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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is worth remembering how we got here: David Dubin was convicted of healthcare fraud for overbilling Medicaid by $101 for psychological services his company provided to Patient L. Dubin did not lie about who received the services at issue. Nor did he include Patient L's name on the bill without his permission. Nor could the bill have had any effect on the benefits subsequently available to Patient L. (The Government now suggests the contrary, but it previously admitted any such notion was "debunk[ed]" at trial. CA5 ROA 5014; *see also infra* at 14-15.) Rather, the claim Dubin submitted simply misrepresented the qualifications of the person who provided the services to Patient L and the date on which the services were provided.

The Government nevertheless persists in its effort to convict Dubin of the additional crime of "aggravated identity theft" and thereby to require him to spend two extra years in prison. This Court should reject that effort. Contrary to the Government's contentions, the text of 18 U.S.C. § 1028A is not elastic enough to cover Dubin's conduct. Nor does his conduct fall within the ordinary meaning of the statute's title, the statute's design, or its structure. Finally, the canon of constitutional avoidance and the rule of lenity resolve any lingering doubt in favor of reversal.

The aggravated identity theft statute mandates enhanced punishment for a special kind of particularly harmful behavior. This Court should not transform it into an all-purpose prosecutorial cudgel in low-level or borderline fraud prosecutions.

ARGUMENT

I. The text of the aggravated identity theft statute does not cover Dubin's conduct.

The Government accuses Dubin of trying to "add elements to the statute's text." U.S. Br. 10. Not true. Read correctly, Section 1028A's phrase "uses . . . in relation to" requires a meaningful nexus between the employment of another person's name and the predicate offense. And the statute's "without lawful authority" element requires the other person's name to be used without permission. Neither of these requirements is satisfied here.

A. Dubin did not "use" Patient L's name "in relation to" his healthcare fraud violation.

According to the Government, the phrase "in relation to" demands nothing more than a "but for" relationship between the defendant's employment of another person's name and the predicate fraud's "success." U.S. Br. 12. This argument incorrectly reads "in relation to" in isolation, rather than together with the verb "uses." The argument also fails to give the phrase "in relation to" itself its proper meaning.

1. Section 1028A's phrase "in relation to" does not stand on its own. As Dubin has explained, the phrase must be read in tandem with the verb "uses." Petr. Br. 18-19. Yet the Government never offers a holistic definition of the phrase "uses . . . in relation to."

This silence alone defeats the Government's suggestion that the plain language of Section 1028A encompasses Dubin's conduct. When faced with a "highly abstract general" verb that can be read to cover a broad range of conduct, that word must be construed with "restraint," as part of "the whole phrase" in which

it appears. *Marinello v. United States*, 138 S. Ct. 1101, 1106-08 (2018). Such is the situation here with the verb "uses" and the whole phrase "uses . . . in relation to." People can scarcely fill out a form or have a discussion without reciting another person's name. Thus, Section 1028A's phrase "uses . . . in relation to" cannot be read to have "broad" meaning. *Id.* Instead, as the Government itself has explained in comparable circumstances, the verb "uses" should be read as meaning "make instrumental to an end." Petr. Br. 20-21 (quoting U.S. Br. at 38, *Van Buren v. United States*, 141 S. Ct. 1648 (2021) (No. 19-783)). That being so, the requirement that another person's means of identification be "use[d] . . . in relation to" healthcare fraud is best understood in a case like this as requiring that the defendant misrepresent who received a given service, not merely how or when the service was provided. Petr. Br. 21-22.

2. Even if it were proper to focus solely on the phrase "in relation to," the Government still could not show that Dubin used Patient L's name "in relation to" healthcare fraud.

a. The Government says that an individual employs another person's name "in relation to" a predicate fraud whenever he otherwise "could not have effectuated" the fraud—that is, whenever the fraud would not have succeeded *but for* the recitation of the name. U.S. Br. 12-13 (citation omitted). In support of this "but for" test, the Government asserts that *Smith v. United States*, 508 U.S. 223 (1993), held that "in relation to" means merely "facilitate or further." U.S. Br. 12.

