No. 18-1490

In the Supreme Court of the United States

COURT OF COMMON PLEAS OF PENNSYLVANIA, BUCKS COUNTY, *et al.*,

Petitioners,

v.

JASON PIASECKI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case concerns the Pennsylvania sex-offender registration law that was in force on December 4, 2014, when respondent filed his federal habeas petition. That law has since been repealed and replaced by a new registration law that differs in material respects. Moreover, the registration and reporting requirements under Pennsylvania's sex offender registration scheme are, as matter of state law, an element of the sentence imposed by the court of conviction. This feature of Pennsylvania law, which was an essential predicate for the Third Circuit's decision, is not broadly replicated in other States.

Against this background, the question presented is whether the requirements of a since-repealed Pennsylvania SORNA law sharply limiting respondent's freedom of movement placed him "in custody pursuant to the judgment of a State court" within the meaning of 28 U.S.C. § 2254(a).

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BRIEF IN OPPOSITION

The Third Circuit held that a now-repealed state SORNA scheme was so onerous that those subject to its registration requirements were "in custody" for purposes of the federal habeas review under 28 U.S.C. § 2254(a). For a wide range of reasons, further review of that decision is not warranted.

To begin with, any conflict among the circuits is academic. Section 2254(a) requires not only that a habeas petitioner be "in custody," but also that the custody be "pursuant to the judgment of a state court." Under the law of most States, SORNA registration is deemed not to be an element of the sentence imposed. Rather, it is a civil collateral consequence of conviction—meaning that federal habeas jurisdiction would be lacking even if the registration requirements were sufficiently severe to constitute "custody." In contrast, the Pennsylvania Supreme Court has held that SORNA registration in Pennsylvania is an element of the sentence imposed by the court of conviction. As the Third Circuit put it below, this sets Pennsylvania apart from "nearly every other state." Pet. App. 28.

Beyond that, the question whether someone is "in custody" is a fact-intensive inquiry, and the restrictions on liberty imposed by the various States' SORNA laws differ significantly from jurisdiction to jurisdiction. Most differences in outcomes on the question presented thus turn on the distinctions in the relevant state statutory schemes—as they are actually enforced—and not on differences in the courts' interpretations of Section 2254(a).

Even if the Court were inclined to consider the question presented in the State's petition, moreover, this case would be a singularly unsuitable vehicle for doing so. There is no factual record in this case because

the State opposed respondent's request to develop one. It is therefore difficult to say with certainty what the requirements of Pennsylvania's registration scheme entailed as a practical matter on December 4, 2014, when respondent filed his habeas petition. And on the face of the State's brief here, there are relevant disputes concerning the statutory scheme, which has been repealed and today applies to no one. Worse still, respondent's registration obligation will expire in a matter of months, meaning that, if the Court were to grant the petition, it also would have to address and resolve a threshold mootness question.

There is no need to rush forward with such a messy vehicle to address the fact-bound question presented in the petition. The Third Circuit is the first court to hold that the registration requirements under any State's SORNA law are sufficiently onerous to constitute "custody" for federal habeas purposes. The other circuits should be afforded the opportunity to consider the Third Circuit's reasoning in this case, as applied to other States' various SORNA schemes. Even if the question presented were worthy of review in the abstract (it is not), more suitable vehicles would arise soon enough, following further percolation.

STATEMENT

A. Statutory background

Pennsylvania's sex-offender registration scheme has been in near-constant flux for the past decade.

1. For several years prior to December 2012 (including from April 2009, when the conviction conduct occurred, through April 2010, when the sentence was imposed), Pennsylvania sex offenders were subject to registration pursuant to Megan's Law III. That law required registrants to appear in person to confirm their residential address, employment information, and

school status every 90 days, and to update their registration information within two days of a change. 42 Pa. Cons. Stat. §§ 9795.1, 9795.2, 9796 (2012). The law imposed these requirements for varying periods of time depending on the offense. *Id*. § 9795.1. Section 9798(a) of the law provided for community notification of the names, photographs, addresses, offenses, and designations of registrants. Registrants were also required to attend monthly counseling sessions. *Id*. § 9799.4. But the law did not otherwise restrict the movements or activities of registrants.

2. The Pennsylvania legislature repealed and replaced Megan's Law III in December 2012—while respondent was on probation—with the Pennsylvania Sex Offender Registration and Notification Act of 2012 (SORNA 2012). Act 111 of 2011, Pub. L. No. 446-111 (Dec. 20, 2011). The Act was a "response to the federal Adam Walsh Child Protection and Safety Act of 2006, which mandates that States impose on sex offenders certain tier-based registration and notification requirements in order to avoid * * * the loss of federal grant funding." *Commonwealth* v. *Muniz*, 164 A.3d 1189, 1203 (Pa. 2017) (footnote and citation omitted), cert. denied 138 S. Ct. 925 (2018).

