No. 22-10

IN THE

Supreme Court of the United States

DAVID DUBIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a person commits "aggravated identity theft" under 18 U.S.C. § 1028A every time he employs another person's name while committing a predicate offense.

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BRIEF FOR PETITIONER

Petitioner David Dubin respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The en banc decision of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-55a) is reported at 27 F.4th 1021. The panel decision of the court of appeals (Pet. App. 56a-81a) is reported at 982 F.3d 318. The relevant proceedings in the district court are unpublished.

JURISDICTION

The en banc decision of the court of appeals was issued on March 3, 2022. Pet. App. 1a. 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 for a writ of certiorari was filed on June 30, 2022, and granted on November 10, 2022. 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

In a recent series of cases, this Court has stressed the need to "exercise[] restraint in assessing the reach of a federal criminal statute" and has chastised lower courts for failing to construe potentially capacious statutory terms in context. *Marinello v. United States*, 138 S. Ct. 1101, 1106-08 (2018) (citation omitted); *see also Van Buren v. United States*, 141 S. Ct. 1648, 1654-55 (2021); *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); *McDonnell v. United States*, 579 U.S. 550, 574-77 (2016); *Yates v. United States*, 574 U.S. 528, 540 (2015); *Bond v. United States*, 572 U.S. 844, 862-65 (2014); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005). This case raises these same concerns yet again.

The federal "aggravated identity theft" statute makes it a crime when an individual, "during and in relation to any [predicate felony violation], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A. The statute ensures that those who steal, for example, others' identification documents or credit card numbers and use them to commit fraud face serious punishment. But the Fifth Circuit has now stretched Section 1028A to cover conduct that bears no resemblance to identity theft. "[B]ased entirely on dictionary definitions of the word 'use,'" the court has construed Section 1028A to be violated *whenever* someone recites another person's name while committing a predicate offense. Pet. App. 40a (Elrod, J., dissenting); *see id.* 69a-71a (panel opinion adopted by en banc majority); *id.* 49a (Costa, J., dissenting).

This sweeping interpretation of the aggravated identity theft statute portends weighty consequences for individuals who, at most, would otherwise be guilty of ordinary frauds. It would mean, for instance, that an applicant for a bank loan who slightly inflates his salary while correctly identifying the co-signer for his loan would commit aggravated identity theft. It would mean that a taxpayer who claims an improper deduction while including the name of her child on her tax return commits aggravated identity theft. It would also mean that every garden-variety mail or wire fraud would constitute aggravated identity theft, for one cannot send a letter or an electronic communication without including the recipient's identifying information.

This case presents another striking application of the Fifth Circuit's maximalist reading of Section 1028A. Petitioner David Dubin overbilled Medicaid by $101 for a psychological evaluation his company provided to a patient. For this, Dubin was convicted of health care fraud and sentenced to one year and a day in prison. But the Government was not content with that conviction and punishment. The Government also charged Dubin with aggravated identity theft and obtained a conviction on that count as well, adding a mandatory two years of additional imprisonment to Dubin's sentence. The Government obtained that conviction not because Dubin stole or otherwise misrepresented anyone's identity. Rather, the "aggravated identity theft" for which Dubin was convicted was simply including his patient's accurate identifying information on the Medicaid claim that misrepresented how and when the service was performed.

The Fifth Circuit's expansive reading of the aggravated identity theft statute cannot stand. Under a proper reading of the full text of Section 1028A, a person violates Section 1028A only if (1) his use of another person's means of identification has a genuine nexus to the predicate felony violation, and (2) that use is carried out without the other person's permission. Neither condition is met here. The decision below should be reversed.

STATEMENT OF THE CASE

A. Statutory background

Since the turn of the century, new technologies have enabled Americans to conduct their everyday business digitally—such as paying bills, filing taxes, and applying for loans. But this shift simultaneously created new opportunities for wrongdoers to steal and exploit others' means of identification. For example, in 2002, a financial services employee stole and sold 30,000 people's credit information in what the Government at the time called the "largest identity theft in American history." U.S. Dep't of Just., *U.S. Announces What Is Believed the Largest Identity Theft Case in American History; Losses Are in the Millions* (Nov. 25, 2002), https://perma.cc/2XXS-Y2H2.

Around the same time, Congress recognized that crime involving identity theft was growing into an ever more serious problem. The federal criminal code, however, did not sufficiently account for this growing threat. Instead, the code often treated crimes involving identity theft as just typical instances of the underlying crimes themselves. The result was cases in which defendants who stole or misappropriated others' identities to commit crimes "received little or no prison

time." H.R. Rep. No. 108-528, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779. These cases included one where an individual provided stolen credit card data and false green cards to aid a terrorist; another where a person stole twenty-four people's identities and submitted bogus income tax returns for them; and another where an individual used another person's Social Security number to get loans and credit lines. *See id.* at 5-6.

To "address[] the growing problem of identity theft" and to ensure that identity thieves receive meaningful punishment, H.R. Rep. No. 108-528, at 3, Congress passed the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004). The Act provides "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. In particular, the Act targets "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 centerpiece of the Act is 18 U.S.C. § 1028A. This statute, entitled "Aggravated identity theft," requires a mandatory two-year term of imprisonment for anyone who, "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." 18 U.S.C. § 1028A(a)(1). Subsection (c) lists over sixty predicate offenses, including the federal fraud provisions (e.g., mail fraud, wire fraud, bank fraud, and healthcare fraud). *See id.* § 1028A(c). Section 1028A requires its two-year sentence to run consecutively to any term of

imprisonment for the predicate offense. *Id.* § 1028A(a)(1)-(b).

B. Factual background and procedural history

1. Petitioner David Dubin worked at his father's psychological services company (PARTS), which provided mental health testing to youths at emergency shelters in Texas. Pet. App. 57a-58a. The Hector Garza Center (the Center), a facility near San Antonio, hired PARTS to perform psychological evaluations for its patients. Under the arrangement between the two entities, PARTS was responsible for determining whether the Center's patients were eligible for Medicaid. If so, PARTS would file Medicaid reimbursement claims for treating those patients; if not, the Center would pay PARTS for the services. *See* Ex. I-1 to ECF No. 239.

In April 2013, the Center asked PARTS to conduct psychological evaluations of several of its residents, including one referred to in court documents as Patient L. PARTS's evaluations "generally consisted of a clinical interview, testing, assessments, and a report containing findings and recommendations." Pet. App. 38a (Elrod, J., dissenting). Later that month, PARTS sent a licensed psychological associate to perform the evaluation. The associate completed the testing but was unable to complete the clinical interview (a separate service with a separate Medicaid billing code). *See* J.A. 17-20; *see also* CA5 ROA 2512, 2571, 3119.

"After the testing, [Dubin and his father] realized that Patient L had already been evaluated within the past year." Pet. App. 38a-39a (Elrod, J., dissenting); *see* J.A. 18-19. As the courts below understood the relevant rules, Medicaid would "not reimburse for

more than one of these evaluations" during any twelve-month period. Pet. App. 38a-39a (Elrod, J., dissenting); *see* J.A. 19. So Dubin told the psychological associate to wait "another month, until the one-year mark had passed[,] before conducting the clinical interview and writing the report about Patient L." Pet. App. 39a (Elrod, J., dissenting); *see* J.A. 19-21.

