No. _____

In The
Supreme Court of the United States

STEPHEN ROBERT DECK,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether California's sex offender registration mandates under Calif. Penal Code section 290 place sufficiently significant burdens on a registrant's liberty so as to allow a federal habeas corpus petitioner standing to file a timely federal habeas petition under 22 U.S.C. 2254; that is, whether the registration burdens "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).

Lower courts are divided on whether a person is "in custody" after being sentenced to sex offender registration requiring lifetime physical appearances at a police station for in-person reporting and registering, fingerprinting, photograph-taking, limitations on travel, and other restrictions, all under threat of a criminal sanction for non-compliance. For habeas purposes, petitioner is in custody, no matter whether registration is retributive, remedial, rehabilitative, administrative, civil, or as a number of state courts have held, criminal.

PARTIES TO THE PROCEEDING

Petitioner Stephen Deck was petitioner in the district court proceedings and appellant in the Ninth Circuit Court of Appeals proceedings. Respondent State of California through Attorney General Rob Bonta was the respondent in the district court proceedings and appellee in the court of appeals proceedings.

RELATED CASES

Deck v. California, habeas petition filed in the U.S.D.C. Central Dist. CA, No. 21-cv-01525-MWF (SP)). Judgment entered September 27, 2022.

Ninth Circuit Court of Appeal, *Deck v. California* (U.S.C.A. No. 22-55923) panel memorandum of the Ninth Circuit Court of Appeal on September 27, 2023. Petition for rehearing was denied on October 13, 2023.

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INTRODUCTION

Petitioner sought to challenge his arguably constitutionally defective state conviction but was denied entry into the province of federal habeas corpus. This bar to the federal courthouse emanates from a ruling that petitioner is not in custody of the State of California despite lifetime restraints on his liberty from his probationary sentence to sex registration followed by lifetime burdens on freedom of movement, association, and the like. Dismissal of his timely filed petition in federal district court was solely grounded on the crabbed interpretation of custody stemming from the many restraints from sex registration.

Fundamental requisites of justice require a forum to vindicate federal constitutional rights. Precluding federal review via the unrealistically narrow line drawing of the "custody" element demeans the Great Writ. "The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before [finding] . . . congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland v. Florida*, 560 U.S. 631, 649 (2010).

Here, a "rule of preclusion [of jurisdiction] would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights." *Haring v. Prosise*, 462 U.S. 306, 322 (1983).

As this Court stated in *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968): "There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court." Petitioner "should not be thwarted now and required to bear the consequences of [an] assertedly unlawful conviction simply because the path has been so long that he has served his sentence." *Id*. at 239. Petitioner Deck will live under the burdensome restraints on his liberty for life without ever having had federal review of his constitutional claims attacking this state conviction and sentence to registration.

OPINION BELOW

On September 5, 2023, the Ninth Circuit Court of Appeal issued its unpublished panel memorandum, *Deck v. California* (U.S.C.A. No. 22-55923), 2023 U.S. App. LEXIS 23511, reprinted in Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2023, and a timely petition for rehearing was denied on October 13, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

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 OF THE CASE

A. Case History.

Petitioner was arrested on February 18, 2006, for attempted child molestation as part of a sting

operation in which a woman posing as 13-year-old "Amy" engaged in a week of online chats with petitioner ending in petitioner being arrested at a public park on his way to an initial meeting with Amy. Petitioner defended that on the day of his arrest he made it plain to Amy in recorded texts and phone calls that he was ill and did not want the meeting. Upon her importuning him to meet, he agreed, but stated it would have to be at a public location, that it would be brief, and that nothing was going to happen because he was ill.

Charged with one count of an attempted molest under California Penal Code sections 288(a) and 664 occurring "on or about" February 18, 2006, the first jury convicted after making manifest its difficulties with the temporal element of the charge as compounded by the prosecutor's errant and expansive description of the element. The conviction was affirmed by the California Court of Appeal on May 24, 2011. No. G043434; 2011 Cal. App. Unpub. LEXIS 3859. In affirming, the State opinion noted the prosecutor misstated the time requirement for an attempt by stating the attempt could be at some vague time in the future. However, it found the error harmless.