SORNA 2012 established three tiers of offenses. 42 Pa. Cons. Stat. § 9799.14 (2014). Tier I offenders had to register for a period of 15 years, during which time they were required to be photographed and to verify their registration information in person at an approved site, annually. Tier II offenders had to register for 25 years and check-in for verification of registration information and a photograph every six months. And Tier III offenders had to register for life and verify their registration information and be photographed every 90 days. See *id*. § 9799.15(a), (e).

SORNA 2012 required registrants to provide significantly more detailed information than Megan's Law III. See Pet. App. 4-5. All registrants would thus have to appear in person at an approved registration site within three business days of any change to their residences, employment statuses, student statuses, telephone numbers, ownerships of a motor vehicle, e-mail addresses, and user names or other information related to internet blogs or any and all websites that allow users to leave comments. 42 Pa. Cons. Stat. § 9799.15(g) (2014).

SORNA 2012 also required all registrants to appear in person at least 21 days in advance of traveling outside the United States, and to provide dates of travel, destinations, and temporary lodging. 42 Pa. Cons. Stat. § 9799.15(i) (2014). And if a registrant did not have "a fixed workplace," he would have to register "general travel routes and general areas" where he worked, including changes to the same. *Id*. § 9799.16-(b)(9).

Failure to comply with any one of these reporting and updating requirements constituted a felony offense. 18 Pa. Cons. Stat. § 4915.1; 42 Pa. Cons. Stat. §§ 9799.21(a), 9799.25(b) (2014).

SORNA 2012 additionally required state police to create and maintain a website notifying the public of the various details of all registered offenders. 42 Pa. Cons. Stat. § 9799.28 (2014). The website included "a feature to permit a member of the public to obtain relevant information * * * based on search criteria including searches for any given zip code or geographic radius set by the user" (*id*. § 9799.28(a)(1)(i)) and "a feature to allow a member of the public to receive electronic notification when [an offender] provides [updated] information * * * [or] moves into or out of a geographic area chosen by the user" (*id*. § 9799.28(a)(1)(ii)).

SORNA 2012 provided that the registration obligation was to be imposed by the sentencing court. The court was therefore required not only to "inform the sexual offender of the duty to register," but also to "order that the fingerprints, palm prints, DNA sample and photograph of the sexual offender be provided to the Pennsylvania State Police," and officially to "classify the individual" as a Tier I, II, or III offender. See 42 Pa. Cons. Stat. § 9799.23 (2014).

3. After respondent's probation expired but while he was still subject to registration as a Tier III offender, the Pennsylvania Supreme Court held that SORNA 2012—unlike Megan's Law III—was "punitive," and therefore that its application to previously convicted offenders violated the *ex post facto* clauses of the federal and state constitutions. See *Muniz*, 164 A.3d at 1208-1218.[1]

The court observed that, unlike the Alaska registration statute that this Court addressed in *Smith* v. *Doe*, 538 U.S. 84 (2003), registrants under SORNA 2012 were "required to appear in person at a registration site four times a year, a minimum of 100 times over the next twenty-five years." *Muniz*, 164 A.3d at 1210. Accord *id*. at 1213 (SORNA 2012 and Alaska statute are "materially different"). The court held further that SORNA 2012's elaborate internet notice scheme was "comparable to [a] shaming punishment[]."

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[1] Parts V and VI of the *Muniz* opinion garnered the support of a plurality of the court. But the disagreement between the plurality and concurrence concerned only whether the Pennsylvania *ex post facto* clause is co-extensive with, or more protective than the federal clause. A majority of the court agreed that "[the 2012] SORNA is punitive and cannot be applied retroactively" under either the state or federal *ex post facto* principles. 164 A.3d at 1232-1233 (Wecht, J., concurring).

Id. at 1213. And more generally, its "mandatory [in-person reporting] conditions" and limitations on travel were "akin to probation." *Ibid*. Thus, the court held that SORNA 2012 was punitive and could not be applied retroactively to offenders convicted before its enactment without violating the state and federal *ex post facto* clauses. *Id*. at 1193.

4. In response to *Muniz*, and while respondent's appeal was pending before the Third Circuit, the Pennsylvania legislature enacted a new law (SORNA 2018). See Act 10 of 2017, Pub. L. No. 27-10 (Feb. 21, 2017); Act 29 of 2018, Pub. L. No. 140-29 (June 12, 2018). Subchapter I of SORNA 2018 applies to offenders, like respondent, who became subject to registration prior to December 20, 2012. Subchapter H applies to all individuals who became or become subject to registration after December 20, 2012. See Pet. 11.

