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NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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Lony Tap Gatwas, PETITIONER,

v.

United States of America, RESPONDENT.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

The Aggravated Identity Theft statute, 18 U.S.C. § 1028A(a)(1), punishes, by a mandatory consecutive two-year sentence, “[w]hoever, during and in relation to any [enumerated felony], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.”

The question presented is:

Whether the Eighth Circuit erred in interpreting 18 U.S.C. § 1028A’s prohibition on the “use” of another’s identity without lawful authority as unambiguously prohibiting use that is “more than incidental to the [enumerated felony],” a construction that is different in scope than other circuits, and in conflict with those circuits that have found the statute ambiguous and subject to the Rule of Lenity.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Lony Tap Gatwas (“Gatwas”), incarcerated at the Federal Prison Camp in Yankton, South Dakota, through appointed counsel, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

### **OPINION BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit, filed December 3, 2018 in Appeal No. 17-3683, is reported as *United States v. Gatwas*, 910 F.3d 362 (8th Cir. 2018) and reprinted in the Appendix (“App.”). (App. 1a-9a). The order denying the petition for rehearing and rehearing *en banc* is unreported. (App. 10a). The Eighth Circuit’s opinion affirmed the judgment of the United States District Court for the Southern District of Iowa, which is unreported, and was entered January 12, 2018 as a result of the jury’s guilty verdict on July 26, 2017. (DCD 116, 73).

### **JURISDICTION**

The United States Court of Appeals for the Eighth Circuit entered its judgment on December 3, 2018, and denied Gatwas’s petition for rehearing *en banc* and petition for rehearing by the panel on January 15, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

18 U.S.C. § 1028A (2016) (“Aggravated Identity Theft”):

### **(a) Offenses.--**

**(1) In general.**--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.

## STATEMENT OF THE CASE

Petitioner Gatwas, as a Sudanese refugee living in Iowa, prepared taxes for members of his African community. (App. 1a). Some of the returns he filed claimed “false” dependents that resulted in larger refunds for his clients. (App. 1a).

The dependents were not false because they were misidentified—to the contrary, they were correctly identified on the returns by their true names and social security numbers (“SSNs”). (DCD 33). The dependents were false because the taxpayers were not allowed to claim the dependents on their returns. (App 1a). For example, even though the IRS rules forbade it, Gatwas identified several of his eight children—using their true names and SSNs—as dependents on other taxpayers’ returns. (App. 1a; DCD 33).

For his fraud, the government charged Gatwas with violations of 18 U.S.C. § 1343 (wire fraud) and 26 U.S.C. § 7206(2) (tax fraud). (DCD 33). The jury convicted. (DCD 73). The district court ordered restitution of \$132,585.00 and varied downward from the recommended guideline range to sentence Gatwas to 21

months' imprisonment. (DCD 116). Gatwas did not contest his fraud convictions on appeal. (App. 2a).

For using the dependents' names and SSNs during his fraud, the government charged Gatwas with Aggravated Identity Theft under 18 U.S.C. § 1028A. (DCD 33). This statute punishes "whoever, during and in relation to any [enumerated felony], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The jury also convicted Gatwas of Aggravated Identity Theft, resulting in a mandatory 24 month consecutive term of imprisonment that more than doubled his overall sentence. (DCD 73, 116).

Gatwas appealed, focusing solely on his § 1028A convictions. (App. 2a). Gatwas argued, as he did in the trial court, that § 1028A required the theft or assumption of another's means of identification. (App. 3a). In other words, Gatwas argued the statute required the government to prove the defendant separated the owner from his identity, as in when a defendant steals or assumes another's identity. In support of his argument, Gatwas emphasized the plain text of the statute as well as the circuit split over the ambiguity and scope of § 1028A, asking the Eighth Circuit to at least side with the First, Sixth, and Seventh Circuits in finding the statute ambiguous, in applying the Rule of Lenity, and in adopting a narrow interpretation of § 1028A. Gatwas specifically directed the court's attention to the phrase, "uses, without lawful authority," arguing that, as a separate element

of the offense, it must have a different meaning than use “during and in relation to” an enumerated felony (because otherwise the phrases are superfluous).