In federal court, the case was reversed. The Ninth Circuit found the prosecutor's misstatement on the temporal element of the attempt expanded it to a time days or weeks after the charged date of "on or about February 18, 2006." This was held a prejudicial denial of due process. *Deck v. Jenkins*, 814 F.3d 954, 985-986 (9th Cir. 2016).

On remand to the California Superior Court, the petitioner was again convicted following a jury trial. By this time, he had fulfilled all the conditions of his original probation grant, the only remaining part of the sentence was lifetime registration and its burdens under Penal Code section 290. Petitioner unsuccessfully appealed his conviction in state court arguing that, as in the first trial, the instructions and prosecutor's argument allowed petitioner to be convicted even if the jury was not sure whether he intended to commit a lewd act "on the night he met Amy" or at some "reasonably close" future time. See *Deck v. Jenkins*, supra, 986.

Petitioner's appeal in state court was unsuccessful. *People v. Deck*, 2020 Cal. App. Unpub. LEXIS 2941. On July 22, 2020, an order denying the petition for review was filed by the California Supreme Court, No. S262783, 2020 Cal. LEXIS 4894. A petition for writ of certiorari to this Court was denied on December 7, 2020. No. 20-419.

On September 16, 2021, petitioner filed a habeas corpus petition in the Central District of California under 28 U.S.C. 2254 raising three constitutional claims that undermined his conviction: (1) the trial court erroneously expanded the temporal element of the charged attempt offense; (2) the trial court failed to give a unanimity instruction; and (3) the trial court failed to suppress petitioner's statements taken in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Maryland v. Shatzer*, 559 U.S. 98 (2010). Given the dismissal by the district court for

lack of custodial jurisdiction, those claims were not addressed, much less adjudicated.

On September 27, 2022, the district court in granting a certificate of appealability [COA] stated:

> After duly considering petitioner's contentions in support of his argument that the court has jurisdiction over his claims, including in his objections to the Report and Recommendation, the Court finds that petitioner has made the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" that it lacks jurisdiction over petitioner's claims. Specifically, petitioner's counsel engaged in a sophisticated analysis of the pertinent case law. Although this Court was not persuaded, other jurists of reason might well be. [¶] Moreover, *given how stringent the California regime is, there should be some sort of appellate review.* Order granting the COA, App. C, App. 8-9. Italics added.

B. Restraints on Liberty.

Under California law (Penal Code [PC] section 290), the restraints placed on persons convicted of a sex offense are far reaching. As one appellate court described it:

> the [California] Legislature established a complete system for regulating a sex offender's daily life . . . these statutes regulate much more than the geographic restrictions imposed on a

> sex offender. They regulate numerous aspects of a sex offender's life so that both law enforcement and the public can monitor the sex offender on a daily basis. They also restrict the places a sex offender may visit and the people with whom he or she may interact. These Penal Code sections regulate a sex offender's duty to inform law enforcement where he or she resides, law enforcement's ability to track a sex offender's movement through a global positioning device, where and with whom a sex offender may reside, what sort of jobs or volunteer positions a sex offender may accept, and, most importantly for this case, the public and private places a sex offender may visit.

People v. Nguyen, 222 Cal.App.4th 1168, 1181 (2014).

A defendant's sentence to sex registration is manifestly a punitive measure as exemplified by registration advice that must be part of any guilty plea proceeding because it is a "direct consequence" of the plea. *People v. McClellan*, 6 Cal.4th 367, 376 (1993). Registration requirements constitute a "grave and direct consequence of [the defendant's] guilty plea." *Ibid.*, quoting *In re Birch*, 10 Cal.3d 314, 322 (1973).

Petitioner fully served every aspect of his five-year probationary sentence without a problem (concluding in 2015). But the lifetime registration requirement and attendant prohibitions remain significant restraints on his freedoms. These restraints include:

(1) He must register in person with the Chief of Police in the city in which he resides, or the sheriff of

the county. Pen. Code sec. 290(b). This is to be done at a minimum each year within five days of his birthday for the rest of his life. PC 290(c)(1); PC 290.012. (There may be a potential for discretionary relief after 20 years under PC 290.5(a) but that date would not arrive until the mid-2030s for petitioner and without any assurance he would get such relief even with a spotless record.)

