No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KAREN GAGARIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The aggravated identity theft statute imposes a mandatory consecutive sentence of minimum two years for "[w]hoever, 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. . . ." 18 U.S.C. § 1028A(a)(1).

The question presented, on which the courts of appeals are split, is: does "another person" include someone who consented to the felonious use of her identifying information?

RELATED PROCEEDINGS

United States District Court (N.D. Cal.): *United States v. Halali et al.*, No. 14-CR-00627 SI, 2017 WL 3232566 (N.D. Cal. July 28, 2017).

United States Court of Appeals (9th Cir.): *United States v. Gagarin*, 950 F.3d 596 (9th Cir. 2020) (petition for reh'g denied Oct. 1, 2020).

PARTIES TO THE PROCEEDINGS

Petitioner is Karen Gagarin, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. There are no parties to the proceeding other than those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Karen Gagarin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in her case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals affirming Ms. Gagarin's conviction (Pet. App. 1a) is published at 950 F.3d 596. The order of the Ninth Circuit Court of Appeals denying panel rehearing (Pet. App. 26a) is not reported. The order of the district court denying Ms. Gagarin's motion for a judgment of acquittal or a new trial (Pet. App. 27a) is not published but is available at 2017 WL 3232566.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 13, 2020. A petition for rehearing was denied on October 1, 2020. Pet. App. 26a. On March 19, 2020, this Court entered a standing order extending the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing, rendering this petition due on March 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 1028A(a)(1) provides as follows:

> 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

In *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009), this Court unanimously held that 18 U.S.C. § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification he or she unlawfully transferred, possessed or used belonged to another person. Since that decision, lower courts have continued to grapple with "this puzzling statute," Pet. App. 25a (Friedland, J., concurring), including the scope of the "another person" language. On the question presented here, the courts of appeals are divided. In a unanimous en banc opinion, the Seventh Circuit held in *United States v. Spears* that, in context, "another person" means "a person who did not consent to the use of the 'means of identification.'" 729 F.3d 753, 758 (7th Cir. 2013) (en banc). By contrast, the Ninth Circuit construed the phrase in the most expansive way it may be read: as an "actual 'person other than the defendant.'" Pet. App. 15a.

Petitioner Karen Gagarin's case illustrates why this distinction matters. Ms. Gagarin, an insurance agent, was convicted of aggravated identity theft for submitting a fraudulent life insurance application on behalf of her cousin, Melissa Gilroy. Pet. App. 7a. It is undisputed that Gilroy asked Ms. Gagarin "to sign [her] up for a policy" and instructed her to lie on the application. *Id.* At trial, the government conceded that Gilroy gave her identifying information to Ms. Gagarin and that Gilroy intended to defraud the insurance company. Excerpts of Record

(ER) 2644, 2765.[1] Ms. Gagarin thus submitted a fraudulent application with Gilroy's knowledge and consent and at her direction. In that sense, Ms. Gagarin's conduct was neither particularly aggravated nor identity *theft*, at least within the ordinary meaning of those words. And under the Seventh Circuit's construction of "another person," Ms. Gagarin would have been acquitted. Yet the Ninth Circuit upheld her conviction and her sentence pursuant to Section 1028A's singularly severe penalty provisions, which mandate a two-year mandatory minimum consecutive prison sentence and also explicitly forbids a court from downwardly adjusting the sentence for the underlying felony to compensate for the harshness of any resulting total sentence. *See* 18 U.S.C. § 1028A(b)(2),(3).

The sweeping interpretation offered by the court below almost entirely swallows the distinction between identity *theft* and identity *fraud*. It criminalizes and punishes a vast array of conduct—including petitioner's—as the former, when Congress has clearly done so as the latter. This case provides an ideal opportunity to resolve the conflict in the courts below and reject an expansive and erroneous construction of Section 1028A. In negative terms, "another person" means "a person who did not consent to the use of the 'means of identification,'" *Spears*, 729 F.3d at 758, or someone who is not "a willing participant in the predicate offense." Pet. App. 24a (Friedland, J., concurring). In positive terms, "another person" refers to

[1] Consistent with the Ninth Circuit rules, Ms. Gagarin will cite, where appropriate, to the Excerpts of Record in her case. *See* 9th Cir. Rule 30-1.1 (directing parties to compile excerpts of record instead of the appendix contemplated by Rule 30 of the Federal Rule of Appellate Procedure).

someone "different or distinct from" the individuals involved in a felonious scheme enumerated in Section 1028A(c). *Ocasio v. United States*, 136 S. Ct. 1423, 1441 (2016) (Sotomayor, J., dissenting).

This Court should grant the writ, rule that a knowing and consenting participant in the felonious use of her identifying information falls outside the bounds of "another person," and reverse the decision below.