But *Smith* did not so hold. In *Smith*, the Court cautioned that it was "*not* determin[ing] the precise

contours of [18 U.S.C. § 924(c)'s] 'in relation to' requirement." 508 U.S. at 238 (emphasis added). The Court simply stated that Section 924(c)'s "in relation to" phrase "requires, *at a minimum*, that the use facilitate the crime." *Id.* at 232 (emphasis added). The concurrence reiterated that the majority's construction of "in relation to" left open the possibility that this phrase "requires more than mere furtherance or facilitation." *Id.* at 241 (Blackmun, J., concurring).

Given *Smith*'s indeterminacy, other cases provide more meaningful guidance regarding how to understand the standalone phrase "in relation to." For example, ERISA preempts state laws that "relate to" any employee benefit plan. 29 U.S.C. § 1144(a). When determining the scope of this preemptive effect, this Court has explained that the notion of "relating to" something else is so open-ended that such statutory language must be construed in accordance with the "objectives of the [] statute." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995); *see also Maracich v. Spears*, 570 U.S. 48, 59-60 (2013) (reaffirming this "limiting principle").

The same contextual approach to understanding the phrase "in relation to" applies here. The objective of Section 1028A is to require additional punishment for those who commit fraud or other predicate offenses by stealing or otherwise using other persons' identities without their permission. *See* Petr. Br. 4-5, 31. Thus, as Chief Judge Sutton has explained, an individual uses another person's name "in relation to" a predicate offense only when the use is "integral" to committing that offense. *United States v. Michael*, 882 F.3d 624, 629 (6th Cir. 2018). Where, as here, the predicate

offense is submitting a fraudulent Medicaid claim, that test is met where a claim misrepresents *who* received services. But it is not satisfied where the claim merely misstates *how* or *when* services were provided. *See id.* at 628-29; Petr. Br. 21-22.

Nothing about Chief Judge Sutton's explanation "adds an element that the statute does not contain," U.S. Br. 20. The Government is right that Section 1028A does not directly require that "the defendant made a 'misrepresentation'" relating to another person's name. *Id.* But the statute requires that the defendant use another person's name in relation to an enumerated "felony violation." 18 U.S.C. § 1028A(a)(1). And here, that predicate violation is fraud—a crime that requires a misrepresentation. *See* 18 U.S.C. § 1347. Thus, "when the predicate violation is the filing of a fraudulent claim," Section 1028A requires a misrepresentation regarding the other person's identity. Petr. Br. 21.

That requirement is not satisfied here. The Government suggests Dubin billed for a "fictitious" service that Patient L did not actually receive. U.S. Br. 22. But the Government knows better. As Dubin has already explained, a licensed psychological associate at Dubin's clinic provided psychological testing to Patient L in April 2013. Petr. Br. 6; Pet. Reply 1. Dubin billed for *that* service—employing the specific procedure code that covers psychological testing (regardless of the psychologist's credentials). *See* CA5 ROA 11892 (Medicaid Manual); J.A. 22-23, 49. Dubin misrepresented the qualifications of the psychologist and the date of the service. Petr. Br. 7-8. But he did not misrepresent *who* received that service.

That leaves the Government's complaint that asking whether the defendant misrepresented who received a product or service is an unduly "malleable and indeterminate framing exercise." U.S. Br. 21-22. It is not. When a waiter uses a diner's credit card to buy himself a new television (*see id.* 21), the waiter plainly misrepresents who purchased the television. There is also an obvious difference between this case and scenarios in which a provider requests reimbursement for medical treatment provided to a person who was never a patient or who never received the type of treatment claimed. There may be borderline cases where the "who" versus "how or when" heuristic does not produce perfect clarity. But that reality derives from the statute's abstract language ("uses . . . in relation to") and the general definition of that phrase ("instrumental" or "integral" to), not any defect in Dubin's argument.