The registration requirements under Subchapter I of SORNA 2018 mimic the requirements of Megan's Law III. See Pet. 11.

The registration requirements under Subchapter H differ in various respects from the requirements of SORNA 2012. Most notably, Section 9799.25(a.1) allows registrants to complete their mandatory registration by telephone (rather than in-person) after the first three years of registration. It also permits Tier III registrants, who previously were subject to a non-revocable lifetime registration period, to obtain registration exemptions after 25 years. See 42 Pa. Cons. Stat. § 9799.15(a.2).

B. Factual background

Respondent Jason Piasecki is a mentally disabled adult; he was 32 years old and living with his parents at the time of the alleged offenses in 2009. Jason has autism and the reading and math skills of an elemen-

tary school child. See 1/11/10 Pretrial Hrg. Tr. 176-177. He "has a difficult time with verbal information because it's hard for him to take it all in and understand the combination of the words and the social context." *Id*. at 176-177. He cannot spell words like "today" or "summer," and he cannot remember the spellings of names of people whose numbers are saved on his phone. *Id*. at 182.

On a computer in respondent's parents' home, officers found 15 short videos of child pornography, all in the form of cached "preview" files. CA3 App. 177a. In other words, the evidence reflected that the videos had been seen "on line" but not deliberately downloaded. *Ibid*. The files were found among thousands of legal images and videos saved to the hard drive of the computer. 1/12/10 Trial Tr. 60-61. Respondent purportedly made statements to the police that the videos were his (CA3 App. 178a), but he has consistently maintained that he had never searched for videos depicting children. 1/12/10 Trial Tr. 43.

C. Procedural background

1. Respondent was charged with knowing possession and dissemination of child pornography, in violation of 18 Pa. Cons. Stat. § 6312(c) and (d). The court held a bench trial, after which it acquitted on the dissemination charges but convicted on the 15 counts of knowing possession. Pet. App. 2.

The court sentenced respondent on April 26, 2010, to three years' probation and 10 years' sex-offender registration under Megan's Law III. Pet. App. 2-3.

On December 20, 2012, SORNA 2012 took effect. Before the state supreme court declared that law's retroactive application unconstitutional, the state police classified respondent as a Tier III offender, subjecting him to quarterly registration for life. Pet. App. 4.

On August 15, 2016, the Pennsylvania Supreme Court rejected the legal basis for respondent's classification as a Tier III offender, holding that offenders like respondent should be classified as Tier I offenders. See *Commonwealth* v. *Lutz-Morrison*, 143 A.3d 891 (Pa. 2016). Although the State now asserts (Pet. 10 n.2) that respondent automatically "became * * * a Tier I offender" by operation of that decision, his classification was never administratively corrected.

On February 21, 2018, SORNA 2018 took effect. Thus, respondent "once again [became] subject to a ten-year period of registration, and is required to report in person annually." Pet. 12. That period of registration will expire on May 4, 2020. See Pet. 12 n.4.

2. Respondent appealed his conviction to the Pennsylvania Superior Court, advancing three issues: (1) failure of the trial court to suppress his statements to police as involuntary and a result of custodial interrogation; (2) a due process violation in mishandling computer evidence, resulting in alteration and destruction of favorable information; and (3) insufficient evidence to prove the mens rea element of knowing and intentional possession of contraband items. The court affirmed the conviction. CA3 App. 183a.

Following denial of discretionary review by the state supreme court, respondent sought collateral relief in the Court of Common Pleas under the Pennsylvania Post-Conviction Relief Act, asserting ineffective assistance of counsel related to his assignments of error on direct appeal. CA3 App. 133a. The court held a two-day evidentiary hearing and denied relief. CA3 App. 134a.

Respondent appealed the denial of post-conviction relief. CA3 App. 194a. Shortly after the trial court entered its order, however, his term of probation expired. The Superior Court accordingly dismissed the appeal

for lack of jurisdiction in accordance with controlling state law. *Ibid*.

3. Respondent filed the present petition for a writ of habeas corpus on December 4, 2014 in the U.S. District Court for the Eastern District of Pennsylvania, while he was factually subject to registration under SORNA 2012 as a Tier III offender. The petition was referred to a magistrate judge.

a. The magistrate judge recommended dismissing the petition for lack of jurisdiction. Pet. App. 41-56.

