No. _____

IN THE
Supreme Court of the United States

CHARLES MALCOLM SPIVEY, JR.
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether venue for a prosecution under 18 U.S.C. § 2250(a) for failing to update a registration under SORNA after traveling in interstate commerce can lie in the jurisdiction that the defendant departed.

LIST OF PRIOR PROCEEDINGS

1. *United States v. Charles Malcolm Spivey, Jr.*, No. 18-4099, United States Court of Appeals for the Fourth Circuit.

2. *United States v. Charles Malcolm Spivey, Jr.*, No. 7:17-cr-29-H, United States District Court for the Eastern District of North Carolina.

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Petitioner Charles Malcolm Spivey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's opinion affirming Mr. Spivey's conviction is attached at Pet. App. 1a-10a and is reported at 956 F.3d 212 (4th Cir. 2020). The opinion of the Eastern District of North Carolina is attached at Pet. App. 11a-18a and is reported at 2017 WL 4518688.

JURISDICTION

The Fourth Circuit issued its opinion on April 15, 2020. Pet. App. 1a-10a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl. 3:

> The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

18 U.S.C. § 3237(a):

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

Fed. R. Crim. P. 18:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.

INTRODUCTION

When someone with a Sex Offender Registration and Notification Act ("SORNA") registration requirement moves from one jurisdiction to another, SORNA requires him to register or update his registration in the jurisdiction to which he moved; it does not require him to take any actions in the jurisdiction from which he moved. Six Circuits nonetheless hold that the government may prosecute that person in the old

jurisdiction for failing to register or update his registration in the new jurisdiction. The Seventh Circuit, in contrast, holds that venue is improper in the old jurisdiction, and if the United States attempts to prosecute an individual there, then the district court must dismiss the indictment for improper venue.

Congress created SORNA to "make[] more uniform and effective the prior patchwork of sex-offender registration systems." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion) (internal quotations omitted). The inconsistencies resulting from circuit splits undermine SORNA's fundamental purpose, and the circuit split in this case is particularly pernicious because it creates the risk that two different interpretations of SORNA will be applied in the same case. As explained below, it is extremely unlikely that the en banc Seventh Circuit will ever have the opportunity to reconsider this issue, so there is no possible way the circuit split will resolve itself without this Court's intervention. This petition presents this Court with an opportunity to resolve this mature circuit split and restore SORNA's necessary uniformity.

Additionally, this Court's intervention can correct the Fourth Circuit's erroneous holding that expands venue for a failure to register or update registration prosecution far beyond the location where the defendant's criminal conduct actually occurred. "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution" requirements that a defendant can be tried only in the state and district in which he allegedly committed a crime. *United States v.*

Johnson, 323 U.S. 273, 275 (1944) (citing U.S. Const. art. III, § 2, cl. 3 and U.S. Const. amend. VI). Mindful of the import that the Framers placed on venue, courts should apply venue provisions narrowly, and the interpretation of federal statutes "should go in the direction of constitutional policy[,] even though not commanded by it." *Id.* at 276.

Yet the Fourth Circuit held that venue could lie in a jurisdiction merely because a defendant *moved away* from that jurisdiction in the course of moving to a new jurisdiction where the actual crime was committed: failing to update sex offender registration. And the logical implication of the Fourth Circuit's decision is that venue would lie not only in the state where the defendant previously lived, but in *any* state from which, through which, or to which a defendant traveled without requiring any connection to his alleged failure to update his registration. This Court's review is necessary to reestablish the proper constitutional and prudential limits on venue.

STATEMENT OF THE CASE

Around 30 years ago, when Petitioner Charles Spivey was between 16 and 20 years old and living in North Carolina, he involved himself in a sexual relationship with a girl. North Carolina convicted him of several counts of taking indecent liberties with a minor.

Around ten years after Mr. Spivey committed his offenses, Congress enacted SORNA, which obligated him to register as a sex offender. For as long as he lived

in North Carolina, Mr. Spivey complied with his SORNA registration obligations.[1]

Mr. Spivey's status as a former sex offender led to a difficult life. He had trouble finding employment because of his criminal history. Still, he worked—sometimes at two jobs—to provide for his wife and three children. His oldest son received a full scholarship to attend college. His two younger sons each had serious medical issues, increasing Mr. Spivey's difficulties.

Things began breaking down in 2013. Mr. Spivey's wife was diagnosed with cancer. His mother died. He continued to work and support his family, but he became withdrawn and reclusive. As financial difficulties mounted, he lost his home and moved into a tent close to his work. Even when he was homeless in North Carolina, he maintained his sex offender registration, updating his status to "homeless residing in the woods" near Wilmington, North Carolina.

The medical condition of one of Mr. Spivey's sons grew steadily worse. The boy's seizure disorder left him incontinent and a target for ridicule at school. Mr. Spivey moved to Colorado to look for CBD oil, a marijuana derivative with anti-epileptic properties and minimal side effects. The government alleges that he did not update his registration as a sex offender in Colorado.

Based on his alleged failure to register in Colorado, a grand jury sitting in the Eastern District of North

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[1] The convictions also obligated Mr. Spivey to register as a sex offender under North Carolina law. Those state obligations are not at issue here.

Carolina indicted Mr. Spivey, under 18 U.S.C. § 2250(a), on one count of failing to update his registration under SORNA.[2] Mr. Spivey moved to dismiss the indictment, arguing, among other things, that venue was improper in the Eastern District of North Carolina because he did not commit any criminal acts or omissions in North Carolina. The district court denied the motion.

Mr. Spivey pleaded guilty, under a plea agreement that reserved his right to appeal whether the district court should have dismissed the prosecution for improper venue. The district court sentenced Mr. Spivey to 10 months of incarceration and five years of supervised release. Mr. Spivey timely appealed.

On appeal, Mr. Spivey renewed his venue argument, contending that his alleged crime occurred in Colorado, not North Carolina. Mr. Spivey and the government agreed that that he did not have any duty to update his registration in North Carolina after he left. Thus, Mr. Spivey argued, venue did not lie in North Carolina; it instead was proper only in Colorado, the jurisdiction in which he allegedly failed to perform a legal duty.