It turned out, however, that Patient L was scheduled to be discharged before the interview could be completed. J.A. 19-20. And the Center's director told PARTS that it did not need the report on Patient L to be completed after all. J.A. 28, 43; *see also* ECF No. 192-67. So neither of these tasks was carried out.

PARTS did not bill Medicaid for the clinical interview that was never conducted or for the report that the Center instructed PARTS not to complete. But Dubin did instruct an employee to bill Medicaid for the services that PARTS actually performed in April 2013—namely, the psychological testing for Patient L. *See* J.A. 22, 48-49; ECF No. 192-55 (Medicaid Bill). That claim had Patient L's name and Medicaid ID number on it, as required for any Medicaid reimbursement claim. *See* J.A. 48-49; Pet. App. 49a (Costa, J., dissenting).

According to the Government, this claim form contained "three material falsehoods"—none of which had anything to do with Patient L's identity. *See* U.S. CA5 En Banc Br. 5. First, the claim represented that a licensed psychologist, rather than a licensed psychological associate, had performed the testing. *Id.* This matters because Medicaid reimburses licensed psychologists at a slightly higher rate—in this case, the difference in reimbursement was $101.43. Second, the claim represented that the testing was performed

on May 30, 2013, when in fact the testing was performed the previous month. *Id.* Third, the claim rounded up the number of hours spent performing the tests from 2.5 hours to 3. *Id.*

2. Based on these alleged misrepresentations, the Government charged Dubin with healthcare fraud under 18 U.S.C. §§ 1347 and 1349. A jury found him guilty of those counts. Pet. App. 61a.[1] In post-trial proceedings, the district court held that the Government's licensed-psychologist and wrong-service-date theories were "adequate to support the jury's verdict." J.A. 39-40. The district court did not address the rounding-up-time theory.

For these same actions, the Government also charged and convicted Dubin of aggravated identity theft under 18 U.S.C. § 1028A. The Government did not argue that Dubin's fraudulent misrepresentations related to Patient L's identity. Nor did the Government contest that Dubin had permission to use Patient L's name to bill Medicaid for psychological testing services. But the Government argued that a conviction for healthcare fraud "go[es] hand in hand" with committing aggravated identity theft, J.A. 31, because Medicaid reimbursement forms like the one here necessarily include the "use[]" of another person's name under Section 1028A, and because a patient "can't give someone . . . permission" to use his name to *overbill* Medicaid, *id.* 32; *see also* U.S. CA5 En Banc

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[1] The charge under Section 1347 was for aiding and abetting; and the charge under Section 1349 was for conspiracy to commit health care fraud. Pet. App. 61a. The Government also charged Dubin in a 25-count indictment with various other offenses. *See Id.* But Dubin was acquitted of all counts except those relating to Patient L. *Id.*

Br. 30. In other words, the Government told the jury that "Dubin's committ[ing] this healthcare fraud offense[] obviously" meant that he was "also guilty of" aggravated identity theft. J.A. 32.

The jury accepted the Government's argument and found Dubin guilty of violating Section 1028A.

Dubin then renewed his motion for acquittal on the aggravated identity theft count. The district court agreed that "this doesn't seem to be an aggravated identity theft case." J.A. 37. Instead, the "whole crux of this case" was "how they were billing"—it was not as if Dubin was "steal[ing] somebody else's credit cards." *Id.* 37-38. But, believing itself bound by Fifth Circuit precedent, the court denied Dubin's motion. *Id.* 39. At the same time, the court expressed "hope" that it would "get reversed on the aggravated identity theft count." *Id.*

For Dubin's healthcare fraud convictions, the district court sentenced him to a term of imprisonment of one year and a day. Pet. App. 61a. Further, the court ordered Dubin to forfeit his ill-gotten gains and pay restitution to the Government. *Id.* Following the dictates of the aggravated identity theft statute, the district court also sentenced Dubin to an additional two years' imprisonment to run consecutively to his sentence for healthcare fraud. *Id.*

3. A panel of the Fifth Circuit affirmed.

In the view of the panel majority, the aggravated identity theft statute "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. As to the first prong of that test, the panel looked to the dictionary

definition of "use" and held that the word—as it appears in the aggravated identity theft statute—means nothing beyond to "employ" or "to avail oneself of." *Id.* 66a-71a. As to the second prong, the panel stated that a use of another person's identity is "without lawful authority" anytime it is employed during conduct that is "contrary to the law." *Id.* 66a (quoting *United States v. Mahmood*, 820 F.3d 177, 188 (5th Cir. 2016)).

The panel concluded that Dubin's conduct satisfied this two-part test. First, he "employ[ed]" Patient L's means of identification by including his name and Medicaid ID number on the bill PARTS submitted to Medicaid. Pet. App. 66a-67a. The panel did not assert that this recitation of Patient L's identity had any nexus to Dubin's fraud itself. Indeed, the Government stressed on appeal 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 CA5 Panel Oral Arg. at 17:43-55). But the panel found it sufficient that Dubin included Patient L's name and Medicaid number on a form that had other, unrelated misrepresentations. Pet. App. 70a-71a.

Second, the panel held that Dubin used Patient L's identity in a manner that was "contrary to the law" because he employed it during the commission of healthcare fraud. Specifically, "in order to be eligible for Medicaid reimbursement as submitted, the services provided to Patient L had to have been performed as submitted." Pet. App. 70a. And the Medicaid reimbursement form Dubin submitted

misrepresented the services "as having been performed by a licensed psychologist." *Id.*

Judge Elrod concurred, but only because she believed that circuit precedent required affirmance. Pet. App. 79a-81a. "[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). In *Medlock*, the Sixth Circuit reversed a conviction for aggravated identity theft where the defendants who owned an ambulance company "misrepresented *how* and *why* [certain patients] were transported," but the defendants did not misrepresent the patients' actual identities on Medicare billing forms or the fact that the patients were transported. Pet. App. 80a (Elrod, J., concurring) (quoting *Medlock*, 792 F.3d at 707). Similarly here, Dubin "lied about *when* and *how* Patient L received services, but did not lie about Patient L's identity or make any misrepresentations involving Patient L's identity." *Id.* 81a (Elrod, J., concurring).