1. In 2011, Benham Halali developed a scheme to defraud the American Income Life Insurance Company (AIL) by taking advantage of AIL's system of compensating agents for insurance policy sales. Pet. App. 5a. Halali ran four offices of the Jatoft-Foti Agency, the exclusive California sales agent of AIL. *Id.* Petitioner Karen Gagarin was employed as a General Agent in JFA's San Jose office, a role with sales and managerial responsibilities. *Id.* Together with Halali and other agents, Ms. Gagarin participated in a scheme wherein the group submitted hundreds of fraudulent insurance applications to AIL on behalf of individuals who, in general, did not intend to apply for life insurance or know that their identifying information was being used, and received commissions and bonuses for the policies purportedly sold. *Id.*

Uncontroverted evidence at trial established that Melissa Gilroy, a former AIL life insurance agent and Jatoft-Foti employee herself, wanted life insurance and asked her cousin Karen Gagarin "to sign [her] up for a policy." Pet. App. 7a. Gilroy testified that she asked Ms. Gagarin to lie on the application, instructing Ms. Gagarin to list Metro PCS as her employer even though Gilroy was unemployed at

the time. *Id.* Consistent with her cousin's request, Ms. Gagarin submitted an online insurance application on Gilroy's behalf, containing Gilroy's personal information and electronic signature. *Id.* In addition to the fictitious employment information, the application included other falsehoods that Gilroy did not specifically approve. *Id.*

At AIL's request, Gilroy underwent a medical examination. ER. 197-98. During that examination, Gilroy disclosed her health issues, but lied about her annual income. ER. 197-98, 2217-18. AIL declined to issue her a policy for medical reasons. ER. 202.

At trial, the Government told the jury that Gilroy was "unique among the policyholders who testified, in that she did intend to apply for some form of insurance. She is also unique in that she intended to lie in doing so." ER. 2644. The Government explained that "[t]he testimony with respect to Ms. Gilroy shows she gave her personal information, her means of identification to Karen Gagarin, because she wanted insurance. Karen Gagarin then used those means of identification to submit an application to AIL that contained false employment information." *Id.*

In short, Ms. Gagarin submitted a fraudulent insurance application in Gilroy's name with her knowledge and authorization. Though Gilroy did not specifically approve or direct some of the application's fraudulent details, it was undisputed, as the government told the jury, that Gilroy "was trying to defraud AIL by lying on her application." Pet. App. 7a; ER. 2765.

Gilroy, who testified pursuant to a grant of immunity, was never charged in connection with the policy application. Pet. App. 7a.

2. At trial, Ms. Gagarin was convicted of conspiracy to commit wire fraud, wire fraud, and aggravated identity theft. Pet. App. 8a. The application Ms. Gagarin submitted on Gilroy's behalf was the basis for the aggravated identity theft conviction. *Id.* Although Ms. Gagarin was "far less culpable" than her co-defendants and had no criminal history whatsoever, the district court sentenced her to 36 months in prison. *Id.* Bound by Section 1028A(b)(2) (barring concurrent sentences) and (b)(3) (barring a court from adjusting the sentence on other counts to compensate for the aggravated identity theft sentence), the district court sentenced Ms. Gagarin to the mandatory minimum 24 months for the aggravated identity theft conviction, to run consecutively to the 12-month sentence for the remaining counts. *Id.*

3. The Ninth Circuit upheld Ms. Gagarin's aggravated identity theft conviction, holding, *inter alia*, that she used the identifying information of "another person." Pet. App. 12a. Ms. Gagarin's petition for rehearing en banc was denied. Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

The circuit courts of appeals are divided on the meaning of "another person" in 18 U.S.C. § 1028A. The Seventh Circuit has held that it refers, in context, only "to a person who did not consent to the use of the 'means of identification,'" *Spears*, 729 F.3d at 758, while the Ninth Circuit construes the phrase to mean an "actual

'person other than the defendant.'" Pet. App. 15a. The Ninth Circuit's construction is not only erroneous, but it raises significant due process, separation of powers, and democratic accountability problems.

The question presented is also significant: prosecutions under Section 1028A are numerous; the statute carries a severe penalty that is sui generis in the federal criminal system; and, owing in part to the ambiguity of the statutory language, Section 1028A is applied in an arbitrary and discriminatory fashion. This Court's intervention is thus sorely needed. The instant case, which resulted in a published, precedential decision, provides an excellent vehicle to correct the error below and resolve the conflict.

I. The courts of appeals are divided on the application of Section 1028A

A. *United States v. Spears*

In a unanimous en banc opinion by then-Chief Judge Easterbrook, the Seventh Circuit held in *Spears* that the "another person" language of Section 1028A excludes a person who consented to the use of her means of the identification. *Spears*, 729 F.3d at 758. In *Spears*, the "victim" in the case, Tirsah Payne, asked the defendant to make a counterfeit handgun permit for her because she was awaiting trial on a drug charge and was barred from obtaining a legal permit. *Id.* at 754. The defendant did so, using Payne's real name and birthdate. *Id.* On appeal, Spears argued, *inter alia*, that Section 1028A did not apply to his conduct because Payne consented to the use of her personal information. *Id.* at 755. Although a three-judge

panel initially affirmed Spears's Section 1028A conviction, the Seventh Circuit, sitting en banc, reversed. *Id.*

