No. 21-

IN THE

Supreme Court of the United States

RADU MICLAUS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in holding that "trafficking" a means of identification does not also constitute "transferring" such identification under Sentencing Guidelines § 2B1.6 Application Note 2's prohibition on additional enhancement contrary to the Sentencing Guidelines and five other courts of appeal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Radu Miclaus. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Sixth Circuit:

United States v. *Miclaus,* No. 19-4273 (6th Cir. Nov. 9, 2021)

United States v. *Miclaus*, No. 19-4273 (6th Cir. Oct. 5, 2021)

United States v. *Miclaus*, No. 1:16-cr-00224 (N.D. Ohio Dec. 6, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Radu Miclaus respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The amended opinion of the Sixth Circuit is reported at 17 F.4th 706 (6th Cir. 2021) and is reproduced in the appendix to this petition. Pet. App. 1a–30a. The original opinion of the Sixth Circuit is reported at 15 F.4th 689 (6th Cir. 2021). Pet. App. 31a–59a. The district court's sentence is detailed in excerpts of the Sentencing Transcript. Pet. App. 68a–89a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on November 9, 2021, Pet. App. 1a, and denied Mr. Miclaus's petition for rehearing en banc on January 11, 2022. Pet. App. 67a. This Court has jurisdiction under 28 U.S.C. § 1254.

LEGAL FRAMEWORK

18 U.S.C. § 1028A provides:

(a) Offenses.–

(1) In general.–

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.

U.S.S.G. § 2B1.6 App. Note 2 provides:

> 2. Inapplicability of Chapter Two Enhancement.—
>
> If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3.

U.S.S.G. § 2B1.1(b)(11) provides:

> If the offense involved . . . (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, . . . increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

STATEMENT OF THE CASE

A. Introduction

Petitioner presents a significant question resulting in unwarranted sentencing disparities between circuits: May district courts enhance a defendant's sentence based on access-device trafficking when the defendant is also convicted of aggravated identity theft involving "transfer" of such device?

Until now, all five circuits to have addressed the question had answered no. The Sixth Circuit stands alone in opting to permit a trafficking enhancement that treats its defendants significantly harsher than any other similarly situated. Those convicted under § 1028A in the Sixth Circuit now face a two-level trafficking enhancement, meaning that the maximum guidelines range in other circuits is now the minimum in the Sixth. As the dissent observed, the Sixth Circuit's strained reading of the Guidelines is belied by its sister circuits' holdings and the ordinary meaning of the text. See Pet. App. 30a (White, J., dissenting) ("That is why every court of appeals to consider the issue has held that the § 2B1.1(b)(11)(B)(i) 'trafficking' enhancement cannot be imposed in these circumstances.").

Moreover, the Sixth Circuit's decision to "chart[] a new course among [its] sister circuits" undermines the Commission's previously clear guidance and permits disparate sentences for the same conduct amongst the circuits. Pet. App. 24a. Defendants in the Sixth Circuit are now punished twice for the same offense. See Pet. App. 29a (White, J., dissenting) (concluding that the majority's view "impermissibly punish[es] the defendant twice for the same conduct.").

The Court has supervisory authority to interpret the Guidelines and restore uniformity among the circuits.

As this case presents a clean vehicle to resolve this conflict, it warrants the Court's review.

B. Factual Background

Bogdan Nicolescu and Mr. Miclaus were involved in a group dubbed by the FBI as "Bayrob." Pet. App. 2a–3a. Bayrob was based in Romania and was known primarily for setting up fake vehicle auctions on eBay. *Id.* Mr. Nicolescu developed a custom-made trojan horse virus, which Bayrob began circulating around 2014 through a link in eBay listings and spam emails. *Id.* Upon clicking this link, the targeted user would download a virus that would run in the background until the user attempted to visit popular websites such as eBay, Facebook, or Gmail. *Id.* Instead of connecting users to the popular websites, the virus would redirect computers to a "look-a-like" website. *Id.*

