No. 20-7359

IN THE SUPREME COURT OF THE UNITED STATES

KAREN GAGARIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. McQUAID
Acting Assistant Attorney General

PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the trial evidence was sufficient to establish that petitioner "use[d], without lawful authority, a means of identification of another person," within the meaning of 18 U.S.C. 1028A(a)(1), when she forged another individual's signature on an insurance application that the individual never saw and that contained false representations that the individual did not authorize petitioner to make on her behalf.

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7359

KAREN GAGARIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 950 F.3d 596. The relevant order of the district court (Pet. 27a-33a) is not reported in the Federal Supplement but is available at 2017 WL 3232566.

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 extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court

judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on February 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; 14 counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A. Am. Judgment 1; Pet. App. 8a. Petitioner was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-25a.

1. a. Petitioner was an independent contractor for the Jatoft-Foti Agency (JFA), the exclusive sales agency in California for insurance policies issued by American Income Life Insurance Company (AIL). Pet. App. 5a; Presentence Investigation Report (PSR) ¶ 7; C.A. E.R. 262, 266-268. Petitioner was a General Agent in JFA's office in San Jose, California, working under coconspirator Benham Halali, who ran that and other offices. Pet. App. 5a; PSR ¶ 7; C.A. E.R. 674-675. Petitioner had both sales and managerial responsibilities, including training agents who reported to her and overseeing the San Jose office when Halali was absent. Pet. App. 5a; PSR ¶¶ 7, 19; C.A. E.R. 531, 675, 777-778.

JFA agents were compensated with a combination of commissions and bonuses based on their policy sales, and petitioner was compensated with commissions and bonuses based on sales made by the agents who reported to her. Pet. App. 5a; PSR ¶ 7; C.A. E.R. 266-272, 417.

Beginning in approximately September 2011, petitioner and her coconspirators engaged in a scheme devised by Halali to defraud AIL by submitting fraudulent life-insurance applications in order to inflate their bonuses and commissions. Pet. App. 5a-6a; PSR ¶ 8; C.A. E.R. 743-744, 868-870, 1179-1185, 1223-1224, 1235-1236, 1520-1521, 1536-1546, 1651-1653, 1922-1923, 2240-2242. The coconspirators obtained personal identifying information for real individuals and used it to submit hundreds of fraudulent applications for life insurance to AIL. Pet. App. 5a-6a; PSR ¶ 8. Although the applications contained certain true information about the purported applicants, including their real names, social-security numbers, birthdates, and sometimes addresses, the applications also included various false information, such as the names of beneficiaries, the ownership of the bank accounts used to fund policies, and the names of the issuing insurance agents. C.A. E.R. 560-571, 615-628, 633-644, 651-666, 869, 887-901, 907-918, 921-932, 1142-1154, 1158-1167, 1904-1914, 2163-2177, 2415-2425, 2449-2464.

At the time of the conspiracy, AIL used an electronic application process. C.A. E.R. 370. In furtherance of the conspiracy, the coconspirators forged the signature of a supposed

policy applicant by typing the applicant's name into the AIL application without the applicant's consent. Id. at 561-571, 622-624, 641-642, 660-662, 870, 895-898, 911, 915-918, 929-931, 1150-1153, 1162-1163, 1165-1167, 1912-1914, 2168-2170, 2424, 2452-2453, 2461-2462. The forged signatures on an application affirmed, among other things, that the information on the application was true and accurate; that the applicant wished to apply for life insurance in a particular amount; and that the applicant authorized AIL to withdraw the premium amount from a specified bank account over which the applicant had control. Id. at 173-174, 290-292, 295-296.

Under AIL's compensation system, agents (including petitioner and her coconspirators) received advance commissions and bonuses at the time a policy issued -- based on the amount of premiums that the policy was expected to generate for approximately seven months -- which the agents would retain unless the policy lapsed during its first four months. In order to profit from those commissions and bonuses, after AIL approved an application, the coconspirators themselves paid the premiums on that policy for approximately four months before allowing it to lapse. The amount of money the coconspirators generated in commissions and bonuses exceeded the amount they were required to pay in premiums for the few months necessary to convince AIL that the policies were legitimate. See Gov't C.A. Br. 6-7; Pet. App. 5a-6a; C.A. E.R. 704-705, 721, 866, 1536-1538, 1544-1545, 2119-2128.