4. 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 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 "our en banc court [in *Dubin*] adopted the panel's opinion"), *petition for cert. docketed* (U.S. Aug. 29, 2022) (No. 22-5460).

b. Chief Judge Richman (then known as Chief Judge Owen) concurred—joined by Judges Smith, Barksdale, Higginson, and Ho. Unlike the panel majority, the Chief Judge did not simply ask in the abstract whether Dubin "used" Patient L's means of identification. She recognized that the aggravated identity theft statute requires the means of identification to be used "in relation to" the predicate fraud. Pet. App. 10a-11a. But she found this requirement satisfied because Medicaid claim forms require those seeking reimbursement to include the patient's identifying information. Thus, in Chief Judge Richman's view, Dubin "could not have effectuated the health care fraud . . . without using Patient L's identifying information." *Id.*

Turning to Section 1028A's "without lawful authority" element, Chief Judge Richman recognized that Dubin "was authorized to use Patient L's identifying information" to bill Medicaid for psychological services. Pet. App. 11a-12a. Nevertheless, she concluded that Dubin used Patient L's identity "without lawful authority" because "neither Patient L nor Medicaid authorized [Dubin] to use that information or Patient L's name to commit health care fraud." *Id.* 12a. In other words, it did not matter that Dubin had authorization to use Patient L's name in a Medicaid bill; what mattered was that Dubin did not have authorization to commit a crime. *See id.* 17a-18a.

Ultimately, Chief Judge Richman acknowledged that Dubin's conduct could not "even fairly [be] described by the words 'identity theft.'" Pet. App. 8a. Yet she asserted that the statute's title is irrelevant. In her view, all that matters is the statute's "actual

text"—not "whether Dubin committed 'identity theft'" or "what ordinary people understand identity theft to be." *Id.* 7a-8a.

c. Judge Oldham—the one judge who voted to uphold Dubin's conviction but did not sign onto the per curiam opinion—also wrote a concurring opinion. In that concurrence, Judge Oldham asserted that Dubin 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. *Id.* at 36a-37a.

d. Judge Elrod—joined by Judges Jones, Costa, Willett, Duncan, Engelhardt, and Wilson, and in substantial part by Judge Haynes—dissented. Pet. App. 38a-46a (Elrod, J.); *see also id.* 47a (Haynes, J.).[2] In Judge Elrod's view, Dubin 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." *Id.* 41a. Instead, "[a]ny forgery alleged in this case relates only to the nature of the services, not to the patient's identity." *Id.* Under "the reasoning of the overwhelming majority of published opinions," Judge Elrod emphasized, it is not enough under Section 1028A to use a person's identity in relation to a predicate fraud. *Id.* 43a-46a (citing cases from the First, Sixth, Seventh, Ninth, and Eleventh Circuits).

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[2] Judge Haynes joined the legal reasoning in Judge Elrod's dissent but not the introduction or recitation of the case's procedural history. Judge Jones did not join footnote 3 of Judge Elrod's opinion.

e. Finally, Judge Costa—joined by Judges Jones, Elrod, Willett, Duncan, Engelhardt, and Wilson—also dissented. The en banc majority's decision, 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 v. United States*, 141 S. Ct. 1648, 1661 (2021)). 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.* 49a. "After all," Judge Costa observed, "any payment form submitted to Medicare, Medicaid, or an insurer needs identifying information for the patient." *Id.*

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 explained Section 1028A's "without lawful authority" element indicates that the statute applies "only when 'another person's' identity was used without permission." *Id.* 53a. Under this interpretation, "no aggravated identity theft happened in this case" because "Patient L consented to the use of [his] name for this Medicaid claim." *Id.* 54a-55a.

SUMMARY OF THE ARGUMENT

The aggravated identity theft statute does not encompass the incidental employment of another person's name while committing a predicate felony.

I. Two textual features of 18 U.S.C. § 1028A limit the statute's reach in critical ways here. First, the statute prohibits "us[ing]" another person's means of

identification only "in relation to" a predicate offense. The phrase "in relation to" signals that the "use" of the means of identification must have a genuine nexus to the predicate offense. That is, the use must at least facilitate—or be instrumental to—the predicate offense. Accordingly, the aggravated identity theft statute covers misrepresenting *who* received a certain service. But the statute does not cover fraudulent claims regarding *how* or *when* a service was performed. In the latter situation, any inclusion of another person's name on a claim form is not sufficiently connected to the fraud.

Second, Section 1028A applies only when an individual "uses" another person's name "without lawful authority." The Fifth Circuit held that this element is satisfied whenever an individual uses another person's name in an illegal manner—in other words, that the statute proscribes unlawful uses. But the word "lawful" in the statute modifies "authority," not "uses." Properly construed, this element requires the prosecution to show that the defendant used another person's name without permission that was lawfully acquired.

The Government did not satisfy either Section 1028A's nexus requirement or its "without lawful authority" element here. The Government convicted Dubin of healthcare fraud on the basis of misrepresenting how and when a psychological evaluation of Patient L was performed. But Dubin did not lie about who received that evaluation. Nor did Dubin lack permission to use Patient L's identity to bill Medicaid for psychological services. Based on either or both of these independent shortcomings, Dubin's conviction should be reversed.

II. The structure of Section 1028A reinforces this analysis. Start with the title that Congress gave to the statute: "Aggravated identity theft." This title indicates that the statute's reach is limited to conduct that involves using other people's identities without their permission.

Section 1028A also functions as a sentence enhancement. Contrary to the Government's argument and the Fifth Circuit's holding below, therefore, the statute should not be automatically satisfied whenever a predicate offense is committed. Instead, the use of another person's name must make the predicate offense sufficiently more blameworthy to justify imposing a two-year mandatory-minimum sentence on conduct that otherwise need not be punished by any imprisonment at all. Such is not the case here.

Finally, the Fifth Circuit's interpretation of the aggravated identity theft statute clashes with the statute's neighboring provision, 18 U.S.C. § 1028(a)(7). That provision forbids similar conduct in connection with any federal, state, or local felony violation. If the Fifth Circuit were correct that an individual "uses" another person's name "without lawful authority" whenever he employs the name to commit a crime, then innumerable state and local offenses would suddenly become federal crimes. Yet Congress gave no reason when enacting the Identity Theft Penalty Enhancement Act to believe it meant to upend the federal-state balance in this regard.

III. If any lingering ambiguity remains, two time-honored canons of construction dictate that the Court should construe Section 1028A more narrowly than the Fifth Circuit did. First, the constitutional

avoidance canon applies here. That is because the Fifth Circuit's all-encompassing construction of the statute raises serious vagueness concerns and would give prosecutors unfettered discretion to charge anyone convicted of ordinary fraud offenses with aggravated identity theft. Second, the rule of lenity forecloses the Fifth Circuit's maximalist interpretation of Section 1028A. The statute's text and structure are, at the very least, susceptible to multiple interpretations. That is enough to restrict the statute to what ordinary Americans consider to be identity theft—and to require reversal here.

ARGUMENT

I. The text of the aggravated identity theft statute does not encompass the incidental employment of another person's name while committing a predicate felony.

The federal aggravated identity theft statute, 18 U.S.C. § 1028A, provides that "[w]hoever, during and in relation to any [enumerated felony violation], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" must receive a mandatory two-year prison sentence that runs consecutively to the sentence for the predicate offense. As relevant here, this statutory language required the prosecution to prove two things to convict Dubin. First, the Government had to show that Dubin "use[d]" Patient L's means of identification "in relation to" his healthcare fraud offenses. Second, the Government had to prove that Dubin "use[d]" Patient L's identity "without lawful authority."