The magistrate judge reasoned that the registration requirements under SORNA 2012 "do not provide a basis for habeas jurisdiction because they are collateral consequences and not direct consequences of the * * * conviction." Pet. App. 52. In the magistrate judge's view, "SORNA's frequent, in-person registration requirements * * * leave a registrant free to live, work, travel, or engage in any legal activities without the approval of a government official." Pet. App. 51. The magistrate judge also believed it relevant that (prior to the Pennsylvania Supreme Court's decision in *Muniz*) "Pennsylvania courts have uniformly held that the current SORNA registration requirements are remedial and not punitive in nature." *Ibid*. The magistrate judge thus recommended dismissing the petition for lack of jurisdiction because respondent was not "in custody" within the meaning of Section 2254(a). Pet. App. 55.

b. The district court adopted the magistrate judge's report and recommendation. Pet. App. 34-40. Rejecting respondent's objections to the report and recommendation, the district court agreed with the magistrate judge that "the burdens and requirements of sex offender registration laws * * * are merely collateral consequences of a conviction." Pet. App. 36-37. The

court also took the position that "the registration requirement was not included in the [sentencing] court's judgement [*sic*]." Pet. App. 37. And the district court agreed "that SORNA's registration requirements are remedial rather than punitive." Pet App. 39. The court therefore approved and adopted the R&R and dismissed the petition, denying a certificate of appealability. Pet. App. 39-40.

4. The court of appeals granted a certificate of appealability and unanimously reversed. Pet. App. 1-33.

With respect to Section 2254(a)'s custody requirement, the court of appeals explained that "for the purposes of habeas jurisdiction, a petitioner is 'in custody' if he or she [is] subject to significant restraints on liberty that are not otherwise experienced by the general public." Pet. App. 8-9 (citing *Lehman* v. *Lycoming Cty. Children Servs. Agency*, 458 U.S. 502, 510 (1982); *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973); *Jones* v. *Cunningham*, 371 U.S. 236, 239 (1963)). On this score, "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on [a person's] liberty * * * which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." Pet. App. 10 (quoting *Jones*, 371 U.S. at 240). The court noted that, applying these standards, it had previously held that a 500-hour community-service requirement was sufficient to constitute "custody" within the meaning of the habeas statute. Pet. App. 13-14 (citing *Barry* v. *Bergen Cty. Prob. Dep't*, 128 F.3d 152 (3d Cir. 1997)).

"Given this precedent," the court concluded, "the question of whether [respondent's] registration requirements were sufficiently restrictive to constitute custody is easily answered. They were." Pet. App. 17. In reaching that conclusion, the court stressed the "state's ability to compel [respondent's] attendance" at

certain times and places; simply put, "[respondent] was not free to 'come and go as he pleased.'" *Ibid*. (quoting *Hensley*, 411 U.S. at 351). The detailed registration requirements to which respondent was subject "compelled [his] physical presence at a specific location and severely conditioned his freedom of movement." Pet. App. 19.

Additionally, the court of appeals held that respondent's SORNA registration requirements were imposed "pursuant to the judgment of a state court." Pet. App. 23-30. The court observed that the state-court judgment determining respondent's sentence in this case expressly imposed "10 yrs" of "sex offender supervision" and "registration" as an element of the sentence. Pet. App. 24 (capitalization altered). The judgment also expressly described "sex offender registration pursuant to Megan's Law" as one of the "conditions" of the sentence. *Ibid*. (capitalization altered). In addition, the court explained, "Pennsylvania state court decisions have historically treated sex offender registration requirements as part of the judgment of sentence," and "registrants seeking to challenge their registration status have traditionally done so by appealing the judgment of sentence." Pet. App. 29.

The court also relied on intervening decisions of the Pennsylvania courts holding that SORNA 2012 registration requirements significantly "impair[ed] a citizen's basic right of freedom of movement," thus imposing a punishment. Pet. App. 27 (quotation marks omitted). "This supports Piasecki's claim that the registration requirements imposed upon him are punitive sanctions imposed pursuant to the state court's judgment of sentence rather than collateral consequences or remedial measures." Pet. App. 28-29.

The court concluded by stressing the limits of its ruling: "We do not hold that *any* collateral consequence

of conviction can support habeas jurisdiction. Rather, we hold that the custodial jurisdiction requirement is satisfied by severe, immediate, physical, and (according to the state's own definition) punitive restraints on liberty that are imposed pursuant to—and included in—the judgment of a state court such as the one here." Pet. App. 31. Because "[t]he physical compulsion of SORNA's registration requirements and their direct relation to the judgment of sentence set them apart from consequences that are truly collateral and noncustodial," the court of appeals reversed the dismissal of his habeas petition.

ARGUMENT

Further review of the decision below is unwarranted. Any tension among the courts of appeals on the "custody" question is immaterial because it presents just half of the jurisdictional question. The decision below also has limited prospective importance because the statute it addressed has been repealed and now applies to literally no one. And this is an unsuitable vehicle in any event. The petition should be denied.