b. Even if the Government were correct that Section 1028A's phrase "in relation to" required nothing more than a "but for" connection to the employment of another person's name, Dubin's conviction would still have to be reversed. The Government argues that including Patient L's name in the Medicaid claim was "indispensable to the fraud's *success*." U.S. Br. 12 (emphasis added); *accord id.* 7, 10-11. The text of Section 1028A, however, does not tie use of another person's name merely to the "success" of a predicate offense. Instead, it requires the use to be in relation to a predicate "felony violation" itself. 18 U.S.C. § 1028A(a)(1). And here, Dubin did not need to use Patient L's name—or any other Medicaid-eligible person's name—to *violate* the healthcare fraud statute. The federal fraud statutes incorporated into Section 1028A prohibit not just frauds that yield

financial gain, but also unproductive "attempts to execute" fraudulent artifices or schemes. 18 U.S.C. § 1347(a); *see also, e.g.*, *United States v. Coffman*, 94 F.3d 330, 333-34 (7th Cir. 1996).

Zedner v. United States, 547 U.S. 489 (2006), illustrates the point. There, the defendant tried to open bank accounts using fake bonds rife with misspelled words like "Onited States" and "Cgicago." *Id.* at 493. Unsurprisingly, banks refused to accept those bonds. *Id.* Yet the Government still convicted the defendant of bank fraud under 18 U.S.C. § 1344. *Id.* at 496. Likewise here, if Dubin had unsuccessfully sought reimbursement for services provided to someone he knew was ineligible for Medicaid—say, someone who was incarcerated, *see* 42 U.S.C. § 1396d(a)(31)(A)—he still could have been prosecuted for healthcare fraud. Consequently, Patient L's name did not have any "but for" connection to Dubin's healthcare fraud violation.

B. Dubin did not use Patient L's name "without lawful authority."

The Government agrees that Section 1028A's phrase "without lawful authority" is a permission requirement. U.S. Br. 15. It also acknowledges that where, as here, the personal identity at issue was not stolen but rather given over with consent, permission to use the identity turns on the "scope" of that consent. *Id.* But, invoking the Restatement (Second) of Agency, the Government argues that an individual uses another person's name without permission whenever he bills for anything other than "the specific services that he actually provided" or otherwise violates "federal [or] state law[]." *Id.* 16-17. The Government's argument is flawed on multiple levels.

1. The Government's interpretation of Section 1028A's "without lawful authority" element violates the canon that each element of a statute should have independent meaning. *See United States v. Taylor*, 142 S. Ct. 2015, 2023-24 (2022). The aggravated identity theft statute already requires the commission of a predicate felony. Thus, as Dubin has explained, holding that the "without lawful authority" element is satisfied whenever the defendant violates the law would render the element superfluous. Petr. Br. 24.

The Government's only answer to this problem is to suggest that "without lawful authority" might do independent work where the other person gave the defendant the "[a]uthority to do illegal . . . acts." U.S. Br. 15 (citation omitted); *see also id.* 17. But that is no answer at all. Ordinary citizens cannot authorize others to commit crimes.

2. The Government is also wrong that scope-of-permission questions under Section 1028A turn on agency principles. Having another person's consent to use her means of identification does not necessarily (or even typically) give rise to a principal-agent relationship. A landlord, for example, who procures a potential tenant's social security number to run a background check does not turn into the would-be tenant's agent. Or take this very case: Dubin did not have a "fiduciary" duty to act on Patient L's "behalf and subject to his control." Restatement (Second) of Agency § 1 (1958) (defining agency); *see also id.* at 1 (agency principles are inapplicable where one "has no duty to act for the benefit of another"). Nor did Patient L have any interest in whether Medicaid reimbursed Dubin for the psychological services performed. *See* Petr. Br. 6.

Instead of the law governing actions performed by fiduciaries, the more apt comparators here are situations where "authority" is assessed against the backdrop of someone acting unlawfully. As Dubin has explained (Petr. Br. 25), the law of burglary provides a good analogy. A person never has permission to steal an object from someone else's dwelling. But he does not enter "without authority"—and, thus, does not commit burglary—if he had permission to enter the building in which he stole something.

