No. ____

In The

Supreme Court of the United States

DAVID DUBIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

Anton Metlitsky
Bruce Pettig
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Michael C. Gross
GROSS & ESPARZA, P.L.L.C
1524 N. Alamo Street
San Antonio, TX 78215

Jason Zarrow
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

QUESTION PRESENTED

The federal aggravated identity theft statute provides: "Whoever, during and in relation to any felony violation enumerated [elsewhere in the statute], 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).

The question presented is whether a person commits aggravated identity theft any time he mentions or otherwise recites someone else's name while committing a predicate offense.

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. David Dubin*, No. 19-50891. The Fifth Circuit's panel decision was filed December 4, 2020, and is reported at 982 F.3d 318. The Fifth Circuit's en banc decision was filed March 3, 2022, and is reported at 27 F.4th 1021.

This petition is related to the following proceedings in the United States District Court for the Western District of Texas, *United States v. David Dubin*, No. 17-cr-00227-XR-2.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RELATED PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

RELEVANT STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Statutory Background 4

B. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 14

A. The Courts Of Appeals Are Intractably Divided Over The Reach Of The Federal Aggravated Identity Theft Statute 14

B. The Question Presented Is Important And Frequently Recurring 20

C. This Petition Is An Excellent Vehicle For Resolving The Conflict Over The Reach Of Section 1028A 22

D. The Fifth Circuit's Construction of Section 1028A Is Wrong 25

CONCLUSION 32

APPENDICES

Appendix A, En Banc Decision of the Fifth Circuit 1a

Appendix B, Panel Decision of the Fifth Circuit 56a

Appendix C, Relevant Statutory Provision..... 82a

TABLE OF AUTHORITIES

Page(s)

Cases

Abramski v. United States,
573 U.S. 169 (2014) 26

Bailey v. United States,
516 U.S. 137 (1995) 26, 27

Clark v. Martinez,
543 U.S. 371 (2005) 31

Eberhart v. United States,
546 U.S. 12 (2005) 24

Flores-Figueroa v. United States,
556 U.S. 646 (2008) 25

Johnson v. United States,
576 U.S. 591 (2015) 31

Kelly v. United States,
140 S. Ct. 1565 (2020) 4, 25

Leocal v. Ashcroft,
543 U.S. 1 (2004) 30

Marinello v. United States,
138 S. Ct. 1101 (2018) 4, 25, 26, 30

Musacchio v. United States,
577 U.S. 237 (2016) 25

Rosemond v. United States,
572 U.S. 65 (2014) 23

Skilling v. United States,
561 U.S. 358 (2010) 31

Smith v. United States,
508 U.S. 223 (1993) 28

United States v. Abdelshafi,
592 F.3d 602 (4th Cir. 2010) 10, 15, 16

United States v. Bass,
404 U.S. 336 (1971) 31

United States v. Berroa,
856 F.3d 141 (1st Cir. 2017)..........................passim

United States v. Croft,
2022 WL 1652742 (5th Cir. May 24, 2022).... 10, 15

United States v. Davis,
139 S. Ct. 2319 (2019) 31

United States v. Fisher,
6 U.S. (2 Cranch.) 358 (1805)............................... 30

United States v. Gagarin,
950 F.3d 596 (9th Cir. 2020) 18, 20

United States v. Gatwas,
910 F.3d 362 (8th Cir. 2018) 19, 20, 22

United States v. Godin,
534 F.3d 51 (1st Cir. 2008).................................. 21

United States v. Harris,
983 F.3d 1125 (9th Cir. 2020) 18

United States v. Hong,
938 F.3d 1040 (9th Cir. 2019) 18, 22

United States v. Katz,
271 U.S. 354 (1926) 30

United States v. Mahmood,
2022 WL 1014143 (5th Cir. Apr. 5, 2022)............ 15

United States v. Mahmood,
820 F.3d 177 (5th Cir. 2016) 9, 11, 29

United States v. Medlock,
792 F.3d 700 (6th Cir. 2015) 9, 16, 22

United States v. Michael,
882 F.3d 624 (6th Cir. 2018) 16, 17, 19, 28

United States v. Miller,
734 F.3d 530 (6th Cir. 2013) 32

United States v. Munksgard,
913 F.3d 1327 (11th Cir. 2019) 19

United States v. Spears,
729 F.3d 753 (7th Cir. 2013) 13, 20, 22, 32

United States v. Tull-Abreu,
921 F.3d 294 (1st Cir. 2019)................................. 18

United States v. Wedd,
993 F.3d 104 (2d Cir. 2021).................................. 19

Van Buren v. United States,
141 S. Ct. 1648 (2021) 4, 13, 25

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,
139 S. Ct. 361 (2013) 29

Yates v. United States,
574 U.S. 528 (2015) 25, 26, 30

Ysleta del Sur Pueblo v. Texas
(U.S. No. 20-493) 27

Statutes

18 U.S.C. § 1028A ....passim

Identity Theft Penalty Enhancement Act of 2004,
Pub. L. No. 108-275, 118 Stat. 831 4

Other Authorities

H.R. Rep. No. 108-528 (2004) 4, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Dubin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The en banc decision of the court of appeals is reported at 27 F.4th 1021, and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-55a. The panel decision of the court of appeals is reported at 982 F.3d 318, and is reprinted at 56a-81a. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The en banc decision of the court of appeals was issued on March 3, 2022. Pet. App. 1a. On May 11, 2022, the Court extended the time to file a petition for a writ of certiorari to July 1, 2022. *See* No. 21-A-694. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1028A(a)(1) provides: "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."

Section 1028A is reproduced in full in the Petition Appendix.

INTRODUCTION

The federal aggravated identity theft statute, 18 U.S.C. § 1028A, makes it a crime—"during and in relation to a" predicate felony—to knowingly transfer, possess, or "use[], without lawful authority, a means of identification of another person." *Id.* § 1028A(a)(1). This petition presents a question concerning the breadth of that provision over which the courts of appeals are deeply divided, and which is outcome-determinative in this case—namely, whether a defendant violates the statute any time he mentions or otherwise recites someone else's name while committing a predicate offense.