The Government failed in both respects. Dubin did not "use[]" Patient L's name "in relation to" his healthcare fraud violation because there was no nexus between Patient L's name and Dubin's fraudulent assertions in the Medicaid claim. Nor did Dubin "use[]" the name "without lawful authority": He had legal permission to bill Medicaid for psychological services provided to Patient L. For each of these independent reasons, Dubin's conviction for aggravated identity theft must be reversed.

A. Section 1028A requires a nexus between the use of another person's name and the predicate offense.

1. Purporting to conduct a "plain language" analysis of Section 1028A, the Fifth Circuit fixated on a dictionary definition of the word "uses": to "employ." Pet. App. 67a-71a (citing *Oxford Dictionary of English* (3d ed. 2010)). But "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." *Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014); *see also Torres v. Lynch*, 578 U.S. 452, 459 (2016). Instead, especially when words "can have more than one meaning," a court must be attentive to "their surroundings." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466 (2001).

This principle is especially applicable when it comes to the word "uses." As this Court has cautioned, that word poses "interpretational difficulties because of the different meanings attributable to it." *Bailey v. United States*, 516 U.S. 137, 143 (1995). In fact, the verb form of "use"—which is what Section 1028A

features—carries seven distinct dictionary definitions. *See Use*, *Oxford American Dictionary and Thesaurus* (1st ed. 2003). Its meanings "range all the way from 'to partake of' (as in 'he uses tobacco') to 'to be wont or accustomed' (as in 'he used to smoke tobacco')." *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting). And even when it comes to any particular definition of the verb "uses," the verb is still "inordinately sensitive to context." *Id.* at 245 (Scalia, J., dissenting). For instance, consider "the paradoxical statement: 'I use a gun to protect my house, but I've never had to use it.'" *Bailey*, 516 U.S. at 143.

In short, the word "uses" in the aggravated identity theft statute provides minimal guidance in isolation. The reach of Section 1028A can be determined only when "uses" is read in combination with its surrounding terms.

2. When reciting the surrounding terms of Section 1028A, the Fifth Circuit presented the statute this way: "The identity-theft statute requires a two-year sentence for '[w]hoever . . . knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person' during the commission of an enumerated felony." Pet. App. 66a (omission and emphasis in original). This rendition of the statute excerpts out the statutory language that imposes the most direct limit on the word "use": the requirement the use of the other person's identification be "during and in relation to" the predicate felony. 18 U.S.C. § 1028A(a)(1).

In particular, where the phrase "in relation to" modifies the word "use," it "illuminate[s the] boundaries" of the term. *Smith*, 508 U.S. at 237; *see*

also Muscarello v. United States, 524 U.S. 125, 138 (1998) (the phrase "in relation to" imposes a "limit" on the reach of the verb "carry"). And where, as here, the statutory object of the phrase "in relation to" is the violation of a predicate offense, the statute requires a nexus between the two: The "use" of the thing at issue "at least must facilitate" the commission of the predicate offense. *Smith*, 508 U.S. at 238; *see also id.* at 241 (Blackmun, J., concurring) (joining majority opinion on the understanding that "in relation to" may "require[] more than mere furtherance or facilitation of a crime"). Put another way, the use of the thing must be instrumental—not merely incidental—to the predicate offense.

Indeed, just two Terms ago, the Government itself urged this Court to interpret the verb form of "use" in this manner. (And it did so even without an "in relation to" modifier.) Under the Computer Fraud and Abuse Act (CFAA), a person may not "use" access to a computer to acquire certain information. 18 U.S.C. §§ 1030(a)(2), (e)(6). The Government explained that although the word "use" can have a "broader definition," one of its dictionary definitions is "'make instrumental to an end.'" U.S. Br. 38, *Van Buren v. United States*, 141 S. Ct. 1648 (2021) (No. 19-783) (quoting *Webster's Third New International Dictionary* 2523-24 (1986)). Thus, to "cabin [the] prosecutorial power" that would flow from giving the term too broad a definition in the CFAA, *Van Buren*, 141 S. Ct. at 1661, the Government argued that "[i]n context, the term 'use' is best understood" as requiring the violator's access be "instrumental to" acquiring the information—"not merely the technical means by which he views such information." U.S. *Van Buren* Br. 38. If it made sense to define "use" that way in the

CFAA, it makes all the more sense to follow that course in the aggravated identity theft statute, where the statute itself makes absolutely clear that the "use" needs to be "in relation to" the predicate offense.

In an opinion for the Sixth Circuit, Chief Judge Sutton effectively put all of this together. As he explained, the phrase "in relation to" in Section 1028A requires the Government to show that the defendant "used the means of identification to further or facilitate" the underlying offense. *United States v. Michael*, 882 F.3d 624, 628 (6th Cir. 2018) (citing *Smith*, 508 U.S. at 238). This means that when the predicate violation is the filing of a fraudulent claim, the criminal misrepresentation must arise from the inclusion of a particular person's identity—not some other information—on the form. *See id.*

For example, in *Michael*, a pharmacist "use[d]" another person's name "in relation to" healthcare fraud because he used it on a reimbursement form for "a drug the doctor never prescribed and the patient never requested." 882 F.3d at 625. There, the nexus requirement was met because the "misuse" of the name was "integral" to committing the predicate offense of healthcare fraud. *Id.* at 629. In short, the pharmacist committed fraud by mispresenting *who* received the drug.

By contrast, Chief Judge Sutton explained that an ambulance company did not use other people's names "in relation to" healthcare fraud when it overbilled Medicare by mischaracterizing the services it provided to its patients. *Michael*, 882 F.3d at 628 (citing *United States v. Medlock*, 792 F.3d 700, 706 (6th Cir. 2015)). The company "really did transport those patients" whose names it listed on the forms; it simply

misrepresented "how and why the patients were transported." *Id.* at 628-29 (cleaned up). There is no nexus when "the defendant used the means of identification in spite of the fraud." *Id.* at 629.

3. In her concurrence below, Chief Judge Richman seemed to recognize the need to account for Section 1028A's "in relation to" language. She reasoned that Dubin used Patient L's identity "in relation to" his healthcare fraud offense because he "could not have effectuated the health care fraud . . . without" including Patient L's name on the form he submitted. Pet. App. 11a (Richman, C.J., concurring).

This "but for" reasoning does not require a meaningful enough connection to satisfy the aggravated identity theft statute's nexus requirement. If a "but for" relationship to effectuating the predicate offense were enough to satisfy Section 1028A, then an individual would commit aggravated identity theft even when he includes another person's name on a form for reasons having nothing to do with the predicate fraud. To take but one example, one cannot send a letter, email, or text message without inputting the recipient's means of identification. A "but for" rule would thus mean that even when fraudulent actions carried out through the mail or wires are entirely unrelated to the identity of a communication's recipient, the sender would be guilty of aggravated identity theft. Section 1028A's nexus requirement precludes the statute from having such a virtually limitless reach.