A. Any disagreement among the lower courts on the "custody" question is academic

The State asserts that the Third Circuit's decision below "depart[s] from the reasoning of other circuit courts of appeals" on the question whether SORNA registrants are in custody within the meaning of Section 2254(a). That is both irrelevant and wrong. It is irrelevant because the "custody" question is just half of the jurisdictional test under Section 2254(a). As to the second half—whether the petitioner's custody is imposed "pursuant to the judgment of a State court" (28 U.S.C. § 2254(a))—the Third Circuit's decision turned on an idiosyncrasy of Pennsylvania law that is not broadly replicated across States. And it is wrong

because state SORNA statutes differ significantly in the burdens on liberty that they impose. Most differences in outcomes on the custody question thus result not from courts' adoption of conflicting legal approaches, but from their consideration of materially different statutes.

1. The Third Circuit's decision rests on a unique feature of Pennsylvania law

Federal habeas jurisdiction has two separate aspects: an individual must be "in custody," and that custody must be "pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). Section 2254(a) thus "requir[es] that the habeas petitioner be 'in custody' *under the conviction or sentence under attack* at the time his petition is filed." *Maleng* v. *Cook*, 490 U.S. 488, 490-491 (1989) (emphasis added).

As the Third Circuit explained with respect to the second element of this jurisdictional test, "Pennsylvania state court decisions have historically treated sex offender registration requirements as part of the judgment of sentence." Pet. App. 29 (citing *Commonwealth* v. *Leonard*, 172 A.3d 628, 631 (Pa. Super. Ct. 2017); *Commonwealth* v. *Sauers*, 159 A.3d 1, 16 (Pa. Super. Ct. 2017)). The State could hardly disagree; in its briefing below, it conceded that challenges to SORNA registration in Pennsylvania "are brought on [direct] appeal from the 'judgment of sentence.'" CA3 State Br. 20.

By contrast, many of the cases cited in the petition involve sex-offender registration requirements that are not incorporated into the judgment as an element of the sentence imposed; they are instead treated under the law of the relevant States as civil, collateral consequences of conviction.

In *Hautzenroeder* v. *Dewine*, 887 F.3d 737 (6th Cir. 2018), for example, the Sixth Circuit concluded that the requirements of Ohio's SORNA law were not elements of the sentence imposed, but instead "collateral consequences" of conviction that cannot serve as the basis for federal habeas jurisdiction. *Id*. at 740-741. That conclusion is consistent with Ohio Supreme Court precedent. See *State* v. *Ferguson*, 896 N.E.2d 110, 117 (Ohio 2008) ("[A]n offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se."). Thus, any tension between the Sixth and Third Circuits on the question of "custody" cannot affect the ultimate question whether a federal court has jurisdiction; either way, the answer is that it does not.

The Tenth Circuit's decision in *Calhoun* v. *Attorney General*, 745 F.3d 1070 (10th Cir. 2014), also involved a sex offender law construed by state courts to impose mere collateral consequences, unlike Pennsylvania's SORNA regime. Colorado courts have consistently interpreted that State's SORNA law as imposing civil consequences collateral to the judgment of conviction. See, *e.g.*, *People* v. *Sheth*, 318 P.3d 533, 534 (Colo. App. 2013) ("[Sex offender] [r]egistration duties are not an element of a defendant's sentence."). Thus, according to the Tenth Circuit, "Colorado['s] sex-offender registration requirements * * * are collateral consequences of conviction." *Calhoun*, 745 F.3d at 1074.[2]

The Fourth Circuit's decision in *Wilson* v. *Flaherty*, 689 F.3d 332 (4th Cir. 2012), is distinguished on the same ground. There, the Fourth Circuit "conclude[d]

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[2] The unpublished Tenth Circuit opinion cited in the petition similarly held that "Oklahoma's sex-offender registration conditions are collateral consequences." See *Dickey* v. *Allbaugh*, 664 F. App'x 690, 693-694 (10th Cir. 2016).

that the sex offender registration requirements of [both] Virginia and Texas are collateral consequences of [the] conviction that are independently imposed on him because of his status as a convicted sex offender and not as part of his sentence." *Id.* at 333. Accord, *e.g.*, *McCabe* v. *Commonwealth*, 650 S.E.2d 508, 513 (Va. 2007) (referring to SORNA as a "civil legislative scheme" collateral to a criminal sentence).[3] The court concluded federal habeas jurisdiction did not exist under Section 2254(a) for that reason, entirely independent of the "custody" question. 689 F.3d at 337 (citing *Maleng*, 490 U.S. at 492).

