No. 17-6086

IN THE SUPREME COURT OF THE UNITED STATES

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Section 2250(a) of Title 18 of the United States Code imposes criminal penalties on a person who "is required to register under the Sex Offender Registration and Notification Act" (SORNA), 34 U.S.C. 20901 et seq., "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration as required by" SORNA. 18 U.S.C. 2250(a). The questions presented are as follows:

1. Whether petitioner was "required to register" under SORNA prior to completing his term of imprisonment for the state-law criminal offense that gave rise to his obligation to register.

2. Whether petitioner traveled in interstate commerce for purposes of Section 2250(a) when, after the Bureau of Prisons granted his request to be transferred from a federal prison in Pennsylvania to a halfway house in New York, he traveled unescorted by commercial bus across state lines.

3. Whether SORNA's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-6086

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 639. A prior opinion of the court of appeals (Pet. App. A5-A26) is reported at 804 F.3d 140. The relevant opinions and orders of the district court (Pet. App. A27-A49, A50-A61) are not published in the Federal Supplement but are available at 2013 WL 4838845 and 2013 WL 2247147.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. The petition for a writ of certiorari was filed on September

20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of failing to register as a sex offender after traveling in interstate commerce, in violation of 18 U.S.C. 2250(a). Pet. App. A2, A68. Petitioner was sentenced to time served and five years of supervised release. Id. at A69-A70. The court of appeals affirmed. Id. at A1-A4.

1. Since at least 1996, all 50 States and the District of Columbia have had sex-offender-registration laws. See Smith v. Doe, 538 U.S. 84, 90 (2003). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 et seq. (formerly codified at 42 U.S.C. 16901 et seq.), which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 34 U.S.C. 20901.[1]

[1] Effective September 1, 2017, after the court of appeals issued its decision in this case, SORNA's provisions previously codified at 42 U.S.C. 16901 et seq. were reorganized and recodified as 34 U.S.C. 20901 et seq.; the statutory text was not changed. U.S. House of Representatives, Office of the Law Revision Counsel, Editorial Reclassification: Title 34, United States Code, http://uscode.house.gov/editorialreclassification/t34/index.html. A table listing the original section numbers in Title 42 and the corresponding new section numbers in Title 34 is available at http://uscode.house.gov/editorialreclassification/t34/T34ERT.pdf.

SORNA provides that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. 20913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). As pertinent here, the term "sex offense" includes, inter alia, "specified offense[s] against a minor." 34 U.S.C. 20911(5)(A)(ii). The term "specified offense against a minor" means "an offense against a minor that involves any" of several enumerated acts, including "[c]riminal sexual conduct involving a minor" and "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. 20911(7).

SORNA establishes deadlines by which sex offenders subject to the registration requirement must register and update their registration. 34 U.S.C. 20913(b) and (c). The statute provides that a sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). "[I]f the sex offender is not sentenced to a term of imprisonment," then the sex offender "shall initially register * * * not later than 3 business days after being sentenced for that offense." 34 U.S.C. 20913(b)(2). Thereafter, "[a] sex offender shall, not later than 3 business days after each change

of name, residence, employment, or student status, appear in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c).

SORNA authorized the Attorney General "to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." 34 U.S.C. 20913(d); see also Reynolds v. United States, 565 U.S. 432, 439 (2012) (explaining that sex offenders convicted of sex offenses before SORNA's enactment were not "require[d] * * * to register before the Attorney General validly specif[ied] that the Act's registration provisions appl[ied] to them"). The statute further authorized the Attorney General to prescribe "rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" the default statutory registration deadlines in Section 20913(b). 34 U.S.C. 20913(d).

On February 28, 2007, pursuant to that authority, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. In 2010, the Attorney General promulgated a final

rule that "finaliz[ed] [the] interim rule" with minor modifications. See 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010). In addition, in 2008, after notice and comment, the Attorney General -- in coordination with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking -- promulgated guidelines for the States and other jurisdictions on matters of SORNA's implementation. See 73 Fed. Reg. 38,030 (July 2, 2008) (Final Guidelines). The Final Guidelines reaffirmed SORNA's application to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063.