The Fourth Circuit affirmed his conviction. Pet. App. 10a. It agreed that SORNA did not obligate him to update his registration in North Carolina. Pet. App. 9a. But, it continued, Mr. Spivey's registration obligations

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[2] The relevant section of SORNA states that "[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 involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. § 20913(c).

under SORNA were irrelevant to the question of where the government could prosecute him. Pet. App. 7a-8a. Instead, the Fourth Circuit held, venue could properly lie anywhere that Mr. Spivey's interstate travel between North Carolina and Colorado occurred. Pet. App. 8a. The Court concluded, "Spivey's interstate travel began when he stepped outside of North Carolina. As a result, the essential conduct element of interstate travel occurred in North Carolina (as well as Colorado)." Pet. App. 9a.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Fourth Circuit "has entered a decision in conflict with the decision of another United State court of appeals on the same important matter." Sup. Ct. R. 10(a). Seven different federal circuits have confronted this question, resulting in a 6-1 split of authority, so this circuit split is mature and ready for this Court's review. This Court's intervention is needed to avoid practical challenges that will arise from disagreement among the circuits on the interpretation of SORNA's nationwide registration requirement. Further, the circuit split is exceedingly unlikely to go away on its own. The Seventh Circuit—the sole circuit finding that venue is improper in the departing circuit—will never have the chance to reconsider the issue en banc because in all cases where a SORNA defendant departs the Seventh Circuit, the government will indict the defendant in the arrival district. Only this Court can ensure uniformity on this important and frequently recurring question.

This Court's review is also necessary because the Fourth Circuit's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court has long held that, barring express statutory language requiring otherwise, venue for a crime should lie only in a jurisdiction in which someone has either allegedly committed a criminal act or failed to fulfill a legal duty. *See, e.g.*, *Johnson*, 323 U.S. at 277-78. SORNA placed no obligation on Mr. Spivey to take any action whatsoever in North Carolina. *See Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016). Thus, venue could not lie in North Carolina.

"[M]atters [related to venue] touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rest." *Johnson*, 323 U.S. at 276. Forcing someone to defend himself from a criminal prosecution in a jurisdiction in which he violated no legal duty and in which Congress has not expressly provided for venue subjects him to unnecessary "unfairness and hardship" and "leads to the appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution." *Id.* at 275. This Court's review is necessary to correct the Fourth Circuit's erroneous approach.

A. The Circuits Have Developed a Mature Split on This Question Which is Ready for This Court's Review.

Section 2250(a) states in relevant part:

> Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;

(2)

. . .

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

This petition asks the question—if someone travels from one jurisdiction to another and allegedly fails to update his registration in the new jurisdiction, can venue to prosecute him under Section 2250(a) lie in the old jurisdiction? Seven federal circuits have now addressed this question. In addition to the Fourth Circuit, the First, Second, Eighth, Tenth, and Eleventh Circuits hold that if someone required to register under SORNA leaves one jurisdiction and travels to another, then venue for a prosecution for allegedly failing to update his registration in the new jurisdiction can lie in the old jurisdiction. In contrast, the Seventh Circuit holds that "the violations of [SORNA] began, were carried out, and ended in the place of the new residence." *United States v. Haslage*, 853 F.3d 331, 336 (7th Cir. 2017).

The first appellate court to consider this question was the **Eighth Circuit.** *See United States v. Howell*, 552 F.3d 709 (8th Cir. 2009). In *Howell*, the defendant moved from Iowa to Texas without updating his sex

offender registration, and was prosecuted in the Northern District of Iowa under SORNA. In a decision containing barely any reasoning, the court held that the "SORNA violation commenced in the Northern District of Iowa" because "he traveled from the Northern District of Iowa when he moved his residence to Texas." *Id.* at 718. In *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), the Eighth Circuit reaffirmed *Howell*'s reasoning as follows: "The offender's act of travel began in Iowa, where he started his interstate journey to Texas, so the SORNA registration violation could be prosecuted in Iowa." *Id.* at 863.[3]

The **Tenth Circuit** reached the same conclusion in *United States v. Lewis*, 768 F.3d 1086, 1092-94 (10th Cir. 2014). After moving from Kansas to Atlanta without updating his registration, the defendant was prosecuted in the District of Kansas under SORNA. The court held that venue was proper in Kansas. The court pointed to its own prior precedent holding that a defendant who departs a jurisdiction is legally obligated to register in the departing jurisdiction. *Id.* at 1091. It held that in

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[3] In *Howell*, the Eighth Circuit also asserted that the defendant had violated SORNA in Iowa because he was obligated under SORNA to update his registration in Iowa when he departed that state. 552 F.3d at 718. In *Lunsford*, the Eighth Circuit characterized that statement as "dicta that is not binding in a future case such as this one that squarely raises the issue under the federal statute," and held that a criminal defendant does not have the obligation to update his registration from the departure jurisdiction. 725 F.3d at 864. As discussed below, in *Nichols v. United States*, 136 S. Ct. 1113 (2016), this Court subsequently adopted the same view as the Eighth Circuit on this issue. *Infra* at 12.

view of that precedent, the defendant had violated SORNA in the departing jurisdiction, making venue proper in that jurisdiction. *Id.* at 1092.

The **Eleventh Circuit** followed suit in *United States v. Kopp*, 778 F.3d 986, 988-89 (11th Cir. 2015). The defendant moved from Georgia to Florida and was prosecuted for violating SORNA in the Northern District of Georgia. The court held that venue was proper in Georgia, reasoning that the defendant "began his crime in Georgia because his interstate journey started there." *Id.* at 988 (alterations omitted). The court explained that "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for [section] 2250, but it is also ... the very conduct at which Congress took aim." *Id.* at 989 (quoting *Carr v. United States*, 560 U.S. 438, 454 (2010) (alterations in original)). "Because the crime consists of both traveling and failing to register, Kopp began his crime in Georgia and consummated it in Florida." *Id.*

In 2016, this Court held unanimously that SORNA does *not* require a defendant who moves out of state to update his registration in the departing jurisdiction, rejecting the Tenth Circuit's contrary view. *See Nichols v. United States*, 136 S. Ct. 1113 (2016).