(2) Petitioner must sign a statement giving information as required by the Department of Justice including the name and address of petitioner's employer, and the address of the place of employment if that is different from the employer's main address.

(3) He must provide fingerprints and a current photograph taken by the registering official each year. Petitioner's registration filing states that he is required to submit DNA samples, as well as fingerprints and full palm prints. (PC §§ 296, 296.2)

(4) He must provide the license plate number of any vehicle owned by, regularly driven by, or registered in his name.

(5) He must provide a signed statement in writing acknowledging that he is required to register and that he must update the information. Failure to register or violate any provision of the registration requirements is a felony punishable by up to three years in prison. PC 290.018(b).

(6) He must acknowledge that he may have a duty to register in any other state where he or she may relocate.

(7) He must provide copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing petitioner's name and address, or any other information that registering officials believe is reliable.

(8) Petitioner must have his name, address, physical description, aliases, date of birth, criminal history, and photo placed on the world wide web (internet). PC § 290.46 mandates the California Department of Justice (CA DOJ) to notify the public about registered sex offenders at https://www.meganslaw.ca.gov. The site includes a map to petitioner's residence along with his address.

(9) Petitioner is precluded from checking the website. It is a crime for petitioner to access "the websites search functionality" PC § 290.46, subd. (k).[2] Thus, he cannot check it for accuracy.

(10) The California Department of Justice is required to post petitioner's STATIC risk assessment on the website. Penal Code § 290.03-290.09. It has been over 17 years since petitioner's offense conduct and yet he's never been reassessed to show that his risk level is negligible.

(11) With his PC 288(a) offense of conviction, he is ineligible for statutory expungement relief under PC 1203.4(b) (PC section 290.007), or a certificate of rehabilitation under PC 4852.01(c).

(12) Petitioner must notify authorities of any change of address in person. PC 290(b). Per his registration papers: "Upon coming into, or when changing my residence address within a city and/or county in which I am residing, I must register or reregister in person, within five (5) working days, with the law enforcement agency having jurisdiction over my residence." PC §§ 290, 290.013. ER-129-130. (ER stands for Excerpt of Record in the Ninth Circuit appeal below.)

(13) Petitioner must notify California of any move out of state as well as the state to which he moves.

(14) Petitioner's right to foreign travel is burdened under Title I of the Adam Walsh Child Protection and Safety Act of 2006. The Sex Offender Registration and Notification Act (SORNA), requires that registered sex offenders inform registry officials of any intended travel outside of the United States at least 21 days prior to the start of that travel and to the U.S. Marshals Service. "When a notification of international travel is received, USMS-NSOTC will provide the notification information to INTERPOL Washington, who will then communicate it to law enforcement partners at the intended foreign travel destination(s)." https://smart.ojp.gov/sorna/notice-international-travel. As a result of these notifications, registrants are banned

from entry into numerous countries. See https://registranttag.org/resources/travel-matrix/. An added problem is that if the country of destination has not announced whether it bans registrants, the registrant faces huge risks traveling there.

(15) He is ineligible for TSA pre-check on airplane boarding. ER-78-79.

(16) His passport must bear a "scarlet letter" equivalent – an indication that he is a registered sex offender. 22 U.S.C. § 212b(b)(1) states: "the Secretary of State shall not issue a passport to a covered sex offender unless the passport contains a unique identifier and may revoke a passport previously issued without such an identifier of a covered sex offender." The language is: "The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 United States Code Section 212b(c)(1)." See https://www.fd.org/news/us-passports-identify-child-sex-offenders.

(17) He cannot serve on a California jury even though most other felons are able to serve. Calif. Code of Civil Proc. section 203(a)(10). Under section 203(a) subsection 11, excluded for jury service are: "Persons who are currently required to register as a sex offender pursuant to Section 290 of the Penal Code based on a felony conviction."

(18) Petitioner cannot enter a school ground without lawful business there and with advance written permission of the school's chief administrator. PC 626.81.

