No. 20-347

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner asks this Court to resolve a circuit split on whether venue for SORNA prosecutions is proper in the jurisdiction from which the defendant departed. The government does not dispute any of the premises of Petitioner's case for certiorari. There is no dispute that there is a longstanding circuit split on the question presented; that seven courts of appeals have now weighed in; that the circuit split cannot possibly go away without this Court's intervention; that the circuit split may require conflicting interpretations of federal law to be applied in the same case; and that this case is an ideal vehicle.

The bulk of the brief in opposition focuses on the merits. Yet the government cannot show how venue is proper in the departure jurisdiction when the defendant need not have formed any criminal intent in the departure jurisdiction, and when the defendant's sole connection to the departure jurisdiction is that he left that jurisdiction behind. The petition should be granted, and the judgment should be reversed.

A. The government does not dispute any of the premises behind Petitioner's case for certiorari.

Each of the following points from the petition is undisputed:

- There is a square 6-1 circuit split on the question presented. Pet. 8-15.
- It is structurally impossible for the circuit split to resolve itself without this Court's intervention. Pet. 17-18.

- The circuit split creates a serious practical problem: district judges may be put into the impossible position of adjudicating matters under the law of one circuit that may ultimately be reviewed under the conflicting law of another circuit. Pet. 19-21.
- This case is an ideal vehicle. Pet. 21.

Rather than dispute these points, the government argues that the issue lacks practical importance because the government has the option of prosecuting criminal defendants in the arrival jurisdiction. BIO 12. In other words, according to the government, it is unimportant that the government may be serially violating the federal venue statute in SORNA cases, because the government always has the option of not violating that statute.

This is not a persuasive reason to deny review. The issue has obvious practical importance to the many criminal defendants who face prosecution in the departure jurisdiction. The government seems to be saying that it is of "minimal" consequence (BIO 12) that those defendants are prosecuted in the departure jurisdiction, because they could just as easily be prosecuted in the arrival jurisdiction, so no harm, no foul. But venue is important—important enough that venue protections appear both in a federal statute and in the Bill of Rights. Defendants face serious prejudice when they are transported from their home jurisdiction, where witnesses and evidence are available, to face prosecution in a state that they have left behind. The government cannot seriously claim that the issue lacks

practical importance because prosecutors have the option of *not* doing that.

The government offers no satisfactory response to Petitioner's showing (Pet. 20, 27) that permitting prosecution in the departure jurisdiction invites forum-shopping and causes prejudice. Instead, the government merely offers a one-sentence assertion that SORNA prosecutions "typically" require evidence from both jurisdictions, and declares it "far from clear" that Petitioner's position would have "substantial practical benefits." BIO 12. The government does not elaborate on the basis for these conclusory assertions.

The government also asserts without elaboration that "[t]he Department of Justice has distributed informal guidance to prosecutors recommending" that defendants be prosecuted in the arrival district "when possible." BIO 11-12. This "informal guidance" is apparently not very persuasive, because the government regularly prosecutes defendants in the departure jurisdiction. There are published opinions from seven different circuit courts arising from such prosecutions, including two in 2020 alone. And the government has also recently brought such a prosecution in a district court within the Fifth Circuit (which has yet to weigh in). *See United States v. Elias*, No. 5:19-CR-190, 2019 WL 3803111 (S.D. Tex. Aug. 12, 2019). The government cannot avoid review of prosecutions it constantly brings by declaring that it has distributed "informal guidance" not to bring them.

Finally, the government points to the denial of certiorari in *Lewallyn v. United States*, 139 S. Ct. 1321 (2019) (No. 18-6533). BIO 5. But *Lewallyn* differs

materially from this case. First, in *Lewallyn*, the government opposed certiorari on the ground that "[t]he conflict is shallow, as only two circuits (the Second and the Seventh) have issued published post-*Nichols* circuit precedent on this issue." BIO at 12, *Lewallyn v. United States*, No. 18-6533 (U.S. Feb. 1, 2019). Since *Lewallyn*, however, two more circuits, the First and Fourth, have weighed in. Second, in *Lewallyn*, the government's brief in opposition noted that "the court of appeals' decision here is unpublished and non-precedential." *Id.* Here, the decision below is published and precedential. Finally, in *Lewallyn*, the government pointed out that the certiorari petition "may be non-jurisdictionally out of time" (although it did not urge denial of certiorari on that basis). *Id.* at 2 n.1. There is no question that Petitioner's petition is timely. Hence, the denial of certiorari in *Lewallyn* provides no basis to deny certiorari here.