Following *Nichols*, the **Seventh Circuit** parted ways from the Eighth, Tenth, and Eleventh Circuits, holding that venue for a SORNA prosecution did *not* lie in the departing jurisdiction. In *United States v. Haslage*, 853 F.3d 331 (7th Cir. 2017), two defendants moved from Wisconsin to other states without updating their sex offender registration and were charged with SORNA offenses in the Eastern District of Wisconsin. The

district court dismissed the indictments for improper venue, and the Seventh Circuit affirmed. The court "read *Nichols* to hold that the act of leaving one's home in State A and traveling to State B is not a separable part of the offense defined in [SORNA] for purposes of criminal venue." *Id.* at 334. The court elaborated:

> [T]he premise of *Nichols* is that it does not criminalize travel with intent to commit a crime (*i.e.*, to fail to register), but rather the failure to register *after* traveling. To illustrate this distinction, imagine a hypothetical case in which an offender living in Madison, Wisconsin, packs up all of her belongings and drives to the rural upper peninsula of Michigan with the intent to stay and live there "off the grid" without registering. But imagine that, once she has crossed the border, she hears a radio report about new sightings of wolverines and, terrified, returns to her previous residence in Madison the following day. She has committed no crime under [SORNA].
>
> On the other hand, if this hypothetical offender had also taken her minor nephew along with her with the intent that he engage in prostitution, she would have committed a crime under the Mann Act as soon as she crossed the border, whether or not she followed through on that plan. See 18 U.S.C. § 2423(a). It therefore makes sense to understand the Mann Act violation as beginning in Wisconsin. But when it comes to SORNA, *Nichols* tells us that no criminal conduct even

> *begins* until she fails to register in Michigan, even if her travel began in Wisconsin.

Id. Judge Sykes dissented. In her view, "[a]lthough the crimes were not completed until Haslage and Toney failed to appear in person in their new home states and provide that jurisdiction with their registration information, the offenses clearly began in Wisconsin when each woman commenced the interstate travel that is a necessary element of this crime." *Id.* at 338 (Sykes, J., dissenting).

Following *Haslage*, three additional circuits have considered the same venue question, and all three have expressly declined to follow *Haslage*. In *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 820 (2020), the **Second Circuit** held that a sex offender who moved from New York to Maryland without updating his registration could be prosecuted in the Southern District of New York. The court reasoned that "travel in interstate commerce is an essential element of a SORNA offense involving a state sex offender. The offense begins where the interstate journey begins, regardless of whether the defendant had already formed an intent to violate the statute when the interstate travel began." *Id.* at 15-16. The court "respectfully disagree[d] with the analysis in … *Haslage*," instead endorsing the view of the *Haslage* dissent. *Id.* at 16.

As noted above, in the decision below, the **Fourth Circuit** followed *Holcombe* and held that venue was proper in the departing jurisdiction. *Supra*, at 7-8. Similar to the Second Circuit's reasoning in *Holcombe*, the court held that "the essential conduct element of

interstate travel occurred in North Carolina (as well as Colorado)." Pet. App. 9a. The court did not attempt to distinguish *Haslage*; instead, it relegated *Haslage* to a "*But see*" citation. Pet. App. 9a-10a.

Most recently, a sharply divided panel of the **First Circuit** similarly held that venue was proper in the departing jurisdiction. *See United States v. Seward*, 967 F.3d 57 (1st Cir. 2020). The defendant was a former sex offender who traveled from Massachusetts to New York and was prosecuted in the District of Massachusetts under SORNA. The court held that venue was proper in Massachusetts. Expressly disagreeing with *Haslage*, the court instead "concur[red] with the all but one of our sister circuits to have evaluated *Nichols* in the context of venue to conclude that it does not bear on our venue analysis." *Id.* at 63.

Judge Lipez filed a 33-page dissent, strenuously arguing that *Haslage* was correct and that venue was not proper in the departing jurisdiction. In his view, "based on a close examination of the text and structure of the statute, its placement in a comprehensive legislative scheme, and the Supreme Court's venue precedents, the interstate-travel element is not part of the nature of the crime. Rather, the nature of the crime defined by § 2250 is the failure to register or update a registration, such that venue is proper only where that failure occurs." *Id.* at 68 (Lipez, J. dissenting). Like the Seventh Circuit in *Haslage*, Judge Lipez reasoned that "in the absence of a failure to register, a state sex offender who engages in interstate travel has committed no criminal conduct." *Id.* at 70 (Lipez, J. dissenting). He would have followed a line of this Court's cases involving

failure to accomplish a legally required act, in which this Court held that venue was proper only in the jurisdiction where the act was required. *Id.* at 63-64 (addressing *Johnston v. United States*, 351 U.S. 215 (1956), *United States v. Anderson*, 328 U.S. 699 (1946), and *United States v. Lombardo*, 241 U.S. 73 (1916)). He pointed out that "even if an offender intends to use his interstate travel to elude SORNA's registration requirements, if he changes his mind and performs the required registration obligation when he reaches his new state of residence, no crime has been committed. Accordingly, the lack of a mens rea requirement for the interstate-travel element indicates that Congress did not intend the place of travel to be part of the locus delicti of § 2250." *Id.* at 73 (Lipez, J. dissenting). Judge Lipez also raised the "troubling prospect that, if interstate travel were part of the locus delicti of § 2250, venue might lie in a location of interstate travel bearing no relationship whatsoever to the sex offender's failure to register, thereby running afoul of the constitutional venue protections." *Id.* (Lipez, J. dissenting). Judge Lipez thoroughly addressed and repudiated all aspects of the majority's reasoning and pointed to the serious constitutional concerns raised by the majority opinion. *Id.* at 73-76 (Lipez, J. dissenting).

B. This Court Should Grant Certiorari to Resolve the Split.

The Court should resolve the circuit split in this case for four reasons. First, there is an unusually clear and mature circuit split. Second, this split will never resolve itself without this Court's intervention because the government will never bring a prosecution in the

Seventh Circuit that it knows is foreclosed by binding precedent. Thus, the Seventh Circuit will never have an opportunity to reconsider its position. Third, because these prosecutions will always be brought in situations where defendants travel from one jurisdiction to another, inconsistent interpretations of the federal venue statute across those jurisdictions will have harmful practical effects. Fourth, this case is an ideal vehicle.

1. The Circuit Split is Mature, and No More Percolation is Needed.

First, there is an unusually clear and mature circuit split. Seven courts of appeals have now considered the question presented in published opinions—far exceeding the typical number of cases in a circuit split that warrants a grant of certiorari. For instance, this Court granted certiorari in *Nichols* to resolve a 1-1 split between the Eighth and Tenth Circuits. *See* 136 S. Ct. at 1117. In addition, this Court regularly grants certiorari in other federal criminal cases to resolve 1-1 and 2-1 splits.[4]

Moreover, all arguments on both sides of the split have now been fully aired. *Haslage* was a divided decision, with detailed arguments from both the

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[4] *See, e.g.*, *Dahda v. United States*, 138 S. Ct. 1491 (2018) (2-1 split); *Koons v. United States*, 138 S. Ct. 1783 (2018) (3-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split).

majority and the dissent; three other courts of appeals have subsequently considered and rejected *Haslage*'s reasoning; and the First Circuit's recent decision on this question was accompanied by a dissent, arguing that *Haslage* was correctly decided and rebutting the arguments by other circuits. In view of the wealth of appellate authority, there would be no benefit to additional percolation.

