No. 25-

IN THE

Supreme Court of the United States

JULIAN OMIDI AND SURGERY CENTER MANAGEMENT, LLC,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government must prove that the defendant used a means of identification without the consent of its owner, that is, stole the identity, in order to sustain a conviction for aggravated identity theft under 18 U.S.C. § 1028A.

2. Whether a district court's error in instructing the jury on a mens rea standard that was not alleged in the indictment and does not exist under the charged statutes can be considered harmless beyond a reasonable doubt by an appellate court when the defendant contests the mens rea element at trial.

CORPORATE DISCLOSURE STATEMENT

Codefendant Surgery Center Management, LLC, which joins this petition and has filed its own petition, has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

- *United States v. Julian Omidi, et al.*, No. CR 17-00661-DMG, U.S. District Court for the Central District of California. Judgments entered August 1, 2023, August 16, 2023, and August 21, 2023.

- *United States v. Julian Omidi and Surgery Center Management, LLC*, Nos. 23-1719, 23-1941, 23-1949, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 16, 2025, rehearing denied April 3, 2025.

- *Julian Omidi and Surgery Center Management, LLC v. United States*, No. 24A1254, Supreme Court of the United States. Extension granted June 20, 2025.

- *Julian Omidi v. United States*, No. 20A172, Supreme Court of the United States. Application denied June 11, 2021.

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INTRODUCTION

This petition presents a clear split between the Seventh and Ninth Circuits. In the decision below and in a published opinion issued shortly thereafter, the Ninth Circuit adhered to its decade-old precedent holding that the aggravated identity theft statute, 18 U.S.C. § 1028A, does not require the government to prove that a means of identification was stolen or used without the owner's consent. *See United States v. Parviz*, 131 F.4th 966, 972-73 (9th Cir. 2025); *United States v. Omidi*, Nos. 23-1719, 23-1941, 23-1959, 2025 WL 212820, at *4 (9th Cir. Jan. 16, 2025). The Ninth Circuit's interpretation of § 1028A conflicts with Judge Easterbrook's opinion for the unanimous *en banc* panel in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013), which held that the government must prove that the alleged victim of the identity theft "did not consent to the use of the 'means of identification.'" *Id.* at 758.

In *Dubin v. United States*, 599 U.S. 110 (2023), this Court endorsed the Seventh Circuit's approach, repeatedly citing *Spears* approvingly while rejecting the mode of analysis underlying the Ninth Circuit's contrary interpretation. *Id.* at 120-25. Furthermore, although the government inconsistently shifted positions in *Dubin*, this Court noted that the Solicitor General appeared to *concede* that "a defendant would not violate § 1028A(a) if they had permission to use a means of identification to commit a crime." *Id.* at 128 n.8.

In this case and in *Parviz*, the Ninth Circuit denied *en banc* review, despite the conflict with *Spears* and this Court's analysis in *Dubin*. In other words, the Ninth

Circuit has made it clear that it will not budge until this Court explicitly overrules its approach, regardless of the strong message that this Court sent in *Dubin*. The Court should therefore grant this petition to give the Ninth Circuit the crystal-clear guidance that it apparently needs. Alternatively, the Court should consider this petition with the petition for a writ of *certiorari* in *Parviz*, which will be filed in the coming weeks, and it should grant in either of the two cases and hold the other.

OPINIONS BELOW

The Ninth Circuit issued a published opinion, *United States v. Omidi*, 125 F.4th 1283 (9th Cir. 2025), and a simultaneous unpublished memorandum decision that can be found at *United States v. Omidi*, Nos. 23-1719, 23-1941, 23-1959, 2025 WL 212820 (9th Cir. Jan. 16, 2025).

JURISDICTION

The court of appeals filed its published opinion and memorandum decision on January 16, 2025 and denied a timely petition for rehearing and rehearing *en banc* on April 3, 2025. App. 1a, 12a, 25a-26a.[1] On June 20, 2025, Justice Kagan granted an extension to file this petition up and until August 1, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

1. "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit.

STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 1028A(a)(1):

> 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. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

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

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

As the Ninth Circuit described it, this case involved a business generally referred to as "Get Thin," which provided weight-loss procedures to patients, and its purported "Wizard of Loss," petitioner Julian Omidi. App. 14a. The indictment alleged that Mr. Omidi "controlled" the "Get Thin" entities, which submitted false sleep studies and other false information to insurance companies in order to receive approvals for lap-band surgeries (although the trial evidence showed that the surgeries were generally authorized regardless of any false information in the studies). 2-ER-517-33.

The indictment charged several counts of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. 2-ER-514-538. It also charged one count of aggravated identity theft related to mail fraud under 18 U.S.C. § 1028A, 2-ER-539, and two counts of false statements related to health care matters under 18 U.S.C. § 1035. 2-ER-540. Finally, the indictment alleged one money laundering conspiracy count to promote the § 1035 offense, 2-ER-541-48, and two substantive money laundering counts to promote the § 1035 offense under 18 U.S.C. §§ 1956(a)(1)(A)(i) and (h). 2-ER-549-50. None of the charges alleged that Mr. Omidi acted with reckless disregard or conscious avoidance of

the truth; indeed, those phrases do not appear anywhere in the indictment. 2-ER-514-55. To the contrary, the indictment repeatedly alleged that Mr. Omidi "directed" and "instructed" others to fabricate results for the sleep studies. 2-ER-528-32.

With respect to the § 1028A charge in particular, the indictment alleged that codefendant Mirali Zarrabi was a doctor who permitted his signature to be used on sleep study reports even if he did not review the reports or failed to confirm the accuracy of the raw data. 2-ER-516, 527-28. From 2010 until 2013, Dr. Zarrabi received payments for his interpretations of sleep studies, and he also received payments in 2015 for interpretations he provided in 2014. 2-ER-532.[2] Count 32 charged the § 1028A violation and alleged that, in March 2014, Mr. Omidi used the "name" of Dr. Zarrabi without lawful authority in relation to the mail fraud offense alleged in Count 21. 2-ER-539. Count 21 alleged a payment made for a sleep study in March of 2014. 2-ER-536. In openings, the government admitted that Dr. Zarrabi gave "permission to use his electronic signature" and that, at some unspecified time "in 2014," he "left GET-THIN," but his signature was still used: "And when he found out, he didn't get mad. He didn't call the police. He didn't blow the whistle. Instead, they gave him a check for thousands of dollars, which he happily cashed, no questions asked." 6-ER-1287-88.

As far as its evidentiary presentation, the government showed that Dr. Zarrabi's electronic signature appeared on the sleep study at issue in Count 21. 16-ER-3382;

2. Dr. Zarabi was ultimately acquitted on all charged counts at a joint jury trial with Mr. Omidi.

18-ER-3720. Also, cooperating witness Charles Klasky testified that there was a period of time when Dr. Zarrabi was not being paid, although he was not clear when that period was, but even during that period Dr. Zarrabi allowed the use of his signature. 30-ER-6022. Neither Klasky nor anyone else testified that Dr. Zarrabi failed to review the sleep study alleged in Count 21 or otherwise did not authorize the use of his signature for that study.

During summations, the government's theory as to the § 1028A count was that there was a temporary gap in payments to Dr. Zarrabi starting towards the end of 2013, and, although he was later paid for services he provided in 2014, he must not have reviewed the sleep study at issue. 49-ER-9768. During its brief discussion of the § 1028A count, the government never even argued that Dr. Zarrabi did not authorize the use of his signature on the study. 49-ER-9767-68. Over Mr. Omidi's objection, 2-ER-482, the jury instructions on the § 1028A count stated: "The government need not establish that the means of identification of another person was stolen." 2-ER-374.

Also over Mr. Omidi's objections and claim of a constructive amendment of the indictment, 47-ER-9332-36, the district court gave general instructions applicable to all counts that both knowledge and intent can be proved if the defendant acted with "reckless indifference" and deliberate ignorance. 2-ER-377-78. Over objections, the district court refused to define "reckless indifference." 2-ER-485-86. The government specifically relied on the reckless-indifference standard during closing arguments. 48-ER-9506, 9596; 49-ER-9737-39; 50-ER-10019-20.