Petitioner David Dubin was convicted of healthcare fraud. As relevant here, he submitted a claim to Medicaid for $540 for services provided to a patient called Patient L. The government disputed neither that petitioner in fact treated Patient L nor that petitioner had the authority to use Patient L's name in billing. Nor did the government contend that the bill was false because of anything petitioner said (or didn't say) about Patient L's identity. Instead, the government's theory was that petitioner overbilled Medicaid for the services provided. That was sufficient to obtain a conviction for healthcare fraud.

But the government was not content with that conviction. It also indicted petitioner for aggravated identity theft under 18 U.S.C. § 1028A. According to the government, petitioner violated the aggravated identity theft statute because he put Patient L's identifying information on the fraudulent Medicaid claim form. The district court reluctantly accepted this argument, expressing hope that it would be reversed.

But the Fifth Circuit affirmed. Adopting the panel majority's opinion as the law of the circuit, the en banc Fifth Circuit held 9-1-8 that a defendant is guilty of aggravated identity theft anytime he recites someone else's name as part of a predicate crime—even when he has authority to use that person's name and the predicate crime does not involve a misrepresentation about that person's identity.

This petition that follows satisfies all the criteria for this Court's review. First and foremost, "there is undeniably a split among circuit courts as to how" to interpret the federal aggravated identity theft statute. Pet. App. 5a (Owen, C.J., concurring). The Fifth Circuit's construction, moreover, conflicts with "the overwhelming majority of published opinions" in other courts of appeals, where petitioner's aggravated identity theft "conviction would [have] be[en] vacated." *Id.* at 43a (Elrod, J., dissenting). In those circuits, a person violates Section 1028A only when he engages in identity theft or at least makes some sort of misrepresentation involving another person's identity.

The reach of the aggravated identity theft statute is also extremely important. The statute subjects an offender to a mandatory two-year prison sentence that must be stacked on top of the sentence for the predicate felony. (Here, for example, the statute nearly tripled petitioner's term of imprisonment.) Under the Fifth Circuit's rule, moreover, the additional two-year sentence applies not only to most every commission of healthcare fraud, but would also sweep in tax preparers, immigration attorneys, and anyone else convicted of submitting any form on someone's

behalf that contains a misrepresentation unrelated to the person's identity.

Finally, the Fifth Circuit's construction of Section 1028A is incorrect. In case after case, this Court has admonished that federal criminal statutes should not be construed to produce "sweeping expansion[s] of federal criminal jurisdiction" where their plain text does not require it. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (quotations omitted); *see also, e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Marinello v. United States*, 138 S. Ct. 1101 (2018). Indeed, "[i]n the last decade, it has become nearly an annual event for the Court to give this instruction." Pet. App. 48a (Costa, J., dissenting). Most circuits have followed this guidance and recognized that Section 1028A's text signals a limited reach. Yet over the votes of eight dissenting judges, the Fifth Circuit has unjustifiably adopted the government's "maximalist interpretation" of the statute. *Id.* at 43a (Elrod, J., dissenting).

The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Statutory Background

In 2004, Congress enacted the Identity Theft Penalty Enhancement Act. Pub. L. No. 108-275, 118 Stat. 831 (2004). The statute was meant to "address[] the growing problem of identity theft," and to provide "enhanced penalties for persons who steal identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes." H.R. Rep. No. 108-528, at 3 (2004). In addition to cases of stolen identities, the statute covers "all types of crimes in

which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception." *Id*. at 4.

The operative provision of the statute—titled "Aggravated identity theft"—makes it a crime to knowingly transfer, possess, or "use[], without lawful authority, a means of identification of another person," "during and in relation to" a set of predicate crimes listed in Section 1028A(c), including the federal fraud statutes, *see* 18 U.S.C. § 1028A(c)(5). A defendant convicted of aggravated identity theft must be sentenced to an additional two-year term that runs consecutively to the sentence for the underlying crime. *Id.* § 1028A(a)(1).

B. Proceedings Below

1. Petitioner worked at his father's psychological services company (called PARTS), which provided mental health testing to youths at emergency shelters in Texas. Pet. App. 57a-58a. This case concerns the testing services provided for one patient, referred to as Patient L.[1]

In April 2013, Hector Garza, a facility near San Antonio, Texas, asked PARTS to conduct an evaluation of Patient L. PARTS's "services generally consisted of a clinical interview, testing, assessments, and a report containing findings and recommendations." Pet. App. 38a (Elrod, J., dissenting). PARTS

---

[1] The government charged petitioner in a 25-count indictment. *See* Pet. App. 61a. But petitioner was acquitted of all counts except those relating to Patient L. *Ibid*.

sent Louie Johnson, a licensed psychological associate, to perform the evaluation on April 26. Johnson completed the testing component of the evaluation, but was not able at that time to complete the clinical interview (a separate service with a separate Medicaid billing code). ROA 3149-53; *see* ROA 2512, 2571, 3119.[2] "After the testing, the Dubins realized that Patient L had already been evaluated within the past year." Pet. App. 38a-39a (Elrod., J., dissenting). "Medicaid will not reimburse for more than one of these evaluations per year, so Dubin told the psychological associate to wait until the one-year mark had passed before conducting the clinical interview and writing the report about Patient L." *Ibid*.

On May 10, however, Hector Garza's clinical director emailed PARTS to see "if the psychological assessment [for Patient L] could be completed with the data that is already on your file," because Patient L was scheduled to be discharged on May 16. ROA 4457-58. PARTS responded that it could provide a report "with the information that we did accumulate from the testing and we were able to accomplish," and that it would "do whatever is necessary to assist," even though Medicaid would not reimburse for additional work at that time. ROA 4455-59. Hector Garza's clinical director responded: "Don't send it, don't do anymore, we don't need it." ROA 4460; *see also* ROA 19447-49.

