No. _____

In the
Supreme Court of the United States

Michael Avenatti,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Kendra L. Hutchinson
Federal Defenders of New York
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417–8731
Kendra_Hutchinson@fd.org

Counsel for Petitioner

QUESTION PRESENTED

In *Dubin v. United States*, 599 U.S. 110, 114 (2023), the Court narrowed the scope of the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), and held that it only "is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal. . . ." All the circuit courts to address the issue since have articulated the legal standard as *Dubin* does, and have agreed that the "crux" nexus test is *Dubin's* core holding.

The Second Circuit's decision in Petitioner's case is the one notable exception. Here, the panel held that identity theft need only play a "key role" in the criminal conduct to satisfy § 1028A(a). Pet. App. 9a. The Second Circuit's outlier position has created a nascent circuit conflict. Moreover, the "key role" standard adopted in Petitioner's case broadens the type of conduct that is subject to criminal liability.

The question presented is the correct standard, under *Dubin,* for evaluating criminal liability pursuant to the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1).

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Michael Avenatti respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction appears at Petitioner's Appendix ("Pet. App.") 1a-9a, and is available at 2024 WL 959877. That court's order denying panel rehearing and rehearing *en banc* appears at Pet. App. 10a, and is unreported. The bench rulings of the United States District Court for the Southern District of New York denying the motions for acquittal appear at Pet. App. 16a, 17a, and are unreported.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 3231 and entered judgment of conviction on June 2, 2022. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, affirmed the judgment on March 6, 2024, and denied rehearing on June 14, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The aggravated identify theft statute, 18 U.S.C. § 1028A(a)(1), provides:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT OF THE CASE

A. Legal background

The aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), punishes one who, "during and in relation to [enumerated felonies], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Conviction of this crime carries a mandatory two-year prison sentence that, with almost no exceptions, must be imposed consecutively, "in addition to," any other sentence a person receives. 18 U.S.C. § 1028A(a)(1), (b)(2). Since one who commits aggravated identity theft, by definition, also commits an underlying felony, sentences ratchet up quickly.

Against this backdrop, the Court decided *Dubin v. United States,* 599 U.S. 110 (2023), a little over a year ago. In *Dubin*, the petitioner was convicted of health care fraud, 18 U.S.C. § 1347, and aggravated identity theft, 18 U.S.C. § 1028A(a)(1), after he overbilled Medicaid by misrepresenting his employees' qualifications. The government argued that because Dubin's fraudulent Medicaid bill included the patient's reimbursement number – a means of identification – it automatically satisfied the requirements of aggravated identity theft. However, the Court held that 18 U.S.C. § 1028A(a)(1) only "is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal. . . ." *Id.* at 114. Because Dubin's use of the patient's Medicaid number was only "an ancillary feature" of the underlying healthcare fraud, he "did not use the

patient's means of identification in relation to the predicate offense within the meaning of § 1028A(a)(1)." *Id.* at 132. Vacatur was warranted.

The Court reached this result, in part, by recognizing that aggravated identity theft's mandatory sentencing scheme was "a severe penalty" that divests judges of sentencing discretion. *Id.* at 115, 128. This pointed toward a "narrower," "more targeted reading" of the statute, one that more "accurately captures the ordinary understanding of identity theft." *Id.* at 120. Justice Gorsuch would have gone further than the majority and held the statute void for vagueness: "I worry the Court has stumbled upon a more fundamental problem with § 1028A(a)(1). That provision is not much better than a Rorschach test. Depending on how you squint your eyes, you can stretch (or shrink) its meaning to convict (or exonerate) just about anyone." *Id.* at 133 (Gorsuch, J., concurring).

B. Factual and procedural background

1. Throughout 2018 and 2019, Petitioner, a successful and high-profile lawyer, represented adult entertainer Stephanie Clifford, commonly known as "Stormy Daniels," in numerous matters.[1] Among other services he provided her, Petitioner filed a lawsuit on Clifford's behalf to nullify her non-disclosure agreement with then-President Donald Trump, represented Clifford when she was wrongfully arrested in Ohio, and negotiated a lucrative $800,000 book publishing deal for her.

