No. 22-10

In the Supreme Court of the United States

DAVID FOX DUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported the jury's finding that petitioner "use[d]" the means of identification of another person to commit fraud, in violation of 18 U.S.C. 1028A(a)(1), by submitting a Medicaid claim invoking a specific patient's right to reimbursement for a fictitious three-hour examination by a licensed psychologist on a date when that patient would have been eligible for the reimbursement.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-55a) is reported at 27 F.4th 1021. The opinion of the court of appeals panel (Pet. App. 56a-81a) is reported at 982 F.3d 318.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2022. On May 11, 2022, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 1, 2022. The petition was filed on June 30, 2022. 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 Western District of Texas, petitioner was convicted of conspiring to commit healthcare fraud, in

violation of 18 U.S.C. 1349; healthcare fraud, in violation of 18 U.S.C. 1347 and 2; and using a means of identification of another during and in relation to a listed felony, in violation of 18 U.S.C. 1028A. Judgment 1. He was sentenced to 36 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 56a-81a. The court granted rehearing en banc and again affirmed. *Id.* at 1a-55a.

1. Petitioner was the managing partner of PARTS, a psychology practice in Texas. Pet. App. 57a; Gov't C.A. En Banc Br. 1. PARTS is an enrolled Medicaid provider, and petitioner's role in the company included managing its Medicaid billing. *Ibid.*

In April 2013, a treatment facility in San Antonio asked PARTS to evaluate a child known as Patient L. Gov't C.A. En Banc Br. 4. PARTS sent one of its associates to the facility, and the associate spent about two and a half hours evaluating Patient L. *Ibid.* In the middle of the evaluation, petitioner's father (the founder of PARTS) directed the associate to stop the evaluation because Patient L had already exhausted Medicaid benefits for the applicable benefits period, meaning that Medicaid would not pay for more testing. *Ibid.*

Petitioner later directed an employee to submit a fraudulent reimbursement claim to Medicaid that invoked Patient L's name and Medicaid identification number. See Gov't C.A. En Banc Br. 5; Pet. App. 70a. The actual two-and-a-half-hour associate evaluation in April 2013, however, would not have been reimbursable at all. See Gov't C.A. En Banc Br. 4-5. The claim instead asserted Patient L's right to reimbursement for an evaluation in May 2013, by which time Patient L's benefits had been renewed, that lasted three hours, and

that was conducted by a licensed psychologist (who would be reimbursed at a higher rate than an associate would have been. *Id.* at 5.

2. A grand jury in the Western District of Texas indicted petitioner on one count of conspiring to receive healthcare kickbacks, in violation of 18 U.S.C. 371; five counts of offering to pay and paying illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b)(2); one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1349; seven counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2; and six counts of using a means of identification of another during and in relation to a listed felony, in violation of 18 U.S.C. 1028A and 2. Superseding Indictment 1-24. One of the Section 1347 counts and one of the Section 1028A counts concerned the false claim about Patient L. *Id.* at 22-23.

Section 1028A provides:

> Whoever, during and in relation to [certain felonies, including healthcare 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). The district court instructed the jury that "the statute criminalizes a situation in which 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." 10/25/2018 Tr. 173. Petitioner did not object to that instruction.

The jury found petitioner guilty of one count of conspiring to commit healthcare fraud, as well as the one count of healthcare fraud and the one count of using a means of identification of another during and in relation

to a felony that related to Patient L. Judgment 1. It found petitioner not guilty on the remaining counts, which concerned other conduct. *Ibid.*

3. Petitioner moved for a judgment of acquittal, making arguments that the evidence supporting the jury's verdict was insufficient in multiple ways. See D. Ct. Doc. 208 (Nov. 9, 2018). The district court denied the motion. See D. Ct. Doc. 221 (Feb. 19, 2019).