(19) Should petitioner become homeless, California law imposes a host of additional reporting obligations per Penal Code section 290.011(a), including personal registration every thirty days.

(20) Registration requires that he be forbidden from admission to any "federally assisted housing." 42 U.S.C. § 13663(a). ER-70.

(21) California Health and Safety Code sec. 1564(a) forbids registrants from residing in a community care facility within one mile of an elementary school.

C. Factual and Procedural Background.

After pleading not guilty, petitioner had two jury trials on a single charge of attempted lewd and lascivious conduct with a minor under California Penal Code § 288(a). The first jury trial took place on December 10, 2009, through a guilty verdict on December 22, 2009. On March 19, 2010, he was sentenced to probation for five years on various conditions including that he serve 365 days in jail, and register as a sex offender for life under California Penal Code section 290. (Superior Court of Orange County, California, No. 06HF0372.) See SER 4-5, Appellee's Supplemental Excerpts of Record.

Petitioner appealed to the Fourth Appellate District, Div. 3. The California Court of Appeal's unpublished decision affirming the conviction was filed on May 24, 2011. (No. G043434; 2011 Cal. App. Unpub. LEXIS 3859.)

Petitioner filed a petition for review in the California Supreme Court (S194226) which denied the petition on August 31, 2011.

Petitioner then filed a petition for writ of habeas corpus in the federal district court which was denied. However, on appeal, the Ninth Circuit reversed that decision and vacated petitioner's conviction based on a constitutional error in the prosecutor's misstatements of the temporal element of the attempt charge. *Deck v. Jenkins*, 814 F.3d 954, 986-986 (9th Cir. 2016).

The case was then retried in the Orange County Superior Court and petitioner was convicted of the same count on December 19, 2019. Having fulfilled the conditions of his probation, the Court reimposed the previous sentence including the only remaining condition of his serving lifetime registration under Penal Code section 290.

Petitioner filed an appeal raising the three constitutional issues cited above. The California Court of Appeal on May 12, 2020, affirmed the conviction in an unpublished opinion. (*State of California v. Deck*, Fourth Appellate District, Div. 3, No. G057168, 2020 Cal. App. Unpub. LEXIS 2941.)

Petitioner filed a petition for review in the California Supreme Court. On July 22, 2020, an order denying the petition for review was filed by that Court. (No. S262783, 2020 Cal. LEXIS 4894.)

Petitioner then filed a petition for certiorari in this Court raising the three constitutional issues which

was denied on December 7, 2020. (No. 20-419, *Deck v. California*, 141 S. Ct. 899 (2021)).

On September 9, 2021, petitioner filed his federal habeas corpus in the Central District of California raising the three constitutional claims that should render improper his underlying conviction. On September 27, 2022, the District Court entered its order dismissing habeas petition for want of jurisdictional custody. (U.S.D.C. Central Dist. CA, No. 21-cv-01525-MWF (SP)). App. B. It did issue a COA on the custody issue on the same date. App. C.

D. Ninth Circuit Ruling.

On direct appeal, on September 5, 2023, the Ninth Circuit Court of Appeal affirmed in an unpublished panel memorandum in *Deck v. California* (U.S.C.A. No. 22-55923), App. A.

The panel's memo focuses on what it labels a lack of severe and "significant" restraints on movement:

> Whether sex offender registration conditions are sufficiently restrictive to constitute "custody" depends primarily on "'whether the legal disabilit[ies] in question somehow limit[] the putative habeas petitioner's movement' in a 'significant' way." *Id.* at 1242 (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183-1184 (9th Cir. 1998).)

App. A p. 2.

The panel found "most of these collateral consequences have little to no bearing on Deck's freedom of movement, and none of them severely and immediately restrain his physical liberty." App. p. 3. Also, citing its own cases:

> *Henry* and *Munoz* both held, after *Dow* [all discussed infra], that a reasonable requirement to re-register in person, without more, does not render a petitioner "in custody." See *Munoz*, 17 F.4th at 1246; *Henry*, 164 F.3d at 1242. Deck has not shown that the frequency with which he is required to re-register in person renders him "in custody."