The opinion first examined the textual referent of "another." The defendant argued that, from *Payne's* perspective, she had not received the means of identification of "another"—she had received a counterfeit card with her own identifying information on it. *Id.* at 755-56. The government argued that, from "Spears's perspective, Payne was the 'another.' On this view, Spears could give Payne a card bearing Spears's name but not anyone else's." *Id.* at 756. The court found both interpretations plausible and "[t]he phrase 'another person' . . . ambiguous: neither text nor context tells us whether 'another' means 'person other than the defendant' or 'person who did not consent to the information's use'." *Id.* at 756. But it noted the "surprising scope" of the statute under the government's reading:

> If the prosecutor is right, § 1028A acquires a surprising scope. It would, for example, require a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction, because the return is transferred to the IRS, concerns a person other than the preparer, includes a means of identifying that person (a Social Security number), and facilitates fraud against the United States (which 1028A(c)(4) lists as a predicate crime).

Id. at 756.

As this Court did in *Flores-Figueroa*, 556 U.S. at 655, the Seventh Circuit turned to the statute's caption, "Aggravated identity theft," to help resolve the ambiguity. *Id.* Focusing on the ordinary, common-sense meaning of "theft," the court explained that "[p]roviding a client with a bogus credential containing the

client's own information is identity *fraud* but not identity *theft*; no one's identity has been stolen or misappropriated." *Id.* at 756 (emphasis in original). Since the ordinary meaning of "theft" excludes consent to the use of the item at issue, interpreting "another person" to include one who consents to the felonious use of his information "treats § 1028A as forbidding document counterfeiting and other forms of fraud, a crime distinct from theft." *Id.*

As the *Spears* court pointed out, the statutory scheme reflects this common-sense distinction between fraud and theft. It noted that this Court "observed that 'Congress separated the fraud crime from the theft crime in the statute itself' by giving § 1028 and § 1028A different titles and placing the rules in different sections." *Id.* (quoting *Flores-Figueroa*, 656 U.S. at 655). Section 1028A's "next-door neighbor," Section 1028 ("Fraud and related activity in connection with identification documents"), "comfortably" encompassed Spears's conduct. *Id.* at 757. But "instead of using §1028, the prosecutor charged Spears under §1028A—which, if it means what the prosecutor says, would convert most identity fraud into identity theft and add a mandatory, consecutive, two-year term to every conviction, even though §1028 lacks any equivalent sentencing provision." *Id.*

For the *Spears* court, Section 1028A's unique sentencing provision also weighed in favor of a narrow reading of "another person." The court noted that Section 1028A's focus on a short list of serious predicate crimes—most of which concern financial and other types of fraud—partly explained its harsh sentencing approach. *Id.* (By contrast, Section 1028(a)(7) targets identity fraud in connection

with any federal offense or any state felony – some of which are significantly more serious than the predicate offenses for Section 1028A. *See id.*) But the main reason is that "identity *theft* has a victim other than the public at large . . . ." *Id.* Indeed, the Solicitor General told this Court that "'[t]he statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim.'" *Id.* (quoting Brief for the United States at *20, *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), No. 08-108, 2009 WL 191837 (hereinafter "Solicitor General's *Flores-Figueroa* Brief")). "The usual victim of identity theft may be out of pocket . . . or may be put to the task of rehabilitating a damaged reputation or credit history." *Id.* at 757.

In the Seventh Circuit's view, the statute's caption, its purpose, and the statutory structure clarify that "identity-theft crimes entail a victim whose information has been used without consent." *Id.* And to the extent that any ambiguity remained, the *Spears* court reasoned that the rule of lenity required that the court adopt the defendant's interpretation:

> Crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language. A reasonable person reading §1028A(a)(1) would not conclude that Congress has definitely used the word "another" to specify every person other than the defendant, as opposed to a person whose information has been misappropriated.

Id. at 758. The Seventh Circuit therefore held that "another person" refers "to a person who did not consent to the use of the 'means of identification.'" *Id.*

B. Ninth Circuit decision in this case

The court below began its analysis of the question presented here by summarizing *Spears*. Pet. App. 13a-14a. The Ninth Circuit declared that following *Spears* would conflict with its precedent in *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185-86 (9th Cir. 2015) (holding the illegal use of a means of identification constitutes use "without lawful authority," regardless of whether the means of identification was used with the knowledge and consent of its owner). Pet. App. 14a. In the court's view, "[t]hat the cases interpreted different words in the statute cannot obscure that *Spears* made available a consent defense that *Osuna-Alvarez* squarely rejected." Pet. App. 15a.