[1] The Second Circuit's summary order does not set forth all of the pertinent facts. Accordingly, in the Statement of the Case, Petitioner relies on facts set forth in both that order, Pet. App. 4a-5a, 9a, and his brief on appeal before the Second Circuit. *See* Brief for Defendant-Appellant 2-21, *United States v. Avenatti*, No. 22-1242 (2d Cir. Dec. 16, 2022) ECF 59.

He calculated, and Clifford did not contest, that he performed over $2 million worth of legal work for her, most of which was uncompensated.

This prosecution arose from the book deal. Under the publishing contract, Clifford was to receive four payments: $250,000 at signing; $175,000 at manuscript delivery; $175,000 at publication; and a final $200,000 post-publication payment. The money was to be wired from the publisher to the literary agent, who would take his commission and wire the remainder to Clifford. Clifford's portion of the first payment at signing was wired from the literary agent directly to her business banking account.

Several months later, however, Clifford closed this business account, told Petitioner she had done so, and asked for the second payment, as she was strapped for cash. Thereafter, Petitioner contacted the literary agent, urged him to expedite the second payment, and sought to change Clifford's banking details to a client trust account for Clifford at Petitioner's law firm. After the literary agent balked, Petitioner emailed the agent a letter authorizing the account change, purportedly from Clifford and signed by her. However, Clifford did not know of this letter or its account change, and never signed it: her signature was copy-and-pasted from another document by Petitioner's secretary, at his direction. As a result, the literary agent wired Clifford's second and third book payments (both for $148,750) into the law firm client trust account.

According to the trial proof, thereafter, Petitioner: transferred the funds in the trust account to other accounts at the firm; paid law firm expenses not associated with Clifford from the funds in these other accounts; did not give Clifford the book

payment funds; and affirmatively led Clifford to believe, for months, that the publisher had not paid her and that Petitioner was attempting to rectify this. Petitioner ultimately paid Clifford a sum equal to the second payment from a different source of funds, but Clifford never received the third payment from Petitioner.

2. Based on this conduct, Petitioner was indicted for one count each of wire fraud, 18 U.S.C. § 1343, and aggravated identity theft, 18 U.S.C. § 1028A(a)(1), and was tried before a jury. The aggravated identity theft charge was premised on Petitioner's unauthorized use of Clifford's name and signature in the account-change letter, and alleged that this letter was used in relation the wire fraud. *See* Indictment 15, *United States v. Avenatti*, No. 19-cr-374 (S.D.N.Y. May 22, 2019) ECF 1. During summation, the government argued that there were ten reasons why Petitioner was guilty of wire fraud. Only one of these reasons was the account-change letter; the other nine reasons related to Petitioner transferring and converting the funds in the trust account, falsehoods to Clifford and others, ethical violations as an attorney, and failing to timely remit the book deal payments to her. *See* Appendix Vol. II 523, 527, *United States v. Avenatti*, No. 22-1242 (2d Cir. Dec. 14, 2022), ECF 51.

Petitioner moved for a judgment of acquittal on both counts following the close of the government's case and renewed the motion at the end of trial. The district court denied the motions. Pet. App. 16a, 17a. After he was convicted of both counts, the district court sentenced Petitioner to 48 months total: 24 months for the wire fraud,

and the consecutive 24-month term mandated by the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), (b)(2).

3. While Petitioner's appeal was pending, this Court decided *Dubin*. As discussed, the Court significantly narrowed the scope of the aggravated identity theft statute, holding that this crime is committed only when "misuse of another person's means of identification is at the crux of what makes the underlying offense criminal . . . ." *Id.* at 114. Appellant sought to file a supplemental brief in his appeal regarding *Dubin's* application to his case, but was denied permission to do so. Motion Order, *United States v. Avenatti*, No. 22-1242 (2d Cir. June 27, 2023) ECF 102. Thus, in a letter pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner alerted the Second Circuit to *Dubin* and argued, *inter alia,* that the evidence of his guilt of aggravated identity theft was insufficient under that case because identity theft was not "at the crux" of the wire fraud.