The jury convicted Mr. Omidi on all counts, and the district court imposed a sentence of seven years, which

included a 2-year consecutive sentence on the § 1028A count. 1-ER-257. On appeal, Mr. Omidi challenged the jury instructions and evidentiary sufficiency as to the § 1028A count, and he raised constructive-amendment and instructional claims regarding the reckless-indifference and deliberate-ignorance instructions and theory of prosecution.

With respect to the jury instruction that the government did not need to prove that Dr. Zarrabi's identity was stolen to establish the § 1028A offense, the Ninth Circuit held: "Even though the district court's instruction is an accurate statement of this court's holding in *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), Omidi argues the Supreme Court 'effectively overruled' *Osuna-Alvarez* in *Dubin*. *Dubin* and *Osuna-Alvarez*, however, interpret different statutory language. Because these holdings are not 'clearly irreconcilable,' we remain bound by *Osuna-Alvarez*. The instruction was not error." App. 11a (citations omitted).

With respect to Mr. Omidi's claim that the reckless-indifference instruction constituted reversible error, the Ninth Circuit held: "[A]ssuming arguendo that the district court's instruction misstated this circuit's law, we conclude any error would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud, which was the focus of the government's case." App. 5a. The Ninth Circuit also rejected his claim that the reckless-indifference and deliberate-ignorance instructions constructively amended the indictment, explaining: "Here, the facts charged in the indictment and presented at trial were materially consistent; both placed Omidi at the helm of the fraudulent billing scheme. Additionally, the jury instructions on deliberate ignorance and reckless

indifference did not 'substantially alter' the crimes charged in the indictment, but rather informed the jury how the mens rea elements of those crimes can be proven. Thus, we hold that neither constructive amendment nor variance occurred here." App. 5a-6a (citations omitted).

Mr. Omidi filed a petition for rehearing and *en banc* review, arguing that the Ninth Circuit's interpretation of § 1028A conflicted with the Seventh Circuit's *en banc* opinion in *Spears* and this Court's analysis in *Dubin*. He also pressed his claims regarding the jury instructions on mens rea. The Ninth Circuit summarily denied his petition. App. 25a-26a.

ARGUMENT

I. The Ninth Circuit's interpretation of the aggravated identity theft statute as proscribing the use of a means of identification even with the identity holder's consent conflicts with the Seventh Circuit's unanimous *en banc* opinion in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013), and this Court should grant review to confirm the Seventh Circuit's approach.

A. The Seventh and Ninth Circuits are split

Section 1028A is entitled "[a]ggravated identity *theft*." The statute 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." 18 U.S.C. § 1028A (emphases added).

In *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), the Ninth Circuit focused on the "without lawful authority" language in the statute and held that it did not require the identification to have been stolen or used without the consent of its owner. The Ninth Circuit explained that the identity theft title of § 1028A was inconsequential and concluded, purportedly based on the statute's plain language, that "regardless of whether the means of identification was stolen or obtained with the knowledge and consent of its owner, the illegal use of the means of identification alone violates § 1028A." *Id.* at 1185-86.

Meanwhile, the Seventh Circuit's unanimous *en banc* opinion in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) took a contrary view. Writing for the Seventh Circuit, Judge Easterbrook explained that the "another person" language in the statute and the "aggravated identity *theft*" title of § 1028A require the identification to have been stolen or used without the owner's consent. *See Spears*, 729 F.3d at 756-58. With respect to § 1028A's title, he reasoned: "A caption cannot override a statute's text, but it can be used to clear up ambiguities." *Id.* at 756.

Spears found that the title of § 1028A cleared up any ambiguities in the statute's use of the "another person" language. The title reinforced that the statute's "aggravated" two-year consecutive sentence was a recognition of "the fact that identity *theft* has a victim other than the public at large" and that the "usual victim of identity theft may be out of pocket (if the thief uses information to buy from merchants) or may be put to the task of rehabilitating a damaged reputation or credit history." *Id.* at 757. The Seventh Circuit also explained

that its interpretation was supported by a comparison with § 1028A's neighbor, 18 U.S.C. § 1028, and the Solicitor General had even agreed that "'the statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim' . . . whose information has been used without consent." *Id.* at 757 (quoting Brief for the United States in *Flores-Figueroa v. United States*, No. 08-108, at 20 (Jan. 2009)).[3]

After *Spears*, the Ninth Circuit recognized that *Osuna-Alvarez* conflicted with the Seventh Circuit's *en banc* opinion and even acknowledged that *Osuna-Alvarez* mistakenly cited the *vacated* three-judge panel opinion in *Spears* to support its view: "In *Osuna-Alvarez*, we cited the panel opinion in *Spears*, which was vacated by the Seventh Circuit's *en banc* decision, as consistent with our holding regarding 'without lawful authority.' We did not, however, indicate that the *Spears en banc* opinion was consistent with our holding." *United States v. Gagarin*, 950 F.3d 596, 605 n.3 (9th Cir. 2020) (citations omitted). The Ninth Circuit further recognized a flat-out conflict with the Seventh Circuit: "Today we recognize that it would not be workable to adopt both the *Spears en banc* interpretation of 'another person' and the *Osuna-Alvarez* interpretation of 'without lawful authority.' That the cases interpreted different words in the statute cannot obscure that *Spears* made available a consent defense that *Osuna-Alvarez* squarely rejected." *Id.* (citations omitted).

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3. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), this Court held that § 1028A requires the government to prove that the defendant knew the means of identification used belonged to another actual person.

Despite the conflict with *Spears*, and despite this Court's recent analysis of § 1028A in *Dubin* (discussed below), the Ninth Circuit has dug in its heels in its adherence to *Osuna-Alvarez*. In this case and in *Parviz*, the Ninth Circuit has held: "*Dubin* explicitly declined to address the statutory meaning of 'lawful authority.' Because no intervening Supreme Court or en banc decision is 'clearly irreconcilable' with *Osuna-Alvarez*, we remain bound by its construction of the phrase 'without lawful authority.'" *Parviz*, 131 F.4th at 972-73 (citations omitted); *see* App. 11a.

Parviz also cited opinions from several other circuits as supporting the Ninth Circuit's interpretation of § 1028A. *Id.* at 972 (citing *United States v. Reynolds*, 710 F.3d 434 (D.C. Cir. 2013); *United States v. Lumbard*, 706 F.3d 716 (6th Cir. 2013); *United States v. Retana*, 641 F.3d 272 (8th Cir. 2011); *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010)). All of these opinions were decided before *Dubin* and even before the Seventh Circuit's *en banc* opinion in *Spears*. Furthermore, the D.C. Circuit's opinion in *Reynolds* did not really support the Ninth Circuit's interpretation, as it only reviewed for plain error and simply stated that § 1028A applies to "situations in which a defendant gains access to identity information legitimately but then uses it illegitimately – *in excess of the authority granted*." *Reynolds*, 710 F.3d at 436 (emphasis added).

Even if these pre-*Dubin* opinions from other circuits establish that the Ninth Circuit's view is in the majority, that is all the more reason to grant this petition. As discussed below, this Court's opinion *Dubin* endorsed the Seventh Circuit's approach. In other words, the majority view, which approves of a two-year, mandatory consecutive

sentence for defendants who have not actually committed *aggravated* identity *theft*, should be corrected as soon as possible.

B. The Ninth Circuit's interpretation conflicts with *Dubin*

In *Dubin v. United States*, 599 U.S. 110 (2023), this Court held that, to establish a § 1028A violation, the use of a person's means of identification must be at the "crux" of the underlying fraud offense. In doing so, this Court explained that the title of § 1028A is "aggravated identity *theft*," and the statutory language "connote[s] theft" and that the means of identification "has been stolen." *Dubin*, 599 U.S. at 125. The statutory language "not only connote[s] theft, but identity theft in particular[,]" and the "ordinary understanding of identity theft" is "a crime in which someone [1] steals [2] personal information about and [3] belonging to another." *Id.* This language in *Dubin* strongly indicates that the means of identification must have been stolen or used without consent.[4]

Furthermore, in conducting its analysis, this Court cited and adopted the Seventh Circuit's view of identity *theft* as stated in the *en banc* opinion in *Spears*. *See Dubin*, 599 U.S. at 123 (citing the *en banc* opinion in *Spears* to reason that "[t]his central role played by the means of identification, which serves to designate a specific person's identity, explains why we say that the 'identity' has been stolen"). Meanwhile, this Court also explained why the

4. "'[S]tealing' can, of course, include situations where something was initially lawfully acquired." *Dubin*, 599 U.S. at 122 n.6.