The coconspirators concealed from AIL that they, rather than the supposed applicants, were in fact paying the premiums themselves from bank accounts that the coconspirators had opened and funded for purposes of carrying out the scheme. Pet. App. 5a-6a; C.A. E.R. 289, 721-726, 1126, 1545-1548, 1599-1600, 1617-1618. Over the course of the conspiracy, AIL paid approximately $2.8 million in advanced commissions and bonuses for fraudulent policies where the premiums had been paid from bank accounts opened by the coconspirators. C.A. E.R. 115; PSR ¶ 21.

b. Of particular relevance here is a life-insurance application that AIL received in September 2011 on behalf of Melissa Gilroy, who is petitioner's cousin. Pet. App. 7a; PSR ¶ 15; C.A. E.R. 2190-2191. After suffering a health scare, Gilroy wished to apply for life insurance and asked petitioner to "sign her up for a policy." Pet. App. 7a (brackets omitted); PSR ¶ 15; C.A. E.R. 2193-2195. Petitioner and Gilroy "discussed in a general sense Gilroy's desire that [petitioner] help her find an insurance policy," but Gilroy never signed an application and "never asked [petitioner] to sign an insurance application in [Gilroy's] name." Pet. App. 11a. "[N]or did the two ever discuss specifics, such as the type or amount of coverage Gilroy wanted or the premium she would be willing to pay." Ibid.; see id. at 7a-8a, 11a-12a.

Without Gilroy's knowledge, however, petitioner nevertheless "executed and submitted" to AIL an application on behalf of Gilroy that "Gilroy never saw." Pet. App. 7a, 11a; see PSR ¶ 15. The

application stated Gilroy's true name and date of birth and bore what purported to be Gilroy's electronic signature in several places. Pet. App. 7a; see id. at 7a-8a, 11a; see also C.A. E.R. 173, 2197. The electronic signatures verified that Gilroy was the payor on the policy and that all information in the application was true and correct to the best of Gilroy's knowledge. Pet. App. 7a.

The application, however, contained various false representations that, with one exception, Gilroy had never asked petitioner to make. Pet. App. 7a. For example, Gilroy had not "asked [petitioner] to lie about the nature of [Gilroy's] relationship with the intended beneficiary" -- Gilroy's boyfriend -- but the application falsely described the boyfriend as Gilroy's husband. Pet. App. 7a; see C.A. E.R. 173, 2198-2200. In addition, although Gilroy had "intended to pay for the policy herself and never asked [petitioner] to pay for it through anyone else's bank account," the application listed Gilroy as the payor while stating that premiums would be paid from a bank account owned by the brother of one of petitioner's coconspirators, which petitioner later replaced with an account held in petitioner's name that had been created for the coconspirators' scheme. Pet. App. 7a; see PSR ¶ 15; C.A. E.R. 173, 194-195, 2121-2123, 2200-2201.

The application that petitioner submitted did contain one misrepresentation that Gilroy had requested. See Pet. App. 7a. Although Gilroy intended to pay for the policy, she was not

employed at the time and expected that her mother and boyfriend would assist her in paying the premiums. Pet. App. 7a; C.A. E.R. 2194-2195. Gilroy had worried that AIL would deny her application if it disclosed her unemployed status. Pet. App. 7a. She had accordingly asked petitioner to state in an application that Gilroy was employed as a manager at Metro PCS. See ibid.; C.A. E.R. 2197-2198, 2226. The application that petitioner signed and submitted on Gilroy's behalf, without Gilroy's knowledge, listed Gilroy's occupation accordingly. C.A. E.R. 173.

AIL ultimately denied the application. C.A. E.R. 2203-2204.

2. A federal grand jury in the Northern District of California returned an indictment charging petitioner and four codefendants with various counts of conspiring to commit wire fraud, wire fraud, and aggravated identity theft. Pet. App. 8a; Indictment 1-8. Two of the codefendants pleaded guilty; the three others, including petitioner, proceeded to trial. Pet. App. 8a.

Following a four-week trial, a jury found petitioner guilty on all charges tried, including one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; 14 counts of wire fraud, in violation of 18 U.S.C. 1343, including one based on the fraudulent insurance application petitioner submitted on behalf of Gilroy; and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A. Am. Judgment 1. Section 1028A provides that "[w]hoever, during and in relation to" any of several felonies listed in Section 1028A(c) -- which include wire fraud --

"knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c). The aggravate-identity-theft count was based on petitioner's unlawful possession, transfer, or use of Gilroy's identification in connection with the wire-fraud count that was based on the insurance application that petitioner submitted on Gilroy's behalf. Pet. App. 8a.

