Appeal No. 19-1696

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

ALEXANDER DAVIS,
Appellant

On appeal from the U.S. District Court for the Eastern District of Pennsylvania
No. 5-18-cr-00105-001, Honorable Edward G. Smith

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is one such case. The Panel opinion in *United States v. Davis*, 985 F.3d 298 (3d Cir. 2021), represents a judicial expansion of criminal attempt beyond the common law understanding Congress codified. NACDL is a national leader in advocacy addressing the problem of overcriminalization and related due process concerns. Thus NACDL has a particular interest in the

implications of a ruling broadening the reach of all federal criminal attempt statutes.[1]

CORPORATE DISCLOSURE STATEMENT

Undersigned counsel certifies that the National Association of Criminal Defense Lawyers is not a subsidiary of any other corporation, and no publicly-held corporation owns 10 percent or more of the amicus curiae organization's stock.

[1] No counsel for a party authored any portion of this Brief; no party nor party counsel contributed money toward preparing or submitting this Brief; and no person other than counsel to the amicus curiae contributed money toward funding or preparing this Brief.

SUMMARY OF THE ARGUMENT

The Panel Opinion works a sweeping expansion of the law of attempt by endorsing a novel rule redefining a "substantial step" to include conduct that occurs *after* the attempt ends, so long as it is "related" to the offense attempted. As explained in the Petition for Rehearing, this ruling contravenes Supreme Court and Circuit precedent defining a "substantial step" as conduct "toward the commission" of the substantive offense.

A substantial step corroborates the intent to commit the object offense, *and* supplies the actus reus of the attempt crime. Yet the actus reus of a crime is part of its commission; conduct that occurs after a crime ends is not its "actus reus." The Third Circuit now stands alone in holding that the actus reus of criminal attempt—a substantial step—can take place after the attempt ends. *See* Section I.A.

The Panel's redefinition of "substantial step" to include post-attempt conduct raises grave constitutional concerns. It intrudes upon the separation of powers by criminalizing conduct Congress did not criminalize—allowing an attempt conviction to stand without proof of conduct *toward* the commission of the object offense. Correspondingly, it violates due process by allowing evidence of intent to obviate proof of actus reus for attempt crimes. *See* Section I.B.

The redefinition of "substantial step" also disturbs the delicate balance Congress struck between protecting the public and avoiding overcriminalization. Attempt offenses endanger the public when the intent to commit an offense produces action toward doing so. But when the intent dissipates without action toward that goal, the public is not endangered. Punishing the intent alone—coupled with some "related" post-attempt conduct toward a different offense, or no offense at all—is improper. *See* Sections II, III.

NACDL respectfully submits this amicus Brief to explore the implications of the Panel's ruling by placing the substantial step requirement in its historical and constitutional contexts, reviewing the legislative judgment that underlies it, and illustrating how the Panel's new rule would play out in practice—yielding intolerable results.

ARGUMENT

I. THE PANEL OPINION BROADENS THE DEFINITION OF "SUBSTANTIAL STEP," CONTRAVENING SUPREME COURT AND CIRCUIT PRECEDENT AND RAISING CONSTITUTIONAL CONCERNS.

A. A "Substantial Step" Is Conduct "Toward" The Commission Of The Object Offense.

The law has recognized "for centuries" that a criminal "attempt" includes both "overt act and intent elements." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007). Both actus reus and mens rea are tied to the object offense: that is, the act moves the offender closer to completing the crime he intends to commit. *Id.* 106.

Accordingly, the common law described the requisite act as "some open deed tending to the execution of [the offender's] intent." *Id.* 107–08 (quoting 2 W. LaFave, Substantive Criminal Law §11.2(a), at 205 (2d ed. 2003) (quoting E. Coke, Third Institute 5 (6th ed. 1680)); citing Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 468 (1954) ("… some act must be done towards carrying out the intent")). In modern terminology, that is an "'overt act' that constitutes a 'substantial step' toward completing the offense." *Resendiz-Ponce*, 549 U.S. at 107–08 (quoting LaFave, *supra*, §11.4; citing ALI, Model Penal Code §5.01(1)(c)(1985) ("an act or omission constituting a substantial step in a course of conduct planned to culminate in

his commission of the crime")); *accord Braxton v. United States*, 500 U.S. 344, 349 (1991) (requiring "a substantial step towards" attempted killing).

