below does not conflict with any decisions of this Court. Alaska is mistaken in alleging that it does.

Finally, this issue appears to arise extraordinarily rarely. A decision in this case would have little or no effect on other cases.

I. This case is a very poor vehicle for addressing the Question Presented.

It would be hard to find a worse vehicle than this case for deciding the question that Alaska has presented.

To begin with, the Court of Appeals' decision is unpublished and non-precedential. In a future case, if a different panel of the Ninth Circuit wants to ignore this decision and decide the issue differently, it can. There is no need for this Court to intervene.

Second, there is no final judgment below. The Court of Appeals reversed the District Court's dismissal of the habeas petition and remanded for further litigation on the District Court's alternative holding. This further litigation has not yet taken place. As of now, the District Court has neither granted nor denied Sean Wright's petition for a writ of habeas corpus. Once the District Court takes either of these actions, if the case climbs back up the appellate ladder, that will be the time for the Court to consider whether certiorari is warranted. But we are not there yet. If the Question Presented is important enough to justify review, it will recur in future cases where there has been a final judgment. Any such case would be a better vehicle than this one.

Moreover, because we do not yet have a final judgment, we do not know whether a decision from this Court could have any effect on the outcome of this case. If the District Court on remand adheres to its alternative holding—that Wright should have filed his habeas petition in the Eastern District of Tennessee—it will make no difference whether Wright is in or out of custody, because his habeas petition will be denied either way. If this issue is important enough to require this Court's intervention, it will recur in cases where it is outcome-determinative.

Alternatively, if on remand the District Court determines that it does have jurisdiction to consider Wright's habeas petition, the District Court may nevertheless deny the petition on the merits. If so, the custody question will likewise have no bearing on the outcome of this case. Wright, of course, maintains that his habeas petition is meritorious, but the vast majority of habeas petitions are denied, so the odds of success are low. These considerations counsel in favor of letting the District Court finish its work.

This case poses a third vehicle problem as well. In the Court of Appeals, Wright advanced *two* reasons he satisfies the custody requirement of § 2254. The Court of Appeals agreed with Wright's first argument, so it had no occasion to address his second. Wright's second argument was that the sex offender registration requirements to which he is subject under his original Alaska conviction are so onerous that they constitute custody independent of Wright's federal supervised release conditions. Wright Ct. App. Br. 17-26. The Third Circuit reached this conclusion regarding Pennsylvania's registration requirements in *Piasecki v. Court of Common Pleas*, 917 F.3d 161 (3d Cir. 2019), cert. denied, 140 S. Ct. 482 (2019). If this Court were to grant certiorari and reverse, the Court of Appeals would then have to consider whether Wright nevertheless satisfies the custody requirement for this second reason. Once again, the Court's intervention is unlikely to affect the outcome.

Moreover, if this Court grants certiorari, Wright would be entitled to defend the judgment below on this alternative ground, even though it was not considered by the Court of Appeals. *14 Penn Plaza LLC*

v. Pyett, 556 U.S. 247, 273 (2009). Alaska makes no claim that this separate issue is suitable for certiorari. There is no significant disagreement among the lower courts on this question, because it depends heavily on the specific registration requirements imposed by each individual state. In addition, the Court would be addressing the question in the first instance. But whether a state's sex offender registration requirements are "custodial" is a fact-specific question, which the Court would have to answer based on an inadequate record because the issue was never confronted by the lower court.

For these reasons, this case would be a very poor vehicle for addressing the Question Presented.

II. The Courts of Appeals are not in conflict.

Alaska errs in alleging, Pet. 9, a conflict between the decision below and cases from the Third, Sixth, and Seventh Circuits. In fact, there is no conflict. These cases addressed different questions than the decision below.