Petitioner filed a post-trial motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, asserting insufficient evidence to support the wire-fraud and aggravated-identity-theft counts based on the Gilroy application. Pet. App. 8a; see id. at 29a. The district court denied the motion. Id. at 29a-32a. With respect to the aggravated-identity-theft count, the district court observed that "the application contained numerous false statements with regards to Gilroy"; that "Gilroy testified that she did not sign or type her name in either of the two places in which her signature appears on the application"; and that, "[o]n this record, the jury could have reasonably concluded that [petitioner] 'used' Gilroy's forged signatures as part of the wire fraud scheme." Id. at 32a.

In its presentence report, the Probation Office calculated petitioner's advisory Sentencing Guidelines range to be 78-97 months of imprisonment on the conspiracy and wire-fraud counts, in

addition to a 24-month consecutive term on the aggravated-identity-theft count as required by Section 1028A. PSR ¶ 64; see 18 U.S.C. 1028A(a)(1) and (b)(2) (imposing a two-year term of imprisonment for a violation of Section 1028A(a)(1), which cannot run concurrently with any other term of imprisonment). The Probation Office recommend a sentence of one day on the conspiracy and wire-fraud counts and 24 months on the aggravated-identity-theft counts. PSR Sentencing Recommendation 1-2. The district court sentenced petitioner to a total of 36 months of imprisonment, consisting of 12 months of imprisonment on the conspiracy and wire-fraud counts, to run concurrently with one another; and to 24 months of imprisonment on the aggravated-identity-theft count, to run consecutively to all other counts. Am. Judgment 3.

3. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court of appeals rejected petitioner's contention that the trial evidence was insufficient to establish that she "use[d], without lawful authority, a means of identification of another person." Pet. App. 10a (quoting 18 U.S.C. 1028A(a)(1)); see id. at 10a-16a. The court first determined that, "[v]iewing the facts in the light most favorable to the prosecution," petitioner's "actions constituted 'use' under the meaning of the aggravated identity theft statute." Id. at 11a-12a; see id. at 10a-12a. The court noted that it had previously interpreted "use" in Section 1028A, drawing on decisions of other circuits, to be satisfied if defendants "attempt[] to pass themselves off" as

another person or "purport to take some other action on another person's behalf through impersonation or forgery," and that "the salient point is whether the defendant used the means of identification to further or facilitate" the underlying offense. Id. at 10a-11a (brackets and citations omitted). And the court found that petitioner here had "purported to take action on behalf of * * * Gilroy, and in so doing used Gilroy's identity to further the fraudulent insurance application." Id. at 11a. It observed that "the inescapable inference" from petitioner's conduct is that she "forged Gilroy's signature" on the application, which "falsely conveyed the impression that Gilroy herself certified" the accuracy of false representations that petitioner made on the application. Id. at 11a-12a. The court explained that petitioner had thereby "'attempted to pass herself off' as [Gilroy] through forgery and impersonation," and that her forgery of Gilroy's signature made her fraud "'much harder to detect'" by "obscuring [petitioner's] own role in the fraudulent application." Id. at 12a (brackets and citations omitted).

The court of appeals next rejected petitioner's contention "that she did not act 'without lawful authority.'" Pet. App. 12a; see id. at 12a-13a. The court observed that Section 1028A's "prohibition of the use of another person's means of identification 'without lawful authority' 'clearly and unambiguously encompasses situations . . . where an individual grants the defendant permission to possess his or her means of identification, but the

defendant then proceeds to use the identification unlawfully.'" Id. at 12a-13a (citation omitted). The court noted that Section 1028A "does not require theft as an element of the offense." Id. at 12a (citation omitted). It additionally observed that petitioner "acknowledge[d] that," under circuit precedent, "even if Gilroy consented to the submission of the insurance application, th[at] would not mean that [petitioner] had 'lawful authority.'" Id. at 13a. And the court disagreed with petitioner's suggestion that Section 1028A required the government to "show that her use of the means of identification was 'itself illegal,'" reasoning that the statute already prescribes "the degree of connection between the use of the identity and the predicate felony" by providing that "the use must be 'during and in relation to' specified unlawful activity." Ibid.

