NO. 18-9019

IN THE SUPREME COURT OF THE UNITED STATES

Lony Tap Gatwas, PETITIONER,

v.

United States of America, RESPONDENT.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY

There is an undeniable conflict among the Circuits regarding the interpretation of 18 U.S.C. § 1028A(a)(1). More than one circuit has found the prohibited "uses" under the statute ambiguous and adopted a narrow construction, whereas the Eighth Circuit expressly "reject[ed]" the "argument that the statute is ambiguous and the rule of lenity therefore applies." (App. 8a); *United States v. Gatwas*, 910 F.3d 362, 368 n.2 (8th Cir. 2018). This case also presents—finally—a suitable vehicle to address the issue because it focuses the Court's attention on the meaning of, and contrast between, "uses" that are "without lawful authority" and those that are "during and in relation to" an enumerated felony, which has never been presented this squarely to the Court and yet is critical to the statute's construction. In addition, the government's arguments against certiorari misconstrue Gatwas's arguments and consist of red herrings. Finally, the government's attempts to rebut the merits of Gatwas's position fall decidedly short by giving lip service to the plain meaning of the statute and by failing to take a position on what the statute ultimately means, all while supporting interpretations—including that of the Eighth Circuit's—that render the statutory text superfluous. The logical incoherence of these arguments and gaps in reasoning highlight both the need for this Court's review and the Eighth Circuit's error on the merits.

A. A Circuit Conflict Exists That Compels This Court's Review

The government's argument that the Eighth Circuit's decision in this case "does not conflict with any decision of this Court or another Court of Appeals" is absolutely wrong. (Opposition Brief, pp. 10-11). The Eighth Circuit's decision in this case squarely conflicts with at least the First and Sixth Circuit decisions that found the scope of the prohibited "uses" under § 1028A ambiguous and applied the Rule of Lenity. *Compare United States v. Berroa*, 856 F.3d 141, 156 n.2 (1st Cir. 2017) (finding statutory ambiguity and applying the Rule of Lenity), *and United States v. Miller*, 734 F.3d 530, 540-42 (6th Cir. 2013) (same), *with* (App. 8a); *Gatwas*, 910 F.3d at 368 n.2 ("We reject Gatwas's argument that the statute is ambiguous and the rule of lenity therefore applies.").

The First Circuit's construction of the statute also cannot be reconciled with the Eighth Circuit's construction here. The Eighth Circuit found the "use of another person's means of identification must be more than incidental to the [enumerated felony]" in order to constitute a prohibited use under the statute. (App. 8a); *Gatwas*, 910 F.3d at 368. The First Circuit, on the other hand, interpreted the prohibited "use" under the statute as "requir[ing] 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." *Berroa*, 856 F.3d at 156. The "another person" in both of these constructions, of course, is the alleged victim whose identity was used in violation of the statute (*i.e.*, the dependents in Gatwas's case).

These constructions set forth obviously different standards with different results. In fact, the government's argument that Gatwas's conduct "satisf[ies] the First Circuit's formulation" does not withstand scrutiny. (Opposition Brief, p. 20). Gatwas never passed himself off as the dependents and never purported to take some other action on the dependents' behalf. At best, the government could only argue what the Eighth Circuit emphasized (and which proves the point): that "Gatwas fraudulently used the identities of children to obtain tax refunds on behalf of his clients[.]" (App. 4a (emphasis in original)); *Gatwas*, 910 F.3d at 365. Gatwas's use of the dependents' identities without taking any action on their behalf is not sufficient under the First Circuit's narrow construction of the statute.

The circuit conflict regarding the scope and construction of § 1028A compels this Court's review to uniformly state what the law is.

B. This Case Is The Suitable Vehicle To Address The Conflict Because It Focuses The Court's Attention On "Uses, Without Lawful Authority"

The Government's argument that "this case would be an unsuitable vehicle to address [petitioner's statutory arguments]" is also wrong. (Opposition Brief, p. 11). The circuit split as to whether § 1028A is ambiguous and the Rule of Lenity applies has ripened and matured since past petitions in which this Court denied review. (*See id.*). Moreover, central to the tension regarding the meaning of the term "uses" in § 1028A is the fact that the statute already commands that the conduct be "during and in relation to any [enumerated felony]," and then further requires that the person "knowingly . . . uses, *without lawful authority*, a means of identification

of another person." 18 U.S.C. § 1028A(a)(1) (emphasis added). This case is particularly suitable for addressing the construction of § 1028A because, unlike other petitions challenging § 1028A convictions, Gatwas's petition squarely focuses the Court's attention on the definition of "use" that is "without lawful authority," and in contrast to "use" that is "during and in relation to" an enumerated felony. The statutory phrase "uses, without lawful authority" is the key phrase in determining the scope of § 1028A and as of yet undefined by this Court, but it is plainly presented to the Court in this case for determination.