App. p. 4.

This Court's seminal authority, *Jones v. Cunningham*, 371 U.S. 236 (1963), cast the standard not as one requiring a "severe and immediate" restraint, but rather as one that "significantly restrain[s] petitioner's liberty to do those things which in this country free men are entitled to do[.]"

SUMMARY OF THE ARGUMENT

The rigors of lifetime registration have expanded far beyond simple notifications to the local police department of one's location. For petitioner, among many requirements noted above, they mandate restrictions on locations he may visit and require appearances at the police station to, at least annually, be subject to

questions, fingerprinting, and photographing for the internet with a map to his home.

Many state courts have found these requirements punitive and, given the lack of risk to the public, unconstitutional. At least one federal circuit has found similar registration conditions constitute custody for habeas purposes. Here, petitioner had no prior record, was granted probation, successfully completed it, and has lived for almost two decades under court and registration restrictions. The conditions imposed upon him are punitive and constitute significant restraints on his liberty to do what free people are entitled to do. He, and others like him, are in "custody" for federal habeas purposes.

REASONS FOR GRANTING THE PETITION

The Court's review is needed to resolve a circuit split on an issue of widespread practical importance concerning thousands of people nationwide who are under registration requirements. Like petitioner, they are rendered powerless under section 2254 to challenge constitutional defects in their underlying state convictions because the impediments on their liberty from sex offender registration are deemed too insignificant to constitute custody. This case is a suitable vehicle for review of that issue. The decision below is wrong and should be corrected.

A. Divided Case Authorities, Federal and State.

1. Federal Cases.

To be sure, the case law on this subject is mixed, but the emergent trend, especially in the states, is to find sex registration as a restraint on liberty. Indeed, they go so far as to deem it punishment. If registration is criminal punishment, perforce, it significantly intrudes on individual liberty. While petitioner need not prove punishment from registration, but rather, a restraint on liberty, the state cases are instructive on the issue.

In *Smith v. Doe*, 538 U.S. 84 (2003), this Court rejected a claim that Alaska violated the Ex Post Facto Clause by applying its newly enacted registry law to those convicted before its enactment. However, *Smith* noted that the Alaska law did not resemble parole because registrants were "free to move where they wish and to live and work as other citizens," and because *they were not required to make periodic updates with law enforcement at a police station in person*. *Id*. at 100, 101-102. (Unlike petitioner's requirements.)

Piasecki v. Court of Common Pleas, 917 F.3d 161, 170 (3d Cir. 2019), held sex registration warranted a finding of restraint to support habeas jurisdiction, holding that the state's ability to compel a petitioner's attendance weighs heavily in favor of concluding that the petitioner was in custody. Further, Piasecki was not free to "come and go as he please[d]." Any change of address, including even a temporary stay at a different

residence, requires an accompanying trip to the State Police barracks within three business days. He was required to regularly report to police if he had no address and became homeless. Mr. Piasecki's conditions which were found sufficient to confer jurisdiction included that he:

> "register in-person with the State Police every three months for the rest of his life," and was required to "appear, in-person, at a registration site" any time he wanted to leave home for more than seven days, travel internationally, change his residence, change his employment, matriculate or end enrollment as a student, add or change a phone number, change ownership of a car, or add or change any email address or online designation, among other things. *Id*. at 917 F.3d 164-165, 170. He was also permitted no "computer internet use." *Id.* at 917 F.3d 170.

These are similar to those petitioner lives under. They constitute a "non-negligible restraint on physical liberty," that is, they are a "direct consequence of [the] conviction" being challenged. *Piasecki*, supra at 166, quoting *Stanbridge v. Scott*, 791 F.3d 715, 719 (7th Cir. 2015).

Piasecki 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 . . . 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. 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 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)).

To be sure, other cases disagree and 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 its requiring 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.

