

IN THE SUPREME COURT OF THE UNITED STATES

LONY TAP GATWAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner "use[d], without lawful authority, a means of identification of another person" within the meaning of the Federal prohibition against aggravated identity theft, 18 U.S.C. 1028A(a)(1), when he listed on his clients' income-tax returns the real names and Social Security numbers of actual minors whom the returns falsely claimed were the clients' dependents.

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No. 18-9019

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 910 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2018. A petition for rehearing was denied on January 25, 2019 (Pet. App. 10a). The petition for a writ of certiorari was filed on April 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343; seven

counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1); and seven counts of preparing false tax returns, in violation of 26 U.S.C. 7206(2). Judgment 1-2. Petitioner was sentenced to 45 months of imprisonment, to be followed by 36 months of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner owned and operated a tax-preparation business in Des Moines, Iowa. Trial Tr. (Tr.) 56, 70-71. For tax years 2009 through 2013, petitioner prepared personal income-tax returns for several clients that falsely claimed purported nieces and nephews as the clients' dependents, in order to obtain inflated tax refunds. See Pet. App. 1a; Gov't C.A. Br. 2-4.

To support those false claims of dependents, petitioner listed on the clients' returns the real names and Social Security numbers of certain actual minors. See, e.g., Tr. 95, 109-110. The minors were not, in fact, the clients' nieces and nephews. Instead, they were petitioner's own children or, in some cases, the children of some of his previous clients. See Pet. App. 1a; Gov't C.A. Br. 2-4; Pet. C.A. Br. 10.

2. A grand jury in the Southern District of Iowa returned a superseding indictment charging petitioner with four counts of wire fraud, in violation of 18 U.S.C. 1343; seven counts of preparing false tax returns in violation of 26 U.S.C. 7206(2); and seven counts of aggravated identity theft, in violation of

18 U.S.C. 1028A(a)(1) and (c)(5). Superseding Indictment 2-9. The aggravated-identity-theft counts were based on using the minors' names and Social Security numbers on the false returns petitioner prepared for his clients. Id. at 4-5. The case proceeded to trial.

a. At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 on (as relevant here) the aggravated-identity-theft counts. Tr. 331; D. Ct. Doc. 68, at 1-4 (July 25, 2017). The aggravated-identity-theft statute, 18 U.S.C. 1028A, provides in pertinent part that "[w]hoever, during and in relation to" any of several felonies enumerated in Section 1028A(c) -- which include wire fraud -- "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(a)(1); see 18 U.S.C. 1028A(c). Petitioner contended that the evidence was insufficient to support a finding of guilt under that provision, on the theory that "[t]here ha[d] been no evidence that [he] misrepresented or misappropriated the names and social security numbers" of the minors and that such evidence "is required to satisfy 'use[] without lawful authority' under 18 U.S.C. § 1028A(a)(1)." D. Ct. Doc. 68, at 2 (fourth set of brackets in original); see Tr. 331-333.

The district court denied petitioner's motion. Tr. 363-364. The court found that "[t]he evidence [wa]s sufficient that [petitioner] used, as to employing or utilizing, the names and Social Security numbers in furtherance of the scheme to defraud." Tr. 363. The court additionally found that, "even under the more cabined definition" of "use" that petitioner advocated, "there [wa]s sufficient evidence to submit [those counts] to the jury based upon the actions taken in putting a Social Security number and name of an individual on a tax form." Ibid.

Petitioner renewed his motion at the close of all the evidence. Tr. 377. The district court denied the renewed motion, finding that its "prior ruling on the Rule 29 motion should remain" because "[t]he evidence presented on behalf of the defense does not alter the Court's analysis of the sufficiency of the evidence." Ibid.

b. The district court instructed the jury that, to find petitioner guilty of aggravated identity theft, the jury had to find that the government had proved "four elements" beyond a reasonable doubt:

One, [petitioner] knowingly used the names and/or Social Security numbers of actual persons;

Two, [petitioner] knew that the names and/or Social Security numbers belonged to other persons;

Three, [petitioner] used the names and/or Social Security numbers without lawful authority; and

Four, [petitioner] used the names and/or Social Security numbers during and in relation to the crime of wire fraud as charged in Counts 1 through 4 of the Indictment.