2. This Circuit Split Will Never Resolve Organically.

Sometimes circuit splits resolve organically because an outlier circuit or circuits will re-evaluate their positions by rehearing an issue en banc. *See, e.g.*, *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) (en banc Fourth Circuit overruling prior precedent to resolve split with Sixth Circuit). That organic resolution can never happen to this circuit split. Only this Court's intervention can resolve it.

The only way the Seventh Circuit could reconsider its precedent is if a defendant who departed a judicial district in the Seventh Circuit was charged, in the departing jurisdiction, with a SORNA violation; a district court dismissed an indictment for lack of venue based on *Haslage*; the Seventh Circuit affirmed based on *Haslage*; and the United States successfully petitioned to reconsider *Haslage* en banc. However, it is virtually impossible that such a scenario could ever arise.

When someone required to register under SORNA moves from one jurisdiction to another, SORNA requires him to update his registration in the new jurisdiction. 18 U.S.C. § 2250(a)(2)(B), (3). Venue will

thus always lie in the new jurisdiction because it is the place that the person is required to perform a legal act. Therefore, if someone required to register under SORNA moves from a jurisdiction within the Seventh Circuit to another jurisdiction and fails to update his registration, the United States will always be able to bring that prosecution in the new jurisdiction. And the United States will always make that choice instead of bringing the prosecution in the old jurisdiction because the United States will not bring a prosecution that it knows violates binding circuit precedent when it has another venue choice that will comply with the law. Indeed, since *Haslage* was decided, the Justice Department has not (to Petitioner's knowledge) brought any SORNA prosecutions within the Seventh Circuit in cases where the defendant departed the Seventh Circuit, even though it has continued to bring such prosecutions in other judicial circuits.

Therefore, the Seventh Circuit will never have an opportunity to reconsider its precedent. Only this Court can resolve the split.

3. The Nature of Venue and SORNA Causes Particular Problems Regarding This Split.

The circuit split in this case is a uniquely harmful type of split: a split over where a case should be litigated. This split will create practical problems, further underscoring that the Court should grant certiorari to resolve it.

Many crimes—even federal crimes—involve primarily local actions. A defendant often commits

every element of a crime in one federal judicial district, is convicted in that district, and appeals to the circuit court with jurisdiction over that district. When circuit splits arise related to such federal crimes, this Court routinely grants certiorari to resolve them: different jurisdictions should not be applying different interpretations of "what is supposed to be a unitary federal law." *In re: Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 (1989). That said, those types of circuit splits do not necessarily create practical problems in the administration of justice: litigants and district judges within a circuit understand what law applies within their circuit and can act accordingly.

Here, however, the very existence of the split in this case creates practical problems in the administration of justice. If the split persists, district judges may be put in the impossible position of adjudicating matters under the law of one circuit that may ultimately be reviewed under the law of another circuit.

It is easy to see how this scenario may arise. Assume that an individual required to register under SORNA moves from Raleigh, North Carolina to Chicago, Illinois. The government alleges that he failed to update his registration in Chicago and prosecutes him in the Eastern District of North Carolina for that failure. He moves to dismiss the indictment for improper venue. The district court, bound by *Spivey*, denies his motion. Then, the defendant moves for a discretionary transfer of venue to the Northern District of Illinois under Federal Rule of Criminal Procedure 21(b).

Such a motion would put the district judge in a very difficult position. On the one hand, in many cases, such a transfer would make perfect sense. Any likely disputed issues of fact—such as whether the defendant did update his registration, whether he actually resided in Chicago, or whether he has a valid affirmative defense to failing to update his registration—would involve evidence and witnesses in Chicago, not Raleigh. *See* 18 U.S.C. § 2250(c) (establishing an affirmative defense of impossibility for failure to register under SORNA). On the other hand, such a transfer would lead to the inevitable vacatur of the conviction. If the defendant is convicted in the Northern District of Illinois and appeals the denial of his motion to dismiss the indictment to the Seventh Circuit, the Seventh Circuit would then apply its own precedents because "[t]he federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis." *Korean Air Lines Disaster*, 829 F.2d at 1176 (R.B. Ginsburg, J.); *see Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1126 (7th Cir. 1993) ("agree[ing] with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim"). Bound by *Haslage*'s interpretation of federal law, the Seventh Circuit will be constrained to hold that the district court in the Eastern District of North Carolina erred in denying the defendant's motion to dismiss for improper venue and vacate the conviction.

This situation puts the district judge, the prosecutor, and the defendant in a "logically inconsistent" position in

which they have to "apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." *Korean Air Lines Disaster*, 829 F.2d at 1175-76. The Court should grant certiorari to prevent this situation from arising.

4. This Case Presents a Proper Vehicle to Address This Question.

This case is a flawless vehicle to resolve the question presented. Mr. Spivey properly raised the question presented in the district court by timely moving to dismiss the indictment for improper venue. Pet. App. 4a. He entered into a conditional plea agreement that expressly preserved his right to appeal this issue. Pet. App. 4a. He timely appealed his conviction, and he briefed this issue to the Fourth Circuit Court of Appeals, which addressed it on the merits. This case does not contain any ancillary jurisdictional issues that would prevent this Court from addressing the merits of the question presented

C. The Fourth Circuit's Decision is Incorrect

In addition to resolving the circuit split discussed above, this Court should grant review because the Fourth Circuit's expansive reading of venue to encompass every jurisdiction through which Mr. Spivey traveled is contrary to this Court's precedent. Sup. Ct. R. 10(c).

1. The Only Conduct Constituting a Violation of Section 2250(a) is the Knowing Failure to Register.

Section 2250 does not contain a separate venue provision. Thus, venue for a Section 2250 prosecution "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). "In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, (1999); *see also Johnston v. United States*, 351 U.S. 215, 220 (1956) ("[T]he place of the crime . . . is determined by the acts of the accused that violate a statute.").

The question of venue therefore collapses into the inquiry of what "conduct constitut[es]" a violation of Section 2250(a). The Fourth Circuit holds that the "conduct constituting" a violation of Section 2250(a) is both the interstate travel and the failure to register. The Fourth Circuit is wrong.

"When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies *only* at that place." *Travis v. United States*, 364 U.S. 631, 636 (1961) (emphasis added). SORNA required Mr. Spivey to "appear in person in at least 1 jurisdiction involved" to update his registration. 34 U.S.C. § 20913(c). Colorado is the only "jurisdiction involved" in Mr. Spivey's case and the only place he could "appear in person" to register. *Nichols*, 136 S. Ct. at 1117-18 (internal quotation marks omitted). It is thus the only

place "where a paper must be filed" and the only place where venue could properly lie.

