No. 22-10

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is no disagreement about the facts here. In April 2013, a psychological associate spent two and one-half hours administering a battery of tests on Patient L. *See* BIO 7. Petitioner sought reimbursement from Medicaid for that testing. But on the Medicaid bill petitioner submitted, he overstated the value of the testing and misstated the date it was performed: He "sought reimbursement for . . . a three-hour exam by a licensed psychologist in May 2013." *Id.* 8. For these actions, petitioner was convicted of healthcare fraud. The question presented is whether such conduct also constitutes "aggravated identity theft" under 18 U.S.C. § 1028A, requiring two extra years of imprisonment.

Judges in both the en banc majority and the dissent below recognized that other courts of appeals have reversed aggravated identity theft convictions "on facts similar to those" here and, therefore, that there is "undeniably a split" over whether Section 1028A applies under these circumstances. Pet. App. 5a, 20a (Owen., C.J., concurring); *id.* 43a-46a (Elrod J., dissenting). Yet the government resists this reality, asserting that this case does not implicate any circuit conflict because petitioner used patient L's name to bill for "a fictitious service" that was never provided. BIO 8; *see also id.* 12. That characterization of the facts, however, is mere wordplay. In all of the cases in the conflict, defendants recited other persons' names while billing for services different from those rendered. Some courts hold that such conduct constitutes aggravated identity theft, while others hold that it does not. *See* Pet. 14-20; Pet. App. 8a-9a (Owen,

C.J., concurring) (siding with former view); Pet. App. 52a-54a (Costa, J., dissenting) (siding with latter view); Pet. App. 41a (Elrod, J., dissenting) (same).

Only this Court can resolve this intractable disagreement over this frequently invoked federal statute. The Court should do so now. There is no impediment to reaching and resolving the issue. And the government's all-inclusive interpretation of Section 1028A is deeply mistaken.

1. *Split*. Contrary to the government's contentions, several courts of appeals would have reversed petitioner's conviction for aggravated identity theft.

a. The government argues that this case involves wholly "fictitious services," whereas cases on the other side of the conflict involved actual services to recipients whose identities were irrelevant to the fraud. BIO 7-9, 12-14. No Fifth Circuit judge below made this argument. And for good reason: The government's spin on the facts here does not distinguish this case from any others in the conflict.

Take *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015), in which the Sixth Circuit held that the defendants did not commit aggravated identity theft when they lied about whether their patients were "transported by stretchers." *Id.* at 708. If the government's characterization of the service in petitioner's case as "fictitious" were correct, then the service in *Medlock* was equally "fictitious"; the patients there never received transportation by stretcher. Similarly, in *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018), Judge Sutton explained that a pharmacist does not use a person's identity during and in relation to

the underlying fraud when the pharmacist "only inflate[s] the amount of drugs he dispensed." *Id.* at 629. There is no difference between that scenario and the inflated billing here.[1]

The Fifth Circuit's decision also conflicts with *United States v. Berroa*, 856 F.3d 141 (1st Cir. 2017). There, the government charged the defendants with aggravated identify theft for writing prescriptions with fraudulently obtained medical licenses. *Id.* at 155-57. Again, the services there could be characterized as "fictitious" in the same way as the services here could be; after all, the patients in *Berroa* did not receive prescriptions from legitimate doctors. But the First Circuit reversed their convictions on the ground that the defendants did not "purport to take some [] action on another person's behalf." *Id.* at 156-57.

The government suggests that a later First Circuit case holds that *Berroa*'s test is satisfied every time a defendant "submit[s] a fraudulent form containing the person's identifying information." BIO 12-13 (citing *United States v. Tull-Abreu*, 921 F.3d 294 (1st Cir. 2019)). Not so. In *Tull-Abreu*, the defendant had people sign Medicaid reimbursement forms with information missing, and then requested reimbursement for "services that were not provided." *Id.* at 297-98, 300-01. Far from supporting the government, *Tull-Abreu* illustrates "the distinction," *id.* at 301, that

[1] The government also tries to distinguish *Medlock* on the ground that part of the fraud here turned on facts unique to Patient L—namely, when he was last tested. BIO 12. But as in *Medlock*, the fraud here was facilitated by a misrepresentation about the service, not the patient's identity.

most circuits draw between overbilling for actual services (as in this case and *Berroa*) and using another person's identity to procure payment for wholly fictitious services. *See also* Pet. App. 53a & n.1 (Costa, J., dissenting).

