No. 20-1116

In the Supreme Court of the United States

ANTHONY SEWARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for failure to update a sex-offender registration, in violation of 18 U.S.C. 2250(a), venue was proper in petitioner's original district of residence from which he began interstate travel to a new district of residence.

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (1st Cir.):

In re Seward, No. 17-2147 (Dec. 5, 2017)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 967 F.3d 57.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2020. A petition for rehearing was denied on September 23, 2020 (Pet. App. 55a). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on February 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Massachusetts,

petitioner was convicted of traveling in interstate commerce and failing to update his sex-offender registration, in violation of 18 U.S.C. 2250(a). Judgment 1; see Indictment 1. The district court sentenced him to time served, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-52a.

1. The Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. 20901 *et seq.*, requires persons who have been convicted of a sex offense to register in each jurisdiction where they reside, where they are employed, and where they are a student. 34 U.S.C. 20911(1), 20913(a). SORNA further requires that the offender "appear in person in at least 1 jurisdiction involved" as noted above "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).

In 18 U.S.C. 2250, Congress prescribed a criminal penalty for failing to register or failing to update a registration under SORNA. For defendants like petitioner who have been convicted of state sex offenses, Section 2250(a) has three elements: (1) the defendant "is required to register under [SORNA]"; (2) the defendant then "travels in interstate or foreign commerce"; and (3) the defendant thereafter "knowingly fails to register or update a registration as required by [SORNA]." 18 U.S.C. 2250(a); see *Carr* v. *United States*, 560 U.S. 438, 445 (2010).

2. Petitioner was convicted as a sex offender in 1996 under Massachusetts law and is subject to registration requirements under SORNA. Pet. App. 3a. He initially registered as a sex offender in Massachusetts. *Ibid.* In 2016, petitioner moved and established residence in New York, but he failed to update his sex-offender registration. *Ibid.*

In 2017, a federal grand jury in the District of Massachusetts returned an indictment charging petitioner with traveling in interstate commerce and failing to update his sex-offender registration, in violation of 18 U.S.C. 2250(a). Indictment 1; see Pet. App. 3a. Petitioner moved to dismiss the indictment, asserting that venue in the District of Massachusetts was improper. Pet. App. 3a-4a.

The applicable venue statute provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. 3237(a). Petitioner contended that, under this Court's decision in *Nichols* v. *United States*, 136 S. Ct. 1113 (2016), he had committed no crime in Massachusetts because his failure to register occurred exclusively in New York. Pet. App. 4a.

The district court denied the motion. Pet. App. 53a-54a. The court explained that, under 18 U.S.C. 3237, when an offense is "begun in one district and completed in another"—which the court observed is "true for crimes involving or requiring travel in interstate commerce," including petitioner's offense—venue is proper in either district. Pet. App. 53a-54a. The court found petitioner's reliance on *Nichols* to be misplaced, observing that *Nichols* had not addressed the venue issue petitioner raised. *Id.* at 54a.

Petitioner entered a conditional guilty plea, reserving his right to appeal the district court's venue ruling. Pet. App. 4a. The court sentenced him to time served, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-52a.

a. The court of appeals explained that, where a criminal statute does not contain a provision specifically addressing venue, "the 'locus delicti of the offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" Pet. App. 6a (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)) (brackets omitted). And the court observed that, under this Court's decision in *Carr* v. *United States*, *supra*, the offense described in Section 2250 "is not merely a failure to register, but rather, a course of conduct that begins with interstate travel." Pet. App. 15a. The court explained that Congress's intent in enacting SORNA was to establish a national system for registration of sex offenders, which can be undermined when sex offenders travel in interstate commerce; that Massachusetts, for example, had expended resources trying to find petitioner and had an interest in knowing his location; and that "[u]ntethering the interstate travel and failure-to-register elements from one another divorces Massachusetts entirely from that interest." *Id.* at 19a-20a; see *id.* at 18a-19a. The court accordingly determined that the *locus delicti* of a Section 2250 offense consists of *both* traveling and failing to register, and that Massachusetts was therefore a proper venue. See *id.* at 15a-22a.

The court of appeals rejected petitioner's reliance on *Nichols*, which held that a federal sex offender who moved from Kansas to the Philippines could not be prosecuted for failing to update his registration in Kansas because SORNA does not require offenders to "(de)register" from the departure jurisdiction. 136 S. Ct. at 1118; see *id.* at 1117-1119; Pet.