Although the panel thought itself bound by *Osuna-Alvarez* and rejected Ms. Gagarin's argument on that basis, two judges wrote that they were not "convinced by the interpretive analysis of *Spears* on its own terms." *Id.* In their view, "the phrase 'another person' does not appear particularly ambiguous on its face, especially when [the Ninth Circuit] ha[s] already determined the phrase refers to another 'actual person.'" *Id.* (citing *United States v. Maciel-Alcala*, 612 F.3d 1092, 1101 (9th Cir. 2010)).[2] Rather, "the plain reading of 'another person' seems . . . to be an actual 'person other than the defendant.'" *Id.* Since a statute's caption cannot alter the plain meaning of the text, Section 1028A's "Aggravated identity theft"

[2] Contrary to the panel's reasoning, the sole issue in *Maciel-Alcala* was whether the government must prove that a Section 1028A defendant knew the "person" was *alive*, which does not shed any light on the meaning of "another." *See Maciel-Alcala*, 612 F.3d 1092 (holding the term "person" means a real person, living or deceased).

caption was irrelevant. *Id.* Similarly, the rule of lenity did not apply because the phrase was unambiguous. *Id.*

Judge Friedland concurred that *Osuna-Alvarez* foreclosed Ms. Gagarin's argument, but disagreed with her colleagues' criticism of *Spears*. Pet. App. 23a. In her view, "*Spears* adopts a reasonable limiting interpretation of a statute that could otherwise be stretched to cover situations far afield from what its title says it is about: aggravated identity theft, not mere identity fraud." Pet. App. 23a-24a. Judge Friedland shared the Seventh Circuit's concern about the "risk, in reading the ambiguous text of 18 U.S.C. § 1028A too broadly, of sweeping in conduct involving a 'means of identification' that is hardly stolen from a victim." Pet. App. 24a. Under such an interpretation, and as in Ms. Gagarin's case, "the identity might . . . belong even to a willing participant in the predicate offense." *Id.* Judge Friedland concluded:

> If this appeal had arisen on a blank slate, I would have given serious consideration to adopting *Spears*'s holding. And for the reasons expressed in *Spears*, I believe there may be a need in future cases to adopt interpretations of the identity theft statute that help prevent it from being read to impose harsh sentences for offenses that do not actually involve identity theft. I therefore refrain from criticizing our sister circuit's sensible attempt to interpret this puzzling statute.

Pet. App. 24a-25a.

C. Related cases

To date, the Seventh and Ninth Circuits are the only courts of appeals to address the meaning of "another person." Other courts have interpreted different elements of Section 1028A, primarily "without lawful authority." *See, e.g.*, *United*

States v. Gatwas, 910 F.3d 362, 365 (8th Cir. 2018); *United States v. Mahmood*, 820 F.3d 177, 187 (5th Cir. 2016); *United States v. Otuya*, 720 F.3d 183, 189 (4th Cir. 2013); *United States v. Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013); *United States v. Lumbard*, 706 F.3d 716, 724 (6th Cir. 2013); *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499 (1st Cir. 2011). These cases, like the Ninth Circuit's decision in *Osuna-Alvarez*, have rejected consent defenses rooted in the "without lawful authority" element.[3]

The appellate courts have also grappled with the meaning of "use" and, incidentally, "during and in relation to," while the terms "possession" and "transfer" have largely gone unexamined. *See, e.g.*, *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) (narrowly construing "use"); *United States v. Berroa*, 856 F.3d 141, 155-57 (1st Cir. 2017) (criticizing "the government's reading of the statute [as] virtually unlimited in scope" and holding that "use" means "attempt[ing] to pass him or herself off as another person or purport[ing] to take some other action on another person's behalf"); *United States v. Miller*, 734 F.3d 530, 540-42 (6th Cir. 2013) (rejecting the government's "expansive" reading and holding that "the term must have practical boundaries, particularly in cases . . . where the only 'means of identification' used is a name."); *but see*, *e.g.*, *United States v. Munksgard*, 913 F.3d

[3] That result is unsurprising. One's consent to the felonious use of her means of identification is plainly "without *lawful* authority." *See*, *e.g.*, *Osuna-Alvarez*, 788 F.3d at 1185. By contrast, *Spears* and the lower court's decision in Ms. Gagarin's case dealt with the distinct requirement that the means of identification belong to "another person." *See Mahmood*, 820 F.3d at 189 (refusing to apply *Spears* to challenge under "without lawful authority").

1327, 1334-35 (11th Cir. 2019) (adopting broad reading of "use" as "'employing or converting to his service' another's name") (internal alterations omitted); *United States v. Michael*, 882 F.3d 624, 626-29 (6th Cir. 2018) (retreating from *Miller* and subsequent Sixth Circuit decisions, adopting a broad reading of "use" as employing or availing oneself of the means of identification, and holding that "[t]he salient point is whether the defendant used the means of identification to further or facilitate" the predicate offense.).

As these cases demonstrate, Section 1028A continues to be the source of significant litigation in the lower courts. Thus, this Court's intervention in Ms. Gagarin's case will have the salutary effect of bringing some much-needed clarity to a statute that has confounded the lower courts ever since its adoption.

II. This Court should resolve the split

The unique structure of Section 1028A's sentencing provision, and the harshness of any resulting sentences, even for first-time offenders, imbues this question of statutory interpretation with major significance.