Finally, the court of appeals rejected petitioner's contention that she had not used a means of identification of "another person" by forging Gilroy's signature on the insurance application. Pet. App. 13a; see id. at 13a-16a. Petitioner urged the court to "construe[] the phrase 'another person' in the aggravated identity theft context to mean 'a person who did not consent to the use of the means of identification.'" Id. at 13a (citation omitted). Petitioner relied on the Seventh Circuit's decision in United States v. Spears, 729 F.3d 753 (2013) (en banc), which concluded that a defendant did not violate Section 1028A by creating a counterfeit handgun permit for an individual who was

unable to obtain a legitimate permit and provided the counterfeit permit to that individual, who in turn used it in an unsuccessful attempt to obtain a handgun. Id. at 754-758; see Pet. App. 13a-14a. Although petitioner argued that the "another person" requirement was not satisfied in this case "because Gilroy requested that [petitioner] file an insurance application for her," Pet. App. 14a, the court of appeals both noted that petitioner's argument was inconsistent with Ninth Circuit precedent recognizing that a person may violate Section 1028A "regardless of whether the means of identification was stolen or obtained with the knowledge and consent of its owner," id. at 14a-15a (citation omitted), and found petitioner's interpretation unpersuasive "on its own terms," id. at 15a. And it explained that "[t]he plain reading of 'another person'" naturally refers to "an actual 'person other than a defendant.'" Ibid. (citation omitted). The court found that Section 1028A's caption ("Aggravated Identity Theft") "does not alter th[at] plain meaning" and that "[r]ecourse to the Rule of Lenity is not necessary because 'another person' is unambiguous." Ibid.

b. Judge Friedland concurred in part. Pet. App. 23a-25a. She joined all of the panel's opinion except for one paragraph in which it criticized petitioner's interpretation of "another person." Id. at 23a. Judge Friedland stated that, if it were not foreclosed by circuit precedent, she "would have given [that reading] serious consideration." Id. at 24a.

ARGUMENT

Petitioner renews her contention (Pet. 6-29) that the trial evidence was insufficient to establish that she used without lawful authority the means of identification "of another person," within the meaning of 18 U.S.C. 1028A(a)(1), when she forged Gilroy's signature on an insurance application that she prepared and submitted without Gilroy's authorization. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. This Court has previously denied petitions for writs of certiorari that have raised other, similar issues concerning the scope of Section 1028A(a)(1). See Munksgard v. United States, 140 S. Ct. 939 (2020) (No. 19-5457); Gatwas v. United States, 140 S. Ct. 149 (2019) (No. 18-9019); Santana v. United States, 139 S. Ct. 1446 (2019) (No. 18-682); Perry v. United States, 137 S. Ct. 2239 (2017) (No. 16-7763) Bercovich v. United States, 577 U.S. 1062 (2016) (No. 15-370); Osuna-Alvarez v. United States, 577 U.S. 913 (2015) (No. 15-5812); Rodriguez-Ayala v. United States, 577 U.S. 843 (2015) (No. 14-10013); Otuya v. United States, 571 U.S. 1205 (2014) (No. 13-6874). The same result is warranted here.

1. Section 1028A(a)(1) requires a consecutive two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means

of identification of another person." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(b). The court of appeals found that the trial evidence was sufficient to establish that petitioner used a means of identification without lawful authority by forging Gilroy's signature on an insurance application that petitioner executed and submitted on Gilroy's behalf, which Gilroy neither authorized petitioner to sign and submit nor even saw, and which contained falsehoods that Gilroy did not direct petitioner to make. Pet. App. 10a-13a. Petitioner does not contest those determinations. Instead, petitioner contends solely that she did not use a means of identification "of another person," which she contends should be construed to encompass only "a person who did not consent to the use of the 'means of identification.'" Pet. 2 (citation omitted); see Pet. 20-29. The court of appeals correctly rejected that contention. Pet. App. 13a-16a.

a. As the court of appeals explained, the "plain reading of 'another person'" is "an actual person 'other than the defendant.'" Pet. App. 15a (citation omitted); see United States v. Zuniga-Arteaga, 681 F.3d 1220, 1224 (11th Cir. 2012) ("[I]t seems natural to read 'a means of identification of another person' as simply 'a means of identification of anyone other than the defendant.'"). Under that "plain reading," Pet. App. 15a, petitioner undoubtedly used a means of identification of "another person" by forging the signature of another individual -- Gilroy -- on an insurance application.

