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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

In a published opinion issued last week, the Ninth Circuit added significant and substantial support to Gatwas's Petition, making it clear that the question presented here is the subject of a mature circuit split on an important and recurring issue that is ripe for resolution by this Court. In *United States v. Hong*, No. 17-50011, __ F.3d __, 2019 WL 4315165, 2019 U.S. App. LEXIS 27490 (9th Cir. Sept. 12, 2019), the Ninth Circuit joined the First and Sixth Circuits in limiting the scope of aggravated identity theft under 18 U.S.C. § 1028A. In so doing, the Ninth Circuit clarified its prior *per curiam* opinion on the subject—*United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015)—to announce a position that squarely conflicts with the Eighth Circuit's decision here regarding the meaning of § 1028A's prohibition on the "use" of another's identity without lawful authority. Contrary to the Eighth Circuit's construction of "the word 'use' broadly" that affirmed Gatwas's convictions for aggravated identity theft, *United States v. Gatwas*, 910 F.3d 362, 365 (8th Cir. 2018), the Ninth Circuit overturned Hong's § 1028A convictions by "narrowly constru[ing] 'use'" to require "that the defendant attempt to pass him or herself off as another person," *Hong*, 2019 WL 4315165 at *7-8. The resolution of this circuit split, which only this Court is capable of, is critical and dispositive because Gatwas's § 1028A convictions would not stand under the Ninth Circuit's interpretation of "use" in *Hong*. Gatwas did not, nor did anyone else, ever assume anyone's identity. Quite the opposite, Gatwas merely identified the dependents on his client's tax returns by their true names and social security numbers. Finally,

the need for this Court to decide the issue now is plainly apparent because Gatwas, having already served his 21 month sentence for his underlying offenses, only remains in prison because of his 24 month mandatory minimum consecutive sentence under § 1028A, with an anticipated release date of April 2021.

This new, published, and precedential decision from the Ninth Circuit, on the eve of conference, emphasizes the need for the Court to grant the writ now to uniformly interpret the law and end the circuit split and disparate application of § 1028A across defendants nationwide.

ARGUMENT

The government claimed in its Opposition that the Eighth Circuit's decision in this case "does not conflict with any decision of this Court or another Court of Appeals." (Opposition Brief, pp. 10-11). For the reasons Gatwas argued in his Reply—that the First and Sixth Circuits, contrary to others, have construed the statute narrowly after finding its language ambiguous and subject to the Rule of Lenity—the government's claim was "absolutely wrong." (Reply Brief, p. 2). To the extent there is any lingering doubt, however, the Ninth Circuit's decision in *Hong* ends the inquiry. The Eighth Circuit's "broad" construction of the term "use" in § 1028A in this case cannot be reconciled with the new decision from the Ninth Circuit, which explicitly adopts a "narrow" construction of that same term and a standard that, if applied here, would compel the reversal of Gatwas's conviction. The circuit split is mature and ripe for this Court's review, and Gatwas's Petition is the right vehicle for this Court to resolve the split.

I. The Ninth Circuit In *Hong* Joins The First And Sixth Circuits In Narrowly Construing § 1028A's "Use" Requirement

Defendant Simon Hong owned and operated several clinics that provided massage and acupuncture services to Medicare patients. *Hong*, 2019 WL 4315165, at *1. Hong contracted with outpatient physical therapy companies to provide the services. *Id.* at *2. However, because Medicare does not pay for massages or acupuncture, and because Hong's businesses could not bill Medicare directly, Hong conspired with the physical therapy companies to file false claims to Medicare alleging the patients received physical therapy rather than massage or acupuncture. *Id.* The physical therapy companies, upon receiving Medicare reimbursement, paid Hong over half of the proceeds (approximately $1.6 million over a four-year time period). *Id.*

In addition to charges of health care fraud and illegal remunerations for health care referrals, the government charged Hong with aggravated identity theft for using his patient's identities in submitting the false Medicare claims. *Id.* at *1. "The government alleged that Hong used the names and Medicare-eligibility information of patients to submit, with the help of his co-schemers, claims for benefits without lawful authority." *Id.* Hong was convicted, but argued on appeal that "submitting fraudulent Medicare claims with his clinics' massage patients' identifying information does not constitute aggravated identity theft." *Id.* at *3. The Ninth Circuit agreed. *Id.* at *7-8.

Hong specifically argued that "there was insufficient evidence of aggravated identity theft for two reasons: the 'without lawful authority' element was not

satisfied because the patients voluntarily provided their information; and this fraudulent billing does not constitute a 'use' of the patients' identifies within the meaning of the aggravated identify theft statute." *Id.* at *7.