4. Section 1028A's nexus requirement was not satisfied here. As the Government itself has explained, "[t]he 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 CA5 Panel Oral Arg. at 17:43-55). The district court also found that Dubin misrepresented when Patient L received psychological services—claiming the services were provided in May 2013 when they were really provided in April. J.A. 39-40.

Neither of those things related to Patient L's identity. Dubin's conduct was found to be illegal because he misrepresented *how* and *when* his company provided the psychological service at issue, not *who* received the service. *See* Pet. App. 81a (Elrod, J., concurring). Dubin did not misrepresent Patient L's identity or the fact that he actually received psychological services. Consequently, Dubin did not "use" Patient L's means of identification "in relation to" the predicate fraud.

B. Section 1028A requires the use of the other person's name to be without lawful permission.

1. The Fifth Circuit further erred when it concluded that Dubin "use[d]" Patient L's identity "without lawful authority." According to the Fifth Circuit, Dubin used Patient L's identity without lawful authority because he "use[d] [Patient L's identifying] information unlawfully." Pet. App. 69a-70a; *see also id.* 12a, 17a-18a (Richman, C.J., concurring). This reasoning credited the conception of the aggravated identity theft statute that the Government advanced in its closing argument. Dubin used Patient L's identity without lawful authority, the Government

contended, simply because he used it "to commit a crime." J.A. 32.

This reasoning improperly transforms Section 1028A's "without lawful authority" element into nothing more than a meaningless reiteration of the statute's requirement that the use of another person's identity occur in relation to a "felony violation" enumerated elsewhere in the statute. 18 U.S.C. § 1028A(a)(1). "[T]wo separate clauses in the same law" should not be construed "to perform the same work." *United States v. Taylor*, 142 S. Ct. 2015, 2024 (2022). Yet if a defendant's "lawful authority" to use a name depended entirely on whether he employed it while committing a crime, then the element would be satisfied in every case in which the defendant committed a predicate offense.

Worse yet, the Fifth Circuit's reading of Section 1028A's "without lawful authority" element rewrites the statute. The statute does not ask whether a defendant had "authority to unlawfully *use*" another's means of identification. It asks whether the defendant "use[d]" the means of identification" without lawful *authority*." Put another way, "lawful" is an adjective, and "[a]djectives modify nouns." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). In the aggravated identity theft statute, the pertinent noun is "authority." So the question under the statute is whether the defendant had *lawful authority* to use another person's name.

In fact, the Fifth Circuit's contrary understanding is not only ungrammatical but illogical. The Fifth Circuit would ask whether the defendant had permission to use another patient's name unlawfully.

But that is an impossibility: An individual cannot give someone else authority to break the law.

2. Properly understood, a person "uses" another person's name "without lawful authority" under the aggravated identity theft statute where he uses the name without that person's lawfully granted permission. "Authority" means "[t]he right or *permission* to act legally on another's behalf." *Authority*, *Black's Law Dictionary* (8th ed. 2004) (emphasis added). Because "lawful" modifies "authority," the phrase "without lawful authority" means a lack of *legally granted* permission.

In comparable areas of the law, the phrase "without authority" also imposes a lack-of-permission requirement. For instance, many state statutes define burglary as entering another's building "without authority" and with the intent to commit a crime. *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/19-1(a); Kan. Stat. Ann. § 21-5807(b)(1)(A). Courts have repeatedly held in this setting that "authority" refers to whether the defendant had permission to enter the building, not whether the defendant had "authority" to commit a crime therein. *State v. Harper*, 785 P.2d 1341 (Kan. 1990), is illustrative. There, an employee who entered his employer's building to steal documents was charged with burglary. *Id.* at 1342, 1349. No person has the authority to steal documents. But because the employer had given the employee permission to enter the building, the court held that the employee did not act "without authority." *Id.* at 1348-49; *see also State v. Thibeault*, 402 A.2d 445 (Me. 1979); *State v. Dunn*, 267 So. 2d 193 (La. 1972); *People v. Carstensen*, 420 P.2d 820 (Colo. 1966).

So too here. It is undisputed that Dubin had permission to use Patient L's Medicaid number to bill Medicaid. In the words of Chief Judge Richman, "[b]oth Patient L [] and Medicaid consented to the use of the patient's name and unique identifying number to seek reimbursement for services provided." Pet. App. 18a-19a (Richman, C.J., concurring); *see also id.* 12a ("Dubin was authorized to use Patient L's identifying information . . . ."); U.S. CA5 En Banc Br. 31. And that permission itself was lawful: It is perfectly legal for a patient to allow a medical services provider to include his means of identification on Medicaid billing forms.

To be sure, it does not appear from the record that Dubin was authorized by PARTS's contract to bill for things other than psychological services.[3] Accordingly, if Dubin had billed Medicaid for cancer treatment, he perhaps would have used Patient L's name "without lawful authority." Similarly, while a waiter who purposefully bills a customer for an appetizer that was ordered but never arrived does not commit aggravated identity theft, Section 1028A does apply to a waiter "who is given a customer's credit card to pay the restaurant bill [and] later uses that credit card number to buy products on the internet." Pet. App. 54a n.2 (Costa, J., dissenting). In the former scenario, the customer gave the waiter permission to charge his credit card for the items listed on the restaurant

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[3] The contract itself was submitted to the district court only in a post-trial filing. *See* Ex. I-1, ECF No. 239. But even apart from that document, all indications from the evidence introduced at trial were that PARTS had the authority to bill Medicaid for psychological services but not for other types of medical treatment.

receipt, so the waiter has not used the customer's means of identification "without lawful authority." But in the latter situation, the customer never gave the waiter permission to purchase personal products on the internet.

Nothing like the latter happened here. Dubin billed Medicaid only for psychological services—the very services for which he was lawfully authorized to use Patient L's name to bill. There is thus no basis to conclude—and the Government certainly offered no evidence from which a reasonable jury could conclude—that Dubin used Patient L's name "without lawful authority."

II. The structure and aim of the aggravated identity theft statute confirm its limited reach.

The Fifth Circuit's reading of the aggravated identity theft statute also misses the forest for the trees. When this Court evaluates statutory language, it should "consider not only [its] bare meaning" but also "its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Yet the Fifth Circuit's holding cannot be reconciled with the common understanding of the title Congress enacted for Section 1028A: "aggravated identity theft." The Fifth Circuit also improperly deemed a provision that operates like a sentencing enhancement to be automatically satisfied whenever many of its predicate offenses are committed. Finally, the Fifth Circuit's interpretation of the aggravated identity theft statute would carry alarming consequences for the statute's neighboring provision, which prohibits similar conduct in connection with any federal, state, or local felony violations.

A. Section 1028A's title—"Aggravated identity theft"—indicates that it does not reach every incidental employment of someone's name while committing a predicate offense.