To enforce SORNA's registration requirements, Congress created a federal criminal offense penalizing nonregistration. See 18 U.S.C. 2250(a). As relevant here, Section 2250(a) provides that a person who "is required to register under [SORNA]," who "travels in interstate or foreign commerce," and who "knowingly fails to register or update a registration as required by [SORNA] shall be fined under this title or imprisoned not more than 10 years, or both." Ibid. This Court has held that, "[f]or a defendant to violate [Section 2250(a)], * * * the statute's three elements must be satisfied in sequence." Carr v. United States,

560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted).[2]

2. a. In 1994, petitioner pleaded guilty in the U.S. District Court for the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. Pet. App. A27. In 1996, he was sentenced to five years of imprisonment, to be followed by five years of supervised release. Ibid. In 2004, jurisdiction over petitioner's supervised release was transferred to the District of Maryland. Ibid.

In October 2004, while petitioner was serving his federal term of supervised release on his 1994 federal drug conviction, petitioner gave cocaine to an 11-year-old girl and then raped her. Pet. App. A12-A13; Gov't C.A. Br. 3 (No. 16-1829); D. Ct. Doc. 16-2, at 9-12 (Mar. 22, 2013). In October 2005, petitioner entered a nolo contendere plea in Maryland state court and was convicted of sexual offense in the second degree, in violation of Maryland Criminal Law § 3-306 (2002). Pet. App. A12, A27. The Maryland court sentenced petitioner to 20 years of imprisonment (with ten years suspended), to be followed by five years of probation. Ibid.

Petitioner's Maryland state-court conviction also violated a condition of his federal supervised release for his federal drug

---

[2] The Attorney General's final rule promulgated in 2010 made "minor changes" in one of the examples provided in the interim rule "to avoid any arguable inconsistency with" this Court's decision in Carr. 75 Fed. Reg. at 81,853.

conviction. Pet. App. A13. Petitioner pleaded guilty to the supervised-release violation. Ibid. The federal court accordingly revoked petitioner's supervised release and ordered him to serve 24 months of imprisonment, to run consecutively to his Maryland state sentence. Ibid.

b. On November 30, 2010, petitioner completed the custodial portion of his Maryland state sentence for his 2005 sex-offense conviction; he was transferred to federal custody in Maryland to serve the 24-month revocation sentence, though he temporarily remained in a Maryland state facility. Pet. App. A13, A17, A52; C.A. App. A119, A217; D. Ct. Doc. 34, at 5 & n.3 (May 31, 2013). In 2011, the Bureau of Prisons transferred petitioner to a federal correctional facility in Pennsylvania. Pet. App. A13, A28; D. Ct. Doc. 34, at 5.

In March 2012, while petitioner was serving his term of imprisonment for his federal supervised-release revocation, he applied to serve the remaining portion of that term in a halfway house. Pet. App. A13; C.A. App. A220. The application was granted, and petitioner signed a "Community Based Program Agreement" that contemplated that he would become "a resident" of a "residential reentry center or work release program." C.A. App. A220. In June 2012, petitioner signed a "Furlough Application" requesting a furlough to enable him to travel from the federal prison in Pennsylvania to his designated halfway house, the Bronx

Residential Re-entry Center in New York. C.A. App. A124. Petitioner's furlough request was approved, and in July 2012, the Bureau of Prisons granted petitioner a furlough to travel unescorted on a commercial bus from Pennsylvania to the Bronx facility in New York. Pet. App. A2, A13-A14; C.A. App. A124-A126.

On July 17, 2012, petitioner traveled by bus from Pennsylvania to New York as authorized. Pet. App. A14. On August 27, 2012, he was released from the halfway house to a private residence in the Bronx. Id. at A2. Petitioner did not register as a sex offender either in Maryland or in New York as required by state law. Ibid.

3. a. In January 2013, a grand jury returned an indictment against petitioner for one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250. Pet. App. A14; C.A. App. A24. The indictment alleged that petitioner "traveled from Pennsylvania to New York and thereafter resided in New York without registering as a sex offender in New York." C.A. App. A24.