Far from being "counterintuitive" (U.S. Br. 17), this understanding of "without authority" comports with common sense. Where it is already otherwise required that a person act unlawfully, the question of authority must be separated from the unlawful conduct and assessed at a higher level of generality. Imagine Lucy gives Dan permission, in accordance with her fitness club's rules, to use her gym card. Dan enters the gym and assaults someone inside the locker room. Though all would agree Dan committed a crime, no one would claim he used Lucy's gym card "without authority."

Similarly, a governmental actor's ability to claim official immunity "has always been tied to the scope of [his] authority." *Doe v. McMillan*, 412 U.S. 306, 320 (1973) (internal quotation marks and citation omitted). No governmental actor has the authority to violate the Constitution or laws of the United States. But that is not the question. Instead, governmental actors, such as judges, are deemed to act within the scope of their authority whenever they act within the general sphere of their official duties. *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349, 355, 360-64 (1978).

In short, it is wrong to ask in this case whether Dubin broke the law by filing the claim at issue here. The proper question is whether Dubin had the authority to bill Medicaid for the service at issue—namely, providing psychological services to Patient L. He did. And because he did, he did not act "without lawful authority" by including Patient L's name on his claim for reimbursement.

Any other approach to this element of the aggravated identity theft statute would produce wholly unacceptable results. For instance, the Government's rule that a person acts "without lawful authority" whenever there is any deviation from "the specific services . . . actually provided," U.S. Br. 17, would ensnare the lawyer who bills a client for 5 hours but worked only 4.9. Or who charges for the work of a third-year associate at the rate of a fourth-year. Or who includes work actually performed in early January on a December bill in an effort to cover year-end expenses. The upshot, at the very least, would be in terrorem use of the aggravated identity theft statute to force guilty pleas in all minor fraud prosecutions. *See* Amicus Br. of NAFD at 6-18. That should not be tolerated.

II. The Government's interpretation of Section 1028A is incompatible with the statute's title, design, and structure.

A. The statute's title

The Government tries to sideline the fact that Section 1028A is titled "Aggravated identity theft," asserting that those words cannot "override" the operative text of the statute. U.S. Br. 23. That, however, is not what Dubin advocates here. His point is simply that the title is part of the text that Congress

enacted, and it provides helpful guidance for interpreting the statute's highly abstract terms: "uses," "in relation to," and "authority." Indeed, the Government itself agrees that a statute's title can be used to "illuminate" its operative text. *Id.* 24.

Nor does Dubin insist that Section 1028A must be strictly limited to "identity theft" as that phrase is ordinarily understood. As the Government observes, statutory titles can be "underinclusive in certain ways." U.S. Br. 25. But this is not a case of mere underinclusivity—i.e., a case involving conduct that falls outside the four corners of a title, but within "complicated and prolific" text, *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528 (1947). Here, the Government contends that Dubin engaged in heartland conduct under Section 1028A(a)(1)—"exactly" what Congress aimed to cover. U.S. Br. 8, 26-29.

That proposition is difficult to credit. And the sources the Government cites fail to support it. For example, the Government cites two dictionaries defining identity theft as the "unauthorized" or "illegal" use of someone else's identification information. U.S. Br. 23. But these dictionaries simply reproduce the imprecision inherent in Section 1028A itself. That is, the dictionaries do not specify whether "unauthorized" or "illegal" means using without permission or using to commit a crime. One of the dictionaries, moreover, strongly leans toward the former meaning. It defines identity theft as a subset of theft, which involves taking something "without consent" and is "commonly encompassed" by statutes prohibiting "a variety of forms of stealing." *Merriam-Webster's Dictionary of Law* 494 (1996).

Federal publications that the Government references (U.S. Br. 23-24) do not aid its cause either. In a two-page brochure, the Department of Health and Human Services warns patients to watch out for claims submitted "without your authorization." Office of Inspector Gen., Dep't of Health & Hum. Servs., *Medical Identity Theft & Medicare Fraud* 1. The Federal Trade Commission similarly instructs that "[i]dentity theft is when someone uses your personal or financial information without your permission" to submit a "false bill[]." Fed. Trade Comm'n, *What to Know About Identity Theft* (Apr. 2021); Bureau of Consumer Protection, Federal Trade Commission, *Medical Identity Theft: FAQs for Health Care Providers and Health Plans* 1 (Jan. 2011). But neither agency elaborates on the term "authorization" or "permission."