The Ninth Circuit held Hong's first argument was "foreclosed by [its prior decision in] *Osuna-Alvarez*," wherein the Ninth Circuit "held that permission to use another's identity in an unlawful scheme is not 'lawful authority' under § 1028A." *Id.* The Ninth Circuit noted, however, that the "latter argument presents a *new question for our court*: whether the fraudulent billing demonstrated in this case constitutes a 'use' of the patients' identities under § 1028A." *Id.* (emphasis added). In resolving this new question, the Ninth Circuit examined the First and Sixth Circuit decisions that "narrowly construed 'use' and reversed convictions for aggravated identity theft in analogous contexts"—*United States v. Berroa*, 856 F.3d 141 (1st Cir. 2017) and *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015)—and "agree[d] with their reasoning." *Hong*, 2019 WL 4315165, at *7.

In explaining the rationale in *Medlock*, the Ninth Circuit emphasized that the *Medlock* defendants—who engaged in Medicare fraud by falsely claiming they used stretchers while transporting patients by ambulance—"misrepresented *how* and *why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so." *Id.* at *7 (quoting *Medlock*, 792 F.3d at 707). "Critically, the defendants [in *Medlock*] 'did not attempt to pass themselves off as anyone other than themselves.'" *Id.* (quoting *Medlock*, 792 F.3d at 707).

Similarly, in examining *Berroa*, the Ninth Circuit emphasized that "the First Circuit '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 *8 (quoting *Berroa*, 856 F.3d at 156). The Ninth Circuit agreed with the First Circuit's explanation of the statute's legislative history: "As the First Circuit recognized, the legislative history of the aggravated identify theft statute 'provide[s] several examples of identity theft,'" and that "'each of these examples involved the defendant's use of personal information to pass him or herself off as another person, or the transfer of such information to a third party for use in a similar manner.'" *Id.* (quoting *Berroa*, 856 F.3d at 156).

After conducting its *de novo* review for this issue of statutory interpretation, the Ninth Circuit followed the holdings in *Medlock* and *Berroa* to join the First and Sixth Circuits in narrowly construing § 1028A. *Id.* at *7-8. The court concluded:

> Hong provided massage services to patients to treat their pain, and then participated in a scheme where that treatment was misrepresented as a Medicare-eligible physical therapy service. *Neither Hong nor the physical therapists "attempt[ed] to pass themselves off as the patients.*" Hong's fraudulent scheme ran afoul of other statutes—namely, health care fraud and unlawful remunerations—but not § 1028A. We hold that Hong did not "use" the patients' identities within the meaning of the aggravated identity theft statute.

Id. at *8 (internal citations omitted) (emphasis added). As a result, the court reversed Hong's aggravated identity theft convictions. *Id.*

II. The Ninth Circuit's Approach Directly Contradicts The Eighth Circuit's Approach In This Case

The Ninth Circuit's approach, described above, directly contradicts the Eighth Circuit's approach here. The Eighth Circuit specifically *rejected* the "substance" of Gatwas's argument "that we should limit the meaning of the word 'use' to circumstances in which the defendant misappropriated another person's identity in committing an enumerated felony." *Gatwas*, 910 F.3d at 365. In rejecting Gatwas's argument, the Eighth Circuit followed "our sister circuits" by "construe[ing] 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.*

The Ninth Circuit, on the other hand, specifically *accepted* the substance of Gatwas's position by limiting "use" to the assumption of another person's identity. *Hong*, 2019 WL 4315165, at *8. In narrowly construing the statute, the Ninth Circuit recognized that "[u]nder other criminal statutes we interpret 'use' in limited, context-specific ways." *Id.* at *7. It also recognized—by quoting this Court's precedent—that "use" is "fraught with 'interpretational difficulties because of the different meanings attributable to it.'" *Id.* at *8 (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)). In sum, the Eighth and Ninth Circuits looked at the same three-letter word in § 1028A—the very same word that is the focus of Gatwas's Question Presented to this Court—in two very different ways, arriving at polar-opposite constructions.

III. *Hong* Clarifies The Ninth Circuit's Prior Precedent And Deepens The Circuit Split Regarding The Meaning Of § 1028A

The Ninth Circuit's decision in *Hong* also makes it clear that its prior decision in *Osuna-Alvarez* does not, in fact, support the Eighth Circuit's decision in this case. Instead, the import of *Osuna-Alvarez*—relied on by the government in its Opposition for supporting a broad interpretation of § 1028A (Opposition Brief, pp. 14-15), and even described by Gatwas in his Petition as being "[o]n the other side of the split" (Petition, p. 8)—is limited by the Ninth Circuit's interpretation in *Hong*. In *Osuna-Alvarez*, the defendant used his twin brother's United States passport, with his brother's permission, to assume his brother's identity to try to enter the United States. 788 F.3d at 1185. The Ninth Circuit held that his brother's consent was not a defense because § 1028A does *not* require the theft of another's identity. *Id.* The Ninth Circuit's additional findings in that case—specifically that § 1028A "clearly and unambiguously encompasses situations like the present, where an individual grants the defendant permission to possess his or her means of identification, but the defendant then proceeds to use that identification unlawfully"—cannot be read, in light of *Hong*, to encompass situations outside of the "assumption" context. *Id.* *Osuna-Alvarez* only involved a defendant's attempt to assume another's identity, and *Hong* clarified that such assumption is required for the use of another's identity to be unlawful under § 1028A.