App. 9a-12a.[*] The court observed that *Nichols* "did not address venue" for SORNA prosecutions, and instead addressed only the defendant's underlying duty to update his registration. Pet. App. 11a. The court additionally observed that *Nichols* involved a federal sex offender who, unlike a state sex offender, did not need to travel in interstate commerce to commit a SORNA offense. *Ibid.* The court explained that this Court in *Nichols* accordingly "had no occasion to and, indeed, did not, address § 2250's interstate travel element." *Ibid.*

b. Judge Lipez dissented. Pet. App. 22a-52a. Judge Lipez agreed with the majority that "interstate travel is an element of" a Section 2250 offense for state sex offenders. *Id.* at 46a. But in his view, the nature of the crime defined in Section 2250 is nevertheless failure to register or update a registration, and "venue is proper only where that failure occurs." *Id.* at 23a.

ARGUMENT

Petitioner renews (Pet. 17-21) his contention that venue was improper in the District of Massachusetts. The court of appeals correctly rejected that contention. When a federal offense begins in one district and ends in another, venue is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. 3237(a). For sex offenders like petitioner, who have been convicted of state sex offenses, the SORNA offense requires "travel[] in interstate or foreign commerce." 18 U.S.C. 2250(a)(2)(B); see *Carr* v. *United*

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[*] Congress has effectively abrogated *Nichols*'s central holding by enacting the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15. Under that law, sex offenders are now required to report under SORNA whenever they travel internationally. See § 6, 130 Stat. 22-23.

States, 560 U.S. 438, 445-450 (2010). Petitioner's offense began in the District of Massachusetts, where he started his interstate travel to New York. Although a lopsided (6-1) circuit conflict exists on this issue, the conflict has limited practical importance, and this Court has recently denied review of the issue. See *Spivey* v. *United States*, 141 S. Ct. 954 (2020) (No. 20-347); *Holcombe* v. *United States*, 140 S. Ct. 820 (2020) (No. 19-6824); *Lewallyn* v. *United States*, 139 S. Ct. 1321 (2019) (No. 18-6533). It should do the same here.

1. The court of appeals correctly recognized that venue was proper in the District of Massachusetts. Pet. App. 7a-22a.

a. Under 18 U.S.C. 3237(a), for federal offenses in which the criminal acts span multiple districts, venue is appropriate "in any district in which such offense was begun, continued, or completed." *Ibid.* Petitioner was convicted of violating 18 U.S.C. 2250(a). To sustain a conviction under Section 2250 against a state sex offender, "three elements must 'be satisfied in sequence, culminating in a post-SORNA failure to register.'" *Carr*, 560 U.S. at 446 (citation omitted). First, the defendant must be "required to register under [SORNA]." 18 U.S.C. 2250(a)(1). Second, the defendant must "travel[] in interstate or foreign commerce" (or must "enter[]," "leave[]," or "reside[] in[] Indian country"). 18 U.S.C. 2250(a)(2)(B). Third, the defendant must "knowingly fail[] to register or update a registration as required by [SORNA]." 18 U.S.C. 2250(a)(3); see *Carr*, 560 U.S. at 445-446. Section 2250(a)'s text thus makes interstate travel "an essential element of a SORNA offense involving a state sex offender," specifying conduct that is a necessary part of the offense. *United States* v.

Holcombe, 883 F.3d 12, 15 (2d Cir. 2018), cert. denied, 140 S. Ct. 820 (2020).

This Court's decision in *Carr* confirms that understanding. As the Court observed, although "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250," traveling in interstate commerce "is also * * * the very conduct at which Congress took aim." *Carr*, 560 U.S. at 454. The Court further explained that "the act of travel" is properly viewed "as an aspect of the harm Congress sought to punish," because "persons required to register under SORNA * * * threaten the efficacy of the statutory scheme by traveling in interstate commerce" without updating their registrations. *Id.* at 453; see *id.* at 452 (stating that Section 2250 reaches state sex offenders "only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach"). The court of appeals thus reasoned that "*Carr* makes clear that [the Court] viewed interstate travel as a key step in the process by which sex offenders slip through cracks in monitoring and enforcement." Pet. App. 16a.