Against this backdrop, any tension between the Third Circuit's holding and those of the Sixth, Tenth, and Fourth Circuits on the "custody" question is academic. Because the state SORNA laws at issue in those other cases do not impose registration requirements as part of defendants' sentences, habeas jurisdiction would be lacking in those cases wholly apart from whether the petitioners' registration obligations placed them in "custody" within the meaning of Section 2254(a).[4]

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[3] But see *Anderson* v. *State*, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006) ("The registration requirement for persons who are convicted of sex offenses is a direct consequence.").

[4] It also bears mention that the State did not seek rehearing en banc in this case. Yet when a single circuit disagrees with others on an issue, that circuit can itself reconsider its position and resolve the disagreement through its own processes, including en banc review. See, *e.g.*, *Critical Mass Energy Project* v. *Nuclear Reg. Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992). The court of appeals should have the opportunity to convene en banc before this Court reaches out to address an academic issue like this.

2. The Fifth, Seventh, and Ninth Circuits examined materially different sex offender registration laws

The State cites (Pet. 16) a hodgepodge of additional cases from the Fifth, Seventh, and Ninth Circuits, but those cases do not conflict with the decision below because they involved less oppressive registration schemes.

The State concedes (Pet. 16), as it must, that "the statutes analyzed in those cases did not require the same level of in-person registration as does Pennsylvania's version of SORNA." That is true. The sex offender registration scheme at issue here imposed more onerous restrictions on respondent's liberty—both in terms of the breadth and frequency of in-person reporting requirements, as well as their duration.

The differences are stark. The Wisconsin statute at issue in *Virsnieks* v. *Smith*, 521 F.3d 707 (7th Cir. 2008), for example, permitted updates to registration information "by mail" or telephone, rather than in person. *Id*. at 719-720 (citing Wis. Stat. § 301.45(3)(b)(1m); Wis. Admin. Code § DOC 332.06(2)(a)).

The Washington and California SORNA laws considered by the Ninth Circuit in *Williamson* v. *Gregoire*, 151 F.3d 1180, 1181 (9th Cir. 1998), and in *Henry* v. *Lungren*, 164 F.3d 1240 (9th Cir. 1999), respectively, similarly allowed registration by means other than in-person reporting. See Wash. Rev. Code § 9A.44.130; Cal. Penal Code § 290.

The Oregon statute considered by the Ninth Circuit in *McNab* v. *Kok*, 170 F.3d 1246 (9th Cir. 1999) (per curiam), required updates only to registrants' home addresses, and not to the day-to-day minutia required to be updated in this case. See Or. Rev. Stat. §§ 181.595, 181.596 (1997).

So too of the Texas statute considered by the Fifth Circuit in *Johnson* v. *Davis*, 697 F. App'x 274 (5th Cir. 2017), and *Sullivan* v. *Stephens*, 582 F. App'x 375 (5th Cir. 2014). See Tex. Crim. Proc. Code §§ 62.051, 62.055 (requiring one-time registration and in-person updates for change in address only).

The significantly more frequent and oppressive reporting requirements under SORNA 2012 were central to the Third Circuit's conclusion below that respondent was "in custody" for the purposes of federal habeas jurisdiction. There is no indication that the Fifth, Seventh, and Ninth Circuits—if confronted with a similarly onerous scheme—would come to a different conclusion on that question.[5]

B. The question presented has virtually no prospective importance

The absence of a material disagreement among the lower courts is reason enough to deny the petition. Further review is all the more unnecessary because the Third Circuit's decision in this case will affect very few future cases.

As the State acknowledges (Pet. 11), SORNA 2012 has been repealed and no longer applies to anyone. Thus, the decision below will control an exceedingly narrow category of cases: those in which federal habeas petitioners in Pennsylvania were convicted before December 20, 2012 and filed a habeas corpus petition

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[5] Appellate courts in California, Oregon, Washington, and Wisconsin have also deemed their States' sex offender registration requirements to be civil collateral consequences of conviction and not an element of the sentence imposed. See *People* v. *Picklesimer*, 226 P.3d 348, 354 (Cal. 2010); *State* v. *Ward*, 869 P.2d 1062, 1076 (Wash. 1994); *State* v. *Bollig*, 605 N.W.2d 199, 206 (Wis. 2000); *Matter of J. S. W.*, 434 P.3d 481, 486 (Or. App. 2018), *review denied*, 442 P.3d 1121 (Or. 2019).

between that date (when SORNA 2012 took effect) and July 19, 2017 (when the state supreme court struck the law as unconstitutionally retroactive). Even among that already-narrow cohort, the question presented is relevant only to those federal habeas petitioners who were no longer incarcerated or on parole or probation when they filed their petitions. We are unaware of any other cases currently being litigated that match that idiosyncratic description. Indeed, despite that it has been on the books for the better part of a year, the decision below has yet to be cited by a single district court as grounds for allowing a federal habeas petition to proceed.