PARTS did not bill Medicaid for the clinical evaluation that was never conducted or for the report that Hector Garza instructed PARTS not to complete. But petitioner did instruct an employee to bill Medicaid

---

[2] "ROA" refers to the record on appeal in the Fifth Circuit.

for the services that PARTS actually performed—namely, the psychological testing. *See* ROA 15716 (Medicaid Bill). That claim had Patient L's name and Medicaid ID number on it, as is required for any claim for Medicaid reimbursement. *See* Pet. App. 49a (Costa, J., dissenting).

According to the government, the claim also contained "three material falsehoods"—none of which had anything to do with Patient L's identity. *See* Appellee's En Banc Br. ("Gov't En Banc Br."), *United States v. Dubin* (5th Cir. No. 19-50912), at 5. First, the claim represented that the testing had been performed by a licensed psychologist, not a licensed psychological associate. *Ibid*. This matters because Medicaid reimburses licensed psychologists at a slightly higher rate—in this case, the difference in reimbursement was $92. Second, the claim represented that the testing was performed on May 30, 2013, to avoid an alleged Medicaid rule limiting the amount of reimbursable testing in any 12-month period, when in fact the testing was performed in April. *Ibid*. Third, the claim rounded up the number of hours spent performing the tests from 2.5 hours to 3. *Ibid*.

2. The government charged and convicted petitioner of healthcare fraud under 18 U.S.C. §§ 1347 and 1349. The district court held that the government's licensed-psychologist and wrong-service-date theories were "adequate to support the jury's verdict." ROA 5033-34. On appeal, the government narrowed its theory further, asserting that the "fraud here is that the hours that were charged were billed as being performed as a licensed psychologist, when it was performed by a licensed psychological associate." Pet.

App. 46a (Elrod, J., dissenting) (quoting Panel Oral Arg. at 17:45-55). But regardless of the precise theory, the important point for present purposes is that the jury convicted petitioner of healthcare fraud for overbilling Medicaid. For these counts, the district court sentenced petitioner to a term of imprisonment of a year-and-a-day.

The government also charged petitioner with aggravated identity theft. The government did not dispute that petitioner had lawful authority to use Patient L's name in Medicaid billing. But the government maintained that an aggravated identity theft conviction "go[es] hand in hand" with any conviction for healthcare fraud involving a patient, ROA 4849, because a patient "can't give someone … permission" to use her name to *overbill* Medicaid, ROA 4876; *see also* Gov't En Banc Br. 30 (defendant guilty of aggravated identity theft any time "a provider uses a patient's identity information to submit a fraudulent health-care claim"). Thus, the government told the jury that petitioner's "use of [the patient's] name on the bill [wa]s aggravated identity theft," ROA 4966; "Dubin's committ[ing] this healthcare fraud offense[] obviously" meant that he was "also guilty of" aggravated identity theft. Pet. App. 40a (Elrod, J., dissenting); *see also* ROA 4876 ("So if you find that [petitioner] committed this healthcare fraud offense, then [he is] also guilty of those identity theft offenses.").

The jury also returned a guilty verdict for aggravated identify theft.

3. After trial, petitioner moved for acquittal on the aggravated identity theft count. The district judge remarked that "this doesn't seem to be an aggravated

identity theft case." ROA 4998-99. But the court denied the motion, ROA 5034, expressing "hope [that it would] get reversed on the aggravated identity count." ROA 5012.

Following the dictates of Section 1028A, the district court sentenced petitioner to an additional two years of prison time, to run consecutively with his one-year sentence for healthcare fraud.

4. A panel of the Fifth Circuit affirmed. According to the panel majority, Section 1028A "operates simply as a two-part question to determine criminal conduct: did defendant *use* a means of identification; and, was that use either 'without lawful authority' or beyond the scope of the authority given?" Pet. App. 69a (emphasis added). The panel looked to dictionary definitions of "use" and held that the term means simply to "employ," "to avail oneself of." *Id.* at 66a-71a. And under *United States v. Mahmood*, 820 F.3d 177 (5th Cir. 2016), a use is "without lawful authority" where it is "'absent the right or permission to act on that person's behalf in a way that is not contrary to the law.'" Pet. App. 66a (quoting *Mahmood*, 820 F.3d at 188). Petitioner satisfied the Fifth Circuit's two-part test, the panel held, because he identified Patient L in the bill he submitted to Medicaid, and he used Patient L's means of identification unlawfully.

Judge Elrod concurred, but only because she believed that circuit precedent required affirmance. Pet. App. 79a-81a (Elrod, J., concurring). "[W]riting on a blank slate," Judge Elrod stated that she would have followed the Sixth Circuit's opinion in *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015). Pet. App. 81a (Elrod, J., concurring). Under *Medlock*, petitioner's

conviction would have been vacated because he did not "lie about Patient L's identity or make any misrepresentations involving Patient L's identity." *Ibid*.

5. On rehearing en banc, the court of appeals affirmed the district court's judgment, adopting the reasoning of the panel majority. Pet. App. 1a-2a. Broadly speaking, the en banc vote count was 9-1-8.

a. Nine members of the Fifth Circuit signed onto a short per curiam opinion adopting the panel's construction of Section 1028A, and its application to the facts here, as the law of the circuit. Pet. App. 1a-2a; *see also United States v. Croft*, 2022 WL 1652742, at *4 (5th Cir. May 24, 2022) (unpublished per curiam) (recognizing that in *Dubin*, "our en banc court adopted the panel's opinion"). The opinion added: "We need not resolve whether our review of the § 1028A issue is de novo or for plain error because the conviction stands regardless of which standard of review applies." Pet. App. 2a.

b. Chief Judge Owen—joined by Judges Smith, Barksdale, Higginson, and Ho—concurred. Judge Owen recognized that "there is undeniably a split among circuit courts as to how § 1028A(a)(1) should be construed," Pet. App. 5a, and that other circuits "have held, on facts similar to those in the present case, that the health care fraud for which the defendant was convicted did not" also constitute aggravated identity theft, *id.* at 20a. But Judge Owen expressed her agreement with the Fourth Circuit's analysis in *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), which affirmed a conviction for aggravated identity theft on "facts indistinguishable from those in the present case." Pet. App. 5a-7a.