Taken together, then, *Osuna-Alvarez* and *Hong* undoubtedly augment the circuit split by positioning the Ninth Circuit clearly in the camp of narrow construction with the First and Sixth Circuits. In fact, the Ninth Circuit deepens

the divide by narrowly construing the statute, *Hong*, 2019 WL 4315165, at *8, and declaring the statute unambiguous, *Osuna-Alvarez*, 788 F.3d at 1186, (whereas the First and Sixth Circuits narrowly construed the statute after finding it ambiguous).

IV. The Government's Arguments Are Refuted By The Ninth Circuit's Ruling In *Hong*, Which, If Applied Here, Would Require Reversing Gatwas's § 1028A Convictions

Although the government of course could not have known of *Hong* at the time of filing its Opposition, the decision disproves the government's argument that a narrow interpretation of § 1028A has been "repeatedly rejected." (Opposition Brief, p. 16). Nor is it true, as the government argued, that circuits "broadly agree on the conduct covered by [§ 1028]," (Opposition Brief, p. 18), or that Gatwas "does not identify any court of appeals that has adopted his crabbed interpretation," (Opposition Brief, p. 19). *Hong*, at the least, demonstrates the circuit split and applies Gatwas's interpretation.

Even assuming, for the sake of argument, that the government is correct that Gatwas's conduct satisfies the "First Circuit's formulation" of § 1028A as reflected in its latest decision in *United States v. Tull-Abreu*, 821 F.3d 294 (1st Cir. 2019), (Opposition Brief, p. 20), there is no denying that Gatwas's conduct does *not* satisfy the Ninth Circuit's formulation of § 1028A in *Hong*. The undeniable conclusion as a result of *Hong* is that the government can no longer credibly claim, if it ever could, that "whatever the precise outer limits of [§ 1028A]" Gatwas's conduct "falls comfortably within its scope." (Opposition Brief, p. 23). This was the wrong conclusion based on the First and Sixth Circuit authority argued by Gatwas in his

Reply, but it is patently wrong now under the Ninth Circuit's ruling in *Hong*. In other words, contrary to the government's argument that Gatwas "offers nothing to refute" the government's position that Gatwas violated § 1028A under the "First Circuit formulation," Gatwas can now offer (in addition to the First and Sixth Circuit authority in his Reply) the Ninth Circuit authority in *Hong*. And that authority clearly refutes the government's position.

Moreover, make no mistake: Gatwas could not have been convicted of § 1028A under *Hong*. Applying the Ninth Circuit's construction of the term "use" in *Hong* would require reversing Gatwas's convictions for aggravated identity theft. In construing "use" broadly, the Eighth Circuit merely required that "the use of another person's means of identification must be more than incidental to the fraud." *Gatwas*, 910 F.3d at 368. In *Hong*, the use of the patients' identities and Medicare information was of course more than incidental (it was necessary) to the health care fraud, *see Hong*, 2019 WL 4315165, at *6 ("Without the patients or their identifying Medicare information, the physical therapy companies could not have submitted claims to Medicare . . . ."), just like Gatwas's use of the dependents' identities was more than incidental to his tax fraud. But similar to Hong, Gatwas did not attempt to pass himself off as anyone else by stating the dependents' true names and social security numbers on his clients' tax returns. Therefore, Gatwas could not be convicted of aggravated identity theft under the Ninth Circuit's ruling, even though, like Hong, Gatwas's "fraudulent scheme ran afoul of other statutes—namely [tax and wire fraud]—but not § 1028A." *Id.* at *8.

V. The Ninth Circuit's Decision Fast Tracks Gatwas's Case As The Right Vehicle For Addressing The Circuit Split

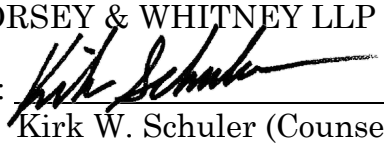
Finally, the time is now for this Court to grant the writ and settle this admitted "interesting statutory-interpretation issue" that has dogged the circuits for a decade or more. *United States v. Munksgard*, 913 F.3d 1327, 1335 (11th Cir. 2019). Not only is this issue ripe and mature based on the input from many circuits over many years, but its resolution now will directly affect Gatwas's life and liberty. Gatwas started serving his remaining twenty-four month consecutive sentence for aggravated identity theft earlier this year. His anticipated release date is April 2021. If *certiorari* is granted and the Eighth Circuit's opinion reversed, his release would be immediate. There would be no need for resentencing, 18 U.S.C. § 1028A(b)(3) ("[I]n determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section."), and there is no time to wait.

CONCLUSION

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

Dated Sept. 20, 2019

DORSEY & WHITNEY LLP

By: 

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