Ninth Circuit precedent is in accord. The government does not dispute that the decision below is irreconcilable with *United States v. Hong*, 938 F.3d 1040 (9th Cir. 2019), which held that lying to Medicare about which services were provided (physical therapy as opposed to massage) is not aggravated identity theft. Instead, the government asserts that *Hong* creates at most "an intra-circuit conflict" because other Ninth Circuit cases suggest that Section 1028A covers conduct beyond "assuming an identity or passing oneself off as a particular person." BIO 13 (quotations omitted). That language in subsequent cases, however, is irrelevant to the question presented here. Under *Hong*, it is not aggravated identity theft to recite someone's name while misrepresenting what services were provided because, in the Ninth Circuit's view, the other person's identity "ha[s] little to do with furthering or facilitating [the] fraudulent scheme." *United States v. Harris*, 983 F.3d 1125, 1127 (9th Cir. 2020). And the Ninth Circuit continues to rely on *Hong*'s holding as good law. *See id.* at 1126-27; *United States v. Gagarin*, 950 F.3d 596, 603-04 (9th Cir. 2020). That means petitioner would have been acquitted in the Ninth Circuit.

Petitioner's "conviction [also] would also be vacated under the reasoning" of the Second, Eighth, Eleventh, and Seventh Circuits. Pet. App. 43a (Elrod,

J., dissenting); *see* Pet. 19-20. The government responds that the Second, Eighth, and Eleventh Circuit 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." BIO 14. That is only partially correct. These decisions also adopted Judge Sutton's causation test, under which petitioner's "conviction would surely be vacated." Pet. App. 45a (Elrod, J., dissenting); *see also* Pet. 19-20.

Finally, the government argues the holding below does not conflict with *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc), because the person's identity in that case was presented "to the very person being identified." BIO 14. But Seventh Circuit has never limited its holding in *Spears* to those facts. Instead, the Seventh Circuit construes the words "another person" in Section 1028A to require an absence of the other person's "consent to the use of the 'means of identification,'" regardless of to whom the identification is shown. 729 F.3d at 758. That requirement would necessitate vacatur here, because "Patient L consented to the use of [his] name for this Medicaid claim." Pet. App. 54a-55a (Costa, J., dissenting).

b. The government notes that this Court has denied review over the years of numerous petitions concerning Section 1028A. BIO 7. Some of those cases, however, involved classic cases of aggravated identity theft—forgery, impersonation, and the like—about which "[t]he courts of appeals broadly agree." Br. in Opp. at 19, 24, *Gagarin v. United States,* 141 S. Ct. 2729 (2021) (No. 20-7359); *see also* Br. in Opp. at 16, 19, *Munksgard v. United States*, 140 S. Ct. 939 (2020)

(No. 19-5457); Br. in Opp. at 18, 23, *Gatwas v. United States*, 140 S. Ct. 149 (2019) (No. 18-9019); Br. in Opp. at 17-18, *Perry v. United States*, 137 S. Ct. 2239 (2017) (No. 16-7763). Other cases focused on whether the statute contains a lack-of-consent element. *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185-86 (9th Cir. 2015), *cert. denied*, 577 U.S. 913 (2015); *United States v. Rodriguez-Ayala*, 773 F.3d 65, 68 (4th Cir. 2014), *cert. denied*, 577 U.S. 843 (2015); *United States v. Otuya*, 720 F.3d 183, 189-90 (4th Cir. 2013), *cert. denied*, 571 U.S. 1205 (2014). The rest of the cases the government references were unsuitable vehicles, for other reasons, for resolving the question presented here.[2]

Furthermore, several of the previous petitions involving Section 1028A arose from decisions predating the Sixth Circuit's 2015 *Medlock* decision, which cemented the conflict over the question presented. That conflict has since blossomed into a broad and intractable split implicating the majority of the circuits and fracturing the en banc court below. It is now time for this Court to step in.