Bayrob would capture and store any personal information entered on the look-a-like page. *Id.* Targeted users' personal information was primarily used to pay for the group's expenses—the costs of servers, VPNs, and registered domain names—but eventually some of the stolen information was sold for prices ranging from $1–35 USD. *Id.*

While Mr. Miclaus was one of two Bayrob members to have been with the group since its inception, he did not write any code or set up any physical or cyber infrastructure for the group. *Id.* at 20a. He received 10% of the group's profits, which was the smallest share of any Bayrob member. *Id.* Ample evidence supported a finding that Mr. Miclaus's co-defendant Mr. Nicolescu was the primarily leader of the Bayrob group and the orchestrator of its various schemes. *Id.*

Mr. Miclaus, prior to trial, proffered to the government and was prepared to accept responsibility. Pet. App. 88a ("[T]he fact of the matter is at some point in

time, this defendant admitted to his conduct."). Nevertheless, Mr. Miclaus chose not to accept the Government's plea offer because he believed the offered sentence to be too harsh. *Id.* at 82a. Thus, the case proceeded to trial.

A jury for the Northern District of Ohio convicted Mr. Miclaus and Mr. Nicolescu of wire fraud under 18 U.S.C. §§ 1343, 1349 and aggravated identity theft under 18 U.S.C. § 1028A as a result of their involvement in Bayrob. Pet. App. 60a.

C. Proceedings at Sentencing

Chapter Two of the Sentencing Guidelines requires that:

> If a sentence [for aggravated identity theft under 18 U.S.C. § 1028A] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer . . . of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction.

U.S.S.G. § 2B1.6 App. Note 2. Despite this, when calculating Mr. Miclaus's Sentencing Guidelines range, the district court applied a two-level enhancement under U.S.S.G. § 2B1.1(b)(11)(B)(i), which is applicable to offenses that "involve[] . . . the . . . trafficking of any unauthorized access device or counterfeit access device." See Pet. App. 21a. Mr. Miclaus did not raise an objection to the application of the trafficking enhancement at the time of sentencing, but his co-defendant Mr. Nicolescu did. The district court overruled Mr. Nicolescu's objection, reasoning that Application Note 2 did not prohibit an increase where a defendant was convicted for "trafficking" of an unauthorized access device. Pet. App. 73a. The district court incorporated

this reasoning when determining Mr. Miclaus's sentence and applying the same enhancement. See *id.* at 88a ("I incorporate all of the statements I made regarding codefendant Nicolescu's sentencing, my rationale for his sentence.").

The district court calculated Mr. Miclaus's offense level to be forty-three after applying, among others, an eighteen level enhancement for causing a loss between $3.5 and $9.5 million. Pet. App. 4a. The offense level resulted in a Guidelines range of life imprisonment, which exceeded the statutory twenty-year maximum on any of the applicable offenses. *Id.* The parties agreed to a five-level reduction for a total offense level of thirty-eight. *Id.* The district court sentenced Mr. Miclaus to 216 months' imprisonment. *Id.* at 5a.

D. Proceedings on Appeal

On appeal, Mr. Miclaus argued, among other things, that the district court erred when it applied the trafficking enhancement. Pet. App. 21a. The Sixth Circuit majority, reviewing for plain error, disagreed and concluded that application of the enhancement was proper. *Id.* at 26a. The panel vacated and remanded the case for resentencing, finding that the sentencing court had improperly applied two other enhancements, erroneously increasing Mr. Miclaus's offense level by six. *Id.* at 27a–28a. The Sixth Circuit issued an amended opinion one month later, including additional discussion of Mr. Miclaus's argument that the trafficking enhancement should not apply to him. See *id.* at 25a–27a.