Petitioner moved to dismiss the indictment, arguing "principally that he was required to register only after the alleged interstate travel between Pennsylvania and New York, and thus could not have violated § 2250(a), the elements of which must be satisfied sequentially." Pet. App. A15. The district court agreed and granted the motion. Id. at A27-A49.

b. The government appealed, and the court of appeals reversed. Pet. App. A5-A26. The court of appeals explained that "[a] person is 'required to register' under SORNA 'once that person becomes subject to SORNA's registration requirements.'" Id. at A18 (brackets omitted) (quoting Carr, 560 U.S. at 447). Because petitioner was "convicted of a sex offense in 2005, before SORNA's July 2006 effective date, the registration requirements attached at the latest on August 1, 2008," when the Attorney General's Final Guidelines making SORNA's registration requirements applicable to pre-SORNA sex offenders became effective. Ibid.[3]

The court of appeals rejected petitioner's contention that, because SORNA provides that a sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 34 U.S.C. 20913(b)(1), petitioner was not required to register "until shortly before his 2012 release from federal custody." Pet. App. A18. "[T]he core registration mandate," the court noted, is contained within Section 20913(a). Id. at A10. The court explained that Section 20913(b), by contrast, "set[s] deadlines for initial registration" but does not "regulate[] when

[3] Although "[t]he guidelines themselves identify their 'Effective Date' as July 2, 2008, the date they were published in the Federal Register," the court of appeals explained that, under 5 U.S.C. 553(d) and consistent with the government's concession below, the actual effective date is August 1, 2008. Pet. App. A12 n.4.

registration requirements attach" or "establish the conditions that make registration mandatory." Id. at A18-A19. The court observed that Section 20913(b) "is worded in terms of cutoff dates rather than beginning points." Id. at A19. The court further explained that "§ 2250(a) treats being 'required to register' and 'failing to register or update a registration as required' as separate and distinct elements of the criminal offense." Ibid. (brackets omitted) (quoting 18 U.S.C. 2250(a)(1) and (3)). The court also found unpersuasive petitioner's arguments that its reading was inconsistent with SORNA's purposes and this Court's decision in Carr. Id. at A20-A25. Petitioner did not seek rehearing or certiorari.

4. a. On remand, after a bench trial on stipulated facts, the district court convicted petitioner of violating 18 U.S.C. 2250(a). Pet. App. A2-A3. It rejected petitioner's argument that Section 2250(a)'s interstate-travel requirement was not satisfied by his travel while in federal custody. See C.A. App. A205-A207. The court also rejected petitioner's contention that SORNA's authorization to the Attorney General to specify SORNA's application to pre-SORNA offenders violates the nondelegation principle. Id. at A204-A205. The court sentenced petitioner to time served and five years of supervised release. Pet. App. A69-A70.

b. The court of appeals affirmed. Pet. App. A1-A4. The court noted that it had held in the prior appeal that petitioner satisfies Section 2250(a)'s first element -- the requirement to register under SORNA, 18 U.S.C. 2250(a)(1). Pet. App. A3. It further noted that "[t]here is no dispute that he knowingly failed to register, thus satisfying the third requirement." Ibid.

Petitioner argued that Section 2250(a)'s interstate-travel element -- that a sex offender required to register has "travel[ed] in interstate * * * commerce," 18 U.S.C. 2250(a)(2)(B) -- is not satisfied where a defendant "crosses state lines while in federal custody," in light of "the usual requirement of criminal law that criminal acts be committed voluntarily." Pet. App. A3. The court "decline[d] to reach [petitioner's] argument regarding the interpretation of § 2250(a)" because it determined that, even "[a]ssuming arguendo that [petitioner] is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case." Id. at A4. The court determined that "the stipulated facts at trial" -- including that petitioner "made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance" -- "are sufficient to support the District Court's finding that [petitioner's] travel was voluntary." Ibid.

Petitioner also argued that SORNA's authorization to the Attorney General to specify SORNA's application to pre-SORNA offenders violates the nondelegation principle, but the court of appeals explained that the argument was "foreclosed" by circuit precedent. Pet. App. A4 n.2 (citing United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir. 2010)).

ARGUMENT

Petitioner contends (Pet. 7-17) that the court of appeals erred in affirming his conviction for failing to register as a sex offender under SORNA after traveling in interstate commerce because he was not "required to register" while in custody and because his voluntary transfer to a halfway house across state lines did not constitute "travel[] in interstate * * * commerce." 18 U.S.C. 2250(a)(1) and (2)(B). He further contends (Pet. 17-19) that SORNA improperly delegates legislative authority to the Attorney General. The court of appeals' decision affirming petitioner's conviction is correct and does not conflict with any decision of this Court or another court of appeals, and this case is not a suitable vehicle to address the issues petitioner raises. Further review is not warranted.

1. As relevant here, Section 2250(a) imposes criminal liability on a person who "is required to register under" SORNA, "travels in interstate * * * commerce," and "knowingly fails to register or update a registration as required by" SORNA. 18 U.S.C.