In Judge Owen's view, petitioner "used" Patient L's means of identification "during and in relation to" healthcare fraud because "[h]e could not have effectuated the health care fraud … without using Patient L's identifying information." Pet. App. 10a-11a. And although Judge Owen recognized that petitioner "was authorized to use Patient L's identifying information," *id.* at 11a-12a, she concluded he nevertheless used it "without lawful authority" because "neither Patient L nor Medicaid authorized [petitioner] to use that information or Patient L's name to commit health care fraud," *id* at 12a. In other words, it did not matter that petitioner had authorization to use Patient L's identifying information in a Medicaid bill; what mattered was that petitioner recited Patient L's identity while committing another crime. *See id.* at 17a-18a.

c. Judge Oldham—the only judge who did not sign onto the per curiam opinion or either dissent—also concurred. In his separate opinion (joined by four judges), Judge Oldham asserted that petitioner did not properly preserve his sufficiency-of-the-evidence challenge to his conviction for aggravated identity theft. Pet. App. 29a-37a. Then, reviewing the district court's application of the aggravated identity theft statute for plain error, Judge Oldham concluded that any error was not plain because the Fifth Circuit's prior decision in *Mahmood* "foreclose[ed] Dubin's interpretation" of Section 1028A. *Id.* at 36a-37a (citing *Mahmood*, 820 F.3d at 187-88).

d. Judge Elrod—joined by Judges Jones, Costa, Willett, Duncan, Engelhardt, and Wilson, and in substantial part by Judge Haynes—dissented. Pet. App.

38a-47a. In Judge Elrod's view, petitioner did not commit aggravated identity theft because he "did not lie about Patient L's identity or make any misrepresentations involving Patient L's identity.... Any forgery alleged in this case relates only to the nature of the services, not to the patient's identity." *Id.* at 41a. Judge Elrod would thus have followed "the reasoning of the overwhelming majority of published opinions in" the courts of appeals, under which petitioner's "conviction would be vacated." *Id.* at 43a-46a (citing cases from the First, Sixth, Seventh, Ninth, and Eleventh Circuits).

Judge Elrod also disagreed with Judge Oldham's view that petitioner's sufficiency challenge was not preserved. Pet. App. 41a-43a n.3. Judge Elrod observed that the district court rejected petitioner's claim on the merits, and "the panel that first considered this appeal applied *de novo* review, with no judge or party even suggesting that Dubin forfeited the issue." *Ibid.* In Judge Elrod's view, the panel was correct because petitioner raised his claim in the district court, and the government did not challenge the timeliness of petitioner's claim. *Ibid.*[3]

[3] Judge Jones did not join the part of Judge Elrod's concurrence described in the previous sentence, but agreed that the issue was preserved and that *de novo* review applied. Pet. App. 38a n.1.

e. Finally, Judge Costa—joined by Judges Jones, Elrod, Willett, Duncan, Engelhardt, and Wilson—dissented.[4] The en banc majority's opinion, Judge Costa explained, failed to heed this Court's "unmistakable" message that "[c]ourts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." Pet. App. 48a (quoting *Van Buren*, 141 S. Ct. at 1661). Instead, "the majority allow[ed] every single act of provider-payment health care fraud involving a real patient to also count as aggravated identity theft." *Id.* at 49a. "After all," Judge Costa observed, "any payment form submitted to Medicare, Medicaid, or an insurer needs identifying information for the patient." *Ibid.*

In Judge Costa's view, "reasonable, alternative interpretations exist that would limit section 1028A to what ordinary people understand identity theft to be—the unauthorized use of someone's identity." Pet. App. 50a. In particular, Judge Costa would have adopted Judge Easterbrook's interpretation for the Seventh Circuit in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc), and held "that identity theft means using another's identity without consent." Pet. App. 52a. "Reading section 1028A to require a lack of consent would mean no aggravated identity theft happened in this case" because "Patient L consented to the use of [his] name for this Medicaid claim." *Id.* at 54a-55a.

---

[4] Judge Costa also noted that he would have switched his vote in *Mahmood*, the earlier Fifth Circuit case that the panel here followed. Pet. App. 54a n.2.

REASONS FOR GRANTING THE WRIT

The courts of appeals are openly and intractably divided over the reach of the federal aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1). The court below upheld petitioner's conviction of aggravated identity theft simply because he recited someone else's name as part of a predicate offense. That decision accords with the law in one other circuit, but such conduct is not enough to commit aggravated identity theft in several other circuits. This case is an ideal vehicle to resolve this conflict over Section 1028A and to confine that statute to its proper scope.

A. The Courts Of Appeals Are Intractably Divided Over The Reach Of The Federal Aggravated Identity Theft Statute

As several judges below recognized, "there is undeniably a split among circuit courts as to how § 1028A(a)(1) should be construed." Pet. App. 5a (Owen, C.J., concurring). In the Fourth and Fifth Circuits, a defendant is guilty of aggravated identity theft and subject to mandatory prison time whenever he recites someone else's name as part of a predicate offense. Yet that is not so in "the overwhelming majority of" circuits, in which petitioner would have been acquitted. *Id.* at 43a (Elrod, J., dissenting).

1. In this case, the en banc court of appeals adopted the panel opinion as the law of the Fifth Circuit. That opinion holds that a person violates Section 1028A(a)(1) whenever he recites someone else's name

as part of a predicate crime. Pet. App.1a-2a (per curiam).[5] Applying that rule here, a conviction for aggravated identity theft went (in the government's words) "hand in hand" with petitioner's conviction for healthcare fraud, ROA 4849, because claims for Medicaid reimbursement necessarily include patient names. *See* Pet. App. 49a (Costa, J., dissenting). That is, although petitioner had permission to use Patient L's name in billing and his healthcare fraud did not involve a lie or misrepresentation about Patient L's identity, he was guilty of aggravated identity theft because he submitted a fraudulent bill to Medicaid with Patient L's identifying information on it. *Id.* at 70a-71a.