Applying *Carr*'s interpretation of Section 2250(a), venue was proper in Massachusetts. Pet. App. 15a-22a. As the court of appeals explained, because "the nature of the offense reveals that its locus delicti encompasses the departure jurisdiction," venue was proper in petitioner's original State of residence. *Id.* at 21a. That is where petitioner's conduct that satisfied the interstate-travel element "beg[a]n," which suffices under Section 3237(a) for venue to lie in Massachusetts. See 18 U.S.C. 3237(a).

b. Petitioner contends (Pet. 17-21) that his offense occurred only in New York because Section 2250(a)

criminalizes failing to register in the arrival State. For the reasons explained above, that contention is at odds with the text of Section 2250(a) and *Carr*. The travel element—which is what causes the integrated nationwide registration system to lose track of a sex offender who then fails to update his registration, see Pet. App. 18a-19a—is indispensable to the crime and the venue analysis.

Petitioner errs in asserting (Pet. 5) that *Carr* is inapposite because the Court's opinion "had nothing to do with venue." See Pet. 20-21. When determining the *locus delicti* of a charged offense, "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 Pet. 17. The Court in *Carr* necessarily addressed the first part of that inquiry when it identified the conduct required to violate Section 2250(a) and the sequence in which that conduct must occur. See 560 U.S. at 446-450; see also, *e.g.*, *id.* at 456 (finding "little reason to doubt 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"). Although the Court did not specifically discuss the consequences of its interpretation of Section 2250(a) for the proper venue in prosecutions under that provision, its definitive statement of the elements of a Section 2250(a) offense—including interstate travel by a person required by SORNA to register—bears directly on the venue analysis under 18 U.S.C. 3237(a).

c. Petitioner suggests (Pet. 14, 18) that the Court's decision in *Nichols* v. *United States*, 136 S. Ct. 1113

(2016), supports a contrary conclusion. As the court of appeals correctly recognized, that suggestion is unsound. Pet. App. 9a-15a.

In *Nichols*, the Court held that a federal sex offender was not required under 34 U.S.C. 20913 (then codified at 42 U.S.C. 16913) to update his registration in the district in which he had previously registered and from which he had departed (Kansas) after he moved to the Philippines. 136 S. Ct. at 1115, 1117-1118. The Court determined that, because the Philippines is not a SORNA jurisdiction and Kansas was no longer a jurisdiction in which Nichols "reside[d]," 34 U.S.C. 20913(a), neither was a "jurisdiction involved pursuant to subsection (a)," 34 U.S.C. 20913(c), and Nichols therefore did not violate Section 2250 by failing to update his registration. *Nichols*, 136 S. Ct. at 1117-1118.

Nichols is inapposite to the venue question here. As the court of appeals explained, "*Nichols* did not address venue, but rather concerned only whether Kansas was an 'involved' jurisdiction under SORNA such that Nichols was required to update his registration there once he moved abroad." Pet. App. 11a. Unlike the Court's analysis in *Carr* of the elements of a Section 2250(a) offense, which bears directly on the essential conduct for a conviction and thus on where venue may lie, the Court's consideration in *Nichols* of SORNA's underlying registration requirements does not shed light on the proper venue. And as the court of appeals additionally observed, *Nichols* differs in a key respect from this case because it "involved a federal sex offender" who, unlike a state sex offender such as petitioner, can violate SORNA without traveling interstate. *Ibid.* (citing *Holcombe*, 883 F.3d at 16).

2. Before *Nichols*, every court of appeals that had considered the question presented had recognized that venue for a SORNA offense was appropriate in the district from which the defendant departed. See, *e.g.*, *United States* v. *Kopp*, 778 F.3d 986, 988-989 (11th Cir.), cert. denied, 576 U.S. 1043 (2015); *United States* v. *Lewis*, 768 F.3d 1086, 1092-1094 (10th Cir. 2014), cert. denied, 574 U.S. 1200 (2015); *United States* v. *Howell*, 552 F.3d 709, 717-718 (8th Cir.), cert. denied, 557 U.S. 913 (2009).

After *Nichols*, a divided panel of the Seventh Circuit overruled its prior precedent and concluded that venue was not proper in the departure jurisdiction. See *United States* v. *Haslage*, 853 F.3d 331, 334-336 (2017). The majority took the view that, unlike some other federal statutes, SORNA "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.* at 334 (emphasis omitted). According to the panel majority, "interstate travel is a necessary precursor" to a SORNA offense for a state sex offender, but it "is neither a distinct crime nor an element of the crime." *Id.* at 335. The majority thus concluded that the SORNA violations in that case "began, were carried out, and ended in the place of the new residence." *Id.* at 336.