Petitioner subsequently moved for reconsideration of that denial, arguing for the first time that Patient L's name and Medicaid identification number "were not 'used' within the scope required by Section 1028A, nor submitted 'during and in relation to' the healthcare fraud alleged as to this billing." D. Ct. Doc. 239, at 43 (Aug. 26, 2019). The court denied the motion for reconsideration, observing that petitioner's argument was contrary to a circuit decision applying Section 1028A in another case of health care fraud. 9/16/2019 Tr. 3-4 (citing *United States* v. *Kelly-Tuorila*, 759 Fed. Appx. 236 (5th Cir. 2019) (per curiam)).

The court later sentenced petitioner to 36 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 56a-78a.

The court of appeals rejected petitioner's contention that he did not "use" Patient L's identifying information. See Pet. App. 66a-71a. The court observed that the "plain meaning" of the word "'use,'" *id.* at 67a (citation omitted), is "to employ for the accomplishment of some purpose" or "'to avail oneself of," *id.* at 68a (quoting *Black's Law Dictionary* 1776 (10th ed. 2014)). And the court determined that, in this case, petitioner had "used" Patient L's means of identification "when he took the affirmative acts in the health-care fraud, such

as his submission for reimbursement of Patient L's incomplete testing." *Id.* at 71a.

Judge Elrod concurred. Pet. App. 79a-81a. She stated that, if she "were writing on a blank slate," she would conclude that petitioner had not used Patient L's means of identification, *id.* at 81a, but read the Fifth Circuit's earlier decision in *United States* v. *Mahmood*, 820 F.3d 177 (2016), to foreclose petitioner's argument, see Pet. App. 79a.

4. The court of appeals granted rehearing en banc. Pet. App. 1a-55a. In a per curiam order, the court stated that it "affirm[ed] the district court's judgment for the reasons set forth in the panel's majority opinion." *Id.* at 2a. The court added that it "need not resolve whether [its] review of the § 1028A issue is de novo or for plain error because the conviction stands regardless of which standard of review applies." *Ibid.*

Chief Judge Richman (Chief Judge Owen at the time of the opinion below) filed a concurrence, which was joined by four other judges. Pet. App. 3a-28a. She considered it "beyond debate that [petitioner] 'used' Patient L's identifying information 'during and in relation to' the offenses for which he was convicted." *Id.* at 10a (footnote omitted). She reasoned that the focus should thus be on whether, as Section 1028A requires, that "use[]" occurred "without lawful authority." *Id.* at 11a. And she explained that petitioner "had no 'lawful' authority to use the information in the manner he did when he committed the felonies for which he was convicted." *Id.* at 12a. She also observed that, although the dissents focused on whether petitioner had engaged in "identity theft," the statutory text "does not contain the words 'identity theft' or even 'theft.'" *Id.* at 3a.

Judge Oldham also filed a concurring opinion, which was joined by the same four judges. Pet. App. 29a-37a. He reasoned that the question whether petitioner had "use[d]" Patient L's identifying information was "not properly before" the court of appeals, because petitioner had forfeited that issue in two different ways. *Id.* at 29a. First, petitioner had failed to raise his "use" argument in his initial motion for a judgment of acquittal, instead raising it for the first time only in a later motion for reconsideration. *Id.* at 29a-33a. Second, petitioner had failed to object to the district court's jury instructions. *Id.* at 33a-37a. Judge Oldham accordingly explained that petitioner's claim was reviewable only for plain error, a standard that petitioner could not satisfy. *Id.* at 36a.

Judge Elrod issued a dissent, joined by six other judges, in which she concluded that petitioner did not violate Section 1028A because he did not "lie about Patient L's identity" or "pretend to be Patient L." Pet. App. 41a; see *id.* at 38a-46a. Judge Haynes issued a brief solo dissent stating that she agreed with Judge Elrod's dissent in part. *Id.* at 47a. And Judge Costa issued a dissent, joined by Judge Elrod and the other judges who had joined her concurrence, in which he concluded that Section is limited "to what ordinary people understand identity theft to be," even if a "textual case can be made" that the statutory text differs from that understanding. *Id.* at 49a-50a; see *id.* at 48a-55a.