Petitioner acknowledges (Pet. 21) that the phrase "another person" supports that plain reading, but argues that "context" requires construing it more narrowly in Section 1028A(a)(1). Petitioner does not, however, identify anything in Section 1028A(a)(1) that requires proof that a defendant obtained or used another person's means of identification without his or her consent -- let alone anything that requires construing the words "another person" to silently contain that unstated limitation. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." Bates v. United States, 522 U.S. 23, 29 (1997); see, e.g., Brogan v. United States, 522 U.S. 398, 406 (1998); United States v. Wells, 519 U.S. 482, 490-493 (1997). That approach is especially appropriate here because Congress often does expressly provide that an action constitutes a crime only if it is done without "consent" or "permission," see, e.g., 18 U.S.C. 290, 1165, 1365(f)(1), 1793, 1863, 1992(a), 2113(e), 2199, 2319A(a), but Congress did not do so in Section 1028A(a)(1).

Instead, Section 1028A(a)(1) requires only that the defendant took or used another person's means of identification during and in relation to a covered crime "without lawful authority." 18 U.S.C. 1028A(a)(1). Lawful authority is not equivalent to consent. The most natural construction of the phrase "without lawful authority" in Section 1028A(a)(1) is that it prohibits the use of another person's identifying information "'without a form of authorization recognized by law.'" United States v. Otuya,

720 F.3d 183, 189 (4th Cir. 2013) (citation omitted), cert. denied, 571 U.S. 1205 (2014); see United States v. Reynolds, 710 F.3d 434, 436 (D.C. Cir. 2013) ("'[U]se[] . . . without lawful authority' easily encompasses situations in which a defendant gains access to identity information legitimately but then uses it illegitimately -- in excess of the authority granted." (second set of brackets in original)). Consistent with those principles, the courts of appeals to consider the question have "universally rejected th[e] argument" that Section 1028A(a)(1)'s "without lawful authority" element "require[s] actual theft or misappropriation of the means of identification." United States v. Osuna-Alvarez, 788 F.3d 1183, 1185 (9th Cir.) (per curiam), cert. denied, 577 U.S. 913 (2015); see United States v. Etenyi, 720 Fed. Appx. 445, 454-455 (10th Cir. 2017); United States v. Mahmood, 820 F.3d 177, 187-188 (5th Cir.), cert. denied, 137 S. Ct. 122 (2016); United States v. Zitron, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam); Otuya, 720 F.3d at 189; Reynolds, 710 F.3d at 436; United States v. Lumbard, 706 F.3d 716, 721-725 (6th Cir. 2013); United States v. Ozuna-Cabrera, 663 F.3d 496, 498-501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); United States v. Retana, 641 F.3d 272, 274-275 (8th Cir. 2011). And petitioner does not contest in this Court that her conduct satisfied that element.

b. Petitioner notes (Pet. 24-26) that Section 1028A is captioned "[a]ggravated identity theft," and she contends that the use of another person's identity with that person's permission

does not constitute "theft" and is better described by the caption of 18 U.S.C. 1028, which refers to identity "[f]raud." But "the title of a statute * * * cannot limit the plain meaning of the text." Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (citation omitted). Here, the text of Section 1028A(a)(1) unambiguously covers petitioner's conduct. Moreover, another portion of Section 1028A -- which specifies increased penalties for persons who use "a false identification document," whether or not that document reflects the identity of another person, 18 U.S.C. 1028A(a)(2) -- unquestionably encompasses conduct that cannot be described as "theft." The reference to identity "theft" in Section 1028A's title is therefore "but a short-hand reference to the general subject matter of the provision," Lawson v. FMR LLC, 571 U.S. 429, 446 (2014) (citation and internal quotation marks omitted), rather than a limitation on the statute's scope.

Petitioner also asserts (Pet. 27-28) that "the examples in the legislative history of [Section] 1028A involve people injured when a third party used their names or financial information * * * without their consent." But legislative history "need not be consulted when, as here, the statutory text is unambiguous." United States v. Woods, 571 U.S. 31, 46 n.5 (2013) (citation omitted). That is especially true where the legislative history is itself unclear. See Milner v. Department of Navy, 562 U.S. 562, 572 (2011) ("We will not * * * allow[] ambiguous legislative

history to muddy clear statutory language."). And that is the case here.

