No. 20-7359

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

REPLY BRIEF FOR THE PETITIONER

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The Ninth Circuit erroneously held that "another person" in the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), includes a person who consented to the felonious use of her identifying information. The government provides no sound basis for allowing the decision to go unreviewed. The Ninth Circuit's published, precedent-setting decision conflicts with the Seventh Circuit's decision in *United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013) (en banc). It also conflicts with Congress's intent in enacting the statute: the protection of "real victims" of identity theft. The Court should grant review.

I. The case is an ideal vehicle for resolving the circuit split

Ms. Gagarin submitted a fraudulent insurance application on her cousin's behalf with her knowledge and consent. Uncontroverted evidence presented at trial

showed that Melissa Gilroy, a former insurance agent herself, asked Ms. Gagarin to "sign [her] up" for a policy and instructed Ms. Gagarin to lie about her being employed at the time. Pet. App. 7a. Gilroy testified that she did not review the application, which included several falsehoods in addition to her fictitious employment information. *Id*. After Ms. Gagarin submitted the application, however, Gilroy underwent a medical examination at the insurance company's request. ER 197-98, 2217-18. During the examination, Gilroy lied about her annual income. *Id*. Thus, although the jury could have concluded that Ms. Gagarin exceeded Gilroy's consent in including additional falsehoods in the application, it was undisputed that Gilroy consented to the fraudulent use of her means of identification. *See* Pet. 4-6.

Because Ms. Gagarin exceeded her cousin's consent, the government asserts that the case is an unsuitable vehicle to address the question presented. Br. in Opp. 23-24. Not so. Gilroy's purported ignorance of Ms. Gagarin's additional falsehoods did not in any way diminish her consent to the fraudulent use of her personal information or its legal significance. *See*, *e.g.*, *United States v. Martin*, 803 F.3d 581, 588 (11th Cir. 2015) ("Although the government must prove that the defendant had knowledge of the scheme, it need not show that she had all of the details of the conspiracy. Rather, it need only prove that she knew of the essential nature of the conspiracy.") (internal quotations omitted); *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982) ("[I]t is also not necessary that the person accused of aiding and abetting know all the details of the crime. . . .") (internal quotations omitted).

As importantly, the Ninth Circuit's precedential holding – that "another person" in Section 1028A includes someone who consents to the felonious use of her

means of identification – involves a purely legal issue and governs the largest circuit in the country. *See* Pet. App. 13a-16a; 9th Cir. Model Crim. J. Instr. 8.83 cmt. ("The government need not prove that the identification document was stolen. *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir. 2015); *see also United States v. Gagarin*, 950 F.3d 596, 604-605 (9th Cir. 2020) (holding that government is not required to prove that other person did not consent to use of his or her means of identification)."). Finally, that holding has created a circuit split regarding the meaning of "another person." *See Spears*, 729 F.3d at 758.[1] Ms. Gagarin's case is therefore an ideal vehicle to resolve the split.

The government attempts to minimize the significance of the circuit split, pressing a reading of *Spears* limited to its facts. *See* Br. in Opp. 21-23. Although the Section 1028A prosecution in *Spears* arose out of a transfer of a fake gun permit to the owner of the means of identification, the Seventh Circuit held broadly that Section 1028A "uses 'another person' to refer to a person who did not consent to the *use* of the 'means of identification.'" *Spears*, 729 F.3d at 758 (emphasis added). The Seventh Circuit's current pattern criminal jury instructions reflect this holding. *See* 7th Cir. Pattern Crim. J. Instr. at 439 (2020 ed.) ("In *United States v. Spears*, 729 F.3d 753, 757 (7th Cir. 2013), the court ruled that 'another person' means a 'person

[1] The government suggests that the Eleventh Circuit has also held that "another person" means "anyone other than the defendant." Br. in Opp. 14 (citing *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1224 (11th Cir. 2012)). The Eleventh Circuit's passing statement was both unreasoned and inapposite, as the only issue in *Zuniga-Arteaga* was whether the "person" had to be alive. *See Spears*, 729 F.3d at 758 (explaining that *Zuniga-Arteaga* did not resolve the meaning of "another person").

who did not consent to the information's use, rather than a person other than the defendant.' "), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_ instructions_2020edition.pdf (last visited May 17, 2021).

Contrary to the government's argument, the Seventh Circuit has never retreated from *Spears*'s holding. *See* Br. in Opp. 22-23 (citing *United States v. Zheng*, 762 F.3d 605, 606 (7th Cir. 2014) (in challenge to the Sentencing Guidelines range for predicate felony, holding that a passport is a means of identification); *United States v. Thomas*, 763 F.3d 689, 691-93 (7th Cir. 2014) (rejecting the defendant's argument that he did not "knowingly . . . use" the means of identification of the third party)). *Zheng* did not even involve a challenge to a Section 1028A conviction, while the defendant in *Thomas* was convicted of aggravated identity theft "for using a real estate investor's identity without permission to craft a phony sale of a home that the victim never owned." *Thomas*, 763 F.3d at 690. Because consent was not an issue, there was no reason for an instruction on that point in *Thomas*. *Zheng* and *Thomas*, in other words, do not bear on the meaning of "another person."