In response, the State asserts (Pet. 30) that the repeal of SORNA 2012 "does not limit the impact of the Third Circuit's holding." But the State offers no reasoned support for that assertion. It says only that the registration requirements imposed by SORNA 2018 are "nearly identical" to the requirements of SORNA 2012. *Ibid*. As we have explained (*supra*, at 6), that is simply wrong.

Unlike SORNA 2012, Subchapter H of SORNA 2018 allows registrants to complete their mandatory registration by telephone (rather than in-person) after the first three years of registration. 42 Pa. Cons. Stat. § 9799.25(a.1). It also provides an escape hatch for Tier III registrants to avoid lifetime registration. See *id*. §§ 9799.25(a.1), 9799.15(a.2). The Third Circuit's "custody" holding in this case turned in large measure on SORNA 2012's unyielding, in-person, lifetime registration requirements for Tier III offenders.

Granting review to consider the legal significance of registration requirements imposed by a statute that has been repealed and is substantially different from

the SORNA law that took its place would serve little or no practical purpose.[6]

C. This is an unsuitable vehicle for review

Even if the court of appeals' disposition of the "custody" issue might otherwise warrant review, this would be an exceedingly poor vehicle for addressing it.

1. As an initial matter, there is no factual record in this case. Yet in determining whether a particular petitioner is "in custody," this Court has traditionally eschewed a "static, narrow, formalistic" analysis based on statutory text in a vacuum; it has instead looked at whether the applicable inhibitions *as a practical matter* "significantly restrain [offenders'] liberty to do those things which in this country free men are entitled to do." *Jones*, 371 U.S. at 240, 243.

To undertake this analysis properly, the Court should have a record that permits it to examine not just the facial requirements of the statute, but also the way the law is implemented on the ground. Before the district court, for example, respondent alleged that he was not just required "to travel quarterly to a State Police Barracks," but that, while there, he was also forced "to remain there behind locked doors, answering questions" until he was permitted to leave by a trooper. Dist. Ct. Dkt. 14, at 3.

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[6] Like its Pennsylvania counterpart, the New Jersey Supreme Court has held that SORNA registration is "part of a defendant's sentence, imposed as part of a court's sentencing authority." *State* v. *Schubert*, 53 A.3d 1210, 1217 (N.J. 2012). But New Jersey's registration requirements are significantly less extensive than Pennsylvania's (see N.J. Stat. §§ 2C:7-2(d), 2C:7-4(b)), so it is doubtful that registrants in New Jersey would be found to be "in custody" under the decision below.

Consideration of the factual specifics is inhibited here because the district court did not permit the development of a factual record. Respondent requested an evidentiary hearing to establish these and other important facts on the record, but the State opposed the motion, and the district court denied a hearing. See Dist. Ct. Dkt. 21, at 1.

Absent evidence of the practical liberty restrictions imposed on individuals subject to periodic, mandatory reporting—those not necessarily apparent on the face of the statute—this Court lacks the kind of well-developed record necessary to determine whether the Third Circuit erred in holding that the reporting requirements at issue here constitute "custody" for the purposes of Section 2254(a).

2. The petition also introduces factual disputes that would have to be resolved before reaching the merits. For example, the Third Circuit implied that the restriction on respondent's "computer internet use" was a condition of his SORNA registration, further supporting its holding on "custody." Pet. App. 18. The State disputes that conclusion (Pet. 22 n.7), asserting that the prohibition on internet use was a condition of his expired probation. Cases marred by such case-specific disputes are unsuitable for further review. Cf. *United States* v. *Young*, 470 U.S. 1, 34 (1985) (Brennan, J., concurring in part and dissenting in part) ("[T]he function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law.").

3. Further complicating matters, respondent's 10-year registration period under Subchapter I of SORNA 2018 will expire in a matter of months, on May 4, 2020. See Pet. 12 n.4. That means that the Court will inevitably have to address the question of mootness before reaching the merits.

To be sure, respondent's position is that the case would *not* be mooted by the expiration of his registration period. A habeas petitioner challenging the validity of his conviction may generally continue to pursue habeas review even after he is released from custody. *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). The basis for this rule is the common-sense recognition that adverse collateral consequences of conviction continue even after custody has concluded. *Spencer* v. *Kemna*, 523 U.S. 1, 9-13 (1998). And this Court has recognized the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences" sufficient to keep a habeas petition alive after conclusion of the sentence imposed. *Sibron* v. *New York*, 392 U.S. 40, 55 (1968).