ARGUMENT

Petitioner contends (Pet. 25-32) that insufficient evidence supported the finding that he had "use[d]" a means of identification of another person within the meaning of 18 U.S.C. 1028A(a)(1). The court of appeals correctly affirmed his Section 1028A(a)(1) conviction,

and its decision does not implicate any split of authority among the courts of appeals. This case also would be a poor vehicle for reviewing the question presented. This Court has recently and repeatedly denied many petitions for writs of certiorari presenting similar contentions about the meaning of Section 1028A(a)(1). See *Gagarin* v. *United States*, 141 S. Ct. 2729 (2021) (No. 20-7359); *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). It should follow the same course here.

1. Section 1028A prescribes a sentence enhancement for any person who, "during and in relation to [certain felonies], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). Petitioner's conduct here—submitting a Medicaid claim seeking reimbursement owed to a specific patient, identified by name and number, for a service that patient never received—qualified for that enhancement.

Petitioner submitted a Medicaid claim asserting Patient L's right to reimbursement for an evaluation in May 2013, lasting three hours, by a licensed psychologist. See Gov't C.A. En Banc Br. 5. No such examination occurred. Patient L had received an examination in April 2013, of a shorter duration, by an associate. See *id.* at 4. But that examination was not reimbursable,

and petitioner's Medicaid claim here did not seek reimbursement for it. Petitioner instead sought reimbursement for a different service that Patient L never received—a three-hour exam by a licensed psychologist in May 2013.

In doing so, petitioner "use[d]" Patient L's "means of identification," 18 U.S.C. 1028A(a)(1), by including Patient L's name and identification number in the claim. See Pet. App. 70a. He did so "during and in relation to" healthcare fraud, 18 U.S.C. 1028A(a)(1), by invoking Patient L's individual right to reimbursement. And he did so "without lawful authority," *ibid.*, by disregarding the actual relationship with Patient L, inventing a fictitious service, and invoking Patient L without Patient L's consent for personal profit. Accordingly, the plain text of Section 1028A(a)(1) specifies that his conduct was subject to a sentence enhancement.

2. Petitioner criticizes (Pet. 31) the decision below for not "adopt[ing] a narrower construction" that petitioner does not precisely describe. But whatever the limits of Section 1028A's scope, petitioner's conduct fits squarely within its compass.

In ordinary English, the verb "use" means "employ," "derive service from," "avail oneself of," "utilize," or "carry out a purpose or action by means of." *Smith* v. *United States*, 508 U.S. 223, 229 (1993) (citations omitted); see, *e.g.*, *id.* at 228 (holding that a person can "use" a firearm without firing it, such as by trading it for drugs). Petitioner's conduct here—in which he invoked Patient L's name and identification number in a Medicaid bill to claim Patient L's right to reimbursement for services that Patient L did not in fact received—satisfied any and all of those definitions. It should therefore "be beyond debate that [petitioner] 'used' Patient L's

identifying information" in the course of committing healthcare fraud. Pet. App. 10a (Richman, C.J., concurring). And petitioner appears now to acknowledge (Pet. 24 n.6) that he indeed "may have used Patient L's means of identification as part of a fraud."

Petitioner errs in suggesting (Pet. 28-29) that his use of Patient L's identifying information was not "without lawful authority," 18 U.S.C. 1028A(a)(1), because he had "permission to use Patient L's means of identification on this Medicaid bill," Pet. 24 n.6 (citation omitted). But in the court of appeals, petitioner "d[id] *not* claim he had lawful authority to use" Patient L's identifying information. Pet. App. 67a (emphasis altered). In any event, the term "without lawful authority," 18 U.S.C. 1028A(a)(1), "easily encompasses situations in which a defendant gains access to identity information legitimately but then uses it illegitimately—in excess of the authority granted." *United States* v. *Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013). Here, although petitioner had authority to use Patient L's identifying information to present Patient L as the recipient of the services that PARTS in fact provided, he did not have authority (let alone "lawful" authority) to use Patient L's information to represent Patient L as the recipient of services that PARTS did not provide.