D. Ct. Doc. 76, at 13 (July 26, 2017) (emphases omitted). As to the third element, petitioner requested that the court instruct the jury that "[t]o use a name and/or social security number without lawful authority means that the defendant must have misappropriated the name and/or social security number of another person for the defendant's own use." D. Ct. Doc. 48, at 21 (July 17, 2017); see also Pet. C.A. Br. 12; D. Ct. Doc. 67, at 1 (July 24, 2017).

The district court declined to give that instruction, finding that it was inconsistent with the statute and Eighth Circuit precedent. See Tr. 357-360. Instead, the court instructed the jury that "[a] person assigned a particular social security number does not possess 'lawful authority' to authorize another person to use their social security number in furtherance of a crime," and "[s]imilarly, a person does not possess 'lawful authority' to authorize another person to use their name in furtherance of a crime." D. Ct. Doc. 76, at 13. The court also gave a further instruction addressing the fourth element, requested by both parties, that stated:

The phrase 'during and in relation to' means that the names and/or Social Security numbers were used in furtherance of the commission of the crime of wire fraud; the names and/or Social Security numbers must have been used to some purpose or effect with respect to the commission of the crime of wire fraud; the presence or involvement of the names and/or Social Security numbers in the commission of the offense cannot be the result of accident or coincidence. The names and/or Social Security numbers must facilitate or have the potential to facilitate commission of the wire fraud.

Id. at 13-14; see D. Ct. Doc. 48, at 18-19, 21.

c. The jury found petitioner guilty on all counts. Tr. 446-449; D. Ct. Doc. 73, at 1-5 (July 26, 2017). The district court sentenced petitioner to a total term of 45 months of imprisonment, composed of 21 months of imprisonment on the wire-fraud and false-return counts, all to run concurrently with one another; and, as required by Section 1028A, 24 months of imprisonment on the aggravated-identity-theft counts, to run consecutively to the other counts but concurrently with one another. See Judgment 3-4; Sent. Tr. 60-61; see also 18 U.S.C. 1028A(b)(2)-(4), 3584(a).

3. The court of appeals affirmed. Pet. App. 1a-9a. On appeal, petitioner challenged only his convictions on the aggravated-identity-theft counts, arguing that both the district court's denial of his Rule 29 motion and its jury instructions rested on an erroneous interpretation of the phrase "uses, without lawful authority," in Section 1028A(a)(1). Id. at 2a; see Pet. C.A. Br. 15-45. The court of appeals rejected both contentions. Pet. App. 3a-9a.

a. Petitioner "d[id] not challenge the jury's verdict that he knowingly used the names and social security numbers of falsely claimed dependents, including his own children, in committing wire fraud." Pet. App. 2a-3a. Instead, he "argue[d] only that he did not 'use' their means of identification 'without lawful

authority,'" asserting that "the term 'uses, without lawful authority,' requires proof that he stole or assumed the identity of another person" and that he "neither stole nor assumed the identities of the children he falsely claimed as his clients' dependents." Id. at 3a. The court of appeals rejected that argument. Id. at 3a-8a.

The court of appeals first explained that whether a person whose means of identification was used by a defendant consented to that use is not determinative. Pet. App. 3a. Petitioner had acknowledged that courts have "widely rejected" the argument that "consensual use is not use 'without lawful authority'" such that Section 1028A(a)(1) "does not apply if [a defendant] used another person's means of identification with his or her permission." Ibid.; see Pet. C.A. Br. 25. The court of appeals agreed and explained that "[t]heft or misappropriation of a victim's identity is not an essential element of the offense" and that the "'use of another person's social security number for an illegal purpose satisfie[s] the statute as a use 'without lawful authority' regardless of whether that use occurred with or without the other person's permission.'" Pet. App. 3a (citation omitted). The court accordingly determined that, "when [petitioner] used the names and social security numbers of actual children, including his own, during and in relation to his wire fraud, whether the minors 'consented' to the use was irrelevant." Ibid.