C. The Government's Arguments Against Certiorari Consist Of Red Herrings That Misconstrue Gatwas's Arguments

The government's argument that, "to the extent" Gatwas advances a narrow interpretation of the statute based solely on the plain meaning of the "word 'uses,' it likewise lacks merit and has been repeatedly rejected," is a red herring. (Opposition Brief, pp. 16-17). Gatwas never argued the meaning of the word "use" alone supported his narrow construction of the statute. Instead, Gatwas argued that the statutory phrase "uses, *without lawful authority*" required a narrow construction of the statute and, specifically, the theft or assumption of another's identity. In other words, the question is not the definition of "use" by itself, but the definition of "uses, without lawful authority" in its entire statutory context—and as required by this Court's precedent. *See Bailey v. United States*, 516 U.S. 137, 143 (1995) ("'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress

intended."), *superseded by statute*, "The *Bailey* Fix Act," Pub. L. No. 105-386, 112 Stat. 3469.

Similarly, the government's argument that the Circuits are uniform in recognizing that § 1028A prohibits more than just the theft (or "misappropriation") of another's identity is another red herring. (Opposition Brief, pp. 13-16). Gatwas never argued on appeal that § 1028A *only* prohibits conduct involving the theft of another's identity. Instead, Gatwas argued that § 1028A only prohibits conduct that involves the theft *or* assumption of another's identity. As a result, the government's argument that the Circuits uniformly hold the statute encompasses more than just theft is no reason to deny the writ. Instead, a reason for granting the writ is that Circuits have erroneously held that the phrase "uses, without lawful authority," which was coined as part of the "Identity Theft and Assumption Act of 1998," encompasses more than just the theft and assumption of another's identity. Pub. Law No. 105-318, 112 Stat. 3007 (emphasis added).

D. The Government's Additional Arguments On The Merits Provide No Basis To Deny Certiorari

1. The government ignores statutory context and gives mere lip service to the plain meaning of "without lawful authority"

The government has overplayed its hand by asserting that "[n]othing in Section 1028A(a)(1)'s text or context confines the term "use" to stealing or assuming an identity." (Opposition Brief, p. 16). The title of the 1998 Act, emphasized above, is part of the reason why. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the

intent of the legislature is the title of the act."). In addition, the plain meaning of § 1028A's phrase "without lawful authority" supports Gatwas's narrow construction of the statute. The government concedes the plain meaning, stating that "[i]n 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.'" (Opposition Brief, p. 12 (emphasis added; quoting Black's Law Dictionary 158, 1018 (10th ed. 2014))). But the government gives lip service to the definition of "authority" because it fails to account for "on another's behalf" in concluding that Gatwas must have acted without lawful authority. The government merely states in conclusory fashion that Gatwas "lacked the requisite 'lawful authority' to list the false dependents on his clients' tax returns" because it was against the IRS rules. (Opposition Brief, pp. 12-13).

The government's lip service to the definition of "authority" (and specifically the part that includes "on another's behalf") underscores two reasons why that part of the definition is critically important. First, "on another's behalf" demonstrates that § 1028A prohibits a person from acting *in the name of another*. *See Behalf*, Black's Law Dictionary (10th ed. 2014) ("[O]n behalf of means 'in the name of, on the part of, as the agent or representative of.'"). The requirement of unlawfully acting "on another's behalf" in order to act "without lawful authority" supports a narrow interpretation of the statute because a person necessarily acts on another's behalf if the person assumes another's identity or steals another's identity and subsequently uses it.

Second, the requirement that the "use" be "on another's behalf" is what separates § 1028A's third element (that the "use" of another's identity be "without lawful authority") from being superfluous with § 1028A's fourth element (that the "use" also be "during and in relation to" an enumerated felony). Using another's identity "during and in relation to" an enumerated felony will always be without the "official right or permission to act" (thereby satisfying the first part of the definition of "authority"), so it is necessary for "use" that is "without lawful authority" to require something more. That "something more" is that the prohibited "use" be "on another's behalf" (thereby satisfying the remaining part of the definition of "authority"), which occurs when a person steals and subsequently uses another's identity or when a person assumes another's identity.