Ninth Circuit's analysis in *Osuna-Alvarez* led to the wrong conclusion. *Osuna-Alvarez* casually dismissed the defendant's reliance on the "[a]ggravated identity theft" title of § 1028A. *See Osuna-Alvarez*, 788 F.3d at 1185. In *Dubin*, however, a primary explanation for this Court's interpretation of § 1028A was that the statute's title makes clear that it was meant to cover identity *theft*, and it is within this discussion of the title that this Court approved of the Seventh Circuit's approach in *Spears*. *See Dubin*, 599 U.S. at 120-23.

Importantly, the Ninth Circuit's analysis in *Osuna-Alvarez* only focused on the words "without lawful authority" appearing in § 1028A, and it did so in isolation. *See Osuna-Alvarez*, 788 F.3d at 1185. *Dubin* rejected the government's similar interpretive approach, which sought to read the words in § 1028A "in isolation." *Dubin*, 599 U.S. at 117. Instead, the title of § 1028A and each of its elements must be read together, as all of the terms together provide the context for the statute's meaning. *Id.* at 118-19 (the statute's terms cannot be "taken alone" and instead "[r]esort to context" is "especially necessary"). The complete context of § 1028A required a "narrower reading" of the statute limited to identity *theft*. *Id.* at 120-22.

Unlike *Osuna-Alvarez*, where the Ninth Circuit limited its analysis to the "without lawful authority" language, *Dubin* concluded that such language had to be read together with the "use," the "in relation to," and the "another person" language in § 1028A, all of which make clear that stealing another person's identity must be at the crux of the underlying offense. *Id.* at 123-25 (statute covers using "a means of identification belonging to 'another person'" and "to unlawfully 'possess' something

belonging to another person suggests it has been stolen"). The unanimous *en banc* opinion in *Spears* relied on the "another person" language together with the title of § 1028A, *see Spears*, 729 F.3d at 756-57, the same analysis that this Court adopted in *Dubin* while relying on *Spears*. *See Dubin*, 599 U.S. at 122-25. The Ninth Circuit has reasoned that *Dubin* is not *clearly* irreconcilable with *Osuna-Alvarez* because they interpreted "different statutory language" with the latter only focusing on the "without lawful authority" language in § 1028A. App. 11a; *see Parviz*, 131 F.4th at 972-73. The fundamental flaw with *Osuna-Alvarez*, however, is that the Ninth Circuit essentially limited its analysis to that language.

Finally, although the government inconsistently shifted positions in *Dubin*, it appeared to *concede* that "a defendant would not violate § 1028A(a)(1) if they had permission to use a means of identification to commit a crime." *Dubin*, 599 U.S. at 128 n.8. For example, one part of the government's brief in *Dubin* conceded that a "defendant can have 'lawful authority' to use a co-conspirator's name to commit bank fraud . . . ." *Id.* Obviously, if the government agrees that the Ninth Circuit's interpretation is wrong, this Court should grant review, and the Solicitor General should direct government attorneys to cease advocating an erroneous interpretation of the statute. Even if the government has not clearly conceded the issue and instead has waffled with shifting positions, that simply demonstrates the current confusion and the need for clear guidance from this Court, particularly given the severe, two-year mandatory consecutive sentence that hangs in the balance. *See Dubin*, 599 U.S. at 127-28. For all of these reasons, this Court should grant review, reverse the Ninth Circuit, and confirm the Seventh Circuit's approach in *Spears*.

C. This case is an ideal vehicle for review, and this Court should not wait for further "percolation"

This case is an exceptional vehicle for review. Mr. Omidi preserved an objection to the jury instruction at trial, and the evidence that Dr. Zarrabi did not consent to the use of his name was exceedingly thin, making the instructional error crucial and justifying reversal of the § 1028A conviction. *See McDonnell v. United States*, 579 U.S. 550, 579-80 (2016) (harmless beyond a reasonable doubt standard for preserved instructional error). The government did not even argue lack of consent or exceeding authorization during its closing argument. 49-ER-9767-68. Likewise, the government's star cooperating witness, Charles Klasky, testified that Dr. Zarrabi authorized the use of his signature, even during the period when his payments were delayed. 30-ER-6022. Indeed, the government's essential theory of the case was that Dr. Zarrabi was participating in the fraud by allowing his signature to be used even though he was not reviewing the sleep studies.

While the error was preserved and was crucial in this case, this Court should also review this issue now rather than wait for further "percolation" after *Dubin*. The Ninth Circuit has made it clear, in this case and again in *Parviz*, that it is not changing its interpretation, despite *Dubin*. Thus, the circuit-split is not disappearing regardless of any further "percolation." That is, the Ninth Circuit is not budging, and there is no reason for the Seventh Circuit to change its interpretation given that *Dubin* supports it. This Court has also noted the government's shifting positions on the issue. *See Dubin*, 599 U.S. at 128 n.8. If the government cannot agree on a clear position, there is not much hope that further "percolation" will do anything

more to frame the issue for this Court. In short, the confusion and conflict has gone on long enough.

At least one member of this Court has lamented the vagueness problems with the aggravated identity theft statute, *see Dubin*, 599 U.S. at 133-39 (Gorsuch, J., concurring), emphasizing that "consistency" in the lower courts' interpretation of § 1028A has "to date, eluded them." *Id.* at 139. The entrenched conflict between the Seventh and Ninth Circuits means that such consistency will continue to "elude" the circuits, regardless of whether other circuits are willing to re-examine their precedent after *Dubin*, which, if the Ninth Circuit's post-*Dubin* approach is any indication, is doubtful. Meanwhile, defendants like Mr. Omidi are forced to serve harsh two-year, *mandatory* consecutive sentences. In short, waiting for percolation presents little upside, while there is an enormous downside of potentially unjustified years in prison for many criminal defendants.

Furthermore, according to statistics published by the Sentencing Commission for fiscal year 2024, the Central District of California was among the top five districts in the country for number of § 1028A prosecutions, and both the Central and Eastern Districts of California were among the top five districts where § 1028A offenses comprised the highest proportion of the overall caseload. *See* Quick Facts, 18 U.S.C. § 1028A Aggravated Identity Theft. Thus, a significant number of the nation's § 1028A cases are prosecuted in the Ninth Circuit, where the law will remain unchanged until this Court intervenes. It should do so now.

Finally, the defendant in *Parviz* is expected to file a petition on this issue in the coming weeks. The Court

should consider the petitions together and grant in at least one of the two cases and hold the other.

II. This Court should grant review to resolve conflict in the lower courts regarding whether harmless-error review is permissible for instructional errors on contested elements of an offense, particularly where the instructional error alters the mens rea theory charged in the indictment.

A. This Court should grant review to resolve confusion regarding whether harmless-error review is permissible for instructional errors on contested elements

As to the charges globally, the essence of the trial was focused on whether Mr. Omidi had the requisite mens rea. In other words, there was not much of a dispute that the results of sleep studies were fabricated; the main defense at trial was that Mr. Omidi did not have knowledge of that conduct and the intent to defraud. Although the indictment alleged that Mr. Omidi was the mastermind who intentionally directed the fraudulent scheme (discussed more in the next section), the district court granted the government's request at the end of the trial to instruct the jury on an uncharged mens rea of reckless indifference. 2-ER-377-78. Mr. Omidi vehemently objected, including to the district court's failure to define recklessness. 2-ER-485-86; 47-ER-9332-36. The government specifically relied on the reckless standard during closing arguments. 48-ER-9506, 9596; 49-ER-9737-39; 50-ER-10019-20.