In concluding that the district court did not err in applying the trafficking enhancement, the majority acknowledged it "chart[ed] a new course," in purporting to resolve the question presented based on "the

ordinary meaning[s] of" "traffic" and "transfer."[1] Pet. App. 24a. "If the culpable conduct involved in 'trafficking' is 'different than or in addition to' the 'transfer, possession, or use,' then the enhancement can apply." Pet. App. 22a (citing *United States* v. *Taylor*, 818 F.3d 671, 675 (11th Cir. 2016)). The Sixth Circuit defined trafficking as "transfer *plus* something else, such as marketing or sale." Pet. App. 23a (emphasis in original). Thus, because trafficking includes transfer and commerce, the Sixth Circuit reasoned that the Guidelines permit courts to apply the trafficking enhancement to impose "additional consequences" for trafficking's "commercial aspect." Pet. App. 23a. The dissenting judge, agreeing with all other courts of appeals to have considered the issue, would have found that "trafficking" necessarily involves a "transfer." Pet. App. 29a. Thus, application of the enhancement when a defendant is already subject to a sentence under § 1028A would constitute double punishment for the same culpable conduct. Pet. App. 22a. The Sixth Circuit denied an *en banc* rehearing petition in this case. Pet. App. 67a.[2]

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[1] Also notable is that the Sixth Circuit certainly charted a new course in having a majority and dissenting opinion authored by the same judge.

[2] Mr. Miclaus's co-defendant Nicolescu submitted a pro se petition for writ of certiorari on March 2, 2022, which was subsequently denied on April 4, 2022. *Nicolescu* v. *United States*, 21-7301 (2022).

REASONS FOR GRANTING THE PETITION

I. THIS CASE CREATES AN ACKNOWLEDGED CIRCUIT SPLIT.

A. Five Circuits Have Held That a § 1028A Aggravated Identity Theft Conviction Precludes a § 2B1.1(b)(11)(B)(i) Trafficking Enhancement

As "the plain meaning of trafficking involves a transfer," all other circuits who have confronted the question—First, Eighth, Seventh, Fourth, and Eleventh—have held that a § 1028A conviction precludes the § 2B1.1(b)(11)(B)(i) trafficking enhancement. Pet. App. 29a–30a (White, J., dissenting); see *United States* v. *Jones*, 551 F.3d 19, 25 (1st Cir. 2008); *United States* v. *Lyons*, 556 F.3d 703, 708 (8th Cir. 2009); *United States* v. *Doss*, 741 F.3d 763, 768 (7th Cir. 2013); *United States* v. *Giannone*, 360 F. App'x 473, 478 (4th Cir. 2010) (unpublished); *United States* v. *Charles*, 757 F.3d 1222, 1227 (11th Cir. 2014).

Interpreting the two provisions together, the First Circuit held:

> [I]f a defendant receives the two-year consecutive sentence on the identity theft count, her sentence for any underlying offense is not eligible for a 2-level increase for 'transfer, possession, or use' of false identification. Considering the plain meaning of the words, we conclude that [defendant's] trafficking of a means of identification involved a transfer (though the reverse is not necessarily true).

Jones, 551 F.3d at 25. The Eighth Circuit adopted this reasoning in *Lyons*, reasoning that "[g]iven that

the plain meaning of trafficking involves a transfer, the enhancement in § 2B1.1(b)([11])(B)(i) for trafficking of an unauthorized access device is one such specific offense characteristic that cannot be applied." *Lyons*, 556 F.3d at 708. The Eighth Circuit further observed that another statute, 18 U.S. § 1029(e)(5), expressly defined "traffic" to include "transfer." *Id.*

The Seventh Circuit relied upon *Lyons* and *Jones* in reversing the District Court for plain error:

> If, therefore, [defendant's] "trafficking of any . . . unauthorized access device or counterfeit access device," U.S.S.G. § 2B1.1(b)(11)(B), as found by the district court, also constitutes "the transfer[ ] . . . of a means of identification" under Application Note 2 to § 2B1.6, the district court should not have applied the two-level enhancement under § 2B1.1(b)(11)(B).