The Circuit affirmed the judgment of conviction. However, in addressing Petitioner's *Dubin* claim, the panel mischaracterized the case's holding: "In *Dubin*, the Supreme Court vacated a conviction for aggravated identity theft because identity theft did not play a 'key role' in the criminal conduct." Pet. App. 9a (quoting *Dubin*, 599 U.S. at 129). Although the panel cursorily quoted *Dubin's* "crux" language in a subsequent paragraph, it nevertheless analyzed and rejected Petitioner's argument using the "key role" standard it incorrectly believed *Dubin* stood for:

> In *Dubin*, the "crux" of the criminal conduct did not involve identity theft. *Id*. at 114. Here, by contrast, identity theft was an essential part of Avenatti's criminal conduct. Avenatti initially sought to divert money from his client without forging her signature, but his client's literary

> agent refused to allow the diversion unless the client authorized it. . . . Only then did Avenatti instruct an employee to forge his client's signature for the purpose of wrongfully obtaining her money. . . . *Identity theft played a key role in Avenatti's crime;* it was not impermissibly "ancillary." *Dubin*, 599 U.S. at 114. *For that reason, Dubin does not require vacating Avenatti's conviction.*.

Pet. App. 9a (emphasis added).

4. Petitioner moved for panel rehearing and rehearing *en banc*, arguing that the panel applied an incorrect legal standard under *Dubin*. The Second Circuit denied rehearing. Pet. App. 10a

REASONS FOR GRANTING THE WRIT

This petition presents a clean vehicle for this Court to nip a circuit split in the bud. Since *Dubin* was decided last year, the circuits have near-unanimously articulated the standard for evaluating aggravated identity theft cases as *Dubin*, itself, did: the crime requires that "misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." *Dubin*, 599 U.S. at 114.

The Second Circuit, however, adopted an outlier, minority position in Petitioner's case. Quoting *Dubin's* dicta – not its holding – that court devised a sdifferent test: a person commits aggravated identity theft if the identification misuse plays nothing more than a "key role" in the underlying felony. The Second Circuit's novel standard has undesirable results. It broadens, not narrows, criminal liability. This is contrary to the policy concerns motivating *Dubin* and other recent cases of this Court. The differing standards will also sow confusion in the lower courts, and have already begun to do so. Petitioner's case presents the ideal opportunity to resolve this conflict. Accordingly, this Court should grant this petition for a writ of certiorari.

II. The Second Circuit's "key role" standard for challenges to aggravated identity theft convictions is inconsistent with *Dubin v. United States*

In *Dubin*, 599 U.S. at 114, this Court held that aggravated identity theft requires that "misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." There are three reasons why this holding is the correct legal standard under *Dubin* for evaluating the sufficiency of evidence as to aggravated identity theft.

First, the majority opinion repeatedly uses this phrase in describing the requisite nexus that identity theft must have with the underlying criminality. In fact, the majority characterizes it as "the crux" fourteen times. *Id.* at 114, 117-18, 121-22, 127, 129, 131-32, 132 n.10.

Second, it is this standard that the majority applies in holding that vacatur is warranted because the petitioner "did not use the patient's means of identification in relation to a predicate offense within the meaning of § 1028A(a)(1)." *Id.* at 132. As the Court explains, "petitioner's use of the patient's name was not at the crux of what made the underlying overbilling fraudulent." *Id*. Rather, "[t]he crux of the healthcare fraud was a misrepresentation about the qualifications of petitioner's employee." *Id.*

And third, Justice Gorsuch, concurring, also describes *Dubin's* holding in this manner: "the Court concludes that a violation of § 1028A(a)(1) occurs whenever the 'use of the means of identification is at the crux of the underlying criminality.'" *Id.* at 134 (Gorsuch, J., concurring) (quoting majority opinion at 122). Indeed, one of

Justice Gorsuch's main critiques of the majority opinion is that the "at the crux" standard is difficult to define and susceptible of many meanings. *Id*. at 134-37. (Gorsuch, J., concurring).