The court of appeals additionally explained that petitioner's argument that Section 1028A(a)(1) "requires proof that [a defendant] stole or assumed the identity of another person * * * has nothing to do with the term 'without lawful authority'" and instead requires construing the word "uses" narrowly to encompass only "circumstances in which the defendant misappropriated another person's identity in committing an enumerated felony." Pet. App. 3a-4a. The court rejected that narrow construction of "uses." Id. at 4a-5a. It observed that "[n]umerous prior decisions have upheld § 1028A(a)(1) convictions where the defendant neither stole nor assumed the identity of the other person" and that other circuits "have construed the word 'use' broadly, relying on the statute's causation element -- that the use be during and in relation to an enumerated felony -- to limit its scope." Id. at 4a. The court of appeals found that "[t]hese prior cases establish that the interpretation of § 1028A(a)(1) urged by [petitioner] on appeal is unsound." Id. at 5a. The court noted in particular that petitioner "urge[d] a more restrictive meaning than the meaning adopted in the case he relie[d] on to establish a circuit conflict." Id. at 4a (citing United States v. Berroa, 856 F.3d 141, 156-157 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017)).

The court of appeals also rejected petitioner's contention that "the broad interpretation of 'uses, without lawful authority,' adopted by other circuits renders this term

superfluous." Pet. App. 5a. Petitioner had posited that, "if any transfer, possession, or use of another person's means of identification 'during and in relation to' an enumerated felony is illegal, * * * it could never be done with lawful authority." Ibid. The court explained, however, that "the limitation 'without lawful authority'" is not superfluous because it "serves the useful purpose of precluding a limitless interpretation of 'in relation to,'" a phrase that the court observed "is potentially broad when applied to an underlying felony like on-going fraud." Id. at 7a-8a. The court emphasized that "another person's means of identification must be more than incidental to the fraud" for the use of that means of identification to be "without lawful authority," and stated that petitioner could not "be convicted of aggravated identity theft simply because he used a client's name and social security number in submitting a tax return that fraudulently under-reported income or claimed bogus deductions." Id. at 8a. But the court found that, on the actual facts of this case, petitioner had "violated § 1028A(a)(1) because his use of children['s] names and social security numbers was essential to the fraudulent claim of dependent-based tax benefits," which "was clearly use of their means of identification 'without lawful authority' during and in relation to an enumerated fraud offense." Ibid.

The court of appeals observed that the "evolution of the federal identity theft statutes" supported its application of the statute here. Pet. App. 5a; see id. at 5a-7a. And it rejected petitioner's contention that Section 1028A(a)(1) is ambiguous as applied to the circumstances of this case and that the rule of lenity required a different construction. Id. at 8a n.2.

b. The court of appeals also rejected petitioner's challenge to the jury instructions on the meaning of "uses, without lawful authority." Pet. App. 8a-9a. Petitioner argued that the district court "abused its discretion in instructing the jury that 'a person does not possess "lawful authority" to authorize another person to use their name in furtherance of a crime,' and in declining to give his proposed instruction that 'the defendant must have misappropriated the name and/or social security number of another person for the defendant's own use.'" Ibid. The court of appeals determined that the instruction the district court did give comported with Section 1028A(a)(1) and that petitioner's proposed instruction did not. Id. at 9a.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred by construing 18 U.S.C. 1028A(a)(1) not to require proof that a defendant stole or assumed the identity of another person. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or

another court of appeals. And even if petitioner's statutory arguments otherwise warranted this Court's review, this case would be an unsuitable vehicle to address them. This Court has previously denied several petitions for writs of certiorari presenting similar arguments concerning the scope of Section 1028A(a)(1). See Bercovich v. United States, 136 S. Ct. 799 (2016) (No. 15-370); Osuna-Alvarez v. United States, 136 S. Ct. 283 (2015) (No. 15-5812); Otuya v. United States, 571 U.S. 1205 (2014) (No. 13-6874). The same result is warranted here.