Doss, 741 F.3d at 767. The Eleventh Circuit followed the First, Eighth, and Seventh Circuits in holding that a mandatory § 1028A aggravated identity theft sentence "precluded" the trafficking enhancement because it "already accounted for [defendant's] transfer of the debit card." *Charles*, 757 F.3d at 1226–27 ("[T]he district court's application of the two-level increase for Count One under § 2B1.1(b)(11)(B) . . . ran afoul of § 2B1.6's prohibition against applying a 'specific offense characteristic for the transfer'"); see also *United States* v. *Taylor*, 818 F.3d 671, 675–676 (11th Cir. 2016) ("[W]e have held that § 2B1.6 precludes enhancement in § 1028A cases for conduct premised on § 2B1.1(b)(11)(B)'s trafficking prong." "Specifically, we found that 'trafficking' such a device covered the same conduct as 'transferring' the device.") (citing *Charles*, 757 F.3d at 1226–27).

The Fourth Circuit acted in accord, stating that "[t]he aggravated identity theft charge itself imposes an additional, consecutive two-year sentence for the unauthorized use or transfer of the account numbers, and therefore the enhancement in § 2B1.1(b)([11]) would amount to double counting." *Giannone*, 360 F. App'x at 478.

II. THIS ISSUE IS IMPORTANT AND RECURRING.

The Sixth Circuit, by its own admission, creates a circuit split that results in substantial, unwarranted sentencing disparities.

Applying the two-level enhancement at nearly any base level, the maximum in all other circuits becomes the new minimum in the Sixth. Thus, regardless of eventual base level, the trafficking enhancement materially alters defendant's sentences. As the Seventh Circuit noted for the defendant in *Doss*, "[w]ithout the enhancement [defendant's] range would have been fifty-one to sixty-three months; with the enhancement, [defendant's] range was sixty-three to seventy-eight months."). *Doss*, 741 F.3d at 768. Similarly, Mr. Miclaus's recommended sentencing range without the trafficking enhancement would be at level 35, equating to 168–210 months or 14 years to 17 years and 6 months. With the enhancement, the Guidelines range *starts* at the maximum of level 35—210 months—and goes up to 262 months, or 21 years and 10 months.

Courts should seek to avoid creating unwarranted sentencing disparities under 18 U.S.C. § 3553(a)(6). For prosecutions brought within the Sixth Circuit, even where another venue may have been proper, defendants will "face dramatically higher sentencing ranges for [the same] crime of conviction" when sentenced for the same conduct, using the same

Guidelines. *Guerrant* v. *United States*, 142 S. Ct. 640 (2022) (mem.). Though the Sentencing Guidelines are advisory, a "court of appeals may presume that the sentence is reasonable" when it "accords with the sentence" the Guidelines recommend. *Gall* v. *United States*, 552 U.S. 38, 40 (2007) (citing *Rita* v. *United States*, 551 U.S. 338, 351 (2007)). As a result of the split created in this case, the maximum sentence a defendant in Pittsburgh might receive is now equivalent to the minimum sentence for a similarly situated defendant in Cleveland. Sentences should not differ so radically based on happenstance of location.

In the past five years, over 5,500 new criminal dockets have included charges under 18 U.S.C. § 1028A.[3] And nearly half of all § 1028A cases also include charges under Title 18, Chapter 63, which governs fraud offenses.[4] In the Sixth Circuit, approximately 80 defendants each year will be receiving substantially disparate treatment to all others, translating into hundreds of years of additional incarceration.

This classic issue of interpretation should and must be resolved by this Court. This is particularly so here where the Sentencing Commission has had clear guidance in place since Application Note 2 was drafted in 2005 to prevent impermissible double counting of

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[3] *See* Bloomberg Law Docket Search (listing 5,563 results for search term 18:1028A for all U.S. dockets in the last 5 years).