The Second Circuit in Petitioner's case did not recognize this standard as the correct one under *Dubin*. The court instead wrote: "In *Dubin*, the Supreme Court vacated a conviction for aggravated identity theft because identity theft did not play a 'key role' in the criminal conduct." Pet. App. 9a (quoting *Dubin*, 599 U.S. at 129). Nor did it apply the correct test. Instead, it rejected Petitioner's challenge to his aggravated identity theft conviction by using the "key role" test it had devised. *Id*. ("Identity theft played a key role in Avenatti's crime . . . . For that reason, *Dubin* does not require vacating Avenatti's conviction") (quoting *Dubin*, 599 U.S. at 114).

There is no reason the Second Circuit should have seized upon this as the correct standard by which to evaluate sufficiency claims under *Dubin*. The phrase "key role" appears but once in *Dubin*. Nor is the phrase part of the case's holding; rather, the Court uses it when it elucidates the policy reasons motivating it to narrow the scope of the aggravated identity theft statute. *Dubin*, 599 U.S. at 129.

For whatever reason, the Second Circuit did seize upon *Dubin's* single use of the phrase, "key role," in deciding Petitioner's case. The Second Circuit thus applied an incorrect legal standard, inconsistent with *Dubin*.

III. The Second Circuit is alone in its reading of *Dubin*, conflicts with every other circuit to address the issue, and has created a nascent circuit split that warrants review

Other circuit courts have addressed challenges to aggravated identity theft convictions following *Dubin*. In contrast with the Second Circuit in Petitioner's case, all these other circuits have correctly characterized *Dubin* as holding that identity theft must be "at the crux" of the underlying criminality, not that it must play "a key role" in it. *See United States v. Ovsepian,* -- F.4th --, No. 21-55515, 2024 WL 4020019, at *9 (9th Cir. Sept. 3, 2024) (*Dubin* holds that "the means of identification [must be] at the crux of what makes the predicate offense criminal, rather than merely an ancillary feature"); *United States v. O'Lear*, 90 F.4th 519, 533 (6th Cir. 2024) (same), *cert. denied*, 144 S. Ct. 2542 (May 13, 2024); *United States v. Conley,* 89 F.4th 815, 825 (10th Cir. 2023) (same), *cert. denied,* 144 S. Ct. 1381 (Apr. 15, 2024); *United States v. Croft,* 87 F.4th 644, 647-48 (5th Cir. 2023) (same), *cert. denied,* 144 S. Ct. 1130 (2024); *United States v. Gladden*, 78 F.4th 1232, 1244 (11th Cir. 2023) (same); *accord United States v. Brown*, No. 23-1819, 2024 WL 1991461, at *2 (3d Cir. May 6, 2024) (unpublished).

The Second Circuit, thus, is an outlier, and its holding in Petitioner's case has created a developing circuit split. Notably, Petitioner pointed out the court's incorrect reading of *Dubin* in his rehearing petition, as well as the fact that the legal standard employed by the Second Circuit in his case conflicts with all other courts of appeal to address the issue. The denial of his rehearing petition

demonstrates the Second Circuit intends to adhere to its mistaken, contrary position, and further deepen the conflict.

This Court's review is warranted to resolve this split, before it becomes more entrenched and risks sowing mischief and confusion in the lower courts. Indeed, at least one district court has cited this case in denying a defendant's motion to dismiss based on *Dubin*. *See United States v. Da Costa*, No. 23-CR-610 (PKC), 2024 WL 3014329, at *3 (S.D.N.Y. June 13, 2024). In *Da Costa*, the district court quoted Petitioner's case for the proposition that the correct legal standard by which to adjudge such claims is whether the "identity theft 'played a key role' in the crime and was not 'impermissibly ancillary' under *Dubin*." *Id.* at *3-*4 (quoting *United States v. Avenatti*, 2024 WL 959877, at *4 (2d Cir. Mar. 6, 2024) (summary order)). Absent review, more lower courts will almost certainly follow suit, in contradiction to *Dubin's* clear command.