As Chief Judge Owen noted in her en banc concurrence, the Fourth Circuit has affirmed a conviction in similar circumstances. Pet. App. 5a-7a. In *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), the owner of transportation company for Medicaid patients submitted claim forms that were fraudulent because they "substantially inflated mileage amounts" and claimed reimbursement for some "trips that did not, in fact, occur." *Id.* at 605. The Fourth Circuit sustained the defendant's conviction because, although

---

[5] *See also United States v. Croft*, 2022 WL 1652742, at *4 (5th Cir. May 24, 2022) (per curiam) (King, Costa & Ho, JJ.) (noting the "en banc court adopted the panel's opinion," and applying the rule that a person commits aggravated identity theft "when [he] employs another's means of identification without permission and in furtherance of a crime, even if said means were initially acquired legally"); *United States v. Mahmood*, 2022 WL 1014143, at *1 (5th Cir. Apr. 5, 2022) (per curiam) (Davis, Jones & Elrod, JJ.) (same).

he "had authority to possess the [patients'] Medicaid identification numbers, he had *no* authority to use them unlawfully so as to perpetuate a fraud." *Id*. at 609.

2. Petitioner's conviction "would be vacated" in the "vast majority" of circuits. Pet. App. 46a (Elrod, J., dissenting). In the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, simply reciting a person's name while committing fraud or some other predicate offense is not aggravated identity theft. These circuits employ "varying rationales" to reach that result, *id.* at 27a (Owen, C.J., concurring), thus to some degree underscoring the need for this Court's review. But these circuits all share the same bottom line: some sort of theft or misrepresentation *involving a person's identity* is required for aggravated identity theft.

a. We begin with the Sixth Circuit, whose case law establishes two distinct ways of limiting the reach of Section 1028A. In *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015), the defendants committed healthcare fraud by misrepresenting their eligibility for Medicaid reimbursement. *Id*. at 704. In an opinion by Judge Boggs, the Sixth Circuit vacated most of the aggravated identity theft convictions because the defendants "did not 'use' the names of patients within the [meaning] of the aggravated-identity-theft statute." *Id*. at 705. While the defendants "misrepresented *how and why* the beneficiaries were transported, … they did not use those beneficiaries' identities to do so." *Id*. at 707.

The Sixth Circuit adopted an alternative test in *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018).

Writing for the court, Judge Sutton read the word "uses" "in tandem with 'during and in relation to' to hold that an aggravated-identity-theft conviction requires the government to show that a defendant 'used the means of identification to further or facilitate the health care fraud.'" Pet. App. 50a (Costa, J., dissenting) (quoting *Michael*, 882 F.3d at 628). Under this approach, "[t]he salient point" is the statute's causation requirement, which focuses on the nexus between the "use" and the predicate crime. *Michael*, 882 F.3d at 628.

The Sixth Circuit thus held in *Michael* that the defendant was guilty of aggravated identity theft because he used a doctor's and patient's "identifying information to fashion a fraudulent submission out of whole cloth, making the misuse of these means of identification 'during and in relation to'—indeed integral to—the predicate act of healthcare fraud." *Id*. at 629. At the same time, Judge Sutton stressed, had the defendant, "in the course of dispensing drugs to a patient under a doctor's prescription, only inflated the amount of drugs he dispensed," he would not have committed aggravated identity theft because "the means of identification of the doctor and patient would not have facilitated the fraud." *Ibid*.

b. The First and Ninth Circuits have adopted the Sixth Circuit's *Medlock* approach and held that a person does not "use" a means of identification within the meaning of the aggravated identity theft statute if he makes no misrepresentations about someone's identity.

In *United States v. Berroa*, 856 F.3d 141 (1st Cir. 2017), the First Circuit "read the term 'use' to require

that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." *Id*. at 156. The court thus reversed convictions for aggravated identity theft where the underlying crime was the use of fraudulently obtained medical licenses to write prescriptions for real patients, because the defendants "did not attempt to pass themselves off as the patients." *Id*. at 155-57. *Compare United States v. Tull-Abreu*, 921 F.3d 294, 297-98, 299-301 (1st Cir. 2019) (affirming convictions where provider duped patients into signing Medicaid forms, which were used to bill for services that were never rendered).

"Ninth Circuit precedent, likewise, would dictate that Dubin's conviction be vacated." Pet. App. 44a (Elrod, J., dissenting). In *United States v. Hong*, 938 F.3d 1040 (9th Cir. 2019), for example, the defendant "provided massage services to patients to treat their pain, and then participated in a scheme where that treatment was misrepresented as a Medicare-eligible physical therapy service." *Id*. at 1051. Following decisions from the First and Sixth Circuits, the Ninth Circuit reversed the defendant's convictions for aggravated identity theft, reasoning that the defendant "did not 'use' the patients' identities within the meaning of the aggravated identity theft statute" because neither he nor his co-conspirators "attempted to pass themselves off as the patients." *Id*. at 1050-51 (quotations and alteration omitted). *Compare United States v. Gagarin*, 950 F.3d 596, 604 (9th Cir. 2020) (affirming conviction where defendant engaged in "forgery and impersonation"); *United States v. Harris*, 983 F.3d 1125, 1126-28 (9th Cir. 2020) (following *Michael*

and affirming aggravated identity theft conviction where defendant "did not merely inflate the scope of services rendered" but "manufactured entire appointments that never occurred" and falsely identified a rendering provider).

c. The Second, Eighth, and Eleventh Circuits have followed the causation test that Judge Sutton explicated in *Michael*. In *United States v. Wedd*, 993 F.3d 104 (2d Cir. 2021), the Second Circuit agreed with Judge Sutton that "'[t]he salient point … is whether the defendant used the means of identification to further or facilitate the … fraud.'" *Id*. at 123 (quoting *Michael*, 882 F.3d at 628). That standard was satisfied because the defendant auto-subscribed consumers in a text-messaging service in which they did not agree to enroll. *Ibid*. In *United States v. Munksgard*, 913 F.3d 1327 (11th Cir. 2019), the Eleventh Circuit also adopted the *Michael* causation test. *Id.* at 1334-35. The court then held that the defendant committed aggravated identity theft when he "forged another person's name" in a loan application. *Id*. at 1329-30.