1. Section 1028A(a)(1) requires a consecutive two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(b). As the court of appeals noted, petitioner has "not challenge[d] the jury's verdict that he knowingly used the names and social security numbers of falsely claimed dependents, including his own children, in committing wire fraud." Pet. App. 2a-3a; see generally Pet. 5-13. He has not contested that he acted "knowingly"; that the name and Social Security number of each false dependent he listed on his clients' tax returns constituted "a means of identification of another person"; or that his conduct occurred "during and in relation to" one of felonies enumerated in Section 1028A(c), namely, wire fraud in violation of 18 U.S.C.

1343. 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c)(5); see also Pet. App. 2a-3a. Instead, petitioner argued below “only that he did not ‘use’ [the false dependents’] means of identification ‘without lawful authority.’” Pet. App. 3a; see Pet. 3-4. The court of appeals correctly determined that the trial evidence was sufficient to establish that element. Pet. App. 3a-8a.

The most natural construction of the phrase “without lawful authority” in Section 1028A(a)(1) is that it prohibits the use of another person’s identifying information “‘without a form of authorization recognized by law.’” United States v. Otuya, 720 F.3d 183, 184 (4th Cir. 2013) (citation omitted), cert. denied, 571 U.S. 1205 (2014). The ordinary meanings of “lawful” and “authority” support that construction. In ordinary usage, “lawful” means “[n]ot contrary to law,” and “authority” means “[t]he official right or permission to act, esp[ecially] to act legally on another’s behalf.” Black’s Law Dictionary 158, 1018 (10th ed. 2014); see Webster’s New International Dictionary 186, 1401 (2d ed. 1949) (defining “lawful” as “[c]onformable to law; allowed or permitted by law; legitimate; competent,” and “[c]onstituted, authorized, or established by law; rightful,” and defining “authority” as “[l]egal or rightful power; a right to command or to act”).

Petitioner lacked the requisite “lawful authority” to list the false dependents on his clients’ tax returns. Indeed,

petitioner conceded below that it was not lawful for him to list those dependents, who included his own children, on his clients' tax returns because "the taxpayers were not allowed to claim the dependents on their returns" under applicable "IRS rules." Pet. C.A. Br. 10. Neither petitioner's clients nor the dependents could have validly conferred lawful authority on petitioner to list the dependents in contravention of applicable law. The court of appeals correctly determined that the evidence was sufficient to support petitioner's conviction for violating Section 1028A(a)(1).

2. Petitioner contended below that the evidence was nevertheless insufficient, on the theory that "the term 'uses, without lawful authority,' requires proof that he stole or assumed the identity of another person" and that no evidence established that he did so. Pet. App. 3a; see Pet. 3-4. Petitioner challenged the district court's jury instructions based on the same reading of the statute. Pet. App. 8a-9a. The court of appeals correctly rejected his arguments. See id. at 3a-9a.

a. As the court of appeals explained, to the extent petitioner reads Section 1028A(a)(1) to prohibit only the theft or misappropriation of another person's means of identification, on the theory that the statute requires taking or using a person's identifying information without that person's permission, that reading lacks merit and has been "widely rejected." Pet. App. 3a.

Nothing in Section 1028A(a)(1)'s language requires proof that the defendant took or used another person's means of identification without that person's consent. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." Bates v. United States, 522 U.S. 23, 29 (1997); see, e.g., Brogan v. United States, 522 U.S. 398, 406 (1998); United States v. Wells, 519 U.S. 482, 490-493 (1997). That approach is especially appropriate here because Congress often does expressly provide that an action constitutes a crime only if it is done without "consent" or "permission," see, e.g., 18 U.S.C. 290, 1165, 1365(f)(1), 1793, 1863, 1992(a), 2113(e), 2199, 2319A(a), but Congress did not include such a limitation in Section 1028A(a)(1).