As Judge Lipez further explained in his *Seward* dissent, this result flows from "the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." *Seward*, 967 F.3d at 70 (Lipez, J., dissenting) (quoting *Johnston*, 351 U.S. at 220). In this case, Mr. Spivey's crime was a failure to do a legally required act—update his registration as a sex offender—and therefore, he should have been prosecuted where that failure occurred.

In reaching a contrary conclusion, the Fourth Circuit held that travel was part of the conduct constituting Mr. Spivey's crime. And, because Mr. Spivey started his travel in North Carolina, the Fourth Circuit held that he committed that crime in North Carolina. The Fourth Circuit is incorrect because travel is not relevant to determining the location of a Section 2255 offense. As the Seventh Circuit explained in *Haslage* and as Judge Lipez explained in his *Seward* dissent, SORNA is a failure to register offense, not a travel offense.

Certain federal crimes focus on travel as the fundamental element of the conduct criminalized. These "are statutes in which the act of travelling from one state to another *is* the predicate for an offense." *Haslage*, 853 F.3d at 334 (emphasis in original). For example, both the Mann Act and the Travel Act criminalize traveling across state lines with the intent to commit certain criminal or sexual activity. *Id.* There, the travel itself is the crime; it occurs wherever the defendant travels; and

venue is proper in any of the locations the defendant traversed.

Similarly, federal law prohibits mailing explosive devices or other contraband. 18 U.S.C. § 1716. And, if someone mails a bomb, venue can lie in the district containing the sending or the receiving mailbox. 18 U.S.C. § 3237(a). This makes sense because the active misuse of the mail is the core element of this crime. The mailing *is* the crime.

Failing to register differs in kind from these crimes. Mr. Spivey's crime was not in his act of travel. Instead, the offense was his failure to timely register once his travel had ended.

Indeed, as the Seventh Circuit explained in *Haslage*, a sex offender can sever all ties with the departing state before forming any *mens rea* to commit any crime. 853 F.3d at 334. Suppose, for instance, the defendant travels from North Carolina to Colorado with the intent of staying there temporarily, but once he arrives in Colorado, decides to move their permanently without updating his registration. In that scenario, the defendant's sole *actus reus* in North Carolina was *leaving* North Carolina—and the defendant would not have formed any illicit *mens rea* in North Carolina at all. That scenario is fundamentally different from the scenario presented when a defendant illicitly mails a bomb across state lines, in which the defendant forms the illicit criminal intent, and actually mails the bomb, in the departing state for the purpose of inflicting harm on the arrival state.

In reaching a contrary conclusion, the Fourth Circuit relied heavily on *Carr* to support its holding that travel is an essential element of a Section 2250 offense. Pet. App. 7a. *Carr* did not discuss, analyze, or mention venue. Instead, it answered the separate question of "whether § 2250 applies to sex offenders whose interstate travel occurred prior to SORNA's effective date." *Carr v. United States*, 560 U.S. 438, 442 (2010). In answering that question, this Court focused on Section 2255's statutory language and structure to hold that the interstate travel aspect of a SORNA prosecution must occur after SORNA became law. *Id.* at 445-51. This Court's decision turned on the distinction between present and past tense verbs, an inquiry irrelevant to the federal venue statute. *Id.* at 449-50 (discussing difference between "travels" in interstate commerce and "traveled" in interstate commerce).

The phrase in *Carr* on which the Fourth Circuit relies—stating that travel is "the very conduct at which Congress took aim"—does not, as that court would have it, resolve the venue issue. *Id.* at 454. At its core, the Fourth Circuit's reliance on this phrase "confuses a general goal of SORNA with the specific purpose of § 2250." *Id.* at 455. Venue does not ask this Court to determine Congress's goal in passing a statutory scheme. It instead requires courts to focus on where the conduct constituting the crime occurred. And one phrase from this Court in a case that was answering a different question does not resolve this issue.

Judge Lipez's dissent in *Seward* thoroughly debunks the Fourth Circuit's conclusion that *Carr* supports its position. As Judge Lipez explained, "[j]ust because the

government must prove that a state sex offender's interstate travel predated his failure to register does not mean that it must also prove that the two elements were performed as part of a single course of conduct." 967 F.3d at 77 (Lipez, J. dissenting). This Court's statement that interstate commerce was "the very conduct at which Congress took aim" was an observation made "to avoid an ex post facto problem," not to resolve the distinct question of venue. *Id.* at 78-79 (internal quotation marks omitted) (Lipez, J. dissenting). Further, *Carr* stated that "Congress intended § 2250 to do exactly what it says: to subject to federal prosecution sex offenders who elude SORNA's registration requirements by traveling in interstate commerce." 560 U.S. at 456. As Judge Lipez observed, this statement supports the position that venue is in the arrival state—because that is the state in which the defendant eludes SORNA's registration requirement. *Seward*, 967 F.3d at 79-80 (Lipez, J dissenting).

2. The Fourth Circuit's Approach Allows for Forum Shopping.

The Fourth Circuit's holding places venue in any jurisdiction from which, to which, or through which a defendant traveled. Pet. App. 7a-8a (focusing on where the interstate travel occurred). The United States could, consistent with *Spivey*, bring a prosecution "anywhere the travel occurred or evidence of the travel was located," regardless of how little time Mr. Spivey actually spent driving through a jurisdiction or how removed it was temporally or spatially from his alleged failure to register. *Haslage*, 853 F.3d at 335.

This expansive reading would allow for broad forum shopping by the United States, one of the precise evils that venue restrictions are designed to prevent. "Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Johnson*, 323 U.S. at 275.

Moreover, this expansive reading allows the government to bring prosecutions in jurisdictions with no connection to the SORNA offense. For example, assume an individual—who had never left the state of North Carolina—commits a state sex offense in 2020 in North Carolina that would requires him to register under SORNA if he travels in interstate commerce. In 2025, he travels to South Carolina and back for a weekend, never leaving North Carolina again. In 2035, he changes jobs but does not update his registration as required by 34 U.S.C. § 20913(c). Under the Fourth Circuit's holding in *Spivey*, venue to prosecute him for failing to update his registration in North Carolina could lie in South Carolina because his weekend trip a decade prior satisfied the statute's "travel" requirement. That cannot be correct.