Mr. Omidi challenged the mens rea instructions on appeal, arguing that there was little question that the

instructions were erroneous. The plain language in the charged statutes clearly requires at least a knowingly mens rea. *See* 18 U.S.C. § 1028A ("knowingly"); 18 U.S.C. § 1035 ("knowingly and willfully"); 18 U.S.C. § 1956(a)(1)(A)(i) ("knowing" and "with the intent to promote the carrying on of specified unlawful activity"). No court has ever held that these statutes can be satisfied with reckless indifference, and it is well-established that recklessness does not suffice. *See Borden v. United States*, 593 U.S. 420, 426-27 (2021) (citing Model Penal Code § 2.02). It was also obvious error to instruct on a recklessness standard, including as to the fraud counts, without providing any definition of recklessness. *See Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (recklessness has different meanings and can be interpreted as negligence); *see also Elonis v. United States*, 575 U.S. 723, 738 (2015) (negligence generally inappropriate for criminal statutes). To get around this problem, the Ninth Circuit assumed that the instructions were erroneous but concluded any error was "harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud, which was the focus of the government's case." App. 5a.

The Ninth Circuit's holding conflicts with other circuits' interpretations of the harmless-error holding in *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, this Court held that an error for failing to instruct on an element of an offense (in that case, materiality) could be reviewed for harmlessness where the defendant did not contest the element before the jury (or even on appeal). *Id.* at 16-17. This Court explained: "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict

would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17.

Justice Scalia dissented in *Neder*, joined by Justices Souter and Ginsburg, explaining that the majority's harmless-error conclusion violated the defendant's Sixth Amendment right to trial by jury. *Id.* at 30-40 (Scalia, J., dissenting). He remarked: "The Court's decision today is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury)." *Id.* at 32.[5]

Since *Neder*, the circuits have divided on when harmless-error review can apply to instructional errors regarding contested elements of an offense, and even precedent within each circuit has been far from consistent. The First and Tenth Circuits have at times stated that harmless-error review cannot save a conviction where, as here, the defendant contested the tainted element at trial. *See United States v. Kahn*, 58 F.4th 1308, 1319 (10th Cir. 2023) ("Where an element of an offense is contested at trial, as it was here, the Constitution requires that the issue be put before a jury – not an appellate court."); *United States v. Wu*, 711 F.3d 1, 20 (1st Cir. 2013).

5. The instructional error here is slightly different than the one in *Neder*, as the district court erroneously instructed on a defective mens rea standard rather than completely omitting the element of the offense. Given the fundamental importance of mens rea in general, *see, e.g.*, *Ruan v. United States*, 597 U.S. 450, 457 (2022), and particularly to Mr. Omidi's defense, there is no reason to treat the instructional error in this case as less serious for purposes of the Sixth Amendment.

Like the Ninth Circuit, however, the Tenth Circuit has at other times permitted harmless-error review, even where the defendant contested the element at issue. *See United States v. Freeman*, 70 F.4th 1265, 1281-82 (10th Cir. 2023); *United States v. Saini*, 23 F.4th 1155, 1164 (9th Cir. 2022); *see also United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999) (interpretation of *Neder* on remand.). The Second Circuit has also noted inconsistency in its interpretation of *Neder*. *See Monsanto v. United States*, 348 F.3d 345, 349-50 (2d Cir. 2003).

The Third Circuit has offered its own take, stating: "We do not read 'uncontested' literally to restrict harmless error to cases where the defendant made no attempt whatsoever to dispute the element, but rather more generally to mean the missing piece 'is supported by uncontroverted evidence.'" *United States v. Boyd*, 999 F.3d 171, 179 (3d Cir. 2021). The Third Circuit's substitution of the words "uncontroverted evidence" is not particularly helpful. What if the only evidence presented on the element is by a cooperating witness who testifies for the government, but whose credibility is attacked by the defense? To its credit, the Ninth Circuit at least doubts that harmless error can save a conviction in these circumstances, *see United States v. Perez*, 962 F.3d 420, 442-44 (9th Cir. 2020), although it did not apply that precedent in this case where the government's main evidence of Mr. Omidi's knowledge and intent was provided by cooperators with significant credibility problems.

Concurring in his own opinion in *United States v. Pizarro*, 772 F.3d 284 (1st Cir. 2014), Judge Lipez summed up the confusing state of affairs, noting the "significant inconsistency in the way courts have reviewed for

harmlessness" and "the potentially unconstitutional applications of *Neder* that have resulted from it." *Id.* at 303 (citation omitted). "Given that the Sixth Amendment right to a trial by jury is at stake, [he] urge[d] the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *Id.*

Judge Lipez further explained that *Neder* "did not unequivocally answer whether the two-part formulation for finding an omitted element harmless in Neder's case – that the element was both uncontroverted and supported by overwhelming evidence – was merely descriptive of the circumstances in *Neder* itself or also prescriptive for any finding of harmlessness . . . ." *Id.* at 303. Not only has *Neder* generated confusion, but several state courts have criticized the opinion, and "at least one state court has suggested that *Neder*'s application of harmless error analysis to cases where the jury did not make a finding of guilt beyond a reasonable doubt on all elements will be 'short-lived' given the Supreme Court's Sixth Amendment jurisprudence, starting with *Apprendi v. New Jersey*, 530 U.S. 466 (2000)." *Id.* at 307 (citing *Freeze v. State*, 827 N.E. 2d 600, 605 (Ind. Ct. App. 2005)).

While that prediction has not come true, as this Court has yet to revisit the harmless-error question, the significant evolution of this Court's Sixth Amendment precedent since the 1999 opinion in *Neder* confirms the validity of Justice Scalia's dissent. *See Neder*, 527 U.S. at 39 (Scalia, J., dissenting) ("What could possibly be so bad about having judges decide that a jury would have necessarily found the defendant guilty? Nothing except the distrust of judges that underlies the jury-

trial guarantee."). This Court should finally take up the question, and given the Sixth Amendment right at stake, as expressed in Justice Scalia's dissenting opinion in *Neder*, it should limit harmless-error review to situations where the defendant did not contest the tainted element at trial.

This case is also an excellent vehicle for reviewing the harmless-error question. Here, the instructional error related to the critical mens rea element, which was essentially the entire dispute at trial, and the government's presentation as to Mr. Omidi's knowledge and intent significantly relied on the testimony of cooperating witnesses who were impeached by the defense in numerous ways.

Not only was Mr. Omidi deprived of his Sixth Amendment right to have a properly instructed jury evaluate these witnesses to determine whether he had the requisite criminal intent, but the Ninth Circuit's harmless error analysis in this case epitomizes the distrust of appellate judges making the jury's findings, as emphasized by Justice Scalia in *Neder*. The sum total of the Ninth Circuit's explanation was this brief statement in its unpublished memorandum: "[W]e conclude any error would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud, which was the focus of the government's case." App. 5a. The Ninth Circuit offered no supporting discussion of the evidence or citation to authority, which has become all too common since *Neder*.

It is a far cry from the Sixth Amendment to have appellate judges making determinations of guilt based on a cold record. *See Bollenbach v. United States*, 326 U.S. 607, 615 (1946); *Weiler v. United States*, 323 U.S. 606, 611

(1945). It is even a more pressing constitutional problem when appellate judges make such determinations with the back of their hand and without any explanation. The approach taken to the jury-trial right in this case may be more expedient, but it is a significant departure from what the Sixth Amendment requires.

"Formal requirements are often scorned when they stand in the way of expediency. This Court, however, has an obligation to take a longer view." *Neder*, 527 U.S. at 40 (Scalia, J., dissenting). Consistent with this obligation, the Court should grant review to clarify the proper application of *Neder*, as there is significant confusion in the lower courts, and many, like the one below, are applying harmless error in a manner that is inconsistent with the Sixth Amendment.

B. This Court should also grant review to clarify whether harmless-error review applies when the jury is instructed on a mens rea theory that is not charged in the indictment

The Ninth Circuit's analysis of the recklessness jury instruction also implicates another circuit-split. In addition to objecting that the undefined recklessness standard given to the jury contravened the mens rea set forth in the statutes, Mr. Omidi also claimed that the jury instructions amended the indictment, which alleged that he knowingly masterminded the scheme, not that he was reckless. Indeed, the charges against Mr. Omidi came in the form of a "speaking" indictment, which unequivocally alleged that he acted knowingly and intentionally by directing and instructing employees to falsify information, without a whisper of reckless indifference. 2-ER-528-32.