Petitioner also errs in contending that his use of Patient L's means of identification did not occur "during and in relation to" the predicate healthcare fraud. Pet. 28 (citations omitted). Petitioner's presentation of Patient L, in particular, as the recipient of nonexistent services was not "merely incidental" (Pet. 27) to the fraud. A random identity, or a wholly fictional one, would have been unsuitable. The fraud depended on casting a real Medicaid-eligible child—Patient L—as the recipient of

services that, if actually provided to the patient, would warrant reimbursement. See, *e.g.*, Pet. App. 11a (Richman, C.J., concurring) (observing that petitioner "could not have effectuated the health care fraud * * * without using Patient L's identifying information"); see also, *e.g.*, Gov't C.A. En Banc Br. 37; C.A. ROA 2600, 3500-3501, 3652. Patient L's own specific medical history in fact informed petitioner's fictitious claim, which falsely represented that Patient L had received an examination at a time when Patient L would be eligible for reimbursement. See Gov't C.A. En Banc. Br. 4-5. The use of the means of identification was therefore "during and in relation to" petitioner's predicate offense. 18 U.S.C. 1028A(a)(1).

Petitioner further errs in contending that, because Section 1028A bears the heading "Aggravated identity theft," 18 U.S.C. 1028A (emphasis omitted), the statute applies only "to what ordinary people understand identity theft to be," Pet. 31 (citation omitted). Congress has provided that "[n]o inference of a legislative construction is to be drawn * * * by reason of the catchlines used in" Title 18 of the U.S. Code. Act of June 25, 1948, ch. 645, § 19, 62 Stat. 862. That provision makes Title 18's section headings (its "catchlines") irrelevant to the interpretation of Title 18's text. See *United States* v. *Dixon*, 347 U.S. 381, 385-386 (1954) (applying a similar disclaimer in Title 26); *Ex parte Collett*, 337 U.S. 55, 59 (1949) (applying a similar disclaimer in Title 28); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 35 (2012) ("Be sure to check your text or code or compilation for such a disclaimer.").

Even putting aside that disclaimer, "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) (brackets and citation omitted). And "the text of 18 U.S.C. § 1028A(a)(1) does not contain the words 'identity theft' or even 'theft.'" Pet. App. 3a (Richman, C.J., concurring). Courts of appeals have thus "universally rejected" the argument that Section 1028A "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. *Ozuna-Cabrera*, 663 F.3d 496, 498-501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); *United States* v. *Abdelshafi*, 592 F.3d 602, 606-610 (4th Cir. 2010), cert. denied, 562 U.S. 874 (2010); *United States* v. *Lumbard*, 706 F.3d 716, 721-725 (6th Cir. 2013); *United States* v. *Retana*, 641 F.3d 272, 274-275 (8th Cir. 2011); *United States* v. *Zitron*, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam); *Reynolds*, 710 F.3d at 436 (D.C. Cir.).

Finally, petitioner errs in contending (Pet. 31) that the application of Section 1028A(a)(1) in this case would violate the rule of lenity. The rule of lenity comes into play only if, even after the application of the ordinary tools of statutory interpretation, there remains a "grievous ambiguity" in the statute. *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998). Application of the plain meaning of the statutory terms here produces no such grievous ambiguity. And contrary to petitioner's contention (Pet. 2), the court of appeals' decision does not mean that "a defendant violates the statute any time he mentions or otherwise recites someone else's name while committing a predicate offense." The court did not hold that, and if any future case were in fact to arise involving one of petitioner's hypothesized scenarios, one or more of the elements of Section 1028A

might not be satisfied. Indeed, in a case unobscured by the preservation issues here, the court of appeals might well review such an issue en banc. See Pet. App. 29a-37a (Oldham, J., concurring) (explaining vote to deny rehearing on plain-error grounds).