1. The statute's penalty is without parallel in federal criminal law. It is the *only* federal criminal statute that carries a consecutive mandatory minimum prison sentence *and* prohibits a court from adjusting the sentence on other counts to offset it. 18 U.S.C. § 1028A(a)(1) (the defendant "shall . . . be sentenced to a term of imprisonment of 2 years"); *id.* § 1028A(b)(1) ("a court shall not place on probation any person convicted of a violation of this section"); *id.* § 1028A(b)(2) ("no term of imprisonment imposed on a person under this section shall run concurrently"); *id.* §

1028A(b)(3) ("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"). It is the *only* federal *fraud* statute with a consecutive mandatory minimum punishment and one of *very few* federal offenses of any kind with such a provision, placing it in the company of very serious federal crimes.[4] In Congress's judgment, then, defendants convicted of aggravated identity theft are particularly serious offenders, deserving of particularly serious punishment. The question is whether Congress intended that defendants like Ms. Gagarin, who acted with the knowledge and consent of the owner of the identifying information, suffer the same particularly serious punishment as those who steal or otherwise misappropriate the identifying information of other people.

2. While there is no comprehensive data on the frequency of the question presented here, cases such as Ms. Gagarin's, *Spears*, and some of the "without lawful authority" cases demonstrate that the question arises regularly. This is unsurprising. During fiscal years 2016-2019, over 1,000 persons were convicted of aggravated identity theft each year except fiscal year 2016, when the number was 996. United States Sentencing Commission, *Quick Facts: Section 1028A Aggravated*

[4] The other offenses are: use of a firearm in connection with a drug offense or crime of violence (18 U.S.C. § 924(c)(1)); possession or use of armor-piercing ammunition in connection with a crime of violence or a drug trafficking offense (18 U.S.C. § 924(c)(5)); carrying a firearm in connection to a crime of violence or drug trafficking (18 U.S.C. § 929(a)); use or transfer for use of fire or explosives to commit a felony (18 U.S.C. § 844(h) & (o)); failure to register as a sex offender followed by the commission of a crime of violence (18 U.S.C. § 2250(d)); commission of a sex offense with a minor when already a registered sex offender (18 U.S.C. § 2260A).

Identity Theft Offenses (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Aggravated_Identity_Theft_FY19.pdf (hereinafter "Sentencing Commission Quick Facts") (last visited Feb. 26, 2021). Even in fiscal year 2016, Section 1028A offenses amounted to 7.2 percent of all convictions carrying a mandatory minimum penalty. United States Sentencing Commission, *Mandatory Minimum Penalties For Identity Theft Offenses In The Federal Criminal Justice System* 4 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf (hereinafter "Sentencing Commission Identity Theft Report") (last visited Feb. 26, 2021). Beyond the number of individuals convicted of the offense, Section 1028A charges are even more frequently threatened, or charged and dismissed, as part of plea negotiations.

3. This Court's intervention in favor of Ms. Gagarin and similarly situated defendants is necessary to safeguard essential values, including due process, the separation of powers, and democratic accountability.

"It is a fundamental tenet of due process that '[no] one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Accordingly, "[i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell v. United States*, 349 U.S. 81, 83 (1955). Although "no citizen should be held accountable for a violation of a

statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed," *United States v. Santos*, 553 U.S. 507, 514 (2008), "[a] reasonable person reading §1028A(a)(1) would not conclude that Congress has definitely used the word 'another' to specify every person other than the defendant, as opposed to a person whose information has been misappropriated." *Spears*, 729 F.3d at 758.

These principles reinforce democratic accountability, "plac[ing] the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514. When Congress writes a criminal law without sufficient clarity, "the consequences should be visited upon the party more able to avoid and correct the effects of shoddy legislative drafting—namely, the federal Department of Justice." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012).

A decision from this Court in Ms. Gagarin's favor would also help preserve the separation of powers and fundamental fairness in the criminal justice system. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity . . . 'plainly and unmistakably.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). "Vague laws invite arbitrary power . . . leaving people in the dark about what the law demands and allowing prosecutors

and courts to make it up." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1222-23 (2018) (Gorsuch, J., concurring). Without "sufficient definiteness[, criminal statutes] encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Skilling v. United States*, 561 U.S. 358, 402-03 (2010).

4. At the very least, the "due process and equal protection [interests] in avoiding excessive prosecutorial discretion and in obtaining equal justice," *Batchelder*, 442 U.S. at 122-23, are heightened when, as here, the conduct prohibited and punishment imposed depends upon the circuit in which an individual is prosecuted.