Instead, Section 1028A(a)(1) requires only that the defendant took or used another person's means of identification during and in relation to a covered crime "without lawful authority." 18 U.S.C. 1028A(a)(1). Lawful authority is not equivalent to consent. As discussed above, the ordinary meaning of "lawful authority" is a right or permission to act that is not contrary to law. See p. 12, supra. A defendant who did not steal or misappropriate the means of identification of another person, but obtained it with the person's permission, still lacks lawful authority to use it in a manner that is legally prohibited. As the Ninth Circuit has explained, Section 1028A(a)(1)'s "language clearly and unambiguously encompasses situations * * * where an

individual grants the defendant permission to possess his or her means of identification, but the defendant then proceeds to use the identification unlawfully.” United States v. Osuna-Alvarez, 788 F.3d 1183, 1185 (9th Cir.) (per curiam), cert. denied, 136 S. Ct. 283 (2015); accord United States v. Reynolds, 710 F.3d 434, 436 (D.C. Cir. 2013) (“‘[U]se[] . . . without lawful authority’ easily encompasses situations in which a defendant gains access to identity information legitimately but then uses it illegitimately -- in excess of the authority granted.” (second set of brackets in original)). And even if a person consents to a particular illegal use of his means of identification, the defendant still acts without lawful authority in using it illegally, because the first person “does not have ‘lawful authority’ to consent to the commission of an unlawful act.” Otuya, 720 F.3d at 189.

Consistent with those principles, the courts of appeals to consider the question have “universally rejected th[e] argument” that Section 1028A(a)(1)’s “without lawful authority” element “require[s] actual theft or misappropriation of the means of identification.” Osuna-Alvarez, 788 F.3d at 1185; see United States v. Etenyi, 720 Fed. Appx. 445, 454-455 (10th Cir. 2017); United States v. Mahmood, 820 F.3d 177, 187-188 (5th Cir.), cert. denied, 137 S. Ct. 122 (2016); United States v. Zitron, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam); Otuya, 720 F.3d at 189;

Reynolds, 710 F.3d at 436; United States v. Lumbard, 706 F.3d 716, 721-725 (6th Cir. 2013); United States v. Ozuna-Cabrera, 663 F.3d 496, 498-501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); United States v. Retana, 641 F.3d 272, 274-275 (8th Cir. 2011). The court of appeals here correctly determined, in accord with that consensus, that Section 1028A(a)(1)'s "without lawful authority" element does not require proof of theft or misappropriation of a person's means of identification without that person's consent.

b. As the court of appeals further explained, to the extent that petitioner's argument that Section 1028A(a)(1) proscribes only stealing or assuming the identity of another person rests on a narrow interpretation of the word "uses," it likewise lacks merit and has been repeatedly rejected. Pet. App. 3a-5a.

Nothing in Section 1028A(a)(1)'s text or context confines the term "uses" to stealing or assuming an identity. See United States v. Michael, 882 F.3d 624, 626-627 (6th Cir. 2018). The most natural reading of "[t]o 'use' a means of identification in this setting is '[t]o convert to one's service' or 'to employ' the means of identification." Id. at 626 (quoting Webster's New International Dictionary 2806 (2d ed. 1942), and collecting other dictionary definitions) (second set of brackets in original). That ordinary meaning of "use" is not limited to theft or impersonation of another person's identity. See id. at 626-627; accord United

States v. Munksgard, 913 F.3d 1327, 1334-1335 (11th Cir. 2019). Whatever the precise scope of “use,” the term readily encompasses petitioner’s conduct in this case: listing the names and Social Security numbers of other persons on tax returns to support false claims concerning his clients’ dependents in order to obtain tax benefits for his clients, all undisputedly contrary to law. See pp. 2, 12-13, supra.

c. The court of appeals also correctly rejected petitioner’s contention (Pet. 9-10) that the phrase “uses, without lawful authority,” must be construed narrowly to save it from superfluity. Pet. App. 5a-8a. Petitioner contended that a broad reading of that phrase renders it duplicative of the separate requirement that the use of a means of identification occur “during and in relation to” an enumerated felony, on the theory that any use during and in relation to a federal crime will necessarily be without lawful authority. Id. at 5a. That is incorrect.