The Eighth Circuit has similarly concluded that a defendant cannot be convicted of aggravated identity theft merely for reciting someone else's name during a predicate crime. Specifically, in *United States v. Gatwas*, 910 F.3d 362 (8th Cir. 2018), the court rejected the notion that a defendant could be "convicted of aggravated identity theft simply because he used a client's name and social security number in submitting a tax return that fraudulently under-reported income or claimed bogus deductions" because that type of use would not "be more than incidental to the fraud." *Id*. at 368. In doing so, the court relied on

"[Section 1028A's] causation element—that the use be during and in relation to an enumerated felony—to limit its scope." *Id.* at 365.

d. Finally, in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc) (Easterbrook, J.), the en banc Seventh Circuit narrowly construed the phrase "another person" to avoid giving Section 1028A "a surprising scope." *Id.* at 756. Like the Eighth Circuit in *Gatwas*, the Seventh Circuit felt compelled to avoid reading Section 1028A to "require a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction." *Ibid.* But rather than relying on "use" or the statute's causation requirement, the Seventh Circuit held that "another person" refers "to a person who did not consent to the use of the 'means of identification.'" *Id.* at 758; *see also Gagarin*, 950 F.3d at 609-10 (Friedland, J., concurring) (Ninth Circuit case law "incorporate[s] limitations that flow from the same concerns that animated the Seventh Circuit's decision in *Spears*"). This approach would likewise require vacating petitioner's conviction. *See* Pet. App. 52a-55a (Costa, J., dissenting).

B. The Question Presented Is Important And Frequently Recurring

The question presented is also highly consequential. Start with the effect of a conviction under Section 1028A(a)(1): a two-year additional sentence on top of whatever sentences defendants receive for their predicate offenses. If the Fourth and Fifth Circuits' interpretation of the statute is wrong, defendants in those jurisdictions are being deprived of their liberty under circumstances Congress did not intend. "For each of

those defendants, an additional mandatory two-year sentence makes a great deal of difference." *United States v. Godin*, 534 F.3d 51, 63 (1st Cir. 2008) (Lynch, J., concurring). By contrast, if the Fourth and Fifth Circuits are correct, Congress' intent to define aggravated identity theft in a sweeping manner is being thwarted in the majority of circuits.

Nor is there any doubt that the question presented is frequently recurring. Section 1028A applies not only in prosecutions for healthcare fraud, but "can be charged when an unlawful means of identification is used in the course of Social Security fraud, 18 U.S.C. § 1028A(c)(11), passport fraud, *id.* § 1028A(c)(7), theft of public property, *id.* § 1028A(c)(1), fraud in the acquisition of a firearm, *id.* § 1028A(c)(3), citizenship fraud, *id.* § 1028A(c)(2), and other crimes." *Godin*, 534 F.3d at 63-64 (Lynch, J., concurring).

Indeed, the breadth of Section 1028A's predicate offenses, coupled with the breadth of the Fourth and Fifth Circuit's interpretation of Section 1028A itself, is another reason why this Court's review is urgently needed. As several courts have recognized, reading Section 1028A as broadly as the Fourth and Fifth Circuits do means that "every instance of specified criminal misconduct in which the defendant speaks or writes a third party's name" is aggravated identity theft. *Berroa*, 856 F.3d at 156. The Court need look no further than the facts of this case. Petitioner was convicted of healthcare fraud for overbilling Medicaid. But "any payment form submitted to Medicare, Medicaid, or an insurer needs identifying information for the patient." Pet. App. 49a (Costa, J., dissenting). Thus, the decision below "allows every single act of

provider-payment health care fraud involving a real patient to also count as aggravated identity theft." *Ibid.*; *see also* Gov't En Banc Br. 30 (arguing Section 1028A is violated "where a provider uses a patient's identity information to submit a fraudulent health-care claim").

And it is not just healthcare overbilling that is automatically converted, in the Fourth and Fifth Circuits, into aggravated identity theft. If those circuits are right, Section 1028A would "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." *Spears*, 729 F.3d at 756; *see also Gatwas*, 910 F.3d at 368. The same would be true of an immigration attorney who submits a false application or anyone else who commits a predicate crime by submitting a false form to the government that includes someone else's name. *See Medlock*, 792 F.3d at 707; *see also Hong*, 938 F.3d at 1051; *Berroa*, 856 F.3d at 156-57.

This Court should not allow continued division over such a significant question of federal law.

C. This Petition Is An Excellent Vehicle For Resolving The Conflict Over The Reach Of Section 1028A

This petition provides the Court an excellent vehicle for resolving the circuit conflict and clarifying the scope of Section 1028A. There is no dispute that petitioner would not have been convicted of aggravated

identity theft in other circuits. Pet. App. 43a-46a (Elrod, J., dissenting); *see also id.* at 20a-21a (Owen, C.J., concurring). That is because petitioner had authority to use Patient L's name in billing. *See id.* at 54a-55a (Costa, J., dissenting). And the bill he submitted to Medicaid was not false or fraudulent because of anything petitioner said about Patient L's identity. *See id.* at 41a (Elrod, J., dissenting). The facts here thus squarely implicate the circuit split. Rejecting the Fifth Circuit's interpretation of Section 1028A would require reversing the court of appeals' judgment.

Judge Oldham argued below that even if petitioner is right that Section 1028A does not cover his conduct, he still cannot prevail on appeal because the plain-error doctrine should apply here. Pet. App. 29a-37a. But this argument poses no obstacle to this Court's review. The majority opinion below declined to reach the standard-of-review question on the ground that, construed *de novo*, Section 1028A covered petitioner's conduct. *Id.* at 2a. If the majority is incorrect and Section 1028A does not actually cover petitioner's conduct, then this Court could reverse and remand for consideration by the full court of appeals in the first instance of whether the plain-error doctrine applies. *See, e.g.*, *Rosemond v. United States*, 572 U.S. 65, 83 (2014).