The Eighth Circuit afforded no lenity: “We *reject* Gatwas’s argument that the statute is ambiguous and the rule of lenity therefore applies.” *United States v. Gatwas*, 910 F.3d 362, 368 n.2 (8th Cir. 2018) (emphasis added). The court also pointed to the “legislative history” as “tell[ing] us not to be concerned if the term ‘without lawful authority’ in § 1028A(a)(1) adds little narrowing to the statute’s causation element, ‘during and in relation to’ an enumerated felony.” *Id.* at 367. In joining the several circuits that have adopted a broad interpretation of § 1028A while finding the statute unambiguous, the Eighth Circuit held that “the use of another person’s means of identification must be more than incidental to the fraud” in order to fall within the scope of § 1028A. *Id.* at 368. Gatwas’s conduct therefore qualified because “his use of childrens’ names and social security numbers was essential to the fraudulent claim of dependent-based tax benefits.” *Id.* The Eighth Circuit’s holding necessarily tied the scope of § 1028A to the nexus between the use of another’s identity and the underlying enumerated felony, and not, as Gatwas argued, to whether the person’s identity had been stolen or assumed. *Id.*

The Eighth Circuit exercised jurisdiction over the appeal—as a direct appeal of the district court’s final judgment—under 28 U.S.C. § 1291. The United States District Court for the Southern District of Iowa exercised original jurisdiction over this case—as a criminal case involving offenses against the United States—under 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE WRIT

This case presents a timely opportunity to resolve a mature circuit split on an important and recurring question of federal criminal law regarding the ambiguity and scope of the Aggravated Identity Theft statute, 18 U.S.C. § 1028A. The split among the circuits began in 2013 when the Sixth and Seventh Circuits, in finding the statute ambiguous, departed from the Fourth and D.C. Circuits and brought limits to the types of “uses” of another person’s identity that were prohibited by the statute. The split solidified in subsequent years with the Fifth and Ninth Circuits adopting broad interpretations, while the First Circuit, in 2017, found the statutory text ambiguous, and further confined the prohibited “uses” under the statute. Now, with two more decisions in just the last six months from the Eighth and Eleventh Circuits declaring the statute unambiguously broad, the split over the ambiguity and scope of the statute is mature and ripe for resolution.

The proper interpretation of § 1028A is also an important issue deserving of this Court’s attention. The importance of this Court’s construction is evidenced by this Court’s prior decision that interpreted § 1028A’s *mens rea* requirement, and notably reversed the Eighth Circuit’s broad interpretation that found the government did not have to prove the defendant knew the means of identification belonged to another person. *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). The meaning of § 1028A is particularly important now because the government is charging aggravated identity theft with increasing frequency and subjecting defendants to, in most cases, mandatory two-year consecutive sentences. Those

charges and sentences should not be subject to disparate application based on the circuit in which the underlying offense occurred.

This case is also the proper vehicle for this Court to review this issue. The split among the circuits is ripe and mature, and the issue here is squarely presented to the Court, where it was the exclusive basis for the Eighth Circuit appeal.

Accordingly, this Court should grant certiorari in this case to resolve the conflict among the circuits and clarify the “uses” of another’s identity that the statute prohibits.

**A. The Circuits Are Split Regarding The Ambiguity And Scope Of § 1028A’s Prohibited “Uses,” And Whether The Rule Of Lenity Applies**

In attempting to define the prohibited “uses” of another’s identity under § 1028A, the circuits have split regarding the ambiguity and scope of the statute, and whether the Rule of Lenity applies.

On one side of the split are the circuits that have found the statute ambiguous, applied the Rule of Lenity, and narrowly interpreted the statute. This position was taken most recently by the First Circuit in 2017. *See United States v. Berroa*, 856 F.3d 141, 156 n.2 (1st Cir. 2017) (applying the Rule of Lenity because “[a]t the very least, the statutory provision is ambiguous and, accordingly, we must read it narrowly.”). The First Circuit’s interpretation of the statute “require[s] 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*, 910 F.3d at 156. Less than one week ago, the First Circuit reasserted its position among the circuits by

following *Berroa*'s interpretation, *see United States v. Tull-Abreu*, No. 17-1364, \_\_\_ F.3d \_\_\_, 2019 WL 1748140, \*3 (1st Cir. April 19, 2019) (“This court defined the scope of the ‘use’ term of § 1028A in *Berroa*”), just as it had done in a line of post-*Berroa* cases, *see United States v. Valdes-Ayala*, 900 F.3d 20, 34-35 (1st Cir. 2018) (following *Berroa*); *United States v. Cohen*, 887 F.3d 77, 88-89 (1st Cir. 2018) (same); *United States v. Morel*, 885 F.3d 17, 23 (1st Cir. 2018) (same).