If Congress does not expressly place venue for a crime in a specific location, then courts should limit venue to the places where the conduct constituting the criminal act or omission allegedly occurred. In making that determination, courts give criminal statutes a narrow construction, limiting venue to the actual locations of the defendant's alleged actions when

possible. The United States alleged that Mr. Spivey failed to perform a legal duty in Colorado. Mr. Spivey had no legal duty to perform any act in North Carolina. Thus, venue was not proper in North Carolina, and the Fourth Circuit was wrong to hold that it was.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4099

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES MALCOLM SPIVEY, JR.

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:17-cr-00029-H-1)

Argued: January 28, 2020 Decided: April 15, 2020

Before FLOYD, HARRIS and RUSHING, Circuit Judges affirmed by published opinion. Judge Floyd wrote the opinion in which Judge Harris and Judge Rushing joined.

ARGUED: Eric Joseph Brignac, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Phillip Anthony Rubin, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appelle. **ON BRIEF**: G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

FLOYD, Circuit Judge:

This appeal requires us to answer the following question: when a state sex offender subject to the Sex Offender Registration and Notification Act (SORNA) relocates from one state to another and fails to update his registration in violation of 18 U.S.C. § 2250(a), in which judicial district(s) is venue proper?

The Defendant-Appellant, Charles Malcolm Spivey, Jr., a state sex offender subject to SORNA's registration requirements, relocated from North Carolina to Colorado but failed to update his registration in Colorado as required by SORNA. Consequently, Spivey was indicted in the Eastern District of North Carolina with failing to update his registration as a sex offender after travelling in interstate commerce, in violation of 18 U.S.C. § 2250(a). Spivey moved to dismiss the indictment for improper venue, arguing that the District

of Colorado was the only proper venue. The district court dismissed Spivey's motion. Spivey conditionally pled guilty, was sentenced, and timely appealed. For the following reasons, we affirm.

I.

Between 1988 and 1993, Spivey was convicted under North Carolina law of four instances of taking indecent liberties with a child under sixteen years old. Per SORNA, Spivey was required to register as a sex offender and update his registration if he moved.

On September 25, 2015, Spivey updated his sex offender registration at the New Hanover County Sheriff's Office (NHCSO), providing an address in Wilmington, North Carolina.

Between February and June 2016, NHCSO attempted to locate Spivey at his registered address but he could not be located. In June 2016, Spivey was arrested for failing to report a new address as a sex offender and was released after posting bond. In December 2016, NHCSO learned that Spivey had relocated and had been living in a lodge in Colorado Springs, Colorado from mid-October to mid-December 2016. On December 30, 2016, Mr. Spivey was apprehended in Colorado Springs and ultimately returned to North Carolina. Investigators learned that Spivey never registered as a sex offender in Colorado and, in a statement to authorities, Spivey admitted that

he knew that he was required to update his sex offender registration but failed to do so.[1]

On April 5, 2017, a grand jury in the Eastern District of North Carolina indicted Spivey with failure to update his registration as a sex offender after travelling in interstate commerce, in violation of 18 U.S.C. § 2250(a). Spivey filed a motion to dismiss the indictment for, among other things,[2] improper venue, arguing that the District of Colorado was the only proper venue. *See* Fed. R. Crim. P. 12(b)(3)(A)(i). On October 10, 2017, the district court denied Spivey's motion. Spivey conditionally pled guilty pursuant to a plea agreement and, on February 6, 2018, was sentenced to 10 months' imprisonment. Spivey timely appealed.[3]

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[1] Under SORNA's registration provisions, Spivey was required to appear in person in Colorado and inform the authorities of that change in residence no later than three business days after such change. *See* 34 U.S.C. § 20913(a), (c) (describing that after a sex offender changes their name, residence, employment, or student status, they must appear in person in at least one "involved" jurisdiction, which is defined as the jurisdiction where the offender resides, the jurisdiction where the offender is an employee, and the jurisdiction where the offender is a student).

[2] Spivey also moved to dismiss the indictment for failure to state a claim, arguing that the indictment alleged a violation of SORNA in North Carolina and that Spivey had no obligation to update his registration in North Carolina. Though the issues overlap to some degree, Spivey only pursues his improper venue argument on appeal.

[3] After Spivey filed his opening brief, this Court granted his motion to stay the appeal pending the Supreme Court's decision in *Gundy v. United States*, No. 17-6086. After the Supreme Court issued its decision, this Court permitted Spivey to file supplemental briefing

On appeal, this Court reviews a district court's denial of a motion to dismiss for improper venue de novo. *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004).

II.

Article III of the Constitution requires that "[t]he Trial of all Crimes ... be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment also affirms that a defendant has a right to a trial by "an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. amend. VI; *see also* Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed.").

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on the case. In his supplemental briefing, Spivey contends that SORNA violates the non-delegation doctrine by assigning a core legislative function to the Attorney General. Sitting with only eight justices, the Supreme Court held in a plurality opinion that 34 U.S.C. § 20913(d) does not violate the non-delegation doctrine. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion) (noting that the "delegation easily passes constitutional muster"); *see also id.* at 2131 (Alito, J., concurring in the result). The Supreme Court's decision in *Gundy* binds us. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) ("It is well established . . . that when a decision of the Court lacks a majority opinion, the opinion of the Justices concurring in the judgment on the 'narrowest grounds' is to be regarded as the Court's holding."). "Here, the narrowest common ground that five Justices stood upon in *Gundy* is that the SORNA delegation did not violate long-standing delegation doctrine analysis." *United States v. Glenn*, 786 F. App'x 410, 412 (4th Cir. 2019). Spivey's counsel concedes that plain error review applies to this claim and that, in light of *Gundy*, the error here is not plain. Oral Arg. 15:22–16:10. However, Spivey has preserved this issue for further appeal.

In 2006, Congress enacted SORNA to make registration of sex offenders "more uniform and effective" than the "patchwork" of state and federal registration requirements that existed at the time. *Reynolds v. United States*, 565 U.S. 432, 435, 132 S. Ct. 975, 181 L.Ed.2d 935 (2012). SORNA created federal criminal sanctions for individuals who violate SORNA's registration requirements. *See* 18 U.S.C. § 2250(a). The offense for which Spivey was charged has "three elements." *Carr v. United States*, 560 U.S. 438, 446 (2010). State sex offenders like Spivey may be convicted under 18 U.S.C. § 2250(a) if they: (1) have been required to register under SORNA; (2) "travel[] in interstate . . . commerce";[4] and (3) "knowingly fail[] to register or update a registration as required" by SORNA. 18 U.S.C. § 2250(a). This appeal turns on the second element, namely interstate travel, and how that element relates to venue.