B. The Fourth Circuit's decision is incorrect.

The brief in opposition primarily argues that the Fourth Circuit's decision is correct on the merits. The Court should reject the government's view and hold that venue for SORNA prosecutions does not lie in a jurisdiction in which a defendant had no duty to register or update his registration.

The government's argument ignores SORNA's plain text and structure, both of which indicate that the statute's "travels in interstate or foreign commerce" element does not establish the crime's location for venue purposes. Moreover, it does not account for this Court's guidance that, in the absence of a congressional directive to the contrary, courts should not read statutes to create

venue in jurisdictions only tangentially related to the alleged conduct. Finally, it over-reads this Court's *Carr* decision, which does not come close to resolving the issue in this case.

1. Courts must identify the conduct constituting an offense in order to determine where venue may lie.

The government correctly notes that "travel[] in interstate or foreign commerce" is an element of a SORNA failure-to-register offense. 18 U.S.C. § 2250(a)(2)(B); BIO 6. But that does not answer the question presented by this case. Venue does not lie in every jurisdiction that has any relationship, however remote, with an element of the offense. Instead, venue for a SORNA 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).

When identifying the conduct constituting the offense for venue purposes, courts should recognize "the unfairness and hardship to which trial in an environment alien to the accused exposes him" and seek to limit venue to the places where a defendant's actual conduct actually occurred. *United States v. Johnson*, 323 U.S. 273, 275 (1944). "Questions of venue in criminal cases. . . raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the

constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id.* Viewing SORNA's text and structure through this lens shows that the SORNA violation for venue purposes is the failure to register or update a registration.

2. SORNA's text and structure show that the failure to register—not the travel—is the conduct constituting a SORNA offense.

SORNA's text and structure—in particular its mens rea requirement—show that Congress did not intend for the "travels in interstate or foreign commerce" requirement to be part of act in which a defendant need to engage to violate the statute. A defendant must have criminal knowledge or intent when he fails to update his registration. But the travel is conduct in which the defendant need not knowingly (or even voluntarily) engage. Thus, it is not part of the nature of the offense for venue purposes.

The relevant portion of SORNA contains three sections, but only one of them contains a mens rea requirement. It applies to anyone who (1) is required to register under SORNA; (2) has a qualifying federal or Indian conviction or travels in interstate commerce; and (3) "*knowingly* fails to register or update a registration as required by" SORNA. 18 U.S.C. § 2250(a) (emphasis added). "Importantly, the statute does not attach a mens rea requirement to the interstate-travel element. This fact distinguishes § 2250 from other statutes in which the interstate travel itself is the predicate for the

offense." *United States v. Seward*, 967 F.3d 57, 71 (1st Cir. 2020) (Lipez, J. dissenting).

For example, "[t]he Travel Act . . .makes it a crime to travel interstate with the *intent* to commit a crime or other unlawful activity. The Mann Act criminalizes interstate travel or transportation with the *intent* to engage in criminal sexual activity. In cases involving violations of those statutes, the crime begins in the state where the defendant set out with the *intent* to cross a state line and commit the crime." *United States v. Haslage*, 853 F.3d 331, 334 (7th Cir. 2017) (internal citations omitted) (emphasis added).

SORNA, in contrast "does not criminalize travel with intent to commit a crime (*i.e.*, to fail to register), but rather the failure to register *after* traveling." *Id.* (emphasis in original). "In other words, 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." *Seward*, 967 F.3d at 73 (Lipez, J. dissenting).

The statute's limited affirmative defense further supports the conclusion that Congress drafted SORNA as a "failure to register" statute and not a "travel" statute. SORNA contains an affirmative defense for a defendant who can prove that "uncontrollable circumstances prevented the individual from complying" with registration. 18 U.S.C. § 2250(c)(1).