2. The government is unable to define the statute's prohibited "uses," and supports overly broad interpretations that result in superfluous statutory text

The government appears to recognize, as it must based on the statutory text, that § 1028A requires something "more" than merely using another's identity to commit a crime. In proposing a hypothetical, however, the government fails to offer any explanation as to what else is required: "[I]f 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)." (Opposition Brief, p. 18). The ostensible reason the government does not volunteer what "more" is required is because it does not know itself and would

prefer not to define it. The freedom to charge § 1028A offenses whenever a means of identification is used "during and in relation to" an enumerated felony is advantageous for the government, but it is not always proper under the statute.

Although the Eighth Circuit attempted to describe what "more" is required, in so doing it mistakenly reverted to the definition of "use" that is "during and in relation to" an enumerated felony. The Eighth Circuit declared that use "without lawful authority" is use that is "more than incidental to the [enumerated felony]." (App. 8a); *Gatwas*, 910 F.3d at 368. That, however, is just another way of saying that the means of identification "must have some purpose or effect with respect to" the enumerated felony, which is exactly how this Court has defined the phrase "during and in relation to" in other statutes. *See Dean v. United States*, 556 U.S. 568, 573 (2009) (analyzing the phrase "during and in relation to" in 18 U.S.C. § 924(c)(1)(A), and recognizing "that the phrase 'in relation to' means 'that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.'" (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993))). The Eighth Circuit's interpretation of § 1028A, and the government's support for it, is unsound. The interpretation renders the element of "use" that is "without lawful authority" and the element of "use" that is "during and in relation to" an enumerated felony superfluous.

Lastly, the government and the Eighth Circuit mistakenly rely on the hypothetical proposed in *United States v. Kasenge*, 660 F.3d 537 (1st Cir. 2011), to

try to show that use "during and in relation to" an enumerated felony is not redundant with use "without lawful authority." (Opposition Brief, p. 17-18). The *Kasenge* court recognized the weakness of its own hypothetical by stating that the distinction between "use" that is "during and in relation to" an enumerated felony and "use" that is "without lawful authority" is only "arguably" present: "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." 660 F.3d at 541 (emphasis added). In other words, the transfer is also arguably with*out* lawful authority, leaving no certain distinction between "use" that is "during and in relation to" an enumerated felony and "use" that is "without lawful authority." Indeed, under the Eighth Circuit's definition of "uses, without lawful authority" (*i.e.*, "use" that is "more than incidental to the [enumerated felony]") the described transfer of the spouse's identity in *Kasenge*—which was required (not incidental) in order to complete the application for naturalization—was undoubtedly performed without lawful authority, thereby emphasizing that the hypothetical is wholly unsupportive of the government's argument.

The government's apparent inability to describe what "more" is required for "use" that is "without lawful authority," the Eighth Circuit's inability to describe what "more" is required without falling into the definition of "use" that is "during and in relation to" an enumerated felony, and their reliance on "arguable"

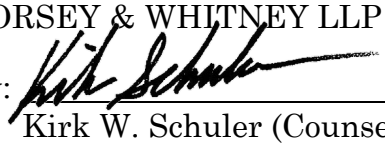
hypotheticals, provide additional reasons why this Court should grant the writ. This Court has never addressed the meaning of "uses, without lawful authority," and the Circuits have failed to provide a uniform interpretation. Moreover, those, like the Eighth Circuit, that have broadly defined the prohibited "uses" that are "without lawful authority" have erroneously arrived at definitions that are redundant to "use" that is "during and in relation to" an enumerated felony. As this Court recognized ten years ago in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the scope of this important statute should not be subject to Circuit conflict or government overreaching. Unless this Court grants the writ to define the scope of § 1028A, defendants across the country will continue to be questionably charged (and often convicted if not pled out to lesser charges) with the § 1028A "hammer" in cases that merely involve the "use" of another's identity "during and in relation to" an enumerated felony, but that do not involve the "use" of another's identity that is "without lawful authority" (which, as Gatwas argues, must involve the theft or assumption of another's identity). *See United States v. Ingram*, 613 F. Supp. 2d 1069, 1086 n.6 (N.D. Iowa 2009) (Bennett, J.) (describing the use of § 1028A as a "hammer" to encourage guilty pleas).

CONCLUSION

For the foregoing reasons, and for the reasons advanced in his previously filed Petition for Certiorari, Petitioner Lony Tap Gatwas respectfully requests that his Petition be granted.

Dated July 9, 2019

DORSEY & WHITNEY LLP

By: 

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