[4] Bloomberg Law Docket Search (2,503 of 5,563 cases 18 USC 1028A involved Title 18 fraud offenses). As of 2020, 74.7% of § 1028A offenders were also convicted of theft, fraud, and property destruction. U.S.S.C., *Quick Facts on Section 1028A Aggravated Identity Theft Convictions FY 2020*, (June 2021) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Aggravated_Identity_Theft_FY20.pdf.

similar offenses. See Application Note 2 to U.S.S.G. § 2B1.6. Until the Sixth Circuit went awry and decided to "chart a new course," all circuits to have addressed the issue relied on the Note's clear language and held that a trafficking enhancement could not be imposed in addition to a 1028A conviction. See supra § I.A; Pet. App. 30a (White, J., dissenting) ("That is why every court of appeals to consider the issue has held that the § 2B1.1(b)(11)(B)(i) 'trafficking' enhancement cannot be imposed in these circumstances.").

The ability to interpret and provide clarity on federal regulations like the Guidelines is a power that remains firmly in the hands of this Court, not the Commission. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417 (2019) (describing some interpretative issues as falling "more naturally into a judge's bailiwick"); *United States* v. *Nasir*, 982 F.3d 144, 158 (3d. Cir. 2020) (interpreting *Kisor* as requiring courts to make an independent inquiry into the Sentencing Guideline's meaning and interpretation). Accordingly, this case presents a classic issue of interpretation for this Court to exercise its supervisorial power and restore clarity amongst the circuits.[5]

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[5] Further, the Commission is currently unable to act. The Commission has not had a quorum since 2019 and today consists of a single member whose term expired in October 2021. Nate Raymond, *U.S. sentencing panel's last member Breyer urges Biden to revive commission*, Reuters, (Nov. 11, 2021), https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/. The Commission has not had full membership since 2014. *See* Former Commissioner Information, USSC, https://www.ussc.gov/about/who-we-are/commisioners/former-commissioner-information; *Guerrant* v. *United States*, 142 S. Ct. 640 (2022) (mem.) (Sotomayor, J.) (stating that the Sentencing Commission has lacked a quorum of four voting members "for three full years"). So long as the Commission remains unpopulated—absent this

III. THE DECISION BELOW IS WRONG.

A. The Sixth Circuit's Decision is Contrary to the Text of § 2B1.6.

The majority "chart[ed] a new course among [its] sister circuits," purporting to resolve the question presented based on "the ordinary meaning[s] of" "traffic" and "transfer." Pet. App. 24a. But the court's course carried it off the edge of the map, "leav[ing] ordinary language behind." See *Wooden* v. *United States*, 142 S. Ct. 1063, 1070 (2022). The Sixth Circuit stands alone in holding that courts may apply a trafficking enhancement to defendants convicted of aggravated identity theft. Rather than evaluate whether "transfer" includes "traffic," as all other circuits have, the majority framed the issue as whether "'trafficking' is different than or in addition to the transfer, possession, or use'" of access devices." Pet. App. 25a–26a.

When a court imposes a sentence for aggravated identity theft in conjunction with another felony involving transfer, the Sentencing Guidelines forbid courts from applying an enhancement to "*any* specific offense characteristic for the transfer . . . of . . . identification." U.S.S.G. § 2B1.6 App. Note 2 (emphasis added). This Court has consistently instructed lower courts interpreting a text to "giv[e] *each* word its

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Court's intervention—defendants will continue to receive unprincipledly disparate sentences. While President Biden has nominated commissioners to the Commission, they have not yet been confirmed. President Biden Nominates Bipartisan Slate for the United States Sentencing Commission, https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/. This does little to assist defendants like Mr. Miclaus and similarly situated defendants as any future clarity the Commission might provide is not likely to be applied retroactively.