The Sixth Circuit reaffirmed *Hautzenroeder in Corridore v. Washington*, 71 F.4th 491 (6th Cir. 2023), dismissing any "argument based on *Piasecki*" as "unpersuasive." *Id.* at 499 n.5. However, Judge Moore, in a strong 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, Seventh and Tenth Circuits agree with the Sixth on registration requirements not amounting to custody for habeas jurisdiction. *Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012); *Virsnieks v. Smith*, 521 F.3d 707, 720 (7th Cir. 2008); *Calhoun v. Attorney General of Colorado*, 745 F.3d 1070, 1074 (10th Cir. 2014).

But state rulings are increasingly finding that lifetime sex registration and attendant obligations are punitive mandates of the State. Such a characterization should be definitive for holding that registration satisfies the habeas custody element since registration regimes are justified as merely regulatory collateral consequences of a conviction and not punishment. *E.g., Williamson v. Gregoire*, 151 F.3d 1180, 1183, 1184 (9th Cir. 1998) (Washington sex registration law is "regulatory and not punitive," and therefore not punishment.).

The lack of any individualized risk assessment over time to show the public safety need for continued registration further demonstrates the punitive and burdensome character of lifetime registration restraints. As stated in *People v. Betts*, 507 Mich. 527, 557 (2021): "The 2011 [Michigan] SORA was imposed on offenders

for the sole fact of their prior offenses and made no individualized determination of the dangerousness of each registrant, indicating that SORA's restrictions were retribution for past offenses rather than regulations to prevent future offenses."

Here, petitioner's alleged conduct was in 2006. His risk assessment was stated as "average" in 2010. ER-67. Having completed probation and therapy over the last 17 years with no issues, his risk level would be negligible. But this would not be obvious to viewers of the DOJ Megan's law website when looking at petitioner's photo, crime data and the map to his home. Elsewhere on the site, in the fine print, the website states: "As offenders successfully live in the community without incurring new offenses, their recidivism risk declines. In general, the expected sexual offense recidivism rate is reduced if the offender has over two years of offense-free behavior in the community. The longer it has been since the offender's sex offense conviction, the lower the expected recidivism rate, if he has not committed another sex offense or a new serious or violent offense." Quoted from the California Megan's Law Website, Risk Assessment FAQ at https://www.meganslaw.ca.gov/FAQ.aspx.

Data collected over the years shows that sex offenders who remain offense-free over time are unlikely to reoffend. In other words, as the California Department of Justice states, "Once a sexual offender, not always a sexual offender." See Calif. DOJ risk assessment chart and attendant note at https://www.meganslaw.ca.gov/SexOffenders_RiskAssessment.aspx. After

seventeen years, a probationary one-time offender like petitioner who is crime free has no more likelihood of re-offending than people without a sex offense history. Ignoring this means that petitioner must unnecessarily undergo the rigors of registration restraints on his liberty despite not being a risk to the public.

In *Dow v. Circuit Court*, 995 F.2d 922 (9th Cir. 1993), Mr. Dow had completed his drunk driving sentence (a $250 fine and ninety-day license suspension). The only outstanding requirement was that he at some time attend fourteen hours of alcohol rehabilitation classes. That obligation was hardly one that *severely and immediately* restrained Dow's liberty, yet it was deemed sufficient to constitute custody and confer federal habeas jurisdiction. *Id*. at 923. See also *Barry v. Bergen County Probation Dep't*, 128 F.3d 152, 161 (3rd Cir. 1997) ("an individual who is required to be in a certain place – or in one of several places – to attend meetings or to perform services, is clearly subject to restraints on his liberty not shared by the public generally").

Dow reasoned that: "[t]he sentence in this case, requiring [petitioner's] physical presence at a particular place, significantly restrains [petitioner's] liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as 'custody.'" 995 F.2d at 923. But the Ninth Circuit decision here, says "the rehabilitation sentence in *Dow* specified a particular period during which the defendant was required to be at a closely supervised location from which he was not

free to leave." Appendix at p. 4. There is nothing in the *Dow* opinion that requires a time limit on when Dow had to complete the class or anything about "a closely supervised location from which he was not free to leave." All *Dow* says about this is that Mr. Dow's "class[es] could be scheduled by appellant over either a three-day or five-day period." *Id*. at 922-923.