3. Contrary to petitioner's contention (Pet. 14-20), this case does not implicate any circuit conflict. The cases that petitioner cites do not demonstrate that another circuit would have granted him appellate relief.

To begin, the decision below does not conflict with *United States* v. *Medlock*, 792 F.3d 700 (6th Cir.), cert. denied, 577 U.S. 1037 (2015). There, the Sixth Circuit concluded that the defendants had not violated Section 1028A(a)(1) by lying "about their own eligibility" to receive reimbursement for transporting Medicare beneficiaries. *Id.* at 706. The court emphasized that "[t]here was nothing about those particular beneficiaries, rather than some other lawful beneficiaries of Medicare, that entitled them to reimbursed rides." *Ibid.* As the court of appeals observed here, however, the "facts of this case do not fit squarely into the holding or facts of *Medlock*." Pet. App. 68a. In this case, unlike in *Medlock*, petitioner's fraud *was* predicated on his false claim that Patient L in particular had received the specified services, and had a right to reimbursement for them. See pp. 9-10, *supra*.

The decision below also does not conflict with *United States* v. *Berroa*, 856 F.3d 141 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017). In that case, 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 156-157. The First Circuit later clarified, however, that a person can use the means of

identification of another by submitting a fraudulent form containing the person's identifying information. See *United States* v. *Tull-Abreu*, 921 F.3d 294, 300, cert. denied, 140 S. Ct. 424 (2019); see *ibid.* (explaining that a person who submits such a form satisfies *Berroa*'s requirement of taking action on another person's behalf); *id.* at 300 n.3 (explaining that decisions upholding Section 1028A convictions "'where the defendant neither stole nor assumed the identity of the other person'" are "[i]n accord with *Berroa*") (citation omitted).

Petitioner's reliance (Pet. 18) on Ninth Circuit decisions is likewise misplaced. Petitioner emphasizes *United States* v. *Hong*, 938 F.3d 1040 (2019), where the Ninth Circuit concluded that the defendant "did not 'use' the patients' identities within the meaning of" Section 1028A(a)(1) where neither he nor others had "'attempted to pass themselves off as the patients.'" *Id.* at 1050-1051 (brackets and citation omitted). But the Ninth Circuit has recognized both before and after *Hong* that "the statutory text does not suggest that 'use' 'refers only to assuming an identity or passing oneself off as a particular person.'" *United States* v. *Harris*, 983 F.3d 1125, 1128 (9th Cir. 2020) (citation omitted); see, *e.g.*, *Osuna-Alvarez*, 788 F.3d at 1185. To the extent that *Hong* conflicts with those other Ninth Circuit decisions, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner also errs in arguing (Pet. 17, 19-20) that the decision below conflicts with *United States* v. *Wedd*, 993 F.3d 104 (2d Cir. 2021), *United States* v. *Michael*, 882 F.3d 624 (6th Cir. 2018); *United States* v. *Gatwas*,

910 F.3d 362 (8th Cir. 2018), cert. denied, 140 S. Ct. 149 (2019), and *United States* v. *Munksgard*, 913 F.3d 1327 (11th Cir. 2019), cert. denied, 140 S. Ct. 939 (2020). As a threshold matter, *Wedd*, *Gatwas*, and *Munksgard* all affirmed the defendants' Section 1028A(a)(1) convictions. See *Wedd*, 993 F.3d at 125; *Gatwas*, 910 F.3d at 368; *Munksgard*, 913 F.3d at 1336. The results of those cases accordingly do not conflict with the corresponding affirmance of petitioner's Section 1028A(a)(1) conviction here. In any event, those decisions simply emphasize that Section 1028A requires the use of another person's means of identification to occur "during and in relation to" the predicate offense. 18 U.S.C. 1028A(a)(1); see *Wedd*, 993 F.3d at 123; *Michael*, 882 F.3d at 628; *Gatwas*, 910 F.3d at 368; *Munksgard*, 913 F.3d at 1334-1335. As discussed above, petitioner's conduct—which relied on Patient L's individual and circumstance-specific right to a Medicaid reimbursement—satisfied that requirement. See pp. 9-10, *supra*.