'ordinary, contemporary, common meaning," *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (emphasis added) (quoting *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997). "Any" is defined as "referring to an unspecified member of a particular class." *Any*, Oxford English Dictionary, oed.com. Here, the "particular class" encompasses enhancements that penalize the defendant for the "transfer" of identification. Thus, the proper inquiry—which every other circuit that confronted this question recognized—was whether "traffic" *includes* "transfer." Pet. App. 29a–30a. (White, J., dissenting) And because "trafficking involves a transfer," the trafficking enhancement is plainly within the class that penalizes transfers. *Lyons*, 556 F.3d at 708; Pet. App. 30a (White, J., dissenting) ("[t]hat is why every court of appeal to consider the issue has held that the § 2B1.1(b)(11)(B)(i) 'trafficking' enhancement cannot be imposed in these circumstances.")); see also *United States* v. *Flete-Garcia*, 925 F.3d 17, 26–27 (1st Cir. 2019) ("The key is whether the proposed enhancement relates to a characteristic of the offense. If so, it is precluded.") (citation omitted).

The Sixth Circuit's determination as to whether "the culpable conduct involved in 'trafficking' is different than or in addition to transfer" is not relevant to whether transferring includes trafficking. Pet. App. 22a. Application Note 2 precludes applying *any* characteristic *involving* a transfer. According to the Sixth Circuit, trafficking is "transfer *plus* something else" *Id*. at 23a. Even if a transferring offense must possess "something else" to be considered trafficking, this definition of trafficking still includes transferring. Therefore, even under the Sixth Circuit's definition of trafficking as "transfer *plus* something else," Application Note 2 categorically precludes the enhancement. *Id.*

Moreover, the ordinary meaning of "trafficking" in criminal law does not require "a commercial aspect." For example, a conviction under 21 U.S.C. § 841 is referred to as "drug trafficking" by lawyers and courts alike. See, *e.g.*, *United States* v. *Mahaffey*, 983 F.3d 238, 389 (6th Cir. 2020) ("For nearly twenty years, our circuit has held that a drug-trafficking conviction under 21 U.S.C. § 841 does not require proof that the defendant knew the type or quantity of controlled substance involved in the offense."). Yet, 21 U.S.C. § 841 has no commercial requirement. A person may be convicted of drug trafficking by simply manufacturing, distributing, or dispensing a controlled substance. No consideration, "marking or sale," is required or even contemplated by the statute.

Additionally, the Commission also uses the term trafficking in § 2D1.1 (the section applicable to a conviction under 21 U.S.C. § 841). This is equally applicable to "trafficking" contraband cigarettes, (18 U.S.C. § 2342 requires no consideration and § 2E4.1 of guidelines refers to the offense as trafficking), and "trafficking" certain motor vehicles (18 U.S.C. § 2321 punishes buying, receiving, possessing, or obtaining control of with intent to sell or otherwise dispose of and 2B6.1 of guidelines refers to the offense as trafficking). No person experienced in criminal law would understand the ordinary meaning of "trafficking" to necessarily require compensation or consideration.

B. Treating Transferring as Involving Trafficking or as Equivalent Will Not Render § 1028 Void.

The Sixth Circuit next explained that "treating 'trafficking' and 'transferring' as equivalent . . . might render superfluous parts of a related statute 18 U.S.C. § 1028." Pet. App. 24a (citing 18 U.S.C. 1028(a)(8) (crime to "knowingly traffic[ ] in . . . authentication

features for use in false identification documents, document-making implements, or means of identification.") and 18 U.S.C. § 1028(a)(5) (crime to "knowingly transfer[ ] . . . a document-making implement or authentication feature . . . [to create] a false identification document.").

But, the question before the court concerned the interactions of two sections in the Guidelines, U.S.S.G. § 2B1.6 App. Note 2 and U.S.S.G. § 2B1.1(b)(11), not § 1028. There was no danger of upsetting Section 1028's construction, particularly where that statute already provides specific definitions for the meanings of the terms "traffic" and "transfer." See 18 U.S.C. § 1028(d)(10), (12). Further, even if the Court were to look at these definitions for guidance, the Sixth Circuit's framing— that "trafficking" constitutes "transfer plus something more" (Pet. App. 25a–26a)—is inconsistent with the Section 1028's statutory definition of "traffic." See 18 U.S.C. § 1028(d)(12)(B) (defining "traffic" to mean "to make or obtain control of with intent to so transport, *transfer*, or otherwise dispose of.") (emphasis added).