Furthermore, there is every reason to be confident the Fifth Circuit would hold that the plain-error doctrine does not apply here. Only ten of the eighteen judges sitting en banc below voted to affirm, and only four judges who joined the per curiam opinion signed onto Judge Oldham's opinion. The rest of the majority

below displayed reticence for good reason: Both of Judge Oldham's theories contradict settled precedent.

Judge Oldham first suggested that petitioner forfeited his right to challenge the sufficiency of the evidence because petitioner's post-trial motion was "untimely" under Federal Rule of Criminal Procedure 29. Pet. App. 30a. But this Court squarely held in *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), that deadlines in the Criminal Rules like the one in Rule 29 are mere "claim-processing rules." *Id.* at 19. That means where, as here, the government fails to object in the district court and the district court reaches the merits, then the court of appeals should "proceed[] to the merits" as well. *Ibid.* The government conceded as much below. *See* Gov't En Banc. Br. 11 n.3. Eight Fifth Circuit judges recognized the problem with Judge Oldham's argument too. *See* Pet. App. 41a-43a n.3 (Elrod, J., dissenting).

Judge Oldham also would have applied the plain-error standard on the ground that petitioner "acquiesce[d]" in a jury instruction that he thought was contrary to his proposed construction of Section 1028A. Pet. App. 33a-34a (Oldham, J., concurring).[6] Again,

[6] The better reading of the jury instructions is that they were not actually contrary to petitioner's interpretation of Section 1028A. The district court instructed the jury that Section 1028A applies when "a defendant gains access to a person's identifying information lawfully but then, proceeds to use that information unlawfully and in excess of that person's permission." ROA 4840. That tracks petitioner's argument. The conjunctive "and" means that the use must be both unlawful *and* in excess of permission. But here, while petitioner may have used Patient L's means of identification as part of a fraud, it is undisputed that he did have "permission to use Patient L's means of identification on this

this Court's precedent squarely forecloses Judge Oldham's argument. "[S]ufficiency review"—which is what petitioner seeks here—"does not rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016). Instead, the reviewing court asks whether a rational jury could have found the defendant guilty under the correct interpretation of the statute. *Ibid*. This Court thus routinely grants certiorari to resolve questions of statutory interpretation that determine the merits of sufficiency challenges—including a prior sufficiency challenge under Section 1028A itself. *See, e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Kelly v. United States*, 140 S. Ct. 1565 (2020); *Yates v. United States*, 574 U.S. 528 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646 (2008). It has done so even when the government has tried to kick up dust—much as Judge Oldham did below—about the content of jury instructions. *See* Br. in Opp., *Van Buren v. United States*, No. 19-783, at 14-16.

D. The Fifth Circuit's Construction Of Section 1028A Is Wrong

In recent years, this Court has been emphatic that lower courts should "not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." Pet. App. 48a (Costa, J., dissenting) (quoting *Van Buren*, 141 S. Ct. at 1661); *see also Kelly*, 140 S. Ct. at 1568, 1574; *Marinello v. United States*,

---

Medicaid bill." Pet. App. 46a (Elrod, J., dissenting). At worst, the instruction simply repeated one of the central ambiguities in Section 1028A—permission to do what?

138 S. Ct. 1101, 1107-08 (2018). And there are "reasonable, alternative interpretations" of the aggravated identity theft statute "that would limit [it] to what ordinary people understand identity theft to be." Pet. App. 50a (Costa, J., dissenting).

1. The panel decision that the en banc court below adopted "was based entirely on the dictionary definition of the word 'use.'" Pet. App. 40a (Elrod, J., dissenting). The panel reasoned that "use" means to employ, so a defendant commits aggravated identity theft anytime he employs identifying information as part of a predicate crime. *Id.* at 67a-71a; *see also id.* at 10a-11a (Owen, C.J., concurring). Here, for example, the panel concluded that "Patient L's means of identification—the patient's Medicaid reimbursement number—was used, or employed, by David Dubin in the reimbursement submissions to Medicaid." *Id.* at 70a.

Courts should never construe a statute based "solely on dictionary definitions of its component words." *Yates*, 574 U.S. at 537 (plurality opinion); *see also Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014) ("[A] court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context."). That is especially so with the word "use." "[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable to it." *Bailey v. United States*, 516 U.S. 137, 143 (1995). That is why this Court has said that the word "use" necessarily "draws meaning from its context," and that courts must look "not only to the word itself, but also to the

statute and the sentencing scheme, to determine the meaning Congress intended." *Ibid*.

The court below did not do so. Indeed, it adopted the one dictionary definition of "uses" that Congress could not have intended. Section 1028A applies equally to "transfers" and "uses." And if "uses" means employs, then "transfers" is superfluous; it is not possible to transfer a means of identification without also employing it. *Berroa*, 856 F.3d at 156; *see also Ysleta del Sur Pueblo v. Texas* (U.S. No. 20-493), slip op. at 10-11 (applying "usual rule against ascribing to one word a meaning so broad that it assumes the same meaning as another statutory term" (quotations omitted)).

Read in context, the more natural reading of "uses" is the one the government proposed in *Van Buren* as a way "to cabin its prosecutorial power." 141 S. Ct. at 1661. There, the government argued that the word "use," as it appears in the Computer Fraud and Abuse Act ("CFAA"), means "instrumental to." Br. for the United States, *Van Buren v. United States* (U.S. No. 19-783), at 38. If "uses" has the same meaning here—i.e., that the defendant's recitation of another person's means of identification must be "instrumental" to the predicate crime—then petitioner would have to be acquitted. Patient L's identifying information played no key role in the fraudulent activity here; it was merely incidental.

The words surrounding "uses" confirm the statute's limited reach. Section 1028A makes it a crime to use another person's means of identification only when the defendant does so "during and in relation to" a predicate crime and "without lawful authority."