As the court of appeals explained, adopting the analysis of the First Circuit, “[i]t takes little imagination to conceive instances in which a person might transfer, possess, or use another person’s means of identification, during and in relation to a predicate offense, in a manner that is lawfully authorized.” Pet. App. 7a (quoting United States v. Kasenge, 660 F.3d 537, 541 (1st Cir. 2011), cert. denied, 565 U.S. 1240 (2012)) (emphasis added). “For example, where an applicant for naturalization

submits documentation of a spouse's citizenship, but the applicant fraudulently claims to have committed no crime of moral turpitude, the transfer of the spouse's information is arguably performed with lawful authority, despite its occurrence during and in relation to a predicate offense." Id. at 7a-8a (quoting Kasenge, 660 F.3d at 541). Similarly, if a tax preparer prepared a return on behalf of a client with the client's permission "that fraudulently under-reported income or claimed bogus deductions," the mere act of including the client's name and Social Security number on his own return would not (without more) violate Section 1028A(a)(1). Id. at 8a.

3. Petitioner contends (Pet. 6-11) that review is warranted to resolve a disagreement among the courts of appeals concerning the scope of "uses, without lawful authority," in Section 1028A(a)(1). That contention lacks merit. The courts of appeals broadly agree on the conduct covered by that phrase. To the extent that any tension can be found in the language of courts of appeals' opinions, it is not implicated here.

Courts of appeals have uniformly rejected the argument that Section 1028A(a)(1) prohibits only theft or misappropriation of another person's means of identification. See pp. 15-16, supra. As the court of appeals observed, "[n]umerous prior decisions have upheld § 1028A(a)(1) convictions where the defendant neither stole nor assumed the identity of the other person." Pet. App. 4a.

Petitioner does not identify any court of appeals that has adopted his crabbed interpretation of the phrase “uses, without lawful authority,” in Section 1028A(a)(1) to encompass only theft of or assuming another person’s identity. Multiple courts have expressly rejected it. See Munksgard, 913 F.3d at 1333-1336; Michael, 882 F.3d at 626-629.

Petitioner errs in contending (Pet. 6-8) that the decision below is inconsistent with decisions of the First, Sixth, and Seventh Circuits. Petitioner cites (Pet. 6) United States v. Berroa, 856 F.3d 141 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017), which found that the mere fact that defendants had fraudulently obtained licenses for medical practice, and thus were not validly licensed to issue prescriptions, did not mean that they committed aggravated identity theft in violation of Section 1028A(a)(1) by listing their actual patients’ names on the prescriptions they issued to those patients. See id. at 155-157. In so doing, the court stated that it “read the term ‘use’ to require that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person’s behalf.” Id. at 156-157.

As the First Circuit itself recently observed, the court of appeals’ decision in this case, as well as other decisions “‘uph[olding] § 1028A(a)(1) convictions where the defendant neither stole nor assumed the identity of the other person,’” are

"[i]n accord with Berroa." United States v. Tull-Abreu, 921 F.3d 294, 300 n.3 (1st Cir. 2019) (quoting Pet. App. 4a and citing United States v. White, 846 F.3d 170, 177 (6th Cir.), cert. denied, 137 S. Ct. 2203 (2017), and Reynolds, supra). In Tull-Abreu, the First Circuit found that the defendant, a doctor, had "'purported to take some other action on another person's behalf,' as set forth in Berroa," by filing fraudulent claims for Medicare reimbursement that listed his patients' identifying information, even though he did not steal that information or assume his patients' identities. Id. at 300 (brackets omitted). As the court of appeals in this case observed, petitioner thus "urges a more restrictive meaning" of "uses" than the First Circuit articulated in Berroa, Pet. App. 4a, which it further clarified in Tull-Abreu. Both the district court and the court of appeals determined that petitioner's particular conduct in this case constituted "employing or purportedly taking an action on that person's behalf," which would satisfy the First Circuit's formulation in Berroa. Tr. 363; see Pet. App. 4a.