Congress is presumed to incorporate settled law when it defines crimes. *E.g.*, *Sekhar v. United States*, 570 U.S. 729, 732 (2013); *United States v. Shabani*, 513 U.S. 10, 13 (1994). Thus the Supreme Court holds that the statutory term "attempt" incorporates the requirement of a substantial step "toward" the object offense—that is, conduct "culminating in the charged 'attempt.'" *Resendiz-Ponce*, 549 U.S. at 108 & n.4.

Unsurprisingly given binding Supreme Court precedent, every circuit—including this one, until *Davis*—agrees that a "substantial step" is conduct "toward" completing the object offense. *E.g.*, *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006); *United States v. Castillo*, 981 F.3d 94, 98 (1st Cir. 2020); *Ovalles v. United States*, 905 F.3d 1300, 1305 (11th Cir. 2018); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1243 (9th Cir. 2014); *United States v. Engle*, 676 F.3d 405, 419–20 (4th Cir. 2012); *United States v. Washington*, 653 F.3d 1251, 1264 (10th Cir. 2011); *United States v. Sanchez*, 615 F.3d 836, 844 (7th Cir. 2010); *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007); *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003); *United States v. Redd*, 355 F.3d 866, 872–73 (5th Cir. 2003); *United States v. Duran*, 96 F.3d 1495, 1508 (D.C. Cir. 1996); *United States v. Shelton*, 30 F.3d

702, 706 (6th Cir. 1994).

That makes sense: the actus reus of *any* offense is conduct that constitutes the commission of the offense. When the offense is an attempt, its actus reus—that is, the substantial step—must occur before the attempt ends.

B. *Davis* Improperly Broadens Statutory Attempt Offenses, With Constitutional Implications.

The *Davis* Panel disagreed: it held that a post-attempt act can be the "substantial step" for an attempt—if the act "relate[s] to" the object offense. *Davis*, 985 F.3d at 305.[2] This Circuit stands alone in so holding.

The Panel's discussion of *Tykarsky* reveals its analytical error. *Tykarsky* refers to post-enticement travel as evidence corroborating intent. 446 F.3d at

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[2] Specifically, the Panel held that "post-enticement" travel was a "substantial step" in attempting enticement by telephone. *Id.* The government did not claim below that the telephone communications were a "substantial step" in the attempt; it urged the jury to treat travel as the actus reus of phone enticement. *Id.* 304. The opinion blesses that approach. *Id.* 305.

This distinguishes *Davis* from the cited out-of-circuit opinions, which detail myriad acts toward the attempted enticement, and reference travel as additional proof of "attempt." They either treat post-enticement travel as corroboration of intent or do not distinguish—and none deems post-enticement travel the actus reus of attempted enticement. *See* discussion of *Tykarsky*, below. *Cf., e.g.*, *United States v. Gillis*, 938 F.3d 1181, 1190 (11th Cir. 2019) (where defendant purportedly abandoned intent to entice, subsequent communications and travel sufficient to find intent persisted); *United States v. Clarke*, 842 F.3d 288, 298 (4th Cir. 2016) ("multiple pieces of evidence . . . taken together" permit conclusion that defendant "intended to … entice … and took substantial steps toward doing so."); *United States v. Faust*, 795 F.3d

469. It identifies different evidence—the enticing communications—as the "substantial step." *Id.* The *Davis* Panel missed that distinction. *See Davis*, 985 F.3d at 305; *see also* n.2, above.

An act is not a "substantial step" unless it corroborates intent; therefore, every "substantial step" corroborates intent. *E.g.*, *United States v. Cruz-Jiminez*, 977 F.2d 95, 101–02 (3d Cir. 1992). But the converse is not true: not every act that corroborates intent is a "substantial step." An act is not a "substantial step" unless it *also* supplies the actus reus of the attempt crime—and the actus reus of a crime cannot come after the crime ends.

That was the Panel's error: taking *Tykarsky*'s statement that travel corroborates intent to mean that travel is a "substantial step." Because that

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1243, 1250 (10th Cir. 2015) ("travel … may well have bolstered the government's proof of his intent to … entice …."); *United States v. Howard*, 766 F.3d 414, 421-27 (5th Cir. 2014) (travel is "corroborative of intent"; "grooming" plus discussions of travel plans supply actus reus); *United States v. Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (travel "is probative …[to] verify an intent to … entice").