Mr. Omidi claimed that the change in theory at the end of the trial violated his Fifth Amendment rights under *Stirone v. United States*, 361 U.S. 212, 215-19 (1960). Furthermore, such a Fifth Amendment error requires automatic reversal. *Id.* at 217 (amendment of the indictment "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" and the "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"); *see, e.g.*, *United States v. Andino-Morales*, 73 F.4th 24, 39 (1st Cir. 2023); *United States v. Simmons*, 11 F.4th 239, 269 (4th Cir. 2021).

The Ninth Circuit did not cite *Stirone* and simply observed that the facts charged in the indictment and presented at trial were "materially consistent" because they both placed Mr. Omidi "at the helm of the fraudulent billing scheme." App. 5a-6a. Mr. Omidi's claim was not that the indictment failed to give notice that he was at the "helm" of the businesses, a point that was not contested. His claim was that the "speaking" indictment, which specifically alleged that he knowingly and intentionally *directed* others working for him to commit fraud, failed to provide any notice of a reckless-indifference theory of liability.

The circuits are split on whether a jury instruction on a mens rea theory not charged in the indictment requires automatic reversal. In *United States v. Lockhart*, 844 F.3d 501, 513-16 (5th Cir. 2016), the Fifth Circuit held that a jury instruction that permitted conviction under a negligence standard impermissibly amended the indictment, which only charged a knowingly or recklessly mens rea, and therefore required automatic reversal under *Stirone*.

The Sixth Circuit, on the other hand, has held that instructing on a lesser mens rea standard of recklessness does not amend an indictment that charges a defendant with acting knowingly. *See United States v. Hathaway*, 798 F.2d 902, 910-12 (6th Cir. 1986). The Sixth Circuit followed the Ninth Circuit's opinion in *United States v. Love*, 535 F.2d 1152, 1158 (9th Cir. 1976), which the panel here also cited. App. 6a.

This Court should grant review to resolve this split, and this case is a good vehicle to do so, as it clearly demonstrates that the Fifth Circuit's approach is correct. As an initial matter, the charges in this case did not permit a recklessness mens rea, and therefore Mr. Omidi could not possibly have had any notice that such a lesser theory would be used at trial. To be clear, the §§ 1028A, 1035, and 1956 counts in the indictment did not allege a reckless-indifference theory for the simple and obvious reason that such a mens rea does not satisfy those statutes. 2-ER-539-50. The plain language in each statute clearly requires at least a knowingly mens rea. *See* 18 U.S.C. § 1028A ("knowingly"); 18 U.S.C. § 1035 ("knowingly and willfully"); 18 U.S.C. § 1956(a)(1)(A)(i) ("knowing" and "with the intent to promote the carrying on of specified unlawful activity"). The fraud charges also required an intent to "devise" a scheme to defraud. *See Kousisis v. United States*, 145 S. Ct. 1382, 1391, 1398 (2025) (fraud statutes require "intentionally lying"); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.20 (1976); Model Penal Code § 2.02.

In short, Mr. Omidi had absolutely no notice that the government would proceed on a reckless-indifference theory because the individual counts did not mention such a theory, the speaking indictment was very specific

that the grand jury charged that he knowingly directed the fraud, and the language of the statutes themselves forbids such a theory. The *conduct* actually charged in this indictment was that Mr. Omidi directed others working at his businesses to commit fraud, *not* the entirely different (and inconsistent) allegation that he was willfully blind or recklessly indifferent to the fraudulent conduct of his underlings. If an amendment to the indictment automatically requires reversal even where the mens rea theory added during trial is permissible under the charged statute, *see Lockhart*, 844 F.3d at 513-16, it clearly requires automatic reversal in these circumstances.

Finally, while such an indictment error under *Stirone* requires automatic reversal regardless of actual prejudice, the impermissible amendment here was quite harmful because employees who worked in the sleep-study department testified as cooperating witnesses that they committed fraud, and Mr. Omidi's defense was that he did not recognize their fraudulent behavior as he attempted to manage multiple facets of a fast-growing business. The addition of a recklessness theory, particularly without any definition of recklessness, significantly undermined the defense.

CONCLUSION

For the foregoing reasons, the Court should grant this petition. Alternatively, the Court should consider this petition with the forthcoming petition in *Parviz*, and it should grant in at least one of the two cases and hold the other.

Dated: August 1, 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-1719, 23-1959
D.C. No. 2:17-cr-00661-DMG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JULIAN OMIDI, AKA COMBIZ JULIAN OMIDI, AKA COMBIZ OMIDI, AKA KAMBIZ OMIDI, AKA KAMBIZ BENIAMIA OMIDI, AKA BEN OMIDI,

Defendant-Appellant.

No. 23-1941
D.C. No. 2:17-cr-00661-DMG-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SURGERY CENTER MANAGEMENT, LLC,

Defendant-Appellant.

Argued and Submitted November 8, 2024
Filed January 16, 2025
Phoenix, Arizona

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Appendix A

MEMORANDUM[*]

Before: PAEZ and OWENS, Circuit Judges, and SEEBORG, Chief District Judge.[**]

Following a lengthy criminal health insurance fraud trial, Julian Omidi and his company, Surgery Center Management, LLC ("SCM") (together, "Appellants") jointly appeal from their convictions of mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), as well as the restitution award issued against them.[1] Omidi individually appeals from his convictions of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), false statements relating to health care matters in violation of 18 U.S.C. § 1035, and promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. First, Appellants argue there was insufficient evidence of materiality to sustain the mail fraud, wire

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard Seeborg, United States Chief District Judge for the Northern District of California, sitting by designation.

1. Appellants also challenge the district court's forfeiture judgment of nearly $100 million. We address this claim in a concurrently filed opinion, in which we affirm.

fraud, and false statement convictions.[2] To find materiality, the jury had to conclude Appellants' false statements had "a natural tendency to influence, or [were] capable of influencing," the insurers to whom the statements "w[ere] addressed." *United States v. Lindsey*, 850 F.3d 1009, 1013 (9th Cir. 2017) (quoting *Neder v. United States*, 527 U.S. 1, 16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). We cannot disturb the jury's verdict for insufficient evidence of materiality unless we determine that no "rational trier of fact could have found [materiality] beyond a reasonable doubt." *United States v. Luong*, 965 F.3d 973, 980-81 (9th Cir. 2020) (citation omitted). Because Appellants failed to renew their motion for acquittal at the close of all evidence, we review for plain error. *See United States v. Pelisamen*, 641 F.3d 399, 408-09 & n.6 (9th Cir. 2011).

On appeal, Appellants emphasize the government's failure to introduce individual insurance plans into evidence, which they argue prevented a reasonable jury from determining whether a falsity impacted a coverage decision. But substantial evidence supports the jury's conclusion that Get Thin's misrepresentations had the "natural tendency to influence" insurers even without the individual insurance plans in evidence. *Lindsey*, 850 F.3d at 1013.

For example, multiple insurance representatives testified that they rely completely on medical providers

2. Because the aggravated identity theft and money laundering convictions are predicated on the fraud and false statement convictions, Omidi and SCM argue all convictions fall together.

to provide accurate information about the medical necessity of claimed procedures, and they would deny claims containing false or misleading information about the service performed or its medical necessity. Get Thin's myriad misrepresentations, which included fabricated diagnoses, forged provider signatures, and falsified patient data, spoke directly to the medical necessity of the claimed procedures and thus implicated "essential aspects of the transaction[s]" between Get Thin and insurers. *United States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024). On this record, and even without individual insurance plans in evidence, a reasonable jury could find Get Thin's misrepresentations material.

Appellants also argue the government's solicitation of testimony from insurance representatives that knowledge of Get Thin's lies would have prompted them to merely "investigate further" introduced the jury to a materiality theory prohibited by *Kungys v. United States*, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). We need not reach the propriety of this alternate theory of materiality because of the ample evidence demonstrating that fraudulent claims would not only have been investigated but also denied. Thus, we conclude the evidence of materiality was sufficient to sustain Appellants' mail fraud, wire fraud, and false statement convictions.