All the same, the question of mootness is a jurisdictional one that the Court would have to address midstream, while the case is pending before it. Cf. *Indiana Emp't Sec. Div.* v. *Burney*, 409 U.S. 540, 542 (1973) (vacating and remanding to the district court to decide whether the case had been rendered moot).

The Court should not rush to decide the question presented without a cleaner vehicle for doing so.

D. Further percolation is essential

Review now would be premature. The Third Circuit is the first court of appeals to hold that any kind of SORNA registration can amount to "custody" within the meaning of Section 2254(a). The other circuits should have the opportunity to evaluate the Third Circuit's reasoning and to apply it to various other SORNA schemes.

Members of this Court "have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may

yield a better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting). "The process of percolation allows a period of exploratory consideration and experimentation by lower courts before [this Court] ends the process with a nationally binding rule." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984)).

This is a quintessential circumstance calling for further percolation. The petition itself shows why: The State explains (Pet. 31) that "[i]t is unclear under the Third Circuit's opinion in this case whether the 'in custody' requirement is met only when the habeas petitioner is subject to lifetime quarterly reporting, as [r]espondent once was, or whether all petitioners who must register under [SORNA 2018] so qualify." The State further suggests (Pet. 32) that the court of appeals' decision in this case may be taken "to apply to the requirements of federal SORNA as well," although no court has addressed that issue.

These uncertainties—which have not been subject to study by any of the lower courts—are reasons to *deny* review, not to grant it. This Court is not a court of first review, and the lower courts must have the leeway to give these (and other) aspects of the question presented "further study before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 961-963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari). In light of the total lack of lower-court consideration of the Third Circuit's opinion, the issue would benefit from further percolation.

E. The decision below is correct

Finally, the decision below is correct. The Third Circuit's decision comports with the statute's plain text

and this Court's precedents. The State's contrary arguments do not.

Although respondent's three-year term of probation had expired before he filed a petition for a writ of habeas corpus in this case, respondent was then subject to the onerous requirements of sex offender registration under SORNA 2012, as it was then being interpreted, enforced, and applied to him.[7] Several of those requirements placed significant restraints on his physical liberty—that is, his right to come and go as he pleased. Among other things, he was required to appear *in person* every 90 days in an official state office; he was forbidden from traveling abroad without first notifying state authorities *in person*; and he was required to update state authorities *in person* upon any change to myriad details of his daily life, including the login information for any website that has a comment board (which includes most news and social media sites). See 42 Pa. Cons. Stat. §§ 9799.14-9799.16 (2014). Practical operation of these conditions requires registrants to appear in person to update information on a constant basis, on pain of incarceration for noncompliance.

These detailed, in-person reporting requirements imposed on respondent by SORNA 2012 operated as a continuation of his sentence. As Justice Ginsburg has noted, such "registration and reporting provisions are comparable to conditions of supervised release or parole." *Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting). And as Judge Davis explained in *Wilson*, "[n]either the formalism of the extant legal arrangements crafted in

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[7] The Third Circuit was correct to focus exclusively on the restraints applicable to respondent on the day he filed his habeas petition. This Court's authority on that subject is well settled. See, *e.g.*, *Spencer*, 523 U.S. at 7; *Maleng*, 490 U.S. at 490-492.

the modern state statutes, nor resort to abstractions such as 'collateral consequences,' obscures this reality." 689 F.3d at 340 (Davis, J., concurring).

This Court has recognized habeas to be "above all, an adaptable remedy," not a "static, narrow, [or] formalistic" one. *Boumediene* v. *Bush*, 553 U.S. 723, 779-780 (2008) (quoting *Jones*, 371 U.S. at 243). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Hensley*, 411 U.S. at 350 (quoting *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969)). Although an individual's custody may begin when he is placed "behind prison walls and iron bars" (*Jones*, 371 U.S. at 243), it extends beyond those confines when the State actively supervises a person's movements such that, though he is not behind bars, "[h]e cannot come and go as he pleases." *Hensley*, 411 U.S. at 351 (recognizance bail 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 supervision constitutes "custody"). That is just what SORNA 2012 did at the time that respondent filed his petition for habeas corpus. The decision below is thus solidly grounded on this Court's precedent.

Moreover, the severe restrictions on respondent's physical liberty rested upon him "pursuant to the judgment" of sentence in his criminal case, within the meaning of 28 U.S.C. § 2254(a). That is so both as a matter of state law, and as a matter of the particular pronouncement of sentence in his case. See Pet. App. 23-24 (quoting sentencing documents); CA3 App. 151a-152a (oral pronouncement by sentencing judge).

Both under this Court's precedent and under the particular and unusual circumstances of respondent's own case, the court of appeals was correct to reverse and remand with directions to the district court to address the merits of respondent's petition.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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