1. Congress enacted Section 1028A as a key provision of the Identity Theft Penalty Enhancement Act. When it did so, it gave Section 1028A the title "Aggravated identity theft." *See* Pub. L. No. 108-275, 118 Stat. 831 (2004). Yet the Fifth Circuit majority never paused to ask whether its construction of Section 1028A comported with the ordinary conception of identity theft, much less any particularly egregious form of that crime. And in her concurring opinion, Chief Judge Richman went so far as to suggest that it would be improper to look to Section 1028A's title to construe the statute. Pet. App. 3a (Richman, C.J., concurring). Blinding herself thusly, Chief Judge Richman arrived at an interpretation of the statute that she acknowledged is "not captured or even fairly described by the words 'identity theft.'" *Id.* 8a.

Neither of these approaches is correct. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), this Court considered whether Section 1028A requires proof that the defendant knew the means of identification he used actually belonged to another real person. *Id.* at 647. In unanimously holding that the statute does require such proof, this Court drew support from the fact that the word "theft" appears in Section 1028A's title. *Id.* at 655. Specifically, the Court reasoned that "theft" refers to instances "where the offender would know that what he has taken identifies a different real person." *Id.* (citation omitted).

Flores-Figueroa's attention to Section 1028A's title accords with long-established precedent. Ever

since the Founding, this Court has recognized that a statute's title should be given "its due share of consideration" when construing the words in the statute itself. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 374 (1805) (Marshall, C.J.). The Court has continued to apply this principle in modern times. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 587-90 (1990) (title of Career Criminals Amendment Act limits the word "burglary" through the words "career criminals"); *Begay v. United States*, 553 U.S. 137, 146 (2008) (title of Armed Career Criminal Act is "not merely decorative" (citation omitted)); *Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (titles within Sarbanes-Oxley Act "supply cues" for interpretation).[4]

Yates is particularly instructive. In that case, the Court considered whether a fish is a "tangible object" under 18 U.S.C. § 1519, which criminalizes destroying such objects to impede a government investigation. It is indisputable, in a literal sense, that fish are tangible objects. But this Court held that the statute did not encompass fish. The plurality reasoned that Section 1519's title—"Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy"—"conveys no suggestion that the section prohibits spoliation of any and all physical evidence." 574 U.S.

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[4] The Government earlier asserted that catchlines "used in" Title 18 may not be used to construe statutes appearing therein. BIO 10 (citing Act of June 25, 1948, ch. 645, § 19, 62 Stat. 862). This argument not only contradicts *Flores-Figueroa* and other cases just cited but is mistaken as a matter of first principles. Section 1028A's title is not simply a catchline "used in" Title 18—that is, the title was not merely added by code compilers. The title was part of the public law that *Congress itself* enacted. *See* Pub. L. No. 108-275, 118 Stat. 831 (2004).

at 539-41 (emphasis added). After all, an ordinary person would not call fish "records." Concurring in the judgment, Justice Alito was also "influenced by § 1519's title," emphasizing that its word "records" "points toward filekeeping," not "every noun in the universe with tangible form." *Id.* at 552 (Alito, J., concurring).

This Court has taken a similar approach even when interpreting statutory definitions, particularly where "there is dissonance between that ordinary meaning and the reach of the definition." *Bond v. United States*, 572 U.S. 844, 861 (2014). For example, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court addressed whether seriously injuring someone while driving under the influence falls under 18 U.S.C. § 16(a), titled "crime of violence defined." *Leocal*, 543 U.S. at 3-4. The statute broadly defines "crime of violence" as a crime involving "physical force against" another person. *Id.* at 5. In holding that a DUI does not qualify, the Court explained: "We cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. The "ordinary meaning of this term," the Court continued, calls to mind "violent, active crimes"—not negligently injuring someone. *Id.*; *see also Bond*, 572 U.S. at 862 (considering ordinary meaning of "chemical weapon"); *Johnson v. United States*, 559 U.S. 133, 136 (2010) (considering ordinary meaning of "violent felony").

2. The title of Section 1028A—"aggravated identity theft"—indicates that violating the statute requires more than incidentally employing someone's name while committing a predicate offense.

The term "identity theft" has a basic meaning in American parlance. As Black's Law Dictionary puts it, "identity theft" is "[t]he unlawful taking and use of another person's identifying information for fraudulent purposes." *Identity Theft*, *Black's Law Dictionary* (11th ed. 2019). Black's Law Dictionary further explains that identity theft is "a crime in which someone *steals* personal information about and belonging to another, such as a bank-account number or driver's-license number, and uses the information to deceive others usu[ally] for financial gain." *Id.* (emphasis added). And the ordinary meaning of "steal" is to "take (property, etc.) *without right or permission*." *Steal*, *Oxford American Dictionary and Thesaurus* (1st ed. 2003) (emphasis added); *see also Steal*, *Black's Law Dictionary* (11th ed. 2019) ("1. To take (personal property) illegally with the intent to keep it unlawfully. 2. To take (something) by larceny, embezzlement, or false pretenses.").[5]

The ordinary understanding of identity theft also calls to mind certain harms: compromised credit ratings; lost or compromised identification documents, bank accounts, passwords, or the like; and individuals or organizations having been duped into believing they were dealing with a particular person when they were really engaged with someone else.

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[5] Even the Government informs the public that "identity theft" refers to "when someone *steals* your personal information to commit fraud." *Identity Theft*, USA.GOV, https://www.usa.gov/identity-theft (emphasis added); *see also Identity Theft Central*, Internal Revenue Service, https://www.irs.gov/identity-theft-central (defining "[t]ax-related identity theft" as "when someone *steals* your personal information to commit tax fraud" (emphasis added)).

This Court should resist construing Section 1028A to reach far beyond this common understanding of "identity theft." Incidentally employing another person's name with their permission cannot fairly be described as "taking" or "stealing" their identity. Nor is it likely that doing so while committing another crime will cause any of the classic harms associated with identity theft.

B. Section 1028A must not be automatically triggered whenever certain predicate offenses are committed.

As Chief Judge Richman recognized in her concurrence below, Section 1028A operates as a "sentencing enhancement." Pet. App. 3a. It applies only if the defendant has committed a "felony violation" enumerated in the statute. 18 U.S.C. § 1028A(a)(1). And Section 1028A mandates an additional two years' imprisonment, which must run consecutive to the defendant's punishment for the underlying offense. *Id.* § 1028A(a)(1)-(b).

But if the Fifth Circuit's interpretation of Section 1028A is correct—namely, that the statute requires nothing more than the employment of another person's name while committing a predicate offense—then the statute's mandatory two-year sentence would apply virtually every time a person commits many of the statute's predicate offenses. For example:

- *Healthcare fraud in violation of 18 U.S.C. § 1347.* To begin, Medicaid and other healthcare reimbursement forms require providers to include their patients' identification numbers. Thus, under the Fifth Circuit's expansive conception of Section 1028A, "*every single act* of provider-payment

health care fraud involving a real patient [would] also count as aggravated identity theft." Pet. App. 49a (Costa, J., dissenting) (emphasis added). In this case itself, the Government previewed as much to the jury, asserting that if it found that Dubin committed healthcare fraud, then his conviction for aggravated identity theft should essentially be "automatic." J.A. 32; *see also id.* ("So if you find that [Dubin] committed this healthcare fraud offense, then [he is] also guilty of those identity theft offenses.").