2. Second, Appellants argue the district court erred by instructing the jury that knowledge and intent to defraud could be shown through defendants' "reckless indifference to the truth or falsity of their statements," and then compounded that error by declining to define

recklessness for the jury. We review de novo whether a jury instruction "misstate[d]" an element of the crime, and the district court's "precise formulation" of an instruction for abuse of discretion. *United States v. Lloyd*, 807 F.3d 1128, 1164-65 (9th Cir. 2015) (citations omitted). If we determine an error occurred, we reverse unless, after a "thorough examination of the record," we conclude "the district court's error was harmless beyond a reasonable doubt." *United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021) (citation omitted). Here, assuming arguendo that the district court's instruction misstated this circuit's law, we conclude any error would be harmless due to the overwhelming evidence of Omidi's actual knowledge of fraud, which was the focus of the government's case.

3. Third, Appellants argue the district court's jury instructions on deliberate ignorance and reckless indifference constructively amended the indictment, or in the alternative, constituted a variance. A constructive amendment occurs when the "complex of facts" at trial differs "distinctly" from those in the indictment, or when "the crime charged [in the indictment] was substantially altered at trial." *United States v. Soto-Barraza*, 947 F.3d 1111, 1118 (9th Cir. 2020) (citation omitted). Alternatively, "we have generally found a variance where the indictment and the proof involve only a single, though materially different, set of facts." *United States v. Adamson*, 291 F.3d 606, 614-15 (9th Cir. 2020). We review these claims de novo. *Id.* at 612, 615.

Here, the facts charged in the indictment and presented at trial were materially consistent; both placed

Omidi at the helm of the fraudulent billing scheme. Additionally, the jury instructions on deliberate ignorance and reckless indifference did not "substantially alter[]" the crimes charged in the indictment, but rather informed the jury about how the mens rea elements of those crimes can be proven. *Accord United States v. Love*, 535 F.2d 1152, 1157-58 (9th Cir. 1976) (rejecting a claim that the district court "rewrote the indictment" by giving a reckless indifference instruction); *Lloyd*, 807 F.3d at 1164 (rejecting a similar constructive amendment argument). Thus, we hold that neither constructive amendment nor variance occurred here.

4. Fourth, Appellants argue they are entitled to a new trial due to three erroneous evidentiary rulings, which we review for abuse of discretion. *See United States v. Hankey*, 203 F.3d 1160, 1166-67 (9th Cir. 2000). We can affirm the admission of evidence "on any basis supported by the record." *United States v. Alexander*, 48 F.3d 1477, 1487 (9th Cir. 1995).

Appellants first argue the draft sleep study reports prepared by Get Thin's only registered polysomnographic technologist (RPSGT) should not have been admitted under Rule 803(6) as business records nor Rule 801(d)(2)(C) as nonhearsay party admissions. Under Rule 801(d)(2)(C), a statement is a nonhearsay party admission if it is "offered against an opposing party and . . . was made by a person whom the party authorized to make a statement on the subject." Fed. R. Evid. 801(d)(2)(C). Here, the record reveals that Omidi hired the RPSGT to, according to his contract, "prepare detailed written reports of professional

sleep study scoring." On this record, we conclude that the district court was within its discretion to admit these sleep study reports as statements authorized by Omidi under Rule 801(d)(2)(C), and we do not reach the question of their admissibility as business records.

Next, Appellants argue the testimony of a forensic accountant, who estimated the amount Appellants billed and received for fraudulent insurance claims, was inadmissible under Rule 702 as unreliable and under Rule 403 as irrelevant. We have counseled, however, that the Rule 702 admissibility inquiry is "a flexible one," and "[s]haky but admissible evidence is to be attacked by cross-examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558, 564 & nn. 17-18 (9th Cir. 2010) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-96, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Moreover, evidence "concerning the financial impact of [a fraud] . . . may be relevant to show that a scheme to defraud existed," *United States v. Rasheed*, 663 F.2d 843, 849-50 (9th Cir. 1981), as well as a defendant's intent to defraud. *See Lloyd*, 807 F.3d at 1152 & n.6. Thus, the district court did not abuse its discretion by admitting the loss testimony.

The final evidentiary ruling Appellants challenge is the admission of several out-of-court statements by Omidi's "litigation coordinator," Brian Oxman, which were described during the testimonies of three trial witnesses. Appellants argue Oxman's statements, which evidenced Omidi's attempts to cover up and obstruct the

investigation into the fraudulent billing scheme, were irrelevant, inadmissible hearsay.

Oxman's out-of-court statement recounted by the first witness, Charles Klasky, was an instruction, not offered for the truth of the matter asserted, and thus not hearsay. *See United States v. Chung*, 659 F.3d 815, 833 (9th Cir. 2011). Oxman's statements to the second two witnesses, Larry Twersky and Jaffy Palacios, were admitted after the government introduced substantial evidence establishing Oxman and Omidi's agency relationship and were admissible as party admissions. *See* Fed. R. Evid. 801(d)(2)(D); *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010). Given this relationship, Oxman's attempts to induce witnesses to lie or cover up the crimes were probative of Omidi's consciousness of guilt. *See United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996). Thus, the district court did not abuse its discretion by admitting Oxman's out-of-court statements.

5. Fifth, Appellants raise three challenges to the district court's restitution award of $11,207,773.96 to the defrauded insurers under the Mandatory Restitution to Victims Act (MVRA). First, Appellants argue that the insurers serving as administrators for employer-funded plans are not "victims" under the MVRA. *See* 18 U.S.C. § 3663A(a)(1), (a)(2). We review the district court's determination of whether a person or entity is a victim for abuse of discretion. *United States v. Luis*, 765 F.3d 1061, 1066 (9th Cir. 2014).

Here, the district court concluded these insurers were victims because they were contractually obligated to recover and return any overpayment to Appellants on behalf of the employers whose plans they administered. We have previously approved of third parties assuming the role of victim under the MVRA in analogous circumstances. *See*, *e.g.*, *United States v. Yeung*, 672 F.3d 594, 602-03 (9th Cir. 2012), *overruled on other grounds by Robers v. United States*, 572 U.S. 639, 134 S. Ct. 1854, 188 L. Ed. 2d 885 (2014); *United States v. Smith*, 944 F.2d 618, 621-22 (9th Cir. 1991). Supported by both facts and law, the district court's conclusion was not an abuse of discretion.

Second, Appellants argue the government did not prove "actual loss" as required by the MVRA due to its failure to produce the individual insurance plans. We review the factual findings underlying a district court's restitution award for clear error. *Luis*, 765 F.3d at 1065. Here, the district court concluded that "uncontradicted trial testimony" established that fraudulent claims would not have been paid, regardless of individual plan terms. We agree and conclude the district court did not clearly err by calculating actual loss without the plan documents.

Third, Appellants argue the district court erred by awarding restitution predicated on negligent, rather than criminal, conduct. *See* 18 U.S.C. § 3663A(a)(2) (providing restitution only for harm that resulted from "the defendant's criminal conduct in the course of the scheme"). Based on our independent review of the record, however, we conclude that the district court's restitution

award compensated insurers for their reimbursement of insurance claims riddled with fraud, or those for medically unnecessary services, and not for Appellants' mere negligence. Thus, we affirm the court's restitution award in full.

6. Sixth, Omidi challenges the sufficiency of the evidence underlying his conviction of aggravated identity theft in violation of 18 U.S.C. § 1028A. Because of Omidi's failure to renew his Rule 29 motion at the close of all evidence, we review for plain error. *Pelisamen*, 641 F.3d at 408-09 & n.6.

Omidi specifically argues the government failed to prove the identity theft was at the "crux" of the underlying fraud offense as required by *Dubin v. United States*, 599 U.S. 110, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (2023). But the signature of Dr. Mirali Zarrabi misled insurers into believing a physician was involved in the billed service, which was necessary for Omidi to be paid for the fabricated claim. *Accord Dubin*, 599 U.S. at 131-32 (explaining identity theft is at the crux of a healthcare fraud when it obfuscates "'who' is involved" in the services provided). Thus, a rational trier of fact could conclude the identity theft was at the "crux" of the scheme to defraud.