The dangers of arbitrary and discriminatory prosecutions warned about by this Court's precedents—and explicitly recognized by the *Spears* court—are also reflected in the racial breakdown of those convicted under Section 1028A. *See Spears*, 729 F.3d at 758 ("Crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language"). In fiscal year 2019, 39.1 percent of individuals convicted under Section 1028A were Black, 29.8 percent were Hispanic, and only 27.0 percent were White. Sentencing Commission Quick Facts, *supra*. In fiscal year 2016, 58.7 percent of those convicted of a Section 1028A offense were Black, while Black offenders made up 49.8 percent of identity theft offenders overall. Sentencing Commission Identity Theft Report, *supra*, at 20. In contrast, *smaller* percentages of White offenders (18.7 percent compared to 20.9 percent) and Hispanic offenders (19.1 percent compared to 24.9 percent) were convicted of Section 1028A as compared to their proportion of overall identity theft offenders. *Id.*

While a comparison of the fiscal years 2016 and 2019 data shows significant recalibration in racial disparities over the past several years, it is indisputable that minorities, and especially Blacks, continue to be grossly overrepresented among those convicted of Section 1028A and sentence under its harsh consecutive mandatory minimum sentencing provisions.

Arbitrary enforcement of Section 1028A is an equally pressing concern: the evidence suggests that a serious penalty intended for very serious offenses and offenders has been consistently applied to individuals who, like petitioner, have little or no criminal history. In fiscal year 2019, 44.2 percent of individuals convicted under Section 1028A were in the lowest criminal history category, Category I. Sentencing Commission Quick Facts, *supra*. In contrast, 27.8 percent of those convicted of Section 1028A offenses were in the three highest criminal history categories *combined. Id.*

5. While the question presented asks this Court to consider only one part of the statute, it is nonetheless an important opportunity to "adopt [an] interpretation[] of the identity theft statute that help[s] prevent it from being read to impose harsh sentences for offenses that do not actually involve identity theft." Pet. App 24a-25a (Friedland, J., concurring). In turn, doing so would help mitigate the arbitrary and discriminatory manner in which the statute has been enforced.

III. This case is an ideal vehicle for resolving the split

The facts and procedural posture of this case make it an excellent vehicle to determine whether "another person" includes a consenting participant in a predicate offense under Section 1028A. The question is squarely and cleanly presented. It was raised and addressed at each stage of the proceedings below. Pet. App. 13a-16a, 23a-25a, 27a. It was thoroughly briefed and argued before the Ninth Circuit and decided in a published, precedential opinion by the court below. It would come before this Court on direct review, posing none of the issues that can arise on interlocutory or collateral review.

The facts of this case also clearly illustrate the significance of the question presented. Gilroy, Ms. Gagarin's cousin, asked for her help in submitting a fraudulent insurance policy application, and she obliged. Pet. App. 7a. Unlike "the usual victim of identity theft," *Spears*, 729 F.3d at 757, Gilroy suffered no financial loss or damage to her credit history, and if she was "put to the task of rehabilitating a damaged reputation," *id.*, it was because she conspired with Ms. Gagarin and aided and abetted her fraudulent conduct. Yet Ms. Gagarin received a 24-month consecutive sentence for that count – *double* the sentence for her conspiracy and fraud convictions. Pet. App. 8a-9a. Congress did not intend such an absurd result.

IV. The decision below is wrong

While the fracture among circuit courts is reason alone to grant review, certiorari is also necessary here because the sweeping interpretation adopted by the court below is erroneous.

"If the statutory language is plain, [courts] must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). Therefore, the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341; *see also King*, 576 U.S at 486.

Unmoored from its context, it is not unequivocally wrong to say that "the phrase 'another person' does not appear particularly ambiguous on its face," as the lower court did here. Pet. App. 15a. But "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). This Court's "duty, after all, is to construe statutes, not isolated provisions." *King*, 576 U.S. at 486 (internal quotation omitted). Properly read in context, "another person" in Section 1028A(a) means a person who did not consent to the unlawful use of her means of identification.

The dispute concerns the meaning of "another" in the context of identity theft. "'Another' is a relational word. It describes how one entity is connected to a

different entity. In particular, it describes an entity 'different or distinct from the one first considered.'" *Ocasio*, 136 S. Ct. at 1441 (Sotomayor, J., dissenting) (quoting Merriam-Webster's Collegiate Dictionary 51 (11th ed. 2003)). A person who consents to the use of her identification in the commission of a predicate offense is an accomplice in and co-conspirator to the aggravated identity theft committed by the principal. *See* 18 U.S.C. § 2(a) (aiding and abetting liability); 18 U.S.C. § 371 (general conspiracy statute). But if the "another" referent is construed as "anyone other than the defendant," it is hardly giving the term its plain meaning; rather, it is giving it the *unnatural* reading that someone who consents to the use of her identifying information is aiding and abetting, and also conspiring to commit, the aggravated identity theft of her *own* means of identification. *See* Pet. App. 24a (Friedland, J., concurring); *Spears*, 729 F.3d at 757.