What *Dow* also states is that Mr. Dow "'cannot come and go as he pleases.' *Hensley*, 411 U.S. at 351. Moreover, appellant suffers a greater restraint upon his liberty – mandatory class attendance – than the restraint suffered by a person who is released upon his own recognizance. See *id*. at 351-353 (holding that person released on recognizance is 'in custody')." 995 F.2d 923.

As one commentator aptly wrote about *Dow* and sex registration: "With the outer limits of the writ expanding to include fourteen hours of mandatory alcohol rehabilitation classes, it seems ridiculous that the sex offender registration statutes should stand just beyond the [habeas jurisdictional] limits." Kimberly Murphy, "The Use of Federal Writs of Habeas Corpus to Release the Obligation to Report under State Sex Offender Statutes: Are Defendants 'In Custody' for Purposes of Habeas Corpus Review?" 2000 L. Rev. M.S.U.-D.C.L. 513, at 535 (Summer, 2000 [Michigan State University-Detroit College of Law]).

The panel's reliance on *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999), is misplaced. The court there noted the requirements that California registrants

were required to obey in 1997. Registrants then only had to annually provide to the local law enforcement a home address, background information, fingerprints, and a photograph plus re-registration upon change of address. Those requirements are nothing close to the stringent requirements of California law now piles on registrants which include mandatory yearly re-registrations at the police station and a host of other mandates and prohibitions including website publication of petitioner's picture, a description of his conviction, his home address and a map of how to get there.

Indicative of the absurdity of rulings in this area is *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), where the Ninth Circuit found a petitioner seeking to challenge a 1987 rape conviction satisfied the habeas custody requirement despite having completed all his sentence. Why? Because he was incarcerated for failing to comply with a sex offender registration requirement resulting from that conviction. *Id*. at 1019-1020. "We now hold 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. No one, including petitioner, should have to violate state registration requirements in order to attain "custody" status to file a federal habeas petition to vindicate his constitutional rights to a fair state trial.

2. State Cases.

As noted, state cases have increasingly found sex registration mandates are so restrictive on individual liberty that they rise to the level of punishments. See *State v. Hinman*, 412 Mont. 434, 438, 530 P.3d 1271 (2023) ("We reverse, and we hold that SVORA, as amended since 2007, is punitive in nature"); *Powell v. Keel*, 433 S.C. 457, 464, 466 (2021), the South Carolina Supreme Court determined that mandatory lifetime sex offender registration for any offender violates due process if there is no opportunity to petition to deregister following judicial review; *Doe v. State*, 189 P.3d 999, 1004-1006 (Alaska 2008) (Alaska's requirements deemed very restrictive because of the wide public dissemination of otherwise private information and potential ostracism from personal and professional relationships. The law "determines who must register based not on a particular determination of the risk the person poses to society but rather on the [conviction]." Accord *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 135-136 (Alaska 2019) (noting "[a] majority of states now provide for individualized risk assessment hearings under which registrants . . . can be relieved of registration obligations"); *Doe v. State*, 167 N.H. 382, 383 [111 A.3d 1077, 1081] (2015) [New Hampshire statute held violative of state law and could only be enforced against the registrant if he were promptly given an opportunity for either a court hearing or an administrative hearing subject to judicial review at which he was permitted to demonstrate that he no longer posed a risk sufficient to justify continued registration]; accord *State v. Williams*, 2011-Ohio-3374, ¶ 17 [129 Ohio St.3d 344, 348-349,

952 N.E.2d 1108, 1112]); *Commonwealth v. Baker*, 295 S.W.3d 437, 439, 444 (Ky. 2009).

Petitioner is not seeking to overturn the registration scheme in California nor is he even seeking to have it deemed "punishment." Rather, he seeks a lesser rule based on this Court's *Jones v. Cunningham* holding, that California's lifetime sex registration and its many requirements "significantly restrain[s] petitioner's liberty to do those things which in this country free men are entitled to do[.]"

Petitioner is in custody, for habeas purposes, no matter whether sex registration is labeled retributive, remedial, rehabilitative, administrative, civil, or criminal.

CONCLUSION

For all the reasons stated above, the petitioner respectfully requests that this Court grant his writ of certiorari.

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Respectfully submitted,

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