In *Piasecki v. Court of Common Pleas*, 917 F.3d 161, 163 (3d Cir. 2019), cert. denied, 140 S. Ct. 482 (2019), the Third Circuit held that sex offender registration requirements entailed by a state sentence "were sufficiently restrictive to constitute custody" under § 2254. In *Piasecki* the Third Circuit had no occasion to decide the question on which Alaska seeks certiorari—whether a petitioner subject to a term of supervised release for failure to register as a sex offender after traveling to a new state is in custody "pursuant to" his original state conviction. This question did not arise in *Piasecki*, which involved a Pennsylvania petitioner who had not been convicted

of failing to register and who had not left the state. *Piasecki*, 917 F.3d at 164. *Piasecki* thus does not conflict with the decision below.

To the contrary, *Piasecki* actually supports Wright's alternative argument that the conditions of registration resulting from his original Alaska conviction satisfy the custody requirement of § 2254. Indeed, for this reason, Wright cited *Piasecki* extensively in his briefing before the Ninth Circuit. Wright Ct. App. Br. 19-25.

The decision below also does not conflict with *Hautzenroeder v. Dewine*, 887 F.3d 737 (6th Cir. 2018). In *Hautzenroeder*, the Sixth Circuit held that Ohio's sex offender registration requirements are not sufficiently onerous to constitute custody under § 2254. *Id.* at 740-41. The Sixth Circuit did not consider whether a petitioner subject to a term of supervised release for failure to register as a sex offender is in custody "pursuant to" the predicate conviction. Indeed, *Hautzenroeder* supports the decision below, because in *Hautzenroeder* the Sixth Circuit contrasted Ohio's sex offender registration requirements with parole, which it noted *does* constitute custody. *Id. Hautzenroeder* thus does not conflict with the decision below.

There is likewise no conflict with *Stanbridge v. Scott*, 791 F.3d 715 (7th Cir. 2015). In *Stanbridge*, the Seventh Circuit held that a person who is civilly committed for a mental disorder after fully serving his criminal sentence is not in custody pursuant to a criminal conviction. *Id.* at 717. The court reasoned that an order requiring civil commitment is a separate judgment from the criminal conviction, so a person civilly committed is in custody pursuant to the

commitment order, not to the criminal conviction. *Id.* at 721. The Seventh Circuit had no occasion to consider the situation of a person convicted of failing to register as a sex offender, a requirement that follows automatically from the criminal conviction and that does not require the entry of a separate judgment, as civil commitment does.

The Court of Appeals cases cited by Alaska thus do not conflict with the decision below.

Nor do these Third, Sixth, and Seventh Circuit decisions conflict with any published Ninth Circuit precedent. Alaska claims, Pet. 9, that they conflict with *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), which holds that "a habeas petitioner is in custody for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction is a necessary predicate to the failure to register charge." *Id.* at 1019 (internal quotation marks omitted). But this holding is not inconsistent with *Piasecki*, *Hautzenroeder*, or *Stanbridge*, none of which addressed this issue.

Alaska correctly observes, Pet. 9, that *Zichko* has been criticized by the Third Circuit, but this criticism appeared only in an unpublished, nonprecedential opinion. *See Bonser v. District Attorney*, 659 F. Appx. 126, 129 n.4 (3d Cir. 2016). The law in the Third Circuit is found in *Piasecki*, a published opinion from 2019, not in *Bonser*.

Indeed, no Court of Appeals has ever disagreed with *Zichko* in a precedential opinion. *Zichko*, which is now nearly twenty years old, appears to be the only published opinion in which any of the Courts of Appeals has ever addressed the issue considered in

that case. If the issue is important it will arise in future cases. The Court can wait to hear from other circuits before weighing in.

Alaska concedes, in any event, that the Ninth Circuit itself has turned away from *Zichko* in subsequent published opinions. Pet. 11 (citing *Contreras v. Schiltgen*, 122 F.3d 30, 33 (9th Cir. 1997); *Allen v. Oregon*, 153 F.3d 1046, 1048 (9th Cir. 1998); and *Resendiz v. Kovensky*, 416 F.3d 952, 957 (9th Cir. 2005)). If Alaska is correct in finding "internal inconsistency within the Ninth Circuit," Pet. 11, that is a matter for the Ninth Circuit to resolve en banc. There is no need for this Court's intervention.