2. *Vehicle*. The government's vehicle argument—that petitioner might need to satisfy the plain-error standard to obtain relief—similarly falls flat.

To begin, the government is wrong to call its plain-error argument a "threshold" issue. BIO 16. As the Petition explained, this Court has previously left

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[2] Br. in Opp., *Santana v. United States*, 139 S. Ct. 1446 (2019) (No. 18-682) (entirely different issue; case involving forgery); Br. in Opp. at 5-6, *Bercovich v. United States*, 577 U.S. 1062 (2016) (No. 15-370) (interlocutory posture).

plain-error contentions for remand, Pet. 23—just like it frequently does with other non-jurisdictional arguments not resolved by the court below. The government offers no response. For this reason alone, the government's plain-error argument does not present any impediment to review.

At any rate, the plain-error doctrine does not apply here. In his separate opinion below—joined by only four of the judges who joined the per curiam opinion, and rejected by all eight dissenters—Judge Oldham proposed two reasons why petitioner should have to show plain error. The government defends neither one.

First, the government does not dispute that tardiness in filing a motion for a judgment of acquittal does not trigger the plain-error doctrine where the government itself does not make a timely objection to such tardiness. Instead, the government suggests it objected in a timely manner by "invok[ing]" the plain-error rule in its en banc brief. BIO 15. This is incorrect. Under *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam), the government must object *in the district court* to the timeliness of a Rule 29 filing to avoid de novo review on appeal. *See* Pet. 24.

By the same token, it is irrelevant whether a party can "waive … the applicable standard of review." BIO 16 (citation omitted). The plain-error standard does not apply here in the first place because the government did not object in the district court to the timeliness of petitioner's motion for acquittal.

Second, the government acknowledges (contrary to Judge Oldham's contention) that petitioner's acceptance of the jury instruction regarding Section 1028A "does not itself foreclose his [de novo] challenges to the sufficiency of the indictment and the evidence." BIO 16; *see also* Pet. 24-25. The government suggests, however, that petitioner's acceptance of the instruction is a "relevant consideration bearing on whether to grant certiorari." BIO 16 (quotation marks and citation omitted). There is no inconsistency between petitioner's position here and the relevant jury instruction. Pet. 24 n.6. But it would not matter even if there were. In the case the government cites, the Court granted certiorari because the question presented "was raised before the Court of Appeals, ruled on there, [and] clearly set forth in the certiorari petition." *United States v. Wells*, 519 U.S. 482, 489 (1997). Exactly so here. In the only case in which the Court has actually deemed failure to object to an instruction relevant to certiorari, the petitioner was a defendant in a civil case making an argument in this Court "not raised or litigated in the lower courts" or even in the petition for certiorari. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). None of those factors is present here.

More generally, the government is wrong (BIO 17) that the sufficiency-of-the-evidence posture here is somehow inferior to a case in which the defendant challenges a jury instruction. In fact, the government has it exactly backwards. In nearly all of this Court's recent cases assessing the breadth of criminal statutes, the Court has considered sufficiency challenges, not jury-instruction arguments. Pet. 25 (collecting

cases); *see also Ciminelli v. United States*, No. 21-1170 (cert. granted June 30, 2022). Sufficiency challenges are cleaner because they relieve this Court of any obligation to parse the language of jury instructions, *compare Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022)—and thus leave the Court free to focus on the statute itself, as applied directly to the key facts at issue.

3. *Merits*. The government's merits argument only underscores the need for review. Like the majority below, the government makes no attempt to argue that its construction of Section 1028A has anything to do with the common understanding of "identity theft"—much less "aggravated" identity theft. Instead, the government maintains that the "plain text" of the statute sweeps far more expansively. The government is wrong at every turn.