Earlier decisions from the Sixth and Seventh Circuits support the First Circuit’s position. In *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013), the court found “the meaning of ‘uses’ ambiguous” and ruled in favor of a defendant that argued his “conduct does not constitute ‘use’ of [others’] names because he did not steal or possess their identities, impersonate them or pass himself off as one of them, act on their behalf, or obtain anything of value in one of their names.” 734 F.3d at 540-41. The *Miller* court applied the Rule of Lenity and held that using another’s name to “merely l[ie] about what they did” was not a prohibited use under § 1028A. *Id.* at 541-42; *see United States v. Medlock*, 792. F3d. 700, 706 (6th Cir. 2015) (stating *Miller*’s “rational remains persuasive,” and that “[g]iven the statutory scheme at issue here, ‘use’ must have a more limited definition than the government suggests”).<sup>1</sup> Similarly, the Seventh Circuit found § 1028A ambiguous

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<sup>1</sup> The Sixth Circuit has also, at least more recently, construed the statute more broadly by focusing on “whether the defendant used the means of identification to further or facilitate the [enumerated felony].” *United States v. Michael*, 882 F.3d 624, 626-29 (6th Cir. 2018). The Sixth Circuit trilogy of *Miller*, *Medlock*, and *Michael* demonstrates the difficulty, even within circuits, of interpreting § 1028A.

(specifically the phrase “another person”), applied the Rule of Lenity, and held the prohibited uses under the statute required proof that the victim “did not consent to the use of the ‘means of identification.’” *United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013).

On the other side of the split are published decisions from the Fourth, Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits.<sup>2</sup> *United States v. Abdelshafi*, 592 F.3d 602, 609 (4th Cir. 2010); *United States v. Mahmood*, 820 F.3d 177, 187-88 (5th Cir. 2016); *United States v. Gatwas*, 910 F.3d 362, 368 (8th Cir. 2018); *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1186 (9th Cir. 2015); *United States v. Munksgard*, 913 F.3d 1327, 1333-36 (11th Cir. 2019); *United States v. Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013). These circuits have found the statute unambiguous and have rejected the Rule of Lenity. *E.g.*, *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.”). They have also broadly interpreted the types of “uses” that are prohibited by the

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<sup>2</sup> The Tenth Circuit has also indicated its support for a broader interpretation of § 1028A, albeit in an unpublished decision. *See United States v. Etenyi*, 720 F. App’x 445, 455 (10th Cir. 2017) (“[T]he fact that Mr. Etenyi had Mr. Sievisa’s consent to use his employment authorization card does not suffice to establish that his use and possession of that document was lawful. Mr. Sievisa plainly does not possess that authority.”). The Second, Third, and (not surprisingly) Federal Circuits have not substantively addressed the ambiguity or scope of § 1028A. The Second Circuit has, however, noted that “[i]n this circuit, there is no binding precedent governing the issue of how § 1028A should be interpreted, or whether the government is required to prove that the individuals did not consent to the unlawful use of their identities.” *United States v. Naranjo*, 645 F. App’x 50, 52 (2d Cir. 2016) (citing cases). At the time (before the First Circuit’s decision in *Berroa*), the Second Circuit recognized the interpretational differences regarding § 1028A between the Sixth and Seventh Circuits and the “majority of other circuits.” *Id.*

statute. *See id.* at 365 (recognizing, and joining, the “circuits [that] have construed the word ‘use’ broadly,” and holding that “the use of another person’s means of identification must be more than incidental to the fraud”).

The circuits that have broadly defined the statute, however, fail to provide uniform definitions. For example, less than three months ago, the Eleventh Circuit, in addressing what it conceded was “an interesting statutory-interpretation issue,” adopted “an interpretation of ‘use[]’ that more broadly forbids one from ‘employ[ing]’ or ‘convert[ing] to [his] service’ another’s name.” *Munksgard*, 913 F.3d at 1335. That interpretation is notably different from the interpretations provided by the other circuits that the Eleventh Circuit could have adopted but did not. *See Abdelshafi*, 592 F.3d at 609 (“The statute prohibits an individual’s knowing use of another person’s identifying information *without a form of authorization recognized by law.*” (emphasis added)); *Mahmood*, 820 F.3d at 187-88 (“[T]he statute plainly criminalizes situations where a defendant gains lawful possession of a person’s means of identification but *proceeds to use that identification unlawfully and beyond the scope of permission granted.*” (emphasis added)); *Reynolds*, 710 F.3d at 436 (finding § 1028A “encompasses situations in which a defendant gains access to identity information legitimately *but then uses it illegitimately—in excess of the authority granted*” (emphasis added)).

In addition, the circuits that broadly define the scope of the statute, such as the Eighth Circuit’s decision in this case, suffer from a crucial mistake: they erroneously conflate two elements of the offense. Under § 1028A, the use of

another's identity must be both "during and in relation to" an enumerated felony and "without lawful authority":

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(a)(1) (emphasis added). As separate elements of the offense, they require their own proof under this Court's precedents. *E.g., Stirone v. United States*, 361 U.S. 212, 218 (1960) (recognizing two elements to a crime and that "neither can be treated as surplusage"); *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) ("It is elementary that all words used in a legislative act are to be given force and meaning[.]"). If they meant the same thing, there is no need for "without lawful authority" to appear in the statute.