Congress created no such affirmative defense for the travel element—such as allowing a defendant to prove that he did not travel intentionally or voluntarily. Nor did Congress create any such affirmative defense for the "is required to register under [SORNA]" element—such as allowing a collateral attack on the predicate sex offense conviction. Congress made this choice because the failure to register is the conduct criminalized by the statute, so it is the conduct for which a defendant can have a defense. Congress provided no affirmative defense for the predicate sex offense or the interstate travel because they are the circumstances that allow a conviction—not the conduct for venue purposes.

Indeed, as the United States has argued in other cases, a defendant's travel in interstate commerce need not even be voluntary. In the Second Circuit, the United State argued that "the interstate element of criminal offenses—sometimes referred to loosely as the 'jurisdictional' element—is generally not subject to a requirement of voluntariness." Reply Brief for the United States at 21, *United States v. Gundy*, 804 F.3d 140 (2d Cir. 2015) (No. 13-3679), 2014 WL 1858202. As long as the United States can prove that a defendant's body was transported in interstate commerce, it need not prove anything else to meet that element of the crime. Whether the defendant knowingly and volitionally traveled or was brought across state lines against his will is not relevant. *Id.*[1] It naturally follows

[1] The most common example of such involuntary travel would be someone federally imprisoned who is transferred across state lines between Bureau of Prisons facilities.

that conduct in which a defendant does not need to voluntarily engage is not part of the criminal conduct underlying the offense.

The brief in opposition does not address Congress' decision to not include a mens rea requirement for the travel section of the statute. It argues only that the travel requirement is an element of the offense—which is not enough to establish venue in the absence of a specific Congressional indication that venue should extend anywhere the travel occurred.

3. *Carr v. United States* does not alter the plain text of the statute.

The brief in opposition relies heavily on *Carr v. United States*, 560 U.S. 438 (2010). But *Carr* did not address venue, and the government's attempt to take isolated statements from *Carr* out of context do not support the Fourth Circuit's conclusion.

"*Carr* did not surreptitiously impose some closer nexus between the interstate-travel element and the failure-to-register element of § 2250 that is lacking in the statutory text. . . . . [P]ursuant to the plain language of § 2250, a state sex offender's interstate travel may occur in a context completely unrelated to [the conduct] which . . . triggers his registration obligation." *Seward*, 967 F.3d at 77-78 (Lipez, J. dissenting).

Carr, of course, did refer generally to travel as "the very conduct at which Congress took aim." *Carr v. United States*, 560 U.S. 438, 454 (2010). But that statement must be viewed in context. Congress "took aim" at travel because a defendant's travel to a new state would impede law enforcement *in that new state*. As the

Court explained, states have primary responsibility for monitoring sex offenders within their borders. *Id.* at 452. Congress enacted SORNA in light of the concern that sex offenders might evade monitoring by moving from one state, where they are registered, to a different state, where they were unregistered and unknown to law enforcement. *Id.* (stating that under SORNA, sex offenders face federal criminal liability "only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach"). *Carr*'s recognition of Congress's concern that travel might endanger *the arrival state* does not remotely show that venue is proper in *the departure state*. As the Seventh Circuit put it in *Haslage*: "a closer look at *Carr* reveals that it is not discussing travel alone; rather, it is talking about those 'who elude SORNA's registration requirements by traveling in interstate commerce.' [560 U.S.] at 456. That takes us right back to the question of the place where that act of eluding takes place. *Nichols* answers it: in the place of the new residence." 853 F.3d at 335.

4. The Fourth Circuit's approach leads to an absurd conclusion.

Finally, the government's response does not address the overly-broad reach that results from the Fourth Circuit's approach. If, as the Fourth Circuit contends, any state involved in a defendant's travel from one jurisdiction to another is the locus delicti of a SORNA prosecution, then every state along his route—"even though they bear little relationship to his failure to register"—is a permissible venue for that prosecution. *Seward*, 967 F.3d at 74 (Lipez, J. dissenting). This is an

"absurd conclusion." *Haslage*, 853 F.3d at 335. Nothing in SORNA indicates that Congress intended the statute's reach to extend to a state through which a defendant may have driven for ten minutes on his way from one place to another.

This expansive reading also raises the specter of prosecutorial abuse of venue. "[S]uch 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. This Court's review is necessary to prevent that outcome from transpiring.

Respectfully submitted,

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