Other agencies describe identity theft in terms that diverge markedly from the conduct at issue here. The President's Identity Theft Task Force explains that the first step in the "life cycle" of identity theft is obtaining personal information, and gives examples involving lack of consent—e.g., "stealing mail or workplace records, or 'dumpster diving.'" President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* 2 (Apr. 2007). The Centers for Medicare and Medicaid Services uses the term "medical identity theft" synonymously with "using stolen medical identities to bill fraudulent claims." Ctrs. for Medicare & Medicaid Servs., Dep't Health & Hum. Servs., *Safeguarding Your Medical Identity: Understanding and Preventing Provider Medical Identity Theft* 3 (Apr. 2016). Other government sources are in accord. *See* Petr. Br. 31 n.5.

It thus comes as no surprise that, when calling for more prosecutions under Section 1028A to maximize "plea bargaining leverage," prosecutors have forthrightly explained that the reading of the statute that the Government pushes here "does not require identity theft." Amicus Br. of NAFD, App. at 1 (1028A Charging Memorandum). Concurring judges below likewise acknowledged that conduct like Dubin's is "not captured or even fairly described by the words 'identity theft.'" Pet. App. 8a (Richman, C.J., concurring).

It is no answer to assert, as the Government does as its final fallback, that a *different* subsection of Section 1028A—a subsection "not at issue here"—also prohibits conduct not ordinarily understood to constitute identity theft. U.S. Br. 26. It is one thing for a subsidiary provision of a statute to cover conduct tangential to the statute's primary aim. It would be wholly another for neither the centerpiece nor any other provision of a statute to match the statute's title. That would be the upshot of the Government's position here. The Court should reject it.

B. Statutory design

The Government next contends that its all-encompassing conception of Section 1028A furthers the "statutory design" of addressing "distinct harms" to persons whose names are employed during the commission of predicate offenses. U.S. Br. 26-27. This, however, is just a legislative-history argument in disguise. It rests almost exclusively on what "members of Congress" said during mere floor debates, culminating with an entire paragraph about what "one lawmaker" claimed during a speech in which the room may well have been empty. *Id.* 27-28.

Suffice it to say that "[f]loor statements by individual legislators rank among the least illuminating forms of legislative history." *N.L.R.B. v. SW. Gen., Inc.*, 580 U.S. 288, 307 (2017). Indeed, the same lawmaker the Government quotes also explained that the bill was designed to "make it easier for prosecutors to target those identity thieves who *steal* an identity for the purpose of committing other serious crimes." 150 Cong. Rec. 13670 (2004) (statement of Rep. Schiff) (emphasis added). And when the Government previously surveyed Section 1028A's legislative history, it said the statute was designed to cover instances "in which someone *wrongfully obtains* and uses another person's personal data in some way that involves fraud or deception." U.S. Br. at 20, *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (No. 08-108) (quoting H.R. Rep. No. 528, 108th Cong., 2d Sess. 4 (2004)) (emphasis altered). As ever, the best indicators of Section 1028A's design remain the statute's text, including its title.

At any rate, the Government's "individual harm" argument fails on its own terms. The Government notes that a "false" medical claim can become part of a patient's medical history, and thus incorrectly suggest that the person suffered from ailments he never experienced. U.S. Br. 28. That may be true when a provider files a truly fictitious claim. But this case involves no such thing. *See supra* at 5. Patient L's medical record simply reflects testing in May rather than April of 2013, by a licensed psychologist instead of a licensed psychological associate.