The government first argues that a person "uses" an individual's name under Section 1028A whenever he "invoke[s an individual's] name" while committing a covered offense. BIO 8. But even if this is true in one sense of the word "uses," the government offers no answer to petitioner's point that this Court and the government itself have defined the word more narrowly in other analogous contexts. Pet. 26-27. Nor does the government dispute that petitioner's conviction must be reversed if "uses" has the definition here that the government proposed to this Court just two Terms ago in *Van Buren v. United States*, 141 S. Ct. 1648 (2021)—namely, deploys for an "instrumental" purpose. *See* Pet. 27.

The government's contention that petitioner used Patient L's name "without lawful authority" is even

more problematic. Consistent with the Fifth Circuit's previous holding in *United States v. Mahmood*, 820 F.3d 177, 187-90 (5th Cir. 2016), the government maintains that a person uses another's identity "without lawful authority" anytime he uses the identity "in excess of the authority granted." BIO 9 (citation omitted). But, as this Court's recent decision in *Van Buren* illustrates, this contention stretches the phrase "without lawful authority" far beyond its breaking point. In *Van Buren*, this Court considered whether an individual accessed a computer "without authorization or exceed[ed] authorized access" under 18 U.S.C. § 1030(a)(2) when he accessed it for a "prohibited purpose." 141 S. Ct. at 1655. The Court took it as a given that acting without authorization is distinct from merely "exceeding authorized access"—a foundational premise that alone defeats the government's argument here. Furthermore, the Court held that a person does not even "exceed authorized access" by accessing a computer for an improper purpose; a person exceeds authorized access only when he has no right to access the information at issue for any reason. *Id.* at 1654-56.

So too here. A person does not use another's identity "without lawful authority" unless he has no authority at all to use the identity under the circumstances at issue. *See* Pet. 28-29. That being so, petitioner did not violate Section 1028A. He had authority to use Patient L's name to bill Medicaid for testing services.

The government also errs in asserting that petitioner used Patient L's identity "during and in relation to" the predicate healthcare fraud because the

fraud "depended on" his identity. BIO 9. The fraud here turned on the nature and date of the services provided, not on any misrepresentation regarding Patient L's identity. Pet. 28; *supra* at 1.

Lastly, the government says it is immaterial that its construction of Section 1028A is not—as the concurring judges below put it—"even fairly described by the words 'identity theft.'" Pet. App. 8a (Owen, C.J., concurring). According to the government, the title of the statute here is "irrelevant" because section headings "used in" Title 18 may not be used to construe statutes in that title. BIO 10 (citing Act of June 25, 1948, ch. 645, § 19, 62 Stat. 862). The section heading here, however, is not simply used in Title 18—that is, it was not simply added by those codifying Congress's enactment. The heading "aggravated identity theft" is part of the public law that *Congress itself* enacted. *See* Pub. L. No. 108-275, 118 Stat. 831 (2004). And the title of that public law—also enacted by Congress—is the Identity Theft Penalty Enhancement Act. The words "identity theft" are thus plainly relevant to the question at hand. And the government's inability to offer even a plausible conception of those words that fits with its construction of Section 1028A cements the need for this Court's intervention.

So does the government's failure to offer any understanding of Section 1028A that makes sense in light of its "place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (quotations omitted). It bears remembering that Section 1028A is a mandatory sentencing enhancement, requiring two extra years of imprisonment when a defendant commits "aggravated identity theft" in the

course of a predicate offense. Yet, as the Petition points out, the government maintains that Section 1028A is triggered virtually every single time someone commits healthcare fraud or another covered offense. Pet. 8, 21-22; *see also* BIO 13 (suggesting statute is triggered any time someone submits "a fraudulent form containing [another] person's identifying information"). The Fourth and Fifth Circuits have now embraced that view.

This is the epitome of overcriminalization. *See* NACDL Amicus Br. at 9-12. A sentencing enhancement—particularly one reserved for an "aggravated" form of misconduct—should have some meaningful limits. Because the Fifth Circuit has declined to impose any, this Court should rein in the government's indiscriminate use of Section 1028A.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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