When a criminal statute does not designate the appropriate venue for an offense, courts must determine where the offense was committed (the locus delicti) "from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, (1999) (quoting *United States v. Cabrales*, 524 U.S. 1, 6–7, (1998)) (internal quotation mark omitted). Not all elements of a criminal offense are relevant, however, for determining

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[4] Interstate or foreign travel is not a required element for sex offenders convicted of a sex offense "under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States." 18 U.S.C. § 2250(a)(2)(A).

where an offense was committed. Courts instead distinguish between "circumstance" and "conduct" elements. *See United States v. Bowens*, 224 F.3d 302, 310–11 (4th Cir. 2000). "[O]nly the essential conduct elements of an offense, not the circumstance elements, provide a basis for venue." *Id.* at 313 (holding that for the offense of harboring or concealing a fugitive from arrest, in violation of 18 U.S.C. § 1071, the element of an issuance of an arrest warrant was a circumstance element and, therefore, that where the warrant was issued was irrelevant for venue purposes); *see also Cabrales*, 524 U.S. at 7, 118 S.Ct. 1772 (holding that for the offense of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(ii) and 1957, the existence of criminally generated proceeds was a circumstance element of the offense and, therefore, that where the laundered funds were unlawfully generated was irrelevant for venue purposes).

In deciding whether interstate travel is a conduct element, Spivey posits that the requirement for interstate travel in § 2250(a)(2) is an inconsequential element of the offense that is merely present to generate federal jurisdiction. In light of the Supreme Court's holding in *Carr*, Spivey's argument is without merit. In that case, the question before the Court was whether a defendant could be convicted under § 2250(a) for interstate travel that pre-dated SORNA's effective date. The Court held that it could not. *Carr*, 560 U.S. at 456–58. Importantly, in discussing the element of "interstate travel," the Supreme Court characterized the element as "an aspect of the harm Congress sought to punish" and expressly rejected the argument that it

was solely a jurisdictional predicate. *Id.* at 453–54. Instead, the Court held that the element of interstate travel was the "the very conduct at which Congress took aim." *Id.* at 454 (emphasis added). For that reason, under *Carr*, the element of "interstate travel" is an essential conduct element for a conviction under § 2250(a).

To circumvent the conclusion that *Carr* compels, Spivey attempts to seek refuge in the Supreme Court's recent decision in *Nichols v. United States*, 136 S. Ct. 1113, 1117-18 (2016). There, the Supreme Court was tasked with deciding whether a federal sex offender was required to update his registration in Kansas once he left the state and moved to the Philippines. The Court held that SORNA did not require the defendant to update his registration in Kansas once he no longer resided there. *Id.* at 1118 (discussing 42 U.S.C. § 16913(a), which later became 34 U.S.C. § 20913(a)). Spivey argues that, in light of *Nichols*, he had no obligation to update his registration in North Carolina given that he no longer resided there; instead, Spivey argues, venue should only lie in Colorado where he resided and failed to update his registration. The problem with Spivey's reliance on *Nichols* is that *Nichols* did not address the issue of venue, but rather concerned what qualifies as an "involved" jurisdiction for SORNA's registration requirements. *Id.* at 1116; *see supra* note 1. Moreover, *Nichols* involved a federal sex offender, not a state sex offender. That distinction matters. A "federal sex offender, unlike a state sex offender, does not need to travel interstate to commit a SORNA offense." *United States v. Holcombe*, 883 F.3d 12, 15–16 (2d Cir. 2018); *see*

*supr*a note 4. As a result, *Nichol*s does not assist us in answering the question presented on appeal, and it certainly did not abrogate the holding in *Carr* that the element of interstate travel was the "very conduct at which Congress took aim." *See Carr*, 560 U.S. at 454.

Having determined that interstate travel is a conduct element and, therefore, relevant for the purposes of determining venue, we must determine whether interstate travel occurred in North Carolina. Here, the question whether Spivey's interstate travel occurred in North Carolina is, in effect, answered by the adjective "interstate," which must logically involve the departure from one state to another. *See Holcomb*e, 883 F.3d at 16 ("Interstate travel requires a departure from one State just as much as arrival in another."). Spivey's interstate travel began when he stepped outside of North Carolina. As a result, the essential conduct element of interstate travel occurred in North Carolina (as well as Colorado). Moreover, this conclusion is bolstered by 18 U.S.C. § 3237(a), which provides that for offenses "begun in one district and completed in another," or for offenses "committed in more than one district," venue may lie "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). Spivey's interstate travel began in North Carolina. As a result, we join several of our fellow circuits and hold that venue was proper in the district from which Spivey departed, namely the Eastern District of North Carolina. *See Holcomb*e, 883 F.3d at 15–16; *United States v. Kopp*, 778 F.3d 986, 988–89 (11th Cir. 2015); *United States v. Lewis,* 768 F.3d 1086, 1092–94 (10th Cir. 2014); *United States v. Howell*, 552 F.3d 709,

717–18 (8th Cir. 2009). *But see United States v. Haslage*, 853 F.3d 331, 335 (7th Cir. 2017) (holding in a 2-1 decision that venue was not proper in the district where the defendant departed). Therefore, the district court did not err in denying Spivey's motion to dismiss the indictment.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
SOUTHERN DIVISION

No. 7:17-CR-29-1H

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
CHARLES SPIVEY, JR.,	)	
Defendant.	)	

This matter is before the court on defendant's motion to dismiss for improper venue and failure to state an offense, [DE #26]. The government has responded, [DE #31], and the time for further filings has expired. These motions are ripe for adjudication.

STATEMENT OF THE CASE

On April 5, 2017, defendant was indicted on one count of knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act ("SORNA"), in violation of 18 U.S.C. § 2250(a). On July 21, 2017, defendant filed a motion to dismiss for improper venue under Fed. R. Crim. P. 12(b) (3) (A) (i) and for failure to state an offense under Fed. R. Crim. P. 12(b) (3) (B) (v),

[DE #26]. The arraignment in this case is set for the court's November 7, 2017 term.

STATEMENT OF THE FACTS

According to the government's response, defendant was convicted of several North Carolina offenses for which he was required to register as a sex offender for his lifetime, including two counts of Indecent Liberties with a Minor on August 16, 1989; one count of Indecent Liberties with a Minor on January 26, 1993; one count of Indecent Liberties with a Minor on December 15, 1993; and one felony Sex Offender Employment Violation on November 17, 2008.