Indeed, *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), actually explains that travel is a "substantial step" in "attempting to have sex with an underage girl." *Id.* 648. But a sexual contact offense is different from an enticement offense. The enticement "statute's focus is on the intended effect on the minor rather than the defendant's intent to engage in sexual activity." *United States v. Berg,* 640 F.3d 239, 252 (7th Cir. 2011). In *Davis* the attempted sexual contact offense (18 U.S.C. §2423(b)) occurred after the alleged attempted phone enticement ended. 985 F.3d at 301.

does not follow logically, it required the Panel to coin a new rule that post-attempt conduct is a "substantial step" if "related" to the object offense.

The new rule makes mens rea sufficient for criminal attempt, so long as the defendant performs some "related" act—whether toward a separate offense, or no offense at all—after the attempt ends.[3] The constitutional problems that raises are plain. Only Congress defines federal crimes. *Whitman v. United States*, 574 U.S. 1003, 1005 (2014); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The statutory term "attempt" signals Congress's intent to require both mens rea and actus reus, the latter consisting of a "substantial step *toward* the commission" of the object offense. *Resendiz-Ponce*, 549 U.S. at 108 & n.4 (emphasis added). By allowing post-attempt conduct to substitute for an act "toward" the offense attempted, *Davis* makes actus reus optional for attempt crimes—effectively criminalizing a far broader swath of conduct (and non-conduct) than Congress criminalized.[4] That the Court cannot do.

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[3] The vagueness inherent in the word "related" only compounds the due process problems the Panel opinion raises. *See* discussion below.

[4] Indeed, deeming post-attempt "related" conduct a "substantial step" opens the door to using conduct toward a different offense (or no offense) to supply *both* mens rea and actus reus for the attempt crime. But the intent required for criminal attempt is the intent to commit the object offense—not a different one. *Resendiz-Ponce*, 549 U.S. at 107.

Correspondingly, the ruling lowers the government's burden of proving every element of the attempt crime. As the Panel's discussion reflects, *Davis* allows proof of intent to swallow the actus reus element.[5] *See* 985 F.3d at 305 (discussing *Tykarsky*, 446 F.3d at 469). But as this Court recently reaffirmed, due process bars conviction for "being bad"; proof of intent does not obviate proof of a prohibited act in the course of the charged offense. *United States v. Harra*, 985 F.3d 196, 211 (3d Cir. 2021) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

II. REQUIRING A SUBSTANTIAL STEP "TOWARD" THE COMMISSION OF THE OBJECT OFFENSE STRIKES THE RIGHT BALANCE BETWEEN PROTECTING THE PUBLIC AND AVOIDING OVERCRIMINALIZATION.

The substantial step requirement, like attempt law (and criminal law) generally, serves competing goals: protecting the public and avoiding overcriminalization. In fact, these goals are not so much "competing" as complementary: they converge in the principle that criminal sanction should be reserved for defendants who endanger the public.

Thus, attempt law developed to "make possible preventive action by the police before the defendant has come dangerously close to committing the

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[5] One of the cases *Davis* cites with approval makes that explicit: "the substantial step element collapses into the intent element in this case." *United States v. Vinton*, 946 F.3d 847, 851 (6th Cir. 2020) (cited at 985 F.3d at 305 n.29).

intended crime." LaFave, *supra*, §11.2(b). But the substantial step requirement provides a counterbalance: it "gives some benefit of the doubt, waiting to brand one a criminal until that moment when we can say with some measure of assurance that a particular act is taken with a criminal purpose that, but for timely intervention, would have been fully realized." *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011); *accord* Andrew Ashworth, *Conceptions of Overcriminalization*, 5 Ohio St. J. Crim. L. 407, 414 (2008) (substantial step requirement avoids criminalizing those who "may change their mind").

This line-drawing is the heart of Congress's legislative function. Oliver Wendell Holmes, THE COMMON LAW, 68 (1938 ed.) ("[L]egislative considerations, are at the bottom of the matter; the considerations being … the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."). It also embodies the constitutional safeguards that bar conviction for "bad thoughts."