The legislative history does not suggest that Congress intended Section 1028A(a)(1) to apply only when a defendant uses another person's means of identification without permission. Although the House Report that petitioner cites (Pet. 27) "is replete with references to 'theft' and 'thieves,' and that one stated purpose of the statute is to increase sentences for 'identity thieves,'" United States v. Ozuna-Cabrera, 663 F.3d 496, 500 (1st Cir. 2011) (quoting H.R. Rep. No. 528, 108th Cong., 2d Sess. 3 (2004) (House Report)), cert. denied, 132 S. Ct. 1936 (2012), it also includes fraudulent use of another person's identity that did not involve theft -- such as a woman who worked using her husband's social-security number while collecting disability benefits. Ibid. (citing House Report 6). The legislative history thus confirms what the text demonstrates: "Congress intended [Section] 1028A to address a wide array of identity crimes, and not only those iterations involving conventional theft." Ibid.

c. Petitioner does not contend that the court of appeals' interpretation conflicts with any decision of this Court. She states (Pet. 22) that a dissenting opinion joined by two Justices in Ocasio v. United States, 136 S. Ct. 1423 (2016), "embraced a similar argument" in the context of conspiracy liability for extortion under the Hobbs Act, 18 U.S.C. 1951. See Pet. 22-24

(discussing Ocasio, 136 S. Ct. at 1440-1446 (Sotomayor, J., joined by Roberts, C.J., dissenting)). But as petitioner acknowledges, (Pet. 22), "[t]his Court rejected th[e] argument" that the dissent advocated, which itself involved a factual scenario distinct from the one here, see pp. 23-24, infra. Petitioner also notes that, in addressing the mens rea required by Section 1028A(a)(1), the Court in Flores-Figueroa v. United States, 556 U.S. 646 (2009), "relied on Section 1028A's caption" in concluding that a defendant must know that a means of identification that he or she uses belongs to another person. Pet. 24 (citing Flores-Figueroa, 556 U.S. at 655). But the Court did so only after finding "strong textual reasons" for the interpretation it adopted grounded in "ordinary English grammar." Id. at 650. And the Court discussed the provision's caption in its analysis of "the statute's history," which the Court ultimately found to be "inconclusive" on the question at issue. Id. at 655.

2. Petitioner contends (Pet. 7-19) that review is warranted to resolve a conflict among the courts of appeals regarding the scope of Section 1028A. That contention lacks merit. The courts of appeals broadly agree on the conduct covered by that provision. In particular, they have uniformly rejected the argument that Section 1028A(a)(1) prohibits only theft or misappropriation of another person's means of identification. See pp. 15-16, supra.

Petitioner asserts (Pet. 7-12) that the decision below conflicts with the Seventh Circuit's decision in United States v.

Spears, 729 F.3d 753 (2013) (en banc), with respect to the meaning of "another person." She acknowledges (Pet. 12), however, that no other court of appeals has addressed that issue and that the other decisions she discusses concerned "different elements of Section 1028A." And although the court of appeals here acknowledged a difference between its approach and the Seventh Circuit's, see Pet. App. 14a-15a & n.3, the particular decision here does not implicate any conflict that warrants this Court's review.

In Spears, the defendant had produced a counterfeit handgun permit for a woman who could not lawfully obtain such a permit, using the woman's own identifying information. 729 F.3d at 754. The defendant did not use the counterfeit permit himself and was charged only with "transfer[ring]" the permit to the woman for whom he made it. Id. at 755. The Seventh Circuit concluded that the defendant had not violated Section 1028A(a)(1) because he did not "transfer" to the woman the means of identification "of another person"; in the court's view, he had transferred to her a counterfeit permit that contained her own identifying information, which she then used in an unsuccessful attempt to obtain a handgun. Id. at 755-756, 758. The court reasoned that, to violate Section 1028A(a)(1) by "transfer[ring] * * * a means of identification of another person," 18 U.S.C. 1028A(a)(1), one must transfer the means of identification to someone other than the person whom it identifies. See Spears, 729 F.3d at 756-758.