IV. This issue is important, and Petitioner's case presents a suitable vehicle for resolving the question presented

The question presented in this petition – the correct standard by which to evaluate the sufficiency of aggravated identity theft convictions – matters a great deal. *Dubin* shows this, in the Court's sated intent to "narrow" and "target" the scope of 18 U.S.C. § 1028A to more "accurately capture[] the ordinary understanding of identity theft." *Dubin*, 599 U.S. at 120. More generally, overbroad criminal statutes run the risk of sweeping in innocent conduct, or imposing outsize punishment for minor transgressions. These concerns have led the Court to interpret criminal statutes in a number of recent cases so as to significantly limit

criminal liability. *See, e.g., Fischer v. United States*, 144 S. Ct. 2176 (2024) (adopting narrow construction of 18 U.S.C. § 1512(c)(1)); *Snyder v. United States*, 144 S. Ct. 1947 (2024) (same; 18 U.S.C. § 666); *Ciminelli v. United States*, 598 U.S. 306 (2023) (rejecting "right to control" theory in 18 U.S.C. § 1343 prosecutions).

The Second Circuit's "key role" standard, which conflicts with the test that is laid out in *Dubin* and faithfully followed by the other circuits, would broaden criminal liability under the aggravated identity theft statute, not narrow it. A "crux" is "an essential point requiring resolution or resolving an outcome." *See* Crux, Webster.com Dictionary, https://www.merriam-webster.com/dictionary/crux (last visited 9/12/2024). By contrast, the adjective "key" describes something much less outcome-determinative: it is "extremely or crucially important." *See* Key, Webster.com Dictionary, https://www.merriam-webster.com/dictionary/key (last visited 9/12/2024). There is a clear difference of degree between these two concepts. Allowing conviction based on the Second Circuit's looser standard would yield undesirable results: it would be contrary to *Dubin,* as well as the Court's trend in recent criminal cases.

This case is a suitable vehicle for resolving the question presented. Petitioner adequately preserved the issue through his motions for judgment of acquittal as to the aggravated identity theft count. Pet. App. 16a, 17a. *Dubin* was decided while Petitioner's appeal was pending and before the conviction was final, and the Second Circuit addressed his *Dubin*-based claim on the merits in its opinion. Pet. App. 9a. Moreover, Petitioner unsuccessfully moved for panel rehearing and rehearing *en*

banc on the issue for which he seeks review in this Court, pointing out the circuit court's application of an incorrect legal standard under *Dubin*. Pet. App. 10a. There are thus no procedural impediments.

Additionally, resolution of the question presented would be outcome-determinative as to Petitioner's aggravated identity theft conviction. Under the correct standard and definition, and even assuming that Petitioner's use of the account-change letter in Clifford's name effected the deposit of book deal funds into the law firm trust account, this deposit was *not* "the crux" of the wire fraud under the meaning of *Dubin*. Instead, it was Petitioner's subsequent transfer of the funds to other accounts at the firm rather than Clifford; use of the funds for expenses not associated with Clifford; and acts of concealment. These were the acts that actually constituted "the crux" of the wire fraud criminality, not the deposit of the book contract payments into the trust account.

The truth of this conclusion is illustrated by considering an alternate scenario. Imagine if Petitioner again effected the account change by misusing Clifford's identification, resulting in the book payments being deposited into the client trust account, but Petitioner thereafter left the funds in the account. That set of facts cannot possibly be prosecuted as a wire fraud, *i.e.,* a "scheme or artifice to defraud." 18 U.S.C. § 1343. Therefore, Petitioner's misuse of Clifford's identification, which effected the deposit, cannot possibly be "the crux" of the wire fraud criminality.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

/s/ Kendra L. Hutchinson

Federal Defenders of New York
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417–8731
Kendra_Hutchinson@fd.org

Counsel for Petitioner

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