Thus, such a construction would not render § 1028's trafficking section void.

C. Application Note 2's Failure to Preclude "Production" is Irrelevant.

Finally, the majority relied upon the fact that Application Note 2 does not preclude § 2B1.1(b)(11)(B)'s two-level enhancement for "production" of access devices. Pet. App. 25a. "Production," it reasoned, "would seem to 'involve' three activities that cannot be double-counted under Application Note 2—namely, "the 'possession' (and potentially also the 'use' or 'transfer') of an unauthorized access device." *Id.* But unlike "trafficking" or "transfer," the Guidelines *do* define

"production." U.S.S.G. § 2B1.1 App. Note 10(A) ("'Production' includes manufacture, design, alteration, authentication, duplication, or assembly."); see also *Taylor*, 818 F.3d at 676. Additionally, by its plain meaning, "production" differs from "traffic," "use," and "transfer."

Indeed, the Sixth Circuit has acknowledged this distinction, noting in another case that "the problem with [defendant's] first argument is that, unlike *Lyons*, this is not a "trafficking" case, but a "production" case." *United States* v. *Wiley*, 407 F. App'x 938, 942 (6th Cir. 2011) (unpublished) ("[B]ecause the note does not say anything regarding the 'production' of a 'means of identity,' but is expressly limited to offenses involving the 'transfer, possession, or use of a means of identification,' . . . it is that conduct that would risk double-counting where a defendant is also convicted of Aggravated Identity Theft, 18 U.S.C. § 1028A(a)(1)."). Thus, the production enhancement is simply not relevant to the majority's argument.[6]

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[6] But even if the Guidelines failed to define "production," consider "how an ordinary person . . . might" define "trafficking" and "production" "—and how she would not." *See Wooden*, 142 S. Ct. at 1069. She might reasonably define "trafficking" as "transfer plus marketing or sale." *See* Pet. App. 26a. That is because "transferring" is an "inextricable element" of "trafficking." *Id.* at 29a (White, J., dissenting). But defining "production" as "possession plus manufacture or assembly" would be met with well-deserved skepticism. Further, even assuming "trafficking" is always transfer plus commerce, "production" could encompass conduct that does not include possession—such as altering or retrofitting another's access device while its owner retains possession. Production is thus readily extricable from possession.

IV. THIS CASE PRESENTS A CLEAN VEHICLE TO RESOLVE THE SPLIT.

This case presents a clean vehicle ripe for this Court's review. Mr. Miclaus raised this question on appeal and the Sixth Circuit, reviewing for plain error, has ruled on the legal question presented. The majority's interpretation is now the law within the circuit, making this an issue ripe for this Court's review. The majority acknowledged it was creating a circuit split and did so against a well-reasoned dissent. See Pet. App. 24a ("We acknowledge that our holding charts a new course among our sister circuits, which have held that the trafficking enhancement cannot apply to a defendant convicted of aggravated identity theft."); Pet. App. 30a (White, J., dissenting) ("That is why every court of appeals to consider the issue has held that the § 2B1.1(b)(11)(B)(i) 'trafficking' enhancement cannot be imposed in these circumstances."). Further, Mr. Miclaus presents a single, straightforward question: whether § 2B1.6 Application Note 2 precludes applying § 2B1.1(b)(11)(B)'s trafficking enhancement.

That the Sixth Circuit remanded for resentencing on other grounds does not change the calculus. This question is dispositive as to whether Mr. Miclaus receives a two-level enhancement.

CONCLUSION

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

Respectfully submitted,

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