The Ninth Circuit too has recognized *Spears*'s broad holding. Pet. App. 13a. It declined to follow it because, *inter alia*, doing so would conflict with its precedent regarding the "without lawful authority" element, which encompasses the illegal use of another's means of identification, regardless of whether the means of identification was used with the knowledge and consent of its owner. Pet. App. 14a. The government presses a similar argument here, pointing out that "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." Br. in Opp. 16 (quoting *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir. 2015) (per curiam)). The government also points out that Ms. Gagarin does not contest in this Court that her conduct satisfied the "without lawful authority" element. *Id*.

The government's argument, and the Ninth Circuit's too, rest on a flawed syllogism: that because "without lawful authority" encompasses unlawful use with the owner's consent, then "another person" must encompass a person who consents to the unlawful use of her means of identification. That syllogism ignores the fact that "without lawful authority" and "another person" are distinct elements, and that they speak to different aspects of the conduct covered by Section 1028A: the former qualifies the verb ("transfers, possesses, or uses"), while the latter qualifies the object of that verb ("a means of identification"). 18 U.S.C. § 1028A. Therefore, the interpretation of one does not govern the interpretation of the other. *See United States v. Mahmood*, 820 F.3d 177, 189 (5th Cir. 2016) (refusing to "interpret 'without lawful authority' element of § 1028A in the same manner that the Seventh Circuit read 'another person'" because "*Spears* is purposefully silent as to the meaning of 'without lawful authority,' as that element was conceded on rehearing. . . . The Seventh Circuit expressly limited its holding and discussion to the meaning of 'another person' . . . .").

By requiring that the use be "without lawful authority," Section 1028A "prohibits an individual's knowing use of another person's identifying information

without a form of authorization recognized by law." *United States v. Abdelshafi*, 592 F.3d 602, 609 (4th Cir. 2010). The law does not recognize the authority to act illegally. *See Osuna-Alvarez*, 788 F.3d at 1185 (combining the definitions of "lawful" and "authority," " '§ 1028A(a)(1) reasonably proscribes the transfer, possession, or use of another person's means of identification, absent the right or permission to act on that person's behalf in a way that is not contrary to the law.' ") (quoting *United States v. Ozuna–Cabrera*, 663 F.3d 496, 499 (1st Cir. 2011)). Therefore, a person who consents to the felonious use of her means of identification does not grant "lawful authority."

That a person's use of identifying information is "without lawful authority," however, does not answer the separate question of whether the information belongs to "another person." *See Mahmood*, 820 F.3d at 189; *cf. United States v. Mobley*, 618 F.3d 539, 547-48 (6th Cir. 2010) ("That a defendant's use of *any* social security number—*including his own*—to submit fraudulent credit applications must be 'without lawful authority' is obvious.") (first italics in original, second italics added). The only circuit courts to have addressed this latter element are the Seventh Circuit in *Spears* and the Ninth Circuit in Ms. Gagarin's case, and they have reached opposite conclusions on whether it encompasses a person who consents to the felonious use of her means of identification. The Court should grant the petition for certiorari and resolve the circuit split.

II. The decision below is incorrect

While the circuit split alone warrants the Court's intervention, review is also necessary to correct the Ninth Circuit's erroneous interpretation of Section 1028A, a uniquely-severe criminal statute.

In the Ninth Circuit's view, "[t]he phrase 'another person' does not appear particularly ambiguous," and "seems to [it] to be an actual 'person other than the defendant.'" Pet. App. 15a. In so reasoning, Ninth Circuit embraced a literalist approach, reading "another person" in isolation and without regard for the consequences of its broad reading. But "[o]rdinary meaning and literal meaning are two different things." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, __ (2021) (Kavanagh, J., dissenting). "And judges interpreting statutes should follow ordinary meaning, not literal meaning." *Id.*

To determine the ordinary meaning of a term, context is critical. Indeed, "[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); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Section 1028A, of course, provides the immediate context for "another person." But Section 1028A itself is part of a larger context: a statutory framework that punishes an aider and abettor "as a principal," 18 U.S.C. § 2(a), and that also punishes the agreement to commit any federal offense, including aggravated identity theft. 18 U.S.C. § 371. If "another person" is to be given its broadest possible meaning, as the Ninth Circuit held, a person who consents to the felonious use of her own means of identification is an aider and abettor to and co-conspirator

in the aggravated identity theft committed by the principal. *See*, *e.g.*, *United States v. Kasenge*, 660 F.3d 537, 539-40, 541 (1st Cir. 2011) (rejecting, on plain error review, sufficiency-of-the-evidence challenge by defendant convicted of aiding and abetting the aggravated identity theft by principal who used the defendant's driver's license and social security card to secure employment).