2250(a). "For a defendant to violate this provision, * * * the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." Carr v. United States, 560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted). Petitioner argues (Pet. 7-14) that he was not "required to register under [SORNA]," 18 U.S.C. 2250(a)(1), when he traveled across state lines in July 2012 because the statutory deadline for "initially register[ing]" as a sex offender, 34 U.S.C. 20913(b), did not occur until he completed his federal supervised-release-revocation sentence in August 2012. Petitioner's argument is incorrect, and he identifies no court of appeals that would have accepted it.

a. The court of appeals correctly determined in the prior appeal that because petitioner had committed a sex offense before SORNA's enactment, he became "required to register under [SORNA]," 18 U.S.C. 2250(a)(1), when SORNA's registration requirements were made applicable to him, no later than August 2008 -- before his interstate travel -- not when the deadline for complying with those registration requirements passed. Pet. App. A13-A22.

This Court held in Carr that a person is "required to register" under Section 2250(a)(1) "when [he] becomes subject to SORNA's registration requirements." 560 U.S. at 446; see Pet. App. A18. SORNA imposes a registration requirement on all sex offenders to whom the statute applies. 34 U.S.C. 20913(a).

Section 20913(a) provides that "[a] sex offender shall register, and keep the registration current," as provided in the statute. Ibid. Petitioner committed a covered sex offense before SORNA's effective date. Pet. App. A18. Thus, as the court of appeals explained, "the registration requirements attached" in this case when petitioner "'bec[a]me[] subject to SORNA's registration requirements,'" i.e., when those requirements were made applicable to pre-SORNA offenders including petitioner. Ibid. (citation omitted). That occurred "at the latest on August 1, 2008," when the Attorney General's Final Guidelines applying SORNA to pre-Act offenders took effect. Ibid.; see, e.g., United States v. Whitlow, 714 F.3d 41, 42-48 (1st Cir.) (defendant was "required to register" for pre-SORNA conduct on August 1, 2008, when the final guidelines took effect), cert. denied, 134 S. Ct. 287 (2013); United States v. Trent, 654 F.3d 574, 585 (6th Cir. 2011) ("All sex offenders whose interstate travel and failure to register occurred after August 1, 2008, are required to register under the Act."), cert. denied, 565 U.S. 1228 (2012).

Petitioner contends (Pet. 9-14) that he was not "required to register" within the meaning of 18 U.S.C. 2250(a)(1) until the statutory deadline for registration had passed. Section 20913(b)(1) provides that sex offenders who are serving a term of imprisonment for a sex offense "shall initially register * * * before completing a sentence of imprisonment with respect to the

offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). Petitioner argues (Pet. 9, 12) that this deadline for registering "dictates when an offender is 'required to register under' SORNA, as that phrase is used in § 2250(a)," and that petitioner had no duty to register "until shortly before the end of [his] sentence of imprisonment." The court of appeals correctly rejected that argument. Pet. App. A18-A20. As it explained, Section 20913(b) "does not regulate when registration requirements attach," but when they are violated. Id. at A20. "The provision is worded in terms of cutoff dates rather than beginning points." Id. at A19. The duty to register is established by Section 20913(a), which "contains the core registration mandate," and which is not contingent on or tied to the completion of a term of imprisonment. Id. at A10.

As the court of appeals further explained, petitioner's view -- which equates when a sex offender is "required to register under [SORNA]" with the expiration of the registration period -- is inconsistent with Section 2250(a). Pet. App. A19. That provision "treats being 'required to register' and 'failing to register or update a registration as required' as separate and distinct elements." Ibid. (brackets omitted). As the court further noted, "[t]he temporal relationship between these elements" as construed by this Court in Carr reinforces this conclusion: under Carr, the element of being required to register "necessarily is satisfied

before" the element of failing to register. Ibid. It follows that "a person can be 'subject to SORNA's registration requirements' before he or she is subject to immediate sanction for 'failing to register.'" Id. at A19-A20 (brackets and citations omitted). Petitioner's reading conflates those separate elements and in doing so fundamentally alters the statute. On petitioner's view, instead of making it an offense for a sex offender who is required to register and travels in interstate commerce to fail to register, Section 2250(a) would make it an offense only for a sex offender who has already defaulted on his duty to register -- i.e., for whom the registration deadline has already passed -- and then travels in interstate commerce to continue to fail to register.