Nevertheless, the Eighth Circuit contravened this black letter principle by declaring that use "without lawful authority" means that "the use of another person's means of identification must be more than incidental to the [enumerated felony]." *Gatwas*, 910 F.3d at 368. That is just another way of saying the use of another's identity must have occurred "during and in relation to" the enumerated felony. *See, e.g., Smith v. United States*, 508 U.S. 223, 237-38 (1993) (defining "during and in relation to" as used in 18 U.S.C. § 924(c), and recognizing that it means with "some purpose or effect with respect to the [underlying crime]"). In sum, the circuits that rely on the "connection" between the use of another's identity and the enumerated felony to define the prohibited uses under the statute, without

affording separate meaning to use “without lawful authority,” are misconstruing the statute.

This Court should issue the writ to resolve the split among the circuits regarding the ambiguity and scope of § 1028A, and to correct the Eighth Circuit’s erroneous analysis.

**B. The Split Concerns An Important Issue Of Statutory Interpretation That Will Continue To Confront Courts Across The Country**

As evidenced by this Court’s prior decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the interpretation of this statute is an important matter that deserves resolution by this Court. In *Flores-Figueroa*, this Court granted certiorari to the Eighth Circuit to resolve a circuit split over whether § 1028A required the government to prove the defendant knew the means of identification belonged to another person. 556 U.S. at 647. The Eighth Circuit had ruled that no such proof was required, but this Court reversed. *Id.* at 657. Here, Gatwas asks this Court to again interpret the statute, resolve a circuit split, and similarly reverse the Eighth Circuit’s overly broad interpretation of § 1028A.

Prosecutors are also charging aggravated identity theft with greater frequency, necessitating this Court’s intervention now. United States Sentencing Commission, MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 4 (Sept. 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924\\_ID-Theft-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf) (recognizing as a “key finding” that “the use of section

1028A mandatory minimum penalties against theft offenders has become more prevalent” and that the “percentage of identity theft offenders convicted under section 1028A has steadily increased”). The greater frequency is of course partly due to the growing prevalence of identity theft generally. *See* United States Dep’t of Justice Bureau of Justice Statistics, VICTIMS OF IDENTITY THEFT, 2016, 2 (Jan. 2019), <https://www.bjs.gov/content/pub/pdf/vit16.pdf> (reporting “the prevalence of identity theft increased from 7% in 2014 to 10% in 2016”). But it is also due to three specific statutory reasons.

First, the penalty, which in most cases allows the government to add a two-year mandatory sentence to the underlying felony, no doubt encourages prosecutors to charge the offense often. 18 U.S.C. § 1028A(a), (b). Second, the range of enumerated felonies that can trigger the offense is expansive, covering a wide-array of felony fraud-related offenses in the United States Code. *Id.* § 1028A(c). Third, the statute broadly defines a person’s “means of identification” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual . . . .” *Id.* § 1028(d)(7). In short, it is nearly impossible to commit an enumerated felony without using a means of identification. Thus, § 1028A offenses are likely to continue to be charged with greater frequency, and no doubt “by clever prosecutors riffing on equivocal language.” *Spears*, 729 F.3d at 758. This Court’s intervention is needed now to address the ambiguity and scope of the statute.

**C. This Case Is An Appropriate Vehicle For Resolving The Split Over The Ambiguity And Scope Of The Statute**

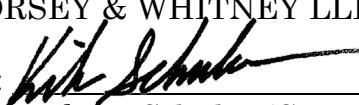
Finally, this case presents the appropriate vehicle for this Court to construe the statute and resolve the circuit split regarding the ambiguity and scope of the statute. Gatwas focused his appeal solely on his § 1028A convictions. He vigorously argued for a narrow interpretation of the statute based on its plain meaning, as well as that the statute was ambiguous and subject to the Rule of Lenity. The Eighth Circuit rejected his arguments, but confronted the issues squarely, including the meaning of the phrase “uses, without lawful authority.” The issues are thus appropriately teed up for this Court’s resolution, which if resolved would be dispositive in Gatwas’s case. The time for review is now.

### **CONCLUSION**

For the foregoing reasons, Petitioner Lony Tap Gatwas respectfully requests that the Petition for Writ of Certiorari be granted.

Dated April 25, 2019

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## **APPENDIX**

Decision of the Eighth Circuit Court of Appeals, December 3, 2018

Eighth Circuit Court of Appeals Order Denying  
Petition for Rehearing or Rehearing En Banc, January 15, 2019