Judge Sykes dissented, pointing out that *Nichols* had only "addressed the scope of the registration duty set forth in [34 U.S.C. 20913]," not "the elements of the criminal offense under 18 U.S.C. § 2250(a)." *Haslage*, 853 F.3d at 336. Judge Sykes would thus have followed this Court's decision in *Carr* and held that interstate travel "is an element of the § 2250(a) offense for a state sex offender" and that venue was therefore proper in

the departure jurisdiction. *Id.* at 338 (emphasis omitted). Judge Sykes emphasized that no decision from this Court suggested that *Carr* was no longer good law, and that *Carr*'s analysis of the elements thus should have controlled the panel's decision. *Ibid.*

The Second Circuit subsequently agreed with Judge Sykes, determining that venue was proper in the departure district. See *Holcombe*, 883 F.3d at 16. Much like the decision of the court of appeals here, the Second Circuit correctly recognized that interstate travel is an essential element of a Section 2250 offense under *Carr*. *Id.* at 15. Like Judge Sykes and the court below, the Second Circuit found that the opinion in *Haslage* did not square with *Carr* and that its reliance on *Nichols* was misplaced because interstate travel was not an issue in that case. *Id.* at 16.

Following the Second Circuit's example, the Eleventh Circuit likewise determined in an unpublished decision that venue is proper in the departure state for state sex offenders. *United States* v. *Lewallyn*, 737 Fed. Appx. 471, 473 (2018) (per curiam), cert. denied, 139 S. Ct. 1321 (2019). The Eleventh Circuit emphasized that, because the elements of a Section 2250(a) offense are different depending on whether the offender has a state or federal sex-offense conviction, this Court's decision in *Nichols* did not bear on venue analysis for a state sex offender. *Id.* at 474. And the Eleventh Circuit rejected the Seventh Circuit's approach because it conflicted with *Carr*. *Ibid.*

In *United States* v. *Spivey*, 956 F.3d 212 (4th Cir.), cert. denied, 141 S. Ct. 954 (2020), the Fourth Circuit followed the same course as the Second and Eleventh Circuits, rejecting the contention that *Nichols* alters the venue analysis. See *id.* at 216. The court explained

that, "under *Carr*, the element of 'interstate travel' is an essential conduct element for a conviction under § 2250(a)." *Ibid.*

The decision below, in turn, largely follows the same analytical path as the Fourth Circuit in *Spivey*. Pet. App. 7a-22a. In particular, the court agreed that *Carr* and the weight of persuasive authority from other circuits demonstrate that venue is proper in the departure State, and that *Nichols* does not support a contrary conclusion. See *ibid.* And even the dissent below "disagree[d]" with the Seventh Circuit majority's premise that "'interstate travel'" is "'no[t] an element of the crime'" in a Section 2250(a) prosecution of a state sex offender. *Id.* at 46a n.21; see *id.* at 46a-47a.

3. Although a lopsided circuit conflict exists on this issue, this Court's intervention is not warranted at this time. Out of the seven circuits to consider this issue (and the five to address it after *Nichols*), the Seventh Circuit is the only outlier. The Seventh Circuit also did not have the benefit of the four subsequent decisions that have adhered to *Carr* after *Nichols*.

In addition, the importance of the issue here is limited. The question presented concerns only one potential venue in Section 2250(a) prosecutions: the district from which interstate travel commenced. As petitioner acknowledges (Pet. 23), the government can comply with both the majority interpretation and the Seventh Circuit's outlier approach by prosecuting defendants in the arrival district. The Department of Justice has distributed informal guidance to prosecutors recommending that they do so when possible. This particular case commenced in 2017, and is thus not a reliable indicator of current practices.

Contrary to petitioner's contention (Pet. 23), the government's ability to bring any Section 2250(a) prosecution in the arrival jurisdiction, and thus to avoid bringing cases within the Seventh Circuit that would be dismissed for improper venue under its approach in *Haslage*, does not show that the question presented warrants further review. To the contrary, the fact that the Seventh Circuit's lone dissenting view does not preclude Section 2250(a) prosecutions in that circuit or impede prosecutions elsewhere shows that the real-world consequences of the conflict are minimal. Petitioner's assertion (*ibid.*) that the Seventh Circuit would not have an occasion to reconsider its approach in the foreseeable future, because cases implicating the question may not arise there, only underscores that the conflict lacks practical significance. And while petitioner asserts (Pet. 3-4, 24-25) that prosecutions in the departure jurisdiction are more burdensome, SORNA prosecutions typically require evidence from both the departure and receiving districts regardless of which venue is selected, and it is far from clear that petitioner's approach of requiring prosecution in the destination district would have substantial practical benefits. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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