b. Even if petitioner were correct that a sex offender is not "required to register" until the deadline for registering set forth in Section 20913 passes, it would not affect petitioner's conviction because the deadline for petitioner to register did pass -- and he therefore was required already to have registered -- before his interstate travel. SORNA provides that a person must "initially register" "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," if a term of imprisonment was imposed for that offense. 34 U.S.C. 20913(b)(1). The offense that "g[ave] rise" to the registration requirement here was petitioner's Maryland state-court sex offense, and petitioner "complet[ed] a

sentence of imprisonment with respect to th[at] offense" (ibid.) in November 2010 -- more than a year before he traveled across state lines in July 2012. See pp. 6-7, supra.

Petitioner acknowledges (Pet. 12) that he was required to register "shortly before the end of [his] sentence of imprisonment." He nevertheless argues, without explanation or citation of authority, that the relevant "sentence of imprisonment" is his federal sentence imposed upon revocation of his supervised release. See ibid. (asserting that "he was not required to register until August 2012, shortly before his release from custody"). That supervised-release-revocation sentence, however, is not a sentence "with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). Petitioner is a "sex offender" subject to SORNA's registration requirements because he "was convicted of a sex offense," 34 U.S.C. 20911(1), not because he violated the conditions of supervised release imposed for a separate drug offense. Petitioner would be subject to SORNA irrespective of whether his supervised release was revoked. Indeed, a supervised-release-revocation sentence is a sentence attributable to the "original conviction," here, petitioner's 1994 federal drug conviction, not his 2005 Maryland sex-offense conviction. See Johnson v. United States, 529 U.S. 694, 701 (2000) ("We therefore attribute postrevocation penalties

to the original conviction."); ibid. ("postrevocation penalties relate to the original offense").

Because the court of appeals held that petitioner was required to register when SORNA was made applicable to him, irrespective of when the deadline for registering occurred, it did not directly address the government's alternative argument that, even if petitioner was required to register only when Section 20913(b)'s registration deadline passed, that deadline passed when petitioner completed his term of imprisonment on his Maryland sex offense in November 2010, long before his interstate travel. But the fact that petitioner did not register before completing the term of imprisonment for his Maryland sex-offense conviction provides an alternative ground for affirming the court of appeals' decision, irrespective of the answer to the question petitioner raises of whether SORNA's registration requirements can attach while a sex offender is still in custody for the offense that gives rise to the registration requirement. At a minimum, this additional ground would make this case a poor vehicle to address that question.

2. Petitioner separately contends (Pet. 14-17) that only voluntary, noncustodial travel can satisfy the interstate-travel element of Section 2250(a)(2)(B), and that his transportation from Pennsylvania to New York does not qualify. Petitioner again identifies no court of appeals that has adopted his proposed interpretation of the statute. And the court of appeals expressly

"decline[d] to reach [petitioner's] argument regarding the interpretation of § 2250(a)" because it would not affect the outcome of this case. Pet. App. A4.

As the court of appeals explained, "even assuming [petitioner] is correct that interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary." Pet. App. A4; see ibid. ("Assuming arguendo that [petitioner] is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case.").

The voluntariness question petitioner raises thus is not properly presented because the court of appeals held that petitioner's challenge to his conviction would fail even under the interpretation he proposed. Petitioner does not appear to challenge in this Court the court of appeals' determination that "the District Court reasonably found that the travel here was voluntary" under the circumstances here -- which included that petitioner "made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance" and unescorted. Pet. App. A4. In any event, that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

To the extent petitioner argues that Section 2250(a)(2)(B)'s interstate-travel element contains an implicit categorical

exception for all custodial travel, voluntary or otherwise, the court of appeals also correctly declined to adopt that argument. Pet. App. A4 n.1. The court was "unpersuaded" by petitioner's "attempt[] to present his case as two separate arguments -- one based on voluntariness, and one based on a lack of congressional 'focus' on sex offenders in custody (supporting the creation of a per se custodial travel exemption)." Ibid. "[Petitioner] himself," the court noted, "repeatedly blend[ed] these arguments, and he provide[d] [the court] with no real reason to look past the statute's text to other expressions of congressional intent except for his stated concern about the voluntariness of custodial travel." Ibid. (citation omitted). Likewise, in this Court, petitioner's argument that custodial travel does not satisfy Section 2250(a)(2)(B) rests on his contention that the statute requires voluntary travel. See, e.g., Pet. 16 (arguing that "custodial movement cannot give rise to criminal liability because such movement is not truly voluntary"). At a minimum, the court of appeals' determination that petitioner had not presented a meaningfully distinct custodial-travel argument on appeal, and the absence of any ruling by the court of appeals on such an argument, makes this case a poor vehicle to address it.