III. The decision below is not contrary to any decisions of this Court.

Alaska also errs in suggesting, Pet. 8-9, 14-16, that the decision below is contrary to *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam), and *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394 (2001).

In *Cook*, the issue was "whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Cook*, 490 U.S. at 492. The Court held that such a petitioner is not in custody, because he "suffers no present restraint from a conviction." *Id.* Because virtually all states impose longer sentences on repeat offenders, the Court observed, "a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the

conviction for which it was imposed at any time on federal habeas." *Id.*

The decision below is not contrary to *Cook*. The Court of Appeals held that Sean Wright is in custody because he is on supervised release, not merely because he fears the possibility of an enhanced sentence for some not-yet-committed future offense.

Nor is the decision below contrary to *Coss*, which held that where a prior "conviction is later used to enhance a criminal sentence" under a repeat-offender statute, "the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Coss*, 532 U.S. at 403-04. Sean Wright is not trying to challenge a subsequent sentence that was enhanced under a repeat-offender statute. He is challenging his original conviction.

This case involves circumstances nothing like the ones present in *Cook* and *Coss*. Sean Wright filed a habeas petition at the earliest opportunity, soon after the Alaska Supreme Court affirmed his conviction on direct appeal. Because of this conviction, Wright is still subject to a lifetime of sex offender registration. For this reason alone, he satisfies the custody requirement of § 2254. Wright is also serving a term of supervised release as a direct consequence of his state conviction. For this reason as well, he satisfies the custody requirement of § 2254.

If Wright had sought to challenge his *second* conviction, the one in federal court, he would have filed a motion under 28 U.S.C. § 2255. But he is challenging his *first* conviction, the one in state court, which requires him to submit to onerous registration re-

quirements for the rest of his life. Alaska is simply wrong in claiming that the validity of Wright's state conviction "is irrelevant to" his obligation to register. Pet. 24. If Wright's state conviction is invalid, he will have no obligation to register. The Court of Appeals thus correctly determined that he satisfies the custody requirement of § 2254.

IV. This issue arises very rarely.

Both state-mandated sex offender registries and prosecutions for failure to register as a sex offender have been commonplace since the 1990s. But in all that time there have been scarcely any habeas cases brought by petitioners whose basis for asserting jurisdiction is premised on a subsequent prosecution for failure to register as a sex offender.

It is easy to understand why. It would take a highly unlikely combination of circumstances for the custody question to present itself in this way. Several unusual events would have to take place within a short span of time.

First, a petitioner convicted of a sex offense would have to serve the entire term of incarceration and be released from parole and probation obligations within one year from the date the conviction has become final (excluding tolled periods), as required by 28 U.S.C. § 2244(d). This is an unlikely scenario given the lengthy sentences typically imposed for sex offenses. Most habeas petitioners challenging convictions for sex offenses will still be incarcerated by the time their cases are heard.

Second, in the unusual event that the petitioner has served the term of incarceration and completed any post-release supervision prior to the expiration

of the statute of limitations for habeas, the petitioner would then have to move to a different state and fail to comply with the sex offender registration laws of that jurisdiction.

Third, after all of the above, the petitioner would have to be prosecuted and convicted in the other jurisdiction for failure to register as a sex offender, which again would have to occur before the one-year limitations period expires.

Finally, the defendant would have to file a federal habeas petition before the expiration of the statute of limitations.

This sequence of events does not appear to happen very often. On this point, silence speaks volumes. The Court has heard from twenty-one states—Alaska and the twenty state amici. Yet none of the states cites a single case other than this one in which this issue has arisen. If the issue arises more often in the future, there will be ample time for the Court to address it then. For now, however, it appears that a decision about Sean Wright's custody for habeas purposes will affect precisely one person, Mr. Wright, and no one else.

The same goes for amici's imagined dystopia, Amici Br. 10-14, in which state lawyers must fly all over the country to defend convictions in far-flung circuits. As far as we know, this has never happened in the real world, not even once. If this problem ever does arise, the Court can address it then.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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