Petitioner also cites (Pet. 7) the Sixth Circuits' decisions in United States v. Miller, 734 F.3d 530 (2013), and United States v. Medlock, 792 F.3d 700, cert. denied, 136 S. Ct. 601 (2015), which he notes found the term "uses" ambiguous and applied the rule of lenity to construe it not to reach particular conduct. But as petitioner acknowledges, the Sixth Circuit has since

clarified in its subsequent decision in Michael, supra, that it construes Section 1028A(a)(1) to encompass conduct by defendants who use a means of identification "to further or facilitate the [enumerated felony]." Pet. 7 n.1 (quoting Michael, 882 F.3d at 628) (brackets in original). Michael specifically rejected reading Section 1028A(a)(1) to require that a defendant "impersonate someone else" or "assume[] another's identity." 882 F.3d at 628-629. The Sixth Circuit further explained that its earlier decisions in Miller and Medlock "support[ed] th[e] interpretation" that it adopted in Michael. Id. at 627.

Finally, petitioner cites (Pet. 8) United States v. Spears, 729 F.3d 753 (7th Cir. 2013) (en banc), but Spears addressed a different question. The defendant in that case made a counterfeit handgun permit for a client -- which contained the client's own name and birthdate -- and the client used the counterfeit permit to attempt (unsuccessfully) to purchase a gun. Id. at 754. The defendant "acknowledge[d] that he lacked 'lawful authority' to sell counterfeit permits," and he argued instead (as relevant here) that he did not "transfer" "a means of identification of another person" within the meaning of Section 1028A(a)(1) by giving the counterfeit permit to the client for whom he had made it and whose name and birthdate it contained. Id. at 755. The en banc Seventh Circuit construed "'another person' to refer to a person who did not consent to the use of the 'means of identification,'" and it

accordingly reasoned that a defendant does not “transfer[] * * * a means of identification of another person’” by giving it to the putative identity-theft victim himself. Id. at 757-758 (citation omitted); see id. at 755-758.

The decision in Spears does not conflict with the decision below in this case. Petitioner was not convicted of aggravated identity theft for producing fraudulent tax returns that contained his clients’ own names and other information, but for listing the names and Social Security numbers of minors unrelated to his clients whom his clients falsely claimed as dependents. It is undisputed that the names and Social Security numbers of the minors were “means of identification of another person,” see Pet. App. 2a-3a; petitioner’s argument instead concerns the meaning of “uses, without lawful authority,” in Section 1028A(a)(1), which was not at issue in Spears. As the Fifth Circuit has observed, “Spears is purposefully silent as to the meaning of ‘without lawful authority,’ as that element was conceded on rehearing,” and “[t]he Seventh Circuit expressly limited its holding and discussion to the meaning of ‘another person.’” Mahmood, 820 F.3d at 189.

In any event, none of the decisions of other courts of appeals that petitioner cites adopted the interpretation of Section 1028A(a)(1) that he advocates, which would require proof that a defendant stole or assumed the identity of another person. No conflict exists on that question. Further review is not warranted.

4. Even if the question presented otherwise warranted further review, this case would be an unsuitable vehicle to address it. Whatever the precise outer limits of the phrase “uses, without lawful authority,” in Section 1028A(a)(1), petitioner’s false listing of names and Social Security numbers of minors as dependents on his clients’ tax returns to obtain fraudulent tax benefits for those clients falls comfortably within its scope. The district court specifically found that, “even under the more cabined” interpretation of Section 1028A(a)(1) that petitioner advocated, “there [wa]s sufficient evidence to submit [the Section 1028A(a)(1) counts] to the jury based upon the actions taken in putting a Social Security number and name of an individual on a tax form.” Tr. 363. And both the district court and the court of appeals determined that petitioner’s conduct would violate Section 1028A(a)(1)’s requirements as articulated by the First Circuit formulation in Berroa, on which petitioner relies. Ibid.; see Pet. App. 4a. Petitioner offers nothing to refute that determination, which is in any event case-specific, fact-dependent, and undeserving of further review. See Sup. Ct. R. 10; see also United States v. Johnston, 268 U.S. 220, 227 (1925) (“We do not grant * * * certiorari to review evidence and discuss specific facts.”).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2019