Finally, the decision below does not conflict with *United States* v. *Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc). *Spears* involved an unusual fact pattern, in which the defendant had transferred the means of identification (a counterfeit handgun permit) to the very person being identified. See *id.* at 756-758. As the Seventh Circuit has since explained, *Spears* held only 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 (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").

This case does not involve any such fact pattern; petitioner used Patient L's means of identification in a claim submitted to Medicaid, not in a claim submitted to Patient L. In addition, petitioner acknowledges that *Spears* did not rely "on 'use' or the statute's causation requirement," but instead construed the term "another person." Pet. 20 (citation omitted). Petitioner did not dispute below, and he does not dispute here, that Patient L is "another person" within the meaning of Section 1028A(a)(1).

4. This case would in all events be a poor vehicle for reviewing the question presented.

First, petitioner has forfeited his current contentions. Under Federal Rule of Criminal Procedure 29, a motion for a judgment of acquittal must be made "within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1). In this case, petitioner filed a motion for judgment of acquittal within that 14-day deadline, but he did not raise his current arguments in that motion. See Pet. App. 30a (Oldham, J., concurring). Petitioner instead raised his argument—which at that time was limited to the "use" element of the statute—for the first time in another motion filed "[m]ore than six months after the verdict," long after Rule 29's deadline had expired. *Ibid.* (emphasis omitted). Because petitioner did not timely raise that contention in the district court, it is subject to review only for plain error—a standard that petitioner cannot satisfy. *Id.* at 33a, 36a.

Petitioner notes (Pet. 24) that the government did not raise that objection in the district court. But the plain-error rule governs *appellate* review, see *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993), and the government invoked that rule in its en banc brief, see

Gov't C.A. En Banc Br. 11 n.3. Further, Judge Oldham stated that, because "[a] party cannot waive, concede, or abandon the applicable standard of review," the government's position on the applicability of plain-error review "is irrelevant." Pet. App. 32a (citation omitted). Whether or not Judge Oldham was correct, threshold questions about the applicable standard of review would make this case a poor vehicle for considering the question presented.

Second, petitioner's current position is "directly adverse to" the jury instructions in which he acquiesced in district court. Pet. App. 34a (Oldham, J., concurring) (citation omitted). Petitioner argues that Section 1028A(a)(1) applies only "to what ordinary people understand identity theft to be." Pet. 26 (citation omitted). But petitioner acquiesced in the district court's instruction that, "[t]o be found guilty of this crime, the defendant does not have to actually steal a means of identification. Rather, the statute criminalizes a situation in which 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." Pet. App. 34a (Oldham, J., concurring).

Although petitioner's position on the jury instructions does not itself foreclose his challenges to the sufficiency of the indictment and the evidence, see *Musacchio* v. *United States*, 577 U.S. 237, 243-244 (2016), it does make this case an inappropriate vehicle for reviewing the question presented. This Court has "treated an inconsistency between a party's request for a jury instruction and its position before this Court" as a relevant "consideration[] bearing on" whether to grant a writ of certiorari. *United States* v. *Wells*, 519 U.S. 482,

488 (1997). "[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

Petitioner's suggestion (Pet. 25 n.6) that the instructions were, in fact, proper even under the reading of the statute that he would favor reinforces that review of the question presented in the petition presents highly fact-bound questions regarding the inferences that could properly be drawn from the allegations and evidence, as opposed to purely legal questions. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10. A writ of certiorari should accordingly be denied here. And the need to review this case through the lens of a challenge to the sufficiency of the evidence, rather than a challenge to an instruction, would make this case a poor vehicle for considering the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2022