3. Finally, petitioner contends (Pet. 17-19) that SORNA's delegation of authority to the Attorney General to specify the applicability of SORNA's requirements to pre-SORNA sex offenders

under 34 U.S.C. 20913(d) violates the nondelegation doctrine. Every court of appeals to decide such a nondelegation challenge to SORNA has rejected it -- ten of them in published decisions and one in multiple unpublished decisions. See, e.g., Pet. App. A4 n.2 (citing United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010)); United States v. Nichols, 775 F.3d 1225, 1231-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); United States v. Richardson, 754 F.3d 1143, 1145-1146 (9th Cir. 2014) (per curiam); United States v. Cooper, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); United States v. Goodwin, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 134 S. Ct. 334 (2013); United States v. Kuehl, 706 F.3d 917, 918-920 (8th Cir. 2013); United States v. Parks, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Whaley, 577 F.3d 254, 262-264 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); see United States v. Sampsell, 541 Fed. Appx. 258, 259 (4th Cir. 2013) (per curiam) (noting that the Fourth Circuit has "consistently rejected similar non-delegation challenges in unpublished decisions").

This Court has repeatedly denied petitions for writs of certiorari raising the same nondelegation claim. See Nichols v. United States, 136 S. Ct. 445 (2015) (No. 15-5238) (limiting grant

of certiorari to the first question presented and thereby excluding review of nondelegation challenge); see, e.g., Hill v. United States, 137 S. Ct. 829 (2017) (No. 16-6049); Harges v. United States, 135 S. Ct. 507 (2014) (No. 14-6748); Stacey v. United States, 135 S. Ct. 419 (2014) (No. 14-6321); Crosby v. United States, 135 S. Ct. 390 (2014) (No. 14-6167); Cooper v. United States, 135 S. Ct. 209 (2014) (No. 14-5174); Atkins v. United States, 134 S. Ct. 56 (2013) (No. 12-9062); Mitchell v. United States, 133 S. Ct. 2854 (2013) (No. 12-8807); Parks v. United States, 133 S. Ct. 2021 (2013) (No. 12-8185); Clark v. United States, 133 S. Ct. 930 (2013) (No. 12-6067); Rogers v. United States, 133 S. Ct. 157 (2012) (No. 11-10450); Yelloweagle v. United States, 566 U.S. 964 (2012) (No. 11-7553); Johnson v. United States, 565 U.S. 834 (2011) (No. 10-10330); May v. United States, 556 U.S. 1258 (2009) (No. 08-7997); see also Beasley v. United States, 562 U.S. 801 (2010) (No. 09-10316) (granting the petition for a writ of certiorari, vacating judgment, and remanding to the court of appeals for further consideration in light of Carr, supra; thereby excluding review of nondelegation challenge). There is no reason for a different outcome here.

This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the

boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-373 (1989) (citations omitted). As the Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle" -- and it has not found any in the last 80 years. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (referring to A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)); see Loving v. United States, 517 U.S. 748, 771 (1996) (same); Mistretta, 488 U.S. at 373 (same); see also Mistretta, 488 U.S. at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

In enacting SORNA, Congress "broadly set policy goals that guide the Attorney General," and it "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders." Ambert, 561 F.3d at 1213. Congress identified the Attorney General as its agent, see 34 U.S.C. 20913(d), and it "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." Ambert, 561 U.S. at 1214; see Guzman, 591 F.3d at 93 (explaining that Congress delineated the crimes requiring

registration, the circumstances of registration, the information required to register, and the penalties for non-registration, leaving to the Attorney General only the applicability of SORNA to a discrete set of persons); see also Parks, 698 F.3d at 7-8 (explaining that Congress "delegat[ed] to the Attorney General the judgment whether th[e] [regulatory policy underlying the registration system] would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders -- problems well suited to the Attorney General's on-the-ground assessment"). This "Court has upheld much broader delegations than" Section 16913(d). Guzman, 591 F.3d at 93 (citing Mistretta, 488 U.S. at 372-373); cf. Touby v. United States, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

DECEMBER 2017