Omidi also argues there was insufficient evidence of his direct involvement in the misuse of Dr. Zarrabi's identity. Trial witnesses clearly established, however, that Omidi micromanaged every aspect of the sleep study program, created its protocols, and reviewed every insurance claim before submission. Thus, a rational trier

of fact could also conclude Omidi was personally involved in the unlawful use of Dr. Zarrabi's signature.

7. Seventh, Omidi argues the district court erred by instructing the jury that the government need not prove Omidi stole Dr. Zarrabi's identity to convict him of aggravated identity theft. Even though the district court's instruction is an accurate statement of this court's holding in *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), Omidi argues the Supreme Court "effectively overruled" *Osuna-Alvarez* in *Dubin*. *Dubin* and *Osuna-Alvarez*, however, interpret different statutory language. *Compare Osuna-Alvarez*, 788 F.3d at 1185-86 (construing the phrase "without lawful authority") *with Dubin*, 599 U.S. at 128 n.8 (declining to do so). Because these holdings are not "clearly irreconcilable," we remain bound by *Osuna-Alvarez*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). The instruction was not in error.

8. Eighth, and finally, Omidi argues the district court's co-schemer liability instruction, which mirrored the Ninth Circuit's model instruction, "tainted" the § 1028A conviction. The ample evidence of Omidi's direct involvement in the offense, however, dispels any notion that Omidi's § 1028A conviction depended upon a co-schemer liability theory. Thus, any potential error would be harmless.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-1719, 23-1959
D.C. No. 2:17-cr-00661-DMG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JULIAN OMIDI, AKA COMBIZ JULIAN OMIDI, AKA COMBIZ OMIDI, AKA KAMBIZ OMIDI, AKA KAMBIZ BENIAMIA OMIDI, AKA BEN OMIDI,

Defendant-Appellant.

No. 23-1941
D.C. No. 2:17-cr-00661-DMG-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SURGERY CENTER MANAGEMENT, LLC,

Defendant-Appellant.

Appendix B

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 8, 2024
Phoenix, Arizona

Before: Richard A. Paez and John B. Owens, Circuit Judges, and Richard Seeborg, Chief District Judge.*

Filed January 16, 2025

OPINION

OWENS, Circuit Judge:

Julian Omidi and his business, Surgery Center Management, LLC ("SCM"), appeal from the district court's forfeiture judgment of nearly $100 million, which came after a lengthy criminal health insurance fraud trial and years of litigation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

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* The Honorable Richard Seeborg, United States Chief District Judge for the Northern District of California, sitting by designation.

1. Omidi and SCM also challenge the sufficiency of the evidence supporting their convictions, certain jury instructions, several evidentiary rulings, and the legality of the restitution awards. We address these claims in a concurrently filed memorandum disposition, in which we affirm.

Appendix B

I. BACKGROUND

A. The "Get Thin" Scheme

Before Ozempic and similar "wonder drugs," medically-assisted weight loss had to happen the old-fashioned way—surgical intervention. For Southern California residents in the 2010s (especially those stuck in traffic and staring at billboards), the Wizard of Loss was Dr. Julian Omidi.[2] To make a long story short, Omidi helmed a massive health insurance fraud scheme called "Get Thin." Omidi's scheme promised dramatic weight loss through Lap-Band surgery and other medical procedures.[3] Using catchy radio jingles and ubiquitous billboard ads, Omidi urged potential patients to call 1-800-GET-THIN and "Let Your New Life Begin."

Through the 800 number and an associated call center, Get Thin funneled patients to a network of consultants whom Omidi tasked to "close a sale." Omidi instructed these consultants, who lacked any medical credentials, to schedule patients for expensive medical tests and procedures, irrespective of medical need, to unearth comorbidities that could help get the lucrative Lap-Band surgery pre-approved by insurers. When patients opted out of the surgery or insurers declined coverage,

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2. Omidi's medical license was revoked in 2009 due to unrelated misconduct.

3. Lap-Band surgery is a weight loss surgery where a small balloon-like band is inserted into a patient's stomach to shrink its size and limit the amount of food the patient can digest.

consultants pushed other costly treatments that could still be billed, such as tummy tucks or nutritional advising. Consultants were trained to prioritize customers with the most generous insurance plans and follow up incessantly to ensure they attended their pre-operative appointments. Omidi carefully tracked patients' show rate and paid consultants commissions when their customers underwent procedures. Witnesses described Get Thin's call center as a "boiler room," with tactics akin to a "credit card collections agency."

Once patients were successfully recruited, Omidi directed his employees to falsify patient data, fabricate diagnoses, and misrepresent the extent of physician involvement in their treatments to deceive insurance companies into paying for thousands of sleep studies, endoscopies, Lap-Band insertions, and other costly treatments. Besides its 1-800-GET-THIN call center, Get Thin did not regularly obtain patients through any other avenues, such as referrals from other doctors or medical systems.

B. Procedural History

A grand jury indicted Omidi and SCM for mail fraud, wire fraud, money laundering, and other related charges arising from the Get Thin scheme. In a nutshell, the government alleged that Omidi and SCM defrauded insurance companies by submitting false claims for reimbursement. The claims included, among other misrepresentations, fraudulent patient test results and false assertions that a doctor had reviewed and approved

the medical procedures at issue. After three-and-a-half years of pretrial litigation and a 48-day jury trial, the jury convicted Omidi and SCM of all charges. The district court sentenced Omidi to 84 months' imprisonment and fined SCM over $22 million.

At a subsequent hearing, the district court considered forfeiture for both defendants. The government argued that the total proceeds of Get Thin's business during the fraud period—$98,280,221—should be forfeited because the whole business was "permeated with fraud." In other words, even if some parts of Get Thin seemed legitimate, the government argued that "*all proceeds* of that business are forfeitable," as "the proceeds of that so-called 'legitimate' side of the business would not exist but for the 'fraudulent beginnings' of the entire operation" (namely, the call center). Omidi and SCM objected to the forfeiture amount, arguing that Get Thin was "not entirely a fraud," and the forfeiture amount should be limited to the proceeds traceable to falsified insurance claims.

Applying the requisite preponderance standard (and after hearing weeks of trial testimony), the district court agreed with the government. Reviewing the relevant statutes and persuasive out-of-circuit authority, it agreed that the $98,280,221 in proceeds were directly or indirectly derived from the fraudulent Get Thin scheme. The district court reasoned that because patients "were recruited through the call center as part of the overall fraudulent billing scheme . . . proceeds from all services at least indirectly resulted from the scheme." This was true even though some patients were redirected to less

invasive, cheaper procedures than the high-priced Lap-Band surgery, and even though some procedures may have been medically appropriate in individual cases.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's interpretation of federal forfeiture law, and its calculation of the forfeitable amount for clear error. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996).

B. The District Court Correctly Assessed $98,280,221 in Forfeiture

Fraud convictions frequently require multiple determinations: the appropriate sentence, the restitution amount (which compensates victims for the harm caused), and the forfeiture judgment (which punishes defendants by depriving them of the proceeds of their crime). *See United States v. Davis*, 706 F.3d 1081, 1083 (9th Cir. 2013) ("Forfeiture is imposed as punishment for a crime; restitution makes the victim whole again."). This case requires us to examine forfeiture, which is "much broader" and "serves an entirely different purpose" than restitution. *United States v. Lo*, 839 F.3d 777, 789 (9th Cir. 2016) (citations omitted).

Here, the government sought forfeiture of the proceeds of Omidi and SCM's mail and wire fraud

violations under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). While 18 U.S.C. § 981 governs civil forfeiture actions, 28 U.S.C. § 2461(c) "permits the government to seek criminal forfeiture whenever civil forfeiture is available and the defendant is found guilty of the offense[.]" *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (emphasis omitted), *abrogated on other grounds by Honeycutt v. United States*, 581 U.S. 443, 454, 137 S. Ct. 1626, 198 L. Ed. 2d 73 (2017). When applicable, such forfeiture is mandatory. *Id.* at 1240; 28 U.S.C. § 2461(c). If the government seeks forfeiture of specific property, such as the proceeds at issue here, it must establish "the requisite nexus between the property and the offense," Fed. R. Crim. P. 32.2(b)(1)(A), by a preponderance of the evidence. *See United States v. Christensen*, 828 F.3d 763, 822 (9th Cir. 2016).