The Government also posits that fraudulent claims can risk exhausting patients' insurance benefits. U.S. Br. 28-29. But again, nothing of the sort

happened here. The Government pins its new suggestion to the contrary on what "the courts below understood." *Id.* 3. But the Government has acknowledged that any such notion is mistaken. *See* CA5 ROA 5014. As the Texas Medicaid manual explains, psychological-testing benefits renew on a "calendar year" basis, starting every January 1—not some sort of perpetually rolling, any-given-twelve-months basis. *Id.* 11895; *see also id.* 2690-92. The inaccuracies in the claim Dubin submitted thus had no effect whatsoever on Patient L's eligibility for benefits in subsequent months. Nor do other types of routine overbilling use up limited benefits. Where, for instance, benefits are capped based on hours, not dollars, charging $150 for a $100 service does not affect a patient's eligibility for future services.

Lastly, even if persons whose names play incidental roles in frauds and other predicate offenses sometimes suffer some sort of injury as a result, there is no reason to believe Congress demanded two-year prison sentences—on top of sentences for predicate offenses—to address those harms. Rather, such harms are a classic basis, under Congress's broader sentencing system, for case-by-case decisions by district courts. *See, e.g.*, *United States v. Stokes*, 392 Fed. Appx. 362, 369 (6th Cir. 2010) (sentence increase where victims of healthcare fraud had to pay higher premiums and copays).

C. Statutory structure

The Government's expansive reading of the aggravated identity theft statute is similarly impossible to square with Section 1028A(a)(1)'s "placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995).

1. The aggravated identity theft statute operates like a sentence enhancement, imposing a mandatory two years of extra imprisonment when predicate offenses are committed in a particularly egregious manner. Petr. Br. 32. Yet the Government's interpretation of Section 1028A would mean that the enhancement virtually always applies where defendants commit numerous underlying offenses.

a. *Mail and wire fraud.* For starters, under the Government's construction of Section 1028A, every mail or wire fraud offense would also constitute aggravated identity theft. Purporting to apply its "but for" test to the statute's "in relation to" element, the Government disputes this notion, asserting that mail and wire fraud "can be and often are" committed without speaking or writing another person's name. U.S. Br. 32. But the Government provides no such example. Quite the contrary: The only case it cites depended on mailing "title-application forms" that included customers' names. *See id.* (citing *Schmuck v. United States*, 489 U.S. 705, 707 (1989)).

The Government also suggests that an individual does not use another person's name "without lawful authority" simply by addressing a fraudulent letter or email to that person. According to the Government, sending "an unsolicited letter" is so insignificant that "everyone is presumed to have permission" to do so. U.S. Br. 32. At the very least, this is an overstatement. Federal and state laws prohibit sending many kinds of unsolicited communications. *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227 (prohibiting unsolicited automated calls, text messages, and faxes); Cal. Bus. & Prof. Code § 17529.2 (prohibiting unsolicited email advertisements). Congress has even

authorized the Federal Trade Commission to create and administer a national do-not-call registry. 15 U.S.C. § 6151; 16 C.F.R. § 310.4(b)(1)(iii).

Even if the Government were right that everyone presumably has permission to send unsolicited communications, that reality would not absolve an individual, under the Government's test, of acting "without lawful authority." Under that test, the question is whether the defendant was authorized to use the name "to engage in the *particular* use at hand"—that is, to engage in his specific unlawful conduct. U.S. Br. 19 (emphasis added); *see also id.* 16-17; *supra* at 8. So it would make no difference if everyone has an "implicit license," in general, to use other people's names to send unsolicited letters or electronic communications to them. U.S. Br. 32 (citation omitted). The question under the Government's test would be whether someone is presumably authorized to send a *fraudulent* letter or email. The answer to that question is no.

b. *Other predicate offenses.* The Government is correct that people can commit various other forms of fraud and other predicate offenses without employing other persons' names. U.S. Br. 32-33. But Section 1028A's sentence-enhancement structure is still at odds with having vast swaths of predicate offenses automatically constitute aggravated identity theft. And the Government is unable to dispel the reality that its reading of Section 1028A would produce just that effect.