As noted above, many circuits read "'uses' in tandem with 'during and in relation to' to hold that an aggravated-identity-theft conviction requires the government to show that a defendant 'used the means of identification to further or facilitate the health care fraud.'" Pet. App. 50a (Costa, J., dissenting) (quoting *Michael*, 882 F.3d at 628). That reading comports with this Court's decisions construing the phrase "in relation to" in other statutes. In *Smith v. United States*, 508 U.S. 223 (1993), this Court explained that "in relation to" means that the use "at least must facilitate" the underlying criminal activity, and must be more than "coincidental" to the underlying crime. *Id.* at 238 (quotation and alteration omitted). The "use" of an identification facilitates a crime when it is "integral to" it. *Michael*, 882 F.3d at 629; *cf. Smith*, 508 U.S. at 238. But a "use" is merely incidental when the reason the conduct is criminal has nothing to do with the use of someone's means of identification. Exactly so here.

The phrase "without lawful authority" likewise reinforces Section 1028A's limited scope and precludes reading the statute to apply anytime a defendant recites someone's name in the course of a predicate crime. Indeed, Judge Owen explained in the principal concurrence below that the "focus" of this case "should be on whether" petitioner used Patient L's "identifying information 'without lawful authority.'" Pet. App. 11a (Owen, C.J., concurring). According to her concurrence and the Fifth Circuit's prior decision in *Mahmood*, a defendant uses a means of identification "without lawful authority" whenever the means of

identification is used in the course of unlawful activity. *Id.* at 12a, 17a-18a (Owen, C.J., concurring); *Mahmood*, 820 F.3d at 187-90. Here, for example, the Fifth Circuit held that petitioner used Patient L's means of identification without lawful authority "because fraudulent billing submissions are unlawful." Pet. App. 18a (Owen, C.J., concurring); *see also id.* at 11a; *id.* at 70a-71a (panel opinion).

As a matter of basic grammar, this interpretation—which reads "lawful" to modify "uses," *see* Pet. App. 9a (Owen, C.J., concurring)—does not work. The problem is that "lawful" is an adjective, and "[a]djectives modify nouns." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2013). The noun here is "authority," not "use," which is sometimes a noun but not in Section 1028A, where "uses" is a verb. So the question under the statute must be whether the defendant was empowered to act on someone else's behalf, not whether someone had authority to act unlawfully (an impossibility). And if that is the question, then petitioner's conviction for aggravated identity theft is invalid: all agree that petitioner "was authorized to use Patient L's identifying information." Pet. App. 12a (Owen, C.J., concurring); *id.* at 53a-54a (Costa, J., dissenting).

The final piece of statutory context confirming that a defendant does not automatically commit aggravated identity theft by reciting someone's name as part of a predicate crime comes from Section 1028A's title: "Aggravated identity theft." It has long been established that the title or classification of a crime can shed light on the statute's scope. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004); *United States v. Katz*, 271

U.S. 354, 357 (1926); *United States v. Fisher*, 6 U.S. (2 Cranch.) 358, 386 (1805) (Marshall, C.J.). And no normal person would think that a statute punishing "aggravated identity theft" criminalizes conduct that does not involve something resembling the theft of another person's identity. Nor, on the Fifth Circuit's reasoning, is there anything particularly "aggravated" about the crime.

True enough, statutory titles are just shorthand. But they must be shorthand for something. *Yates*, 574 U.S. at 539-40 (plurality opinion). And for all the ink the Fifth Circuit spilled on this issue, it has never offered a real theory of what this statute is meant to cover—if not aggravated identity theft, then what? Instead, the principal concurrence below simply asserted that "the elements of [Section 1028A] are not captured or even fairly described by the words 'identity theft.'" Pet. App. 8a (Owen, C.J., concurring). The concurrence then undertook the most literalistic of "plain text" inquiries.

This will not do. Context matters. And why would Congress enact a section titled "Aggravated identity theft" in a bill called the "Identity Theft Penalty Enhancement Act" if the statute was to be wholly unmoored from those concepts? If the Fifth Circuit has no answer, then its construction of the statute cannot be credited.

2. If there were any lingering doubt, two canons of construction require "exercis[ing] interpretive restraint," *Marinello*, 138 S. Ct. at 1108 (quotation omitted), and rejecting the Fifth Circuit's overbroad reading.

First, courts must construe statutes to avoid "constitutional doubts concerning other litigants or factual circumstances." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (quotation omitted); *see also, e.g.*, *Skilling v. United States*, 561 U.S. 358, 405-06 (2010). The Fifth Circuit's expansive reading of Section 1028A is "so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 576 U.S. 591, 595 (2015), and thus poses substantial due process concerns. In particular, the Fifth Circuit's construction gives prosecutors *carte blanche* to prosecute as aggravated identity theft "every instance of specified criminal misconduct in which the defendant speaks or writes a third party's name," *Berroa*, 856 F.3d at 156, including virtually all healthcare crimes involving overbilling, *supra* at 21-22.

Second, the Fifth Circuit's construction runs roughshod over the rule of lenity, which mandates that "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quotations and citation omitted); *see also United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Even assuming the Fifth Circuit's construction of the federal aggravated identity theft statute is plausible, there is no question that "reasonable, alternative interpretations exist that would limit section 1028A to what ordinary people understand identity theft to be." Pet. App. 50a (Costa, J., dissenting). Accordingly, the Fifth Circuit should have adopted a narrower construction, as most courts

of appeals have done, not the broadest possible construction. *See Berroa*, 856 F.3d at 157 n.8 (invoking lenity); *United States v. Miller*, 734 F.3d 530, 542 (6th Cir. 2013) (same); *Spears*, 729 F.3d at 757-58 (same).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

Jason Zarrow
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Anton Metlitsky
Bruce Pettig
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Michael C. Gross
GROSS & ESPARZA, P.L.L.C
1524 N. Alamo Street
San Antonio, TX 78215

June 30, 2022