- *Tax fraud in violation of 18 U.S.C. § 1343.* Tax preparers must include a taxpayer's name on IRS forms. Accordingly, the Fifth Circuit's definition of aggravated identity theft would apply "*every time* a tax-return preparer claims an improper deduction" for a client. *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013) (en banc) (emphasis added). After all, in every such instance the tax preparer would be employing another person's name while committing a predicate offense.[6]
- *Bank fraud in violation of 18 U.S.C. § 1344*. Banks require loan applicants to include a co-signer whenever applicants do not have sufficient collateral to guarantee a loan. Under the Fifth

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[6] What is more, the Fifth Circuit's conception of aggravated identity theft would cover many who prepare tax forms *for themselves.* Taxpayers who claim a childcare deduction, for example, must identify their dependent children on their tax forms. Married persons who file separately must also list the names of their spouses. Under the Fifth Circuit's rule, whenever any such individual files a form making *any* material misrepresentation, they would seem to be employing another person's name while committing a predicate felony.

Circuit's rule, all applicants with co-signers would be deemed aggravated identity thieves every time they lie about their own gross annual income or some other aspect of their own personal backgrounds. Under the Fifth Circuit's rule, it would not matter whether a lie on a loan application related to the co-signer's identity or that the applicant had permission to use the co-signer's name in applying for the loan.

- *Garden-variety mail or wire fraud in violation of 18 U.S.C. §§ 1341 or 1343*. The mail and wire fraud statutes prohibit making misrepresentations via the use of mail or interstate wires. As noted above, violating these statutes almost invariably involves employing another person's means of identification. To mail a letter, a person must write an addressee's name on the envelope. To send an email, text message, or other type of electronic communication, a person must similarly use a recipient's email address or phone number. Once again, the Fifth Circuit would consider all of these incidental actions to trigger the aggravated identity theft statute.

None of this is to deny that in all of these scenarios, people engaged in criminal conduct. But the fact that the conduct involved incidental employments of other persons' names does not warrant an automatic two extra years in prison. *Cf. Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (refusing to construe federal tax obstruction statute to cover failure to report tips or paying babysitters in cash to obscure any paper trail); *Bond*, 572 U.S. at 863 (refusing to construe federal statute prohibiting the use of chemical weapons to reach "the simplest of assaults").

At the very least, if Congress had concluded when considering the Identity Theft Penalty Enhancement Act that certain predicate offenses were automatically worse simply because someone's name is typically employed while committing them, then Congress would have just amended the penalties for those crimes themselves. Congress instead concluded that certain predicate crimes were worthy of enhanced punishment only in *some* circumstances—namely, only when they involved identity theft. *See supra* at 4-5. The Fifth Circuit's contrary, all-encompassing reading of Section 1028A thus cannot be squared with the statute's structure and Congress's evident objective.

C. Section 1028A's neighboring provision reinforces that the aggravated identity theft statute cannot cover all incidental uses of other persons' names.

The Fifth Circuit's reading of the aggravated identity theft statute is also out of joint with the statute's neighboring provision, 18 U.S.C. § 1028(a)(7). That neighboring statute, which Congress amended in the Identity Theft Penalty Enhancement Act, makes it a federal crime when someone "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, *or that constitutes a felony under any applicable State or local law*." 18 U.S.C. § 1028(a)(7) (emphasis added). In short, just like the aggravated identity theft statute, Section 1028(a)(7) is triggered when someone "uses"

another person's means of identification "without lawful authority." But instead of having a limited number of predicate offenses, Section 1028(a)(7) can be tied to a felony violation of *any* federal, state, or local law.

This Court "presume[s] that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019). Furthermore, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (citation omitted); *see also Bond*, 572 U.S. at 856 (federal criminal statutes "must be read consistent with principles of federalism"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 290 (2012).

But applying the Fifth Circuit's broad interpretations of "uses" and "without lawful authority" in Section 1028A to Section 1028(a)(7) would stress this federalism canon beyond its breaking point. If a person "uses" another's means of identification "without lawful authority" whenever she employs another's identity while committing a qualifying offense, then Section 1028(a)(7) would transform innumerable state and local offenses into federal crimes. For instance, felony DUI violations while driving a car registered to someone else (even to a teenager's parent) would qualify as identity theft. A license plate number is a means of identification of the car's owner, and a license plate is required to drive a car on public roads. The same would be true in cases of simple vandalism. Whenever a person spray paints names onto the side of a private building (imagine a

heart with "Johnny + Susie" or "Impeach Donald Trump"), the person would satisfy the Fifth Circuit's conception of "using" another person's name "without lawful authority" so long as the amount of property damage rises to the level of a felony. The list would go on and on.

To say the least, Congress did not "clearly indicate[]," *Bond*, 572 U.S. at 848, in the Identity Theft Penalty Enhancement Act that it meant to turn a vast swath of ordinary state and local transgressions into federal crimes simply because the transgressions involve the utterance of other persons' names. Thus, the language that Section 1028A shares with Section 1028(a)(7) should not be read to encompass the mere incidental recitation of names during the commission of other crimes.

III. If any doubt remains, two narrow-construction canons require rejecting the Fifth Circuit's holding.

A. Constitutional avoidance

It is well established that, when deciding which of two "plausible statutory constructions to adopt," the Court should choose the one that "avoid[s] serious constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 380-83 (2005). Accordingly, when faced with potentially broad and indeterminate federal criminal statutes, this Court has repeatedly adopted narrower interpretations to avoid constitutional vagueness concerns. *See, e.g.*, *McDonnell v. United States*, 579 U.S. 550, 574-77 (2016); *Skilling v. United States*, 561 U.S. 358, 405-06, 410-11 (2010).

The void-for-vagueness doctrine enforces "two due process essentials." *Skilling*, 561 U.S. at 403. First, a

criminal statute must define the criminal offense "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 402-03 (citation omitted). Second, a criminal statute must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.* The Fifth Circuit's construction of the aggravated identity theft statute raises serious questions on both fronts.

1. The Fifth Circuit's interpretation of Section 1028A would enable a "standardless sweep." *McDonnell*, 579 U.S. at 576 (citation omitted). For example, businesspersons and other individuals can hardly send an email, fill out a form, or have a conversation without speaking or writing another person's name. *See supra* at 34. Therefore, the Fifth Circuit's rule would give prosecutors the ability to bring aggravated identity theft charges "every" time a defendant commits predicate offenses such as mail or wire fraud, bank fraud, or healthcare fraud. *United States v. Berroa*, 856 F.3d 141, 156 (1st Cir. 2017); *see also* Pet. App. 49a (Costa, J., dissenting) (majority's rule covers "every single act of provider-payment health care fraud involving a real patient").