• *Healthcare fraud.* The Government does not deny that, under its rule, medical providers would commit aggravated identity theft every time they seek improper payments for treating patients. Instead, the

Government contends this blanket coverage would not be problematic because Section 1028A would not apply where doctors seek payment for treating "wholly fictitious patients." U.S. Br. 33. But such conduct accounts for just 0.1% of all healthcare fraud prosecutions. *See* U.S. Gov't Accountability Off., GAO-16-216, *Health Care Fraud: Information on Most Common Schemes and the Likely Effect of Smart Cards* 18 tbl.3 (2016) (1 out of 739 cases). The Government also points to cases in which patients lie about their own eligibility when applying for Medicaid or file their own fraudulent claims. *See* U.S. Br. 33. But the universe of such filings that do not include another person's name is minuscule as well—if it exists at all. Medicaid application forms ask applicants to identify family members and points of contact at their employers, among other individuals. *See* Health Ins. Marketplace, *Application for Health Coverage & Help Paying Costs*, https://perma.cc/Y822-F5V9. And Medicaid reimbursement claim forms require patients to supply the names of doctors and other service providers. *See, e.g.*, Cal. Dep't of Health Care Servs., *Medi-Cal Claim Form for Beneficiary Reimbursement*, https://perma.cc/XH6C-S5ES.

The Government next asserts that healthcare fraud "can be committed in still other ways that do not involve using someone else's means of identification," citing *United States v. Lucien*, 347 F.3d 45 (2d Cir. 2003), as an example. U.S. Br. 33. In that case, doctors generated fictitious treatment records, and then used those records to submit fraudulent claims to insurance companies. *Lucien*, 347 F.3d at 49-50. The Government does not explain how such a scheme—involving patient records and insurance forms—could

be carried out without employing any other person's name.

• *Tax fraud.* Under the Government's interpretation of Section 1028A, every tax preparer who makes a misrepresentation on a client's tax forms would also commit aggravated identity theft. The Government notes that tax crimes "created by the Internal Revenue Code" are not predicate offenses under Section 1028A. U.S. Br. 31. But tax fraud is readily prosecuted as mail or wire fraud. *See, e.g.*, Indictment, *United States v. Kimble*, 2015 WL 4164820 (D. Md. July 8, 2015), ECF No. 1.[1]

• *Bank fraud.* The Government's construction of the aggravated identity theft statute would also apply to a large swath of ordinary bank fraud. The Government suggests that Section 1028A does not apply to a loan applicant who "slightly inflates his salary while correctly identifying the co-signer." U.S. Br. 32. According to the Government, "the inclusion of the co-signer's name is not 'in relation to' the fraud." *Id.* But the very purpose of including a co-signer is to ensure one qualifies for the loan. So this scenario obviously satisfies the Government's "but for" test.

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[1] The Government also contends that Section 1028A "would not apply" to every taxpayer who correctly lists his child's name but claims an improper deduction. U.S. Br. 31. "[T]he fraud's chances of success," the Government says, "would remain just the same with or without the child's name on the tax return." *Id.* But the Government ignores that Dubin's example was based on the premise that the deduction was purportedly for "childcare." Petr. Br. 33 n.6. Taking that additional fact into account, the Government's "but for" test would be readily satisfied: A taxpayer cannot obtain a childcare deduction without including the child's name.

The Government also says that, in this scenario, "the applicant has used the co-signer's name with lawful authority." U.S. Br. 31. But the Government's position elsewhere in its brief is that an individual uses another person's name without lawful authority whenever he includes it on a claim that violates federal law. *Id.* 16. The Government never explains how this test is not satisfied in this scenario.

2. The Government's sweeping interpretation of Section 1028A is also out of whack with the statute's inflexible requirement that violators spend two years in federal prison. To take but one example, the Government maintains that a cashier commits aggravated identity theft anytime she knowingly mischarges a customer who pays electronically. *See* U.S. Br. 17, 19. Consider, then, a teenager working Sundays at the farmer's market who charges a customer's Venmo account for 3 pounds of squash instead of 2.5 pounds—or who charges the rate for acorn squash instead of (slightly less expensive) butternut squash. Twenty-four months in a federal penitentiary cannot be the correct punishment for such misconduct. And the list of equivalent examples could go on and on.