Thus, if "another person" in Section 1028A were to refer to "a person other than the defendant," as the Ninth Circuit held, it would be 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, not of "another" person. *See Spears*, 729 F.3d at 757; *Ocasio v. United States*, 136 S. Ct. 1423, 1441-42 (2016) (Sotomayor, J., dissenting). Similarly, ordinary people would find it incomprehensible that they could be prosecuted and convicted of aiding and abetting or conspiring to commit aggravated identity theft when they give others permission to use their means of identification in an unlawful manner. The ordinary meaning of "another person," then, excludes someone who consents to the unlawful use of her means of identification. At a minimum, the fact that the broadest possible meaning of "another person" leads to an unnatural reading, at odds with the understanding and expectations of ordinary people, renders the term ambiguous. *See Spears*, 729 F.3d at 757-58.

The government does not meaningfully address Ms. Gagarin's argument on this point. Instead, it points out that "Congress often does expressly provide that an action constitutes a crime only if it done without 'consent' or 'permission,' . . . but

Congress did not do so in Section 1028A(a)(1)." Br. in Opp. 15 (citing 8 U.S.C. §§ 290, 1165, 1365(f)(1), 1793, 1863, 1992(a), 2113(e), 2199, 2319A(a)). But none of these statutory provisions require that the prohibited action concern the person or property of "another person." Given this critical difference, the government's examples shed no light on the meaning of "another person" in Section 1028A. On the other hand, Section 1028A's caption, statutory structure, and legislative history do, and they confirm that "another person" excludes a person who consents to the unlawful use of her information. *See* Pet. 24-28.

The government disagrees. It points out that 18 U.S.C. § 1028A(a)(2), which specifies increased penalties for persons who use, inter alia, "a false identification document," "unquestionably encompasses conduct that cannot be described as 'theft.'" Br. in Opp. 17. The reference to identity "theft" in Section 1028A's caption is "therefore 'but a short-hand reference to the general subject matter of the provision,'" not "a limitation on the statute's scope." *Id.* (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014)).

Ms. Gagarin, of course, does not argue that, by itself, the caption limits Section 1028A's scope, but only that it provides helpful cues regarding Congress's intent when it drafted the statute. *See* Pet. 24-25. And Congress's decision not to reference false identification documents in Section 1028A's caption does not take away from its decision to refer to the transfer, possession, or use of the means of identification of "another person" as aggravated identity "theft"—a term that encompasses stealing and misappropriation, but not consensual illegal use.

Turning to the legislative history, the government argues that it is inconclusive because, in additions to examples of theft, it also includes "fraudulent use of another's person identity that did not involve theft – such as a woman who worked using her husband's social-security number while collecting disability benefits." Br. in Opp. 18 (citing *Ozuna-Cabrera*, 663 F.3d at 500 (citing H.R. Rep. No. 108-528 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 2004 WL 1260964 ("House Report")).[2] The court in *Ozuna-Cabrera* offered an additional example, of a man who used his brother-in-law's name and social-security number to obtain social-security benefits. *See Ozuna-Cabrera*, 663 F.3d at 500. These arguments rest on speculation. Nothing in the House Report indicates the use of the identifying information was consensual in these two examples. In fact, the report describes the defendants in these and all other examples as "persons involved in identity theft." House Report, 2004 U.S.C.C.A.N. 781-82; *see also Spears*, 729 F.3d at 757.

Notably, in *Flores-Figueroa*, the government shared Ms. Gagarin's view of the text and history of Section1028A. There, the government told the 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." Brief for the United States, *Flores–Figueroa v. United States*, No. 08–108, 2009 WL 191837, *20 (U.S. Jan. 23, 2009). The government further stated that Section 1028A's legislative history "underscores Congress's

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[2] The government also claims that the Court found the legislative history " 'inconclusive' on the question at issue" in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). Br. in Opp. 19. The question at issue in *Flores-Figueroa* was whether the government was required to show that a defendant knew the identity he was using belonged to a real person. It did not address the meaning of "another person."

emphasis on the victim," *id.*, and its "overriding purpose" of " '[p]rotecting the good credit and reputation of hardworking Americans.' " *Id.* at *21 (quoting House Report, 2004 U.S.C.C.A.N. 793 (statement of Rep. Schiff)).

Congress, in short, added Section 1028A and its severe punishment to the federal criminal code to protect "real victims" of identity theft, not to punish those who unlawfully use the identifying information of other persons with their consent. Because the Ninth Circuit's decision erroneously expands the reach of the statute beyond Congress's intent and conflicts with the Seventh Circuit's decision in *Spears*, the Court should review it.

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For the foregoing reasons and those states in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,
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