Defendant last registered on September 25, 2015, when he reported to the New Hanover County Sheriff's Office and changed his address to homeless, residing in the woods at 2300 North College Road, Wilmington, North Carolina. One month later, on October 23, 2015, defendant was arrested for unlawfully being on the premises of a high school in New Hanover County, a felony offense. Defendant was released on bond. On June 9, 2016, New Hanover Sheriff's Office obtained an arrest warrant charging defendant with failing to report a new address after investigation revealed that he was not living at the Wilmington address he disclosed in September 2015. A separate arrest warrant was issued on August 9, 2016, because defendant failed to appear in court for the felony offense of Unlawfully Being on School Premises.

On December 9, 2016, the New Hanover Sheriff's Office requested the assistance of the NC Violent Fugitive Task Force (VFTF) to locate and apprehend

defendant. VFTF received information that defendant and his wife had fled to Colorado Springs, Colorado. On December 30, 2016, defendant's bail bondsman from North Carolina traveled to Colorado to attempt to locate defendant. He apprehended defendant in Colorado Springs, Colorado, and brought him back to North Carolina. According to the manager at the Aspen Lodge in Colorado Springs, defendant had been living in room 37 with his family since October 27, 2016. Defendant never registered in Colorado and wrote a statement to that, effect. In that statement, he further stated that he knew he had a warrant for failure to appear in North Carolina and knew that he was required to register within three days. Defendant has been charged in this court with failing to register in violation of 18 U.S.C. § 2250(a).

COURT'S DISCUSSION

I. Motion to Dismiss for Improper Venue

Defendant argues the Eastern District of North Carolina is an improper venue because the crime of failure to register did not occur in North Carolina, but rather in Colorado. SORNA provides, in pertinent part:

> 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 involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that

> information to all other jurisdictions in which the offender is required to register.

34 U.S.C. § 20913 (c). The jurisdictions involved pursuant to subsection (a) are "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). The Supreme Court has determined the present tense of the statute requires a sex offender to register in the state of current residence within three days of change of residence, and there is no requirement for a sex offender under SORNA to update his registration in a state of former residence. *Nichols v. United States*, 136 S. Ct. 1113, 1117-18 (2016) (holding defendant was not required to register in Kansas once he departed Kansas as it was no longer a 'jurisdiction involved.'). The government concedes post-*Nichols*, there is no longer a requirement under SORNA to update registration in the state in which the defendant no longer resides. [DE #31 at 15]. Thus, defendant allegedly only failed to register in Colorado within three days of his change of residence from North Carolina to Colorado.

Defendant therefore argues venue for a violation of SORNA is not proper in the Eastern District of North Carolina, as this district is not the district in which the crime occurred. "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. The government argues one such statute providing otherwise is 18 U.S.C. § 3237, providing "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any

district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237. Further,

> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

The government argues a violation of 18 U.S.C. § 2250 (a) is a continuing offense. The statute of the indictment criminalizes the conduct of whoever is (1) required to register under SORNA as a sex offender; (2) travels in interstate commerce; and (3) "knowingly fails to register or update a registration as required by SORNA." 18 U.S.C. § 2250(a). Government notes the essential second element conduct, interstate travel, was begun in the Eastern District of North Carolina, where defendant resided and was last registered, and defendant's violation has continuing effects on the Eastern District of North Carolina. While there are no published Fourth Circuit cases on venue decisions in SORNA cases post-*Nichols*, the government cites unpublished opinions providing for venue in the district of the state in which the 18 U.S.C. § 2250 violation began.[1] *United States v. Bailey*, 592 F.App'x. 206, 207

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[1] While there are no published Fourth Circuit cases post-*Nichols* addressing venue for a SORNA violation, there is a Fourth Circuit case post-*Nichols* related to conditions of supervised release for a

(4th Cir. 2015) (unpublished) (venue proper under continuing offense theory under 18 U.S.C. § 3237(a)); *United States v. Atkins*, 498 F.App'x. 276, 277 (4th Cir. 2012) (unpublished) (finding venue proper in the former residence state as "[a] convicted sex offender's act of interstate travel both 'serve[s] as a jurisdictional predicate for § 2250, [and] is also . . . the very conduct at which Congress took aim' in enacting the statute.") (citing *Carr v. United States*, 560 U.S. 438, 455 (2010)).

Thus, the motion to dismiss for improper venue is DENIED.

II. Motion to Dismiss for Failure to State an Offense

Defendant argues the indictment, which charges defendant with "knowingly fail[ing] to register and update his registration" fails to state an offense because defendant, having moved to Colorado, did not have a duty to update his registration in North Carolina. [DE #26 at 6]. However, as discussed *supra*, SORNA does require a sex offender to register in a current state of residence. 34 U.S.C. § 20913 (a)&(c) (formerly cited as 42 U.S.C. § 16913). The language of the indictment charges defendant with the crime of "being required to register under [SORNA], and having traveled in interstate commerce, did knowingly fail to register and

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violation of SORNA in which the defendant was indicted in Kentucky for failure to register as a sex offender, but consented to a transfer of his case to the Western District of Virginia, where he was last registered as a sex offender. *United States v. Douglas*, 850 F.3d 660, 662 (4th Cir. 2017) (noting the transfer of venue but without analyzing it).

update his registration as required by [SORNA], in violation of 18 U.S.C. § 2250 (a)." [DE #1 at 1].

Where, as here, the government charges in the conjunctive, "register and update registration," and the statute only provides the disjunctive, "register or update a registration as required by SORNA," the government only has to prove the disjunctive. *See United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009) ("It is well established that when the Government charges in the conjunctive, and the statute is worded in the disjunctive, the district court can instruct the jury in the disjunctive.") (citing *United States v. Montgomery*, 262 F.3d 233, 242 (4th Cir. 2001) and *United States v. Champion*, 387 F.2d 561, 563 n. 6 (4th Cir. 1967)); *see also United States v. Cruz*, 439 F.App'x. 209, 214, 2011 WL 2784102, at *4 (4th Cir. July 18, 2011) (unpublished) ("[I]t is well-established that 'where an indictment charges in the conjunctive several means of violating a statute, a conviction may be obtained on proof of only one of the means.' ") (citing *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000)). The court notes the statute under which defendant was indicted is worded in the disjunctive, "failed to register or update." 18 U.S.C. § 2250(a). The indictment does not fail to state an offense, and thus, defendant's motion to dismiss for failure to state an offense is DENIED.

CONCLUSION

Based on the foregoing reasons, defendant's motion to dismiss for improper venue and failure to state an offense, [DE #26], is DENIED.

This 9th day of October 2017.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
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