3. Lastly, the Government offers no real answer to Dubin's argument that its interpretation of Section 1028A would have serious spillover consequences for the neighboring identity-theft prohibition in 18 U.S.C. § 1028(a)(7)—consequences that would upset the federal-state balance. *See* Petr. Br. 35-37. The Government observes that Section 1028(a)(7) uses "different language" than Section 1028A. U.S. Br. 34. But there are only two differences, and neither helps the Government. First, Section 1028(a)(7) contains the

words "in connection with" instead of "in relation to." But those two phrases are "materially indistinguishable." *United States v. Spurgeon*, 117 F.3d 641, 644 (2d Cir. 1997); *see also Maracich v. Spears*, 570 U.S. 48, 59 (2013). Second, unlike Section 1028A, Section 1028(a)(7) lacks a temporal limitation ("during"). But this suggests that the Government's interpretation of Section 1028A would convert a *broader* range of state-law crimes into federal identity theft under Section 1028(a)(7).

The Government's only other response is that Section 1028(a)(7)'s "without lawful authority" element tracks the same element in Section 1028A. U.S. Br. 34. But insofar as that element is satisfied whenever someone uses another person's name to commit a predicate offense, the Government's response simply confirms the problem Dubin has identified.

III. The Government's interpretation of Section 1028A contravenes the constitutional avoidance canon and the rule of lenity.

If any doubt remains, two final canons of judicial restraint preclude the Government's expansive interpretation of Section 1028A and require reversal.

1. *Constitutional avoidance*. The Government's assertion (U.S. Br. 35) that its reading of Section 1028A does not present vagueness concerns suffers from a threshold flaw. The Government ignores that vagueness can arise not only when a statute does not adequately define what behavior it bars, but also when a statute is drawn so broadly that it "encourage[s] arbitrary and discriminatory enforcement." *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 402-

03 (2010) (noting "two due process essentials")). There is no question that the Government's reading suffers from the latter defect. *See supra* at 16-20; Petr. Br. 32-34; Amicus Br. of Prof. Joel S. Johnson 3-16. Indeed, a driving force behind the Government's reading seems to be a desire to give prosecutors "powerful . . . plea bargaining leverage"—leverage they can use to extract plea deals for low-level versions of Section 1028A's predicate offenses, especially where Congress did not see fit to require prison time for those offenses. Amicus Br. of NAFD 6-19, App. at 1 (1028A Charging Memorandum).

The Government also errs in dismissing the "dissonance" between Section 1028A's title and the Government's expansive reading of its operative text. U.S. Br. 35-36. The Government observes that many state constitutions expressly require accurate titles, whereas the federal Constitution does not. *Id.* 36. But the purpose of those state rules requiring accurate titles "is to insure reasonable notice of the purview [of a statute] to the public," 1A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 18:2 (7th ed. 2022), which is also what due process requires of criminal laws.

2. *Lenity*. The Government asserts that lenity does not apply because Section 1028A is not "grievous[ly]" ambiguous. U.S. Br. 36-37. That is a dubious proposition—on two fronts. For one, as Justice Gorsuch explained last Term, requiring "grievous" ambiguity is inconsistent with historical practice and lenity's purposes. *See Wooden v. United States*, 142 S. Ct. 1063, 1082-86 (2022) (Gorsuch, J., concurring). For another, the Government can hardly maintain that Section 1028A lacks ambiguity when so many federal

judges have struggled so mightily—even through an accumulation of case law—to make any real sense of the provision. *See* Petr. Br. 43; Pet. 14-20.

It is of course true that the rule of lenity does not turn on a "show of hands." U.S. Br. 36. But the inability of judges to determine how far the highly abstract language of the statute reaches is a strong indication that "ordinary people" cannot do so either. *Wooden*, 142 S. Ct. at 1080-83 (Gorsuch, J., concurring). And where a mandatory two-year prison sentence is on the line, that reality demands interpretive restraint.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.[2]

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[2] Contrary to the Government's suggestion (U.S. Br. 37), Dubin does not "urg[e]" this Court to remand for a determination whether the plain error standard applies. It is so clear that this standard does not apply that the Court may well wish to say so. *See* Pet. 23-25; Pet. Reply 7-8.

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