The virtually unbridled authority the Fifth Circuit's holding would give prosecutors would be particularly problematic in light of the relationship between the aggravated identity theft statute and the predicate offenses that trigger its applicability. Many of these predicate offenses—such as Dubin's healthcare fraud and the other fraud provisions just mentioned—do not require any prison time at all. *See, e.g.*, 18 U.S.C. §§ 1343, 1344, 1347(a)(2). If, however, this Court were to adopt the Fifth Circuit's sweeping

construction of Section 1028A, then prosecutors would acquire the ability to threaten at least two years of mandatory prison time even for low-level or otherwise marginal versions of such predicate offenses. Many defendants in that situation would be unable to resist making deals and pleading guilty to the underlying offenses simply to avoid any chance of being wrenched away from their families and communities. *See* Amicus Br. of Nat'l Ass'n of Federal Defenders.

During the en banc oral argument, the Government told the Fifth Circuit that the court did not need to worry about the expansive construction of Section 1028A that the Government was requesting. The Government said that it would exercise "prosecutorial discretion" and decline to charge, say, a tax preparer who simply claims an improper deduction with aggravated identity theft. CA5 En Banc Oral Arg. at 42:10-43:31. But relying on prosecutorial discretion to curb the reach of Section 1028A is not enough. As this Court has explained time and again, the federal courts "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 579 U.S. at 576 (citation omitted); *see also Van Buren v. United States*, 141 S. Ct. 1648, 1662 n.12 (2021); *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (citation omitted).

2. The dissonance between the Fifth Circuit's interpretation of Section 1028A and the common understanding of the statute's title ("Aggravated identity theft") also presents fair notice concerns.

Although vagueness often derives from a particular word or phrase, it can also arise from the way different components of a statute relate to each other and are presented to the public. For example, in

Johnson v. United States, 576 U.S. 591 (2015), this Court held that the Armed Career Criminal Act's "residual clause"—which covered "conduct that presents a serious potential risk" of "physical injury to another"—was void for vagueness. The clause was vague because it was attached "to a confusing list of examples" including at least one crime (extortion) that did *not* necessarily present a "serious potential risk of physical injury to another person." *Id.* at 602-03, 598. Writing for the Court, Justice Scalia likened the clause's inclusion in the ACCA provision at issue to a hypothetical statute containing the list "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red." *Id.* at 603 (citation omitted). Navy blue, of course, is not a shade of red. So determining what fell within "colors that otherwise involve shades of red" would require exactly the sort of guesswork that due process prohibits. *Id.*

It similarly stands to reason that vagueness concerns can arise from a mismatch between the title Congress assigns to a statute and the language of the statute itself. Imagine if Justice Holmes's "bad man" were considering throwing a punch at another person. *See generally* Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897). To learn what his punishment might be, the man would likely pore over criminal statutes titled "assault," "battery," and the like. But he would not likely feel the need to read a section in the U.S. Code entitled "arson," for he would not expect the "arson" statute to punish throwing a punch. Likewise here, if someone was considering actions "not captured or even fairly described by the words 'identity theft,'" Pet. App. 8a (Richman, C.J., concurring), he would likely not think

to read a statute entitled "aggravated identity theft" to determine what his potential punishment might be.

To be sure, this Court has not previously invalidated a federal statute because its congressionally enacted title and operative text are so unrelated to each other that the public is deprived of fair notice. But the Fifth Circuit's interpretation of the aggravated identity theft statute raises a question in this regard that is serious enough to trigger the constitutional avoidance canon.

Indeed, state courts have long dealt with the similar problem of laws that fail to provide fair notice—or cause undue "surprise," *Commonwealth v. Brown*, 21 S.E. 357, 360 (Va. 1895)—because the title and the text "do not fit each other," *People v. Friederich*, 185 P. 657, 658 (Colo. 1919) (citation omitted). Under a state constitutional law doctrine related to the single-subject rule, laws are invalid where "[t]he title indicates one thing, while the bill attempts to write an entirely different thing into law." *Id.* at 658. *See generally* 1A Norman Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 18:7 (7th ed. 2022). In other words, a law cannot stand where "[t]he *body* of the bill expresses its object," but "the *title* of the bill disguises and conceals it." *People* ex rel. *Failing v. Hwy. Comm'rs of Town of Palatine*, 53 Barb. 70, 73 (N.Y. Gen. Term. 1869) (emphases in original). A law will be upheld only if its title "fairly" gives "notice" of the subject of the Act. *Rouleau v. Avrach*, 233 So. 2d 1, 3 (Fla. 1970).

The Fifth Circuit's construction of Section 1028A creates this very problem. "No person, from reading its title, would ever guess," *Failing*, 53 Barb. at 73, that

Section 1028A covers a merely incidental recitation of another person's name with that person's permission. Instead, one would expect the aggravated identity theft statute to proscribe conduct that bears at least some resemblance to—well, the commonly understood notion of identity theft.

B. The rule of lenity

If nothing else, one last canon of construction confirms the wrongheadedness of the Fifth Circuit's decision below. "[W]hen [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) (citation omitted); *accord United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). This time-honored principle, known as the rule of lenity, embodies the "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967)). Indeed, "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.).

Even if the Fifth Circuit's construction of the aggravated identity theft statute were plausible (and for the reasons stated above, it is not), 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). In fact, resolving this case on

grounds of lenity would be especially appropriate for two reasons. First, the Fifth Circuit's construction of Section 1028A largely hinges on the meaning of "uses," which is a "chameleon-like word." *Id.* 40a (Elrod, J., dissenting). As Justice Scalia put it in another case involving the word, the meaning of the verb "use" "is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting).

Second, this is not the ordinary case in which the lower courts have merely disagreed over the meaning of a federal criminal statute. Three courts of appeals have applied the rule of lenity to this very statute. *See United States v. Berroa*, 856 F.3d 141, 157 n.8 (1st Cir. 2017); *United States v. Miller*, 734 F.3d 530, 542 (6th Cir. 2013); *United States v. Spears*, 729 F.3d 753, 757-58 (7th Cir. 2013) (en banc). In *Miller*, for example, the Sixth Circuit found "[n]othing inherent in the term 'uses,'" or "its placement in the text of § 1028A" that "clearly and definitely" indicated that the statute should cover merely reciting a name. 734 F.3d at 542. Thus, the court concluded that the case at hand "fit[] squarely within the rule of lenity." *Id.*

The Fifth Circuit walled off any resort to lenity on the ground that the statute's "plain language" unequivocally sweeps in all incidental recitations of other persons' names while committing predicate felonies. Pet. App. 67a; *see also id.* 4a (Richman, C.J. concurring) (purporting to follow "a straightforward reading of § 1028A(a)(1)"). But the Fifth Circuit's own handling of this case belies such easy dismissal of the fair-notice concerns that Section 1028A raises. The Fifth Circuit granted rehearing en banc for the specific

purpose of bringing clarity to Section 1028A. *See* Pet. App. 38a (Elrod, J., dissenting). Yet after months of deliberation, the court of appeals could not coalesce around any lead opinion at all—not even a plurality opinion. Instead, the court fractured into a 9-1-8 muddle, essentially throwing up its hands.

The general public should not be required to succeed where trained judges have foundered. At the very least, the rule of lenity should preclude construing the aggravated identity theft statute to encompass every incidental use of another person's name while committing a predicate felony.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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