The facts of this case differ markedly, and the court of appeals' application of Section 1028A here does not conflict with the Seventh Circuit's conclusion in Spears. Petitioner did not produce an insurance application using Gilroy's means of identification and then provide it to Gilroy for use in an attempt by Gilroy to defraud an insurer. Instead, without Gilroy's authorization, petitioner prepared an insurance application, on which petitioner forged Gilroy's signature attesting to the truthfulness of multiple false representations that (with one exception) petitioner herself introduced without Gilroy's knowledge, and which petitioner then submitted to a third party (AIL) to garner benefits for herself and her coconspirators. See pp. 5-7, supra. By relying on a means of identification in dealing with an entity (AIL) other than the person identified (Gilroy), petitioner used a means of identification of "another person." The Seventh Circuit's concern in Spears about the absence of "a real victim" is not implicated here. 729 F.3d at 757 (citation omitted).

Petitioner relies (Pet. 8, 10) on the Seventh Circuit's statement in Spears that the phrase "'another person'" in Section 1028A(a)(1) refers to "a person who did not consent to the use of the 'means of identification.'" 729 F.3d at 758. But that statement was made in the context of the unusual facts of Spears; as the court's opinion in that case makes clear, it was focused on the fact that the means of identification at issue was being

transferred to the very person it identified. See ibid.; see also id. at 756. The Seventh Circuit noted that the offense conduct in Spears, transferring to a client a "bogus credential containing the client's own information," id. at 756, fit more comfortably within 18 U.S.C. 1028 (which criminalizes fraud in connection with identification documents) than Section 1028A, Spears, 729 F.3d at 756-757. The Seventh Circuit did not implicitly hold that an individual who uses another person's identification in dealings with a third party while committing a listed felony is immune from liability under Section 1028A so long as the other person consents -- a conclusion that would be at odds with the law of every other circuit to consider the issue, see pp. 15-16, supra.

Subsequent decisions of the Seventh Circuit further undermine petitioner's broad reading of Spears. That court has described Spears narrowly, as concluding "that manufacturing a false means of identification for a customer using the customer's own identifying information does not violate [Section] 1028A." United States v. Zheng, 762 F.3d 605, 609 (7th Cir. 2014); see ibid. (describing the question presented in Spears as "whether a defendant who makes a fake document containing a person's identifying information and transfers the counterfeit document to that person commits aggravated identity theft"). The court has accordingly not applied the "consent" language of Spears in a case like this one, where a defendant is charged with using another person's identifying information in dealings with a third party

while committing a listed felony. To the contrary, the Seventh Circuit has set forth the elements of Section 1028A(a)(1) in such a case without any reference to a lack-of-consent requirement. See United States v. Thomas, 763 F.3d 689, 692 (2014).

In any event, even if it were correct to read Spears as concluding categorically that a Section 1028A(a)(1) violation cannot occur if the person identified by a means of identification consented to the defendant's use of it, the decision below would not conflict with Spears because, as the court of appeals found, petitioner used Gilroy's means of identification in ways to which Gilroy had not consented. As the court explained, Gilroy testified that she "discussed in a general sense Gilroy's desire that [petitioner] help her find an insurance policy" and had asked petitioner to state falsely that she was employed so she would get insurance, Pet. App. 11a; see id. at 7a, but petitioner exceeded that consent by using the means of identification in furtherance of a wire-fraud scheme, to which Gilroy was not a party, designed to defraud an insurance company, id. at 7a-8a, 11a-12a. Specifically, even though Gilroy and petitioner had not "discuss[ed] [the] specifics" of her desired insurance coverage such as coverage amount and premium, and even though Gilroy "never asked [petitioner] to sign an insurance application in [Gilroy's] name," petitioner prepared a complete application (including for a coverage amount and premium Gilroy had not approved), electronically signed it in several places, and submitted it to

AIL. Id. at 11a; see id. at 7a-8a, 11a-12a. And petitioner included in the application several false representations that Gilroy testified that she had not asked petitioner to make, including Gilroy's relationship to the beneficiary and the identity of the payor. See id. at 7a, 11a-12a.

As the court of appeals determined, "the inescapable inference is that [petitioner] forged Gilroy's signature in two places on th[e] application," Pet. App. 11a, and thus necessarily exceeded Gilroy's limited consent. At a minimum, in light of that determination, this case would be an unsuitable vehicle to address the question presented concerning whether Section 1028A applies where a defendant uses another person's means of identification with the consent of that person. To the extent that petitioner disputes the court of appeals' factual determination that petitioner exceeded Gilroy's consent, see, e.g., Pet. 3 (asserting that petitioner "submitted a fraudulent application with Gilroy's knowledge and consent and at her direction"), that case-specific factual issue would not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. McQUAID
Acting Assistant Attorney General

PAUL T. CRANE
Attorney

MAY 2021