Two Justices of this Court embraced a similar argument in *Ocasio*, 136 S. Ct. 1423. In *Ocasio*, the petitioner, a former police officer, was convicted of obtaining money from shopowners under color of official right (a violation of the Hobbs Act, 18 U.S.C. § 1951) and Hobbs Act conspiracy (in violation of 18 U.S.C. § 371). *Id.* at 1427. The Hobbs Act defines "extortion" as "the obtaining of the property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2). Petitioner argued that he and a co-conspirator "did not have the [common] objective of obtaining money 'from another' because the money in question was their own" and therefore "they were incapable of being members of the conspiracy." *Id.* at 1433. This Court rejected the argument, reasoning that the petitioner and the shopowners

shared the common criminal objective of enriching himself and other police officers: "The criminal objective on which petitioner [and the shopowners] agreed was that *petitioner and other Baltimore officers* would commit substantive violations of this nature. Thus, under well-established rules of conspiracy law, petitioner was properly charged with and convicted of conspiring with the shopowners." *Id.* at 1434 (emphasis in original).[5]

The Chief Justice and Justice Sotomayor dissented, explaining that "[t]he most natural reading of 'conspiring' to obtain property 'from another,' . . . is a collective agreement to obtain property from an entity different or distinct from the conspiracy." *Id.* at 1441 (Sotomayor, J., with whom the Chief Justice joins, dissenting). After all, "[i]f a group of conspirators sets out to extort 'another' person, we ordinarily think that they are proposing to extort money or property from a victim outside their group, not one of themselves." *Id.* at 1440. The dissenters also criticized the majority's "implicit assum[ption] that the Hobbs Act's use of 'from another,' takes as its reference point only a single member of the conspiracy . . . rather than the group of conspirators as a whole." *Id.* This assumption "was not based on the plain language of the Hobbs Act," as "[a] natural reading of the text

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[5] This Court also rejected the argument that it is "unnatural to prosecute bribery on the basis of a statute prohibiting 'extortion,'" noting that the petitioner did not ask this Court to overrule its decision in *Evans v. United States*, 504 U.S. 255 (1992), which held that "Hobbs Act extortion 'under color of official right' includes the 'rough equivalent of what we would now describe as 'taking a bribe.'" *Id.* (quoting *Evans*, 504 U.S. at 260). Justice Thomas dissented because, in his view, *Evans* was wrongly decided. *See id.* at 1437-40 (Thomas, J., dissenting); *cf. id.* at 1437 (Breyer, J., concurring).

seems to foreclose it – [the shopowners] are not 'distinct or different from' the group that formed the collective criminal agreement.'" *Id.*at 1442.

In Section 1028A, too, "the natural or logical way to interpret the phrase 'from another'" is a "victim outside the[] group" of participants in the criminal scheme. *Id.* at 1440. A person who consents to the unlawful use of her means of identification is a participant in the criminal scheme, not a victim.

At the very least, the term "another person" is ambiguous. The statute's caption, statutory structure, and legislative history confirm that the term excludes a person who consents to the unlawful use of her information.

Although "the title of a statute and the heading of a section cannot limit the plain meaning of the text," *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947), "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (citations omitted); *see also Yates v. United States*, 574 U.S. 528, 539 (2015) ("While these headings are not commanding, they supply cues that Congress did not intend 'tangible object' in §1519 to sweep within its reach physical objects of every kind").

This Court relied on Section 1028A's caption to elucidate whether the statute requires that a defendant know that the means of identification belongs to a real person. *See Flores-Figueroa*, 556 U.S. at 655. It noted that caption's choice of the word "theft" confirmed that Congress sought to provide "enhanced protections for individuals whose identifying information is used to facilitate the commission of

crimes," *id.* (quoting Solicitor General's *Flores-Figueroa* Brief at *5) but only when the defendant intended to cause this harm:

> Congress separated the fraud crime from the theft crime in the statute itself. The title of one provision . . . is "Fraud and related activity in connection with identification documents, authentication features, and information." 18 U.S.C. § 1028. The title of another provision . . . uses the words "identity *theft*." § 1028A (emphasis added).

Flores-Figueroa, 556 U.S. at 655. The plain meaning of the word "theft" is an instance of stealing, and excludes knowing, voluntary consent to the taking. *See*, *e.g.*, *Theft*, Black's Law Dictionary 1516 (8th ed. 2004) ("1. The felonious taking and removing of another's personal property with the intent of depriving the true owner of it; larceny. . . . 2. Broadly, any act or instance of stealing, including larceny, burglary, embezzlement, and false pretenses."). That Congress chose "Aggravated identity *theft*" as Section 1028A's title is an unmistakable indication of its intent.

The statutory structure sheds further light on the distinction between identity theft and fraud. In 2004, Congress passed the Identity Theft Penalty Enhancement Act, which added Section 1028A. Identity Theft Penalty Enhancement Act, Pub. L. No. 108–275, 118 Stat. 831 (2004). At the time, Section 1028 already criminalized producing, possessing, transferring or using false identification documents or identification documents without lawful authority. In the Act, Congress created a new offense, gave it a different title (concerning aggravated identity "theft" rather than aggravated "fraud"), and critically, included a far more severe penalty provision. But much of the conduct covered by Section 1028A was already prohibited by the various subsections of Section 1028. As a

result, if "another person" included a person who consents to the felonious use of her means of identification, Section 1028A "would convert most identity fraud into identity theft and add a mandatory, consecutive, two-year term to every conviction, even though §1028 lacks any equivalent sentencing provision." *Spears*, 729 F.3d at 757.