In redefining a "substantial step" to include post-attempt conduct toward a separate offense, or no offense, the Panel opinion undermines both legislative and constitutional strictures. A defendant who formed an intent to commit one offense, but changed his mind and attempted a different (perhaps

less serious), though "related," offense, would stand convicted of attempting both.

Worse, because *Davis* does not limit "related" conduct to conduct pursuing a criminal end, a defendant who started out with criminal intent, but wisely corrected herself and pursued a "related" civil or administrative wrong—or no wrong—would stand convicted of a criminal "attempt." *See also* n.4, above. Centuries of attempt law prohibit that result.

III. *DAVIS*'S REDEFINITION OF THE ACTUS REUS FOR ATTEMPT HAS BROAD IMPLICATIONS.

Nothing in the Panel opinion limits its redefinition of the actus reus for attempt to prosecutions under 18 U.S.C. §2422(b). The overcriminalization problem will recur in every context in which Congress has criminalized attempt.

Treating "related" post-attempt conduct as a "substantial step" will support convictions like these:

- A scientist applies for a job with his employer's chief competitor. In his interview he touts his access to his employer's trade secrets, intending to share them if hired; the competitor implies it would welcome them. The scientist takes the new job—but regains his moral compass and neither accesses nor shares the trade secrets.

  Under *Davis*, starting the new job would be a "substantial step" in an attempted theft of trade secrets (18 U.S.C. §1832(a)(4)).

- A successful business owner tells her spouse she plans to run personal expenses through her business, to evade tax liability as its income increases. She reads up on how to do that without triggering an audit. Spooked by her reading, she never books a personal expense to the business; she simply fails to file a return when due after year-end.

  Under *Davis*, her misdemeanor failure to file (26 U.S.C. §7203) would be a "substantial step" in a felony attempted tax evasion (26 U.S.C. §7201).

- A coach brags to a neighbor of his influence in a national sports league; the neighbor reveals that he's a sports bettor and offers a cut of winnings for "fixing" an upcoming game. The coach finds bribery inappropriate, but likes the idea of extra income. He does nothing to influence the game improperly; the bettor's team wins anyway. The next day, the coach collects a cut of the winnings from his neighbor under false pretenses (a state law offense).

  Under *Davis*, his post-game collection of funds would be a "substantial step" in attempted sports bribery (18 U.S.C. §224(a)).

The scientist intended to steal trade secrets but took no action "toward" doing so; his "related" conduct of going to work for a competitor that wants the secrets, after he forwent his chance to steal them, advanced no offense at all. Likewise, the business owner took no action toward the crime she originally intended; her conduct toward a related, less serious, crime is not—or should not be—a "substantial step" toward the offense she abandoned. And the coach never harbored the intent to engage in sports bribery—yet calling his post-game conduct toward a different offense a "substantial step" invites a court to consider it proof of *both* intent and actus reus.

The settled definition of "substantial step" as conduct *toward* committing the offense being attempted would properly bar an attempt conviction in each of these cases. Rehearing is warranted to correct the Panel's departure from it.

CONCLUSION

For these reasons and those explained in Mr. Davis's Petition, Panel rehearing or rehearing en banc should be granted.

Respectfully submitted,

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Dated: April 5, 2021

REQUIRED CERTIFICATIONS

A. Type-Volume. Pursuant to Rule 29(a)(4) and 29(b)(4) of the Federal Rules of Appellate Procedure, and Third Circuit L.A.R. 29.1(b), I certify that, according to the word-counting function of my word processing system (Word 2016), this Brief contains 2,593 words, including footnotes, and employs 14-Point Cambria font.

B. Bar Membership. Pursuant to Rules 28.3(d) & 46.1(e) of the Local Appellate Rules, I certify that all counsel who have signed this Brief are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

C. Electronic Filing. Pursuant to Rule 31.1(c) of the Local Appellate Rules, I certify that the text of the electronically filed Brief is identical to the text in the paper copies of this Brief as filed with the Clerk. The electronic (PDF) version of this Brief has been checked for viruses using Trend Micro Security Agent, an antivirus program, with all current updates, and no virus was detected.

April 5, 2021 */s/ Lisa A. Mathewson*

CERTIFICATE OF SERVICE

I certify that on this date, I served the foregoing Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Defendant-Appellant's Petition For Rehearing Or Rehearing En Banc via this Court's CM/ECF system upon all parties of record.

April 5, 2021 */s/ Lisa A. Mathewson*