The question in this case is whether the district court erred in ordering the forfeiture of all Get Thin's proceeds, even though conceivably some of the incoming funds ultimately paid for legitimate and medically necessary procedures. After a review of the relevant law and facts, we conclude that the district court got it right.

We begin with the relevant statutory language. Under § 981(a)(1)(C), any property which "constitutes or is derived from proceeds traceable to" a mail or wire fraud scheme is subject to forfeiture.[4] Section 981(a)(2)

4. To be even more precise, § 981(a)(1)(C) makes forfeitable property "traceable to . . . any offense constituting 'specified

(A) defines "proceeds" in a health care fraud scheme as "property of any kind obtained *directly or indirectly*, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense" (emphasis added). Said more simply, any proceeds that directly or indirectly derive from the fraudulent scheme must be forfeited, even if particular proceeds were not profits from the offense itself.

Applying the above rules to this case, any money acquired via the fraudulent Get Thin funnel was subject to forfeiture. In its comprehensive review of the law and evidence, the district court found that to the extent certain proceeds derived from legitimate medical procedures, those proceeds still "were indirectly the result of the fraudulent portions of the business," and were thus subject to forfeiture. In other words, even though some patients who called 1-800-GET-THIN were ultimately redirected to non-Lap-Band treatments or could have qualified for Lap-Band surgery without Omidi's chicanery, the proceeds from those patients would never have existed but for Get Thin's fraudulent billing scheme, which began with the call center through which all patients were recruited. Our independent review of the extensive record confirms

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unlawful activity'" under 18 U.S.C. § 1956(c)(7), and mail and wire fraud meet that definition. *See* 18 U.S.C. § 1956(c)(7)(A) (defining "specified unlawful activity" to include "any act or activity constituting an offense listed in" 18 U.S.C. § 1961(1)); *id.* § 1961(1) (listing mail and wire fraud).

that the evidence supporting the district court's finding was overwhelming, and the district court did not clearly err by so concluding.

Rather than challenge this factual finding, Omidi and SCM argue that the district court applied the wrong legal standard. They contend that *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997), prevents the forfeiture of all the proceeds that flowed through Get Thin. In that case, the government had to prove Rutgard's entire ophthalmology practice was fraudulent to convict him of laundering its proceeds. *Id.* at 1287. We concluded that the medical practice at issue performed both legitimate and illegitimate procedures, so Rutgard was not guilty of money laundering under 18 U.S.C. § 1957. *Id.* at 1287-93. In fact, we determined "[t]he actually-proved instances of fraudulent pretense of medical necessity for cataract surgery [we]re a tiny fraction of a practice that did thousands of cataract surgeries." *Id.* at 1289. Accordingly, under a different forfeiture statute, we concluded the evidence was insufficient to support the forfeiture of 100 percent of the practice's proceeds involved in the alleged money laundering transactions. *Id.* at 1293.

Omidi and SCM seize on this unique holding to contend that under *Rutgard*, forfeiture of 100 percent of the Get Thin proceeds required the government to prove "100 percent of [Get Thin's] medical practice was fraudulent" (citing *id.* at 1289). Any proceeds generated from allegedly "untainted" or "appropriate" services initiated through

Get Thin's call center would not be forfeited, the argument goes, as they would not be proximately traceable to falsified insurance claims.

This argument overreads *Rutgard*, which concerned money laundering convictions and an entirely different forfeiture statute—18 U.S.C. § 982(a)(1).[5] *See id.* at 1293. Section 982(a)(1) specifically targets laundered funds and requires proof that the funds at issue were either "involved in" the particular illegal transaction or "traceable to such property" before forfeiture can occur—it never mentions proceeds and lacks the more expansive "derived from" and "directly and indirectly" language from § 981(a)(1)(C) and § 981(a)(2)(A). Thus, the district court correctly concluded that *Rutgard*'s strict § 1957 money laundering analysis—featuring very different facts and statutes—had no application here.

And although there is no precise Ninth Circuit law on point, our sister circuits (which, unlike the court in *Rutgard*, have analyzed forfeiture in the fraud context) reject Omidi's proposed "100% Fraud Rule" and support the district court's approach. For example, in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Sixth Circuit faced a very similar argument. There, the mail and wire fraud defendants contended that certain sales from their fraudulent herbal supplements business were

5. The statute is materially the same today as it was at the time of Rutgard's forfeiture judgment in March 1995. *Compare* 18 U.S.C. § 982(a)(1) (2018) *with id.* (1994).

legitimate, so the proceeds from those transactions were not subject to forfeiture. *Id.* at 330-31. Their theory had "no traction," the Sixth Circuit explained, because the "very nucleus of [the defendants'] business model [was] rotten and malignant" and "[a]ny money generated through these potentially legitimate sales . . . resulted 'directly or indirectly'" from the fraudulent scheme. *Id.* at 332. Thus, forfeiture of "money generated through supposedly legitimate transactions[] was appropriate." *Id.* at 333.[6] We reach the same conclusion in this case, in which all Get Thin proceeds were derived from a single intake process that, by design, disregarded medical necessity in favor of profit as part of the larger fraudulent billing scheme.

Accordingly, we follow our sister circuits to conclude that in a forfeiture case seeking proceeds of a fraud scheme under § 981(a)(1)(C), there is no so-called "100%

6. *See also United States v. Gladden*, 78 F.4th 1232, 1251 (11th Cir. 2023) (affirming forfeiture of gross proceeds because "the evidence demonstrates that [the company's] legitimate operations were facilitated by the illegitimate operations"); *United States v. Bikundi*, 926 F.3d 761, 792, 441 U.S. App. D.C. 293 (D.C. Cir. 2019) (rejecting identical argument as "overlook[ing] the breadth" of a similarly-worded forfeiture statute, given that "'[g]ross proceeds traceable' to the fraud include 'the total amount of money brought in through the fraudulent activity, with no costs deducted or set-offs applied'" (quoting *United States v. Poulin*, 461 F. App'x 272, 288 (4th Cir. 2012))); *United States v. Sanders*, 952 F.3d 263, 286 (5th Cir. 2020) ("If the business couldn't have existed absent the fraud, then even [funds from legitimate business] trace[] to it.").

Fraud Rule." All proceeds directly or indirectly derived from a health care fraud scheme like Get Thin—even if a downstream legitimate transaction conceivably generated some of those proceeds—must be forfeited. The district court did not err in so concluding.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-1719
D.C. No. 2:17-cr-00661-DMG-1
Central District of California, Los Angeles

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JULIAN OMIDI, AKA COMBIZ JULIAN OMIDI, AKA COMBIZ OMIDI, AKA KAMBIZ OMIDI, AKA KAMBIZ BENIAMIA OMIDI, AKA BEN OMIDI,

Defendant-Appellant.

No. 23-1941
D.C. No. 2:17-cr-00661-DMG-3
Central District of California, Los Angeles

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SURGERY CENTER MANAGEMENT, LLC,

Defendant-Appellant.

Appendix C

No. 23-1959
D.C. No. 2:17-cr-00661-DMG-1
Central District of California, Los Angeles

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JULIAN OMIDI, AKA COMBIZ JULIAN OMIDI, AKA COMBIZ OMIDI, AKA KAMBIZ OMIDI, AKA KAMBIZ BENIAMIA OMIDI, AKA BEN OMIDI,

Defendant-Appellant.

Filed April 3, 2025

ORDER

Before: PAEZ and OWENS, Circuit Judges, and SEEBORG, Chief District Judge.*

The panel has voted to deny the petitions for panel rehearing. Judge Owens voted to deny the petitions for rehearing en banc, and Judges Paez and Seeborg so recommend.

* The Honorable Richard Seeborg, United States Chief District Judge for the Northern District of California, sitting by designation.

Appendix C

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and the petition for rehearing en banc are therefore DENIED.