It is doubtful that Congress intended this result. For instance, it is doubtful that Congress meant to require "a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction, because the return is transferred to the IRS, concerns a person other than the preparer, includes a means of identifying that person (a Social Security number), and facilitates fraud against the United States." *Id.* at 756. Or that Congress meant to require a two-year consecutive sentence for the spouse who submits an inflated joint income figure on a credit card or mortgage application at the other spouse's suggestion, or the spouse who, with her partner's encouragement, submits a naturalization-by-marriage application that falsely states that the residence or physical presence requirements are met. *See* 18 U.S.C. § 1028A(c)(1), (c)(5). Yet these are exactly the results that the Ninth Circuit's reading allow. The overbreadth of the lower court's ruling should therefore give this Court considerable concern. *See Spears*, 729 F.3d at 757-78; *cf. Bond v. United States*, 572 U.S. 844, 862 (2014) (rejecting government's reading of statute banning use of chemical weapons "that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room.").

Section 1028A's legislative history also weighs in favor of a narrower interpretation of "another person." *Cf. Flores-Figueroa*, 556 U.S. at 655-57 (consulting the statute's legislative history with regard to whether the defendant must know that the identification belongs to a real person, but finding it inconclusive). According to the House of Representatives Judiciary Committee Report ("House Report"), the legislation "provides enhanced penalties for persons who *steal identities* to commit terrorist acts, immigration violations, firearm offenses, and other serious crimes." H.R. Rep. No. 108-528 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 2004 WL 1260964 (emphasis added). The House Report explains the bill criminalizes conduct "in which someone *wrongfully obtains* and uses another person's personal data in some way that involves fraud or deception[.]" *Id.* at 780 (emphasis added); *see also United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1243 (D.C. Cir. 2008) ("That Congress intended section 1028A(a)(1) to single out thieves—in the traditional sense of the word—for enhanced punishment finds additional support in the statute's legislative history."). The sponsor of the bill, Representative John Carter, explained, "This legislation addresses the growing occurrences of identity theft. It will facilitate the prosecution of criminals who steal identities in order to commit felonies." 150 Cong. Rec. H4808-01 (June 23, 2004) (statement of Rep. Carter), 2004 WL 1402606. The House Judiciary Committee Chair, Representative Jim Sensenbrenner, added, "This legislation will allow prosecutors to identify identity thieves who steal an identity, sometimes hundreds or even thousands of identities, for purposes of committing one or more crimes." *Id.*

(statement of Rep. Sensenbrenner). Moreover, "*Flores-Figueroa* observed that the examples in the legislative history of §1028A involve people injured when a third party used their names or financial information (credit card or Social Security numbers) without their consent." *Spears*, 729 F.3d at 757.

In fact, summarizing the statute's text, structure and legislative history, the Solicitor General told this Court in *Flores-Figueroa* that "the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim. . . . Section 1028A(a)(1) is a victim-focused statute whose overriding purpose is to provide enhanced protection for those whose personal identifying information is used to facilitate the commission of another crime." Solicitor General's *Flores–Figueroa* Brief at *20, 23. Congress, in other words, added Section 1028A and its severe punishment to the federal criminal code to protect the "real victims" of identity theft—not individuals who conspire to commit, or aid and abet, fraud involving their own means of identification.

Finally, to the extent that any ambiguity remains, it "should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). The rule of lenity "emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses." *Johnson v. United States*, 576 U.S. 613 (2014) (Thomas, J., concurring). "Schooled in the English tradition, American judges applied the principle of lenity from the start. . . . [A] review of early federal case law leaves one with the distinct impression that lenity was the most commonly applied substantive canon of construction." Amy Coney Barrett, *Substantive Canons and*

Faithful Agency, 90 B.U. L. REV. 109, 129 n.90 (2010). The principle "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). In its modern form, the rule of lenity may be invoked when "the recourse to traditional tools of statutory construction leaves any doubt about the meaning of . . . [a] term." *Yates*, 574 U.S. at 547. Thus, if "text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Here, the rule of lenity requires that "another person" be construed to exclude a person who consents to the unlawful, felonious use of her identifying information. Thus, a defendant commits aggravated identity theft only when he or she unlawfully uses someone's identifying information without that person's knowledge or consent. The harm that such an unsuspecting victim suffers is what makes the offense aggravated and what makes it identity theft. It is also the reason why Congress decided to attach a uniquely severe punishment for Section 1028A offenses. Ms. Gagarin may have been guilty of multiple crimes when she helped her cousin commit insurance fraud, but aggravated identity theft was not one of them. The lower court's holding to the contrary and limitless interpretation of Section 1028A cannot stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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