No. 18-682

In the Supreme Court of the United States

MANUEL ENRIQUE SANTANA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government does not seriously argue that the use of a name alone can sustain a conviction under 18 U.S.C. § 1028A. Its brief in opposition is instead an exercise in avoidance: the government repeatedly invokes the fact that U.S. Treasury checks contain the payee's address. *E.g.*, Opp. 2-3, 7-9. But repetition cannot alter the reality that both the conviction and the holding below affirming the conviction rest entirely on the use of a name alone—a determination that squarely conflicts with the Fourth Circuit's holding that the use of a name alone cannot support a Section 1028A conviction.

Moreover, allowing the lower courts' broad reading of Section 1028A to remain undisturbed would allow federal prosecutors to charge virtually any instance of forgery, typically a state-law offense, as a crime under federal law. That defies this Court's precedents warning against interpretations of federal criminal statutes that intrude deeply into the province of the States.

Review by this Court is plainly warranted to resolve the conflict among the lower courts and to prevent the use of Section 1028 to federalize routine state-law crimes.

A. Petitioner's conviction and the holding below rest entirely on the determination that the use of a name alone violates Section 1028A.

The government asserts (Opp. 9) that "the fact that the checks in this case contained additional information [besides a name] * * * make[s] this an unsuitable vehicle." That might be true if the government had ever raised the issue before. But the record below

shows that this case has always turned exclusively on whether a name alone constitutes a means of identification under Section 1028A. To be sure, the U.S. Treasury checks in question contained individuals' addresses as well as their names. But neither the jury nor the court below relied on that fact.

At trial, the government rested its claim of a Section 1028A violation on the use of a name. Thus, the indictment relied entirely on the use of a handwritten name, charging petitioner specifically with the misuse of "a means of identification of another person—that is, the names and forged signatures of other individuals." Redacted Indictment 2 (D. Ct. Dkt. No. 34).

Most important, the jury was instructed that a "means of identification" under Section 1028A can include a "name * * * used[] alone." Pet. App. 37a. Significantly, the instruction referenced a number of other identifiers—such as a birthdate, Social Security number, and driver's license number—*but the instruction did not reference an address*. *Ibid.* It is therefore impossible to credit the government's contention that the jury could have relied on the addresses in addition to the names.

The exclusive focus on the use of a handwritten name continued in the court of appeals, where the government argued that "[t]he use of a person's name and forged signature qualifies as the use of a 'means of identification' under [S]ection 1028A." U.S. C.A. Br. 12 (citing *United States* v. *Wilson*, 788 F.3d 1298, 1310 (11th Cir. 2015)). The government's brief in the court of appeals did not rely in any respect on the fact that Treasury checks contain other information besides names.

The court of appeals rested its decision squarely—and solely—on petitioner's use of a name and forged signature. It framed the issue as whether the "names and signatures [on the checks] were * * * means of identification" within the meaning of Section 1028A. Pet. App. 3a-4a. And it proceeded to answer that question in the affirmative, upholding petitioner's conviction solely by reference to the use of names. The government's contention that the Eleventh Circuit's prior decision in *Wilson* may have been broader (see Opp. 8) has no bearing on the factual setting of, and the lower court's holding in, the present case.

The petition therefore cleanly and squarely presents the question whether the use of a name alone constitutes the use of a "means of identification of another person" under 18 U.S.C. § 1028A.

B. There is a conflict among the courts of appeals.

The government argues that *United States* v. *Mitchell*, 518 F.3d 230 (4th Cir. 2008), reached a "case-specific conclusion [that] does not conflict with the court of appeals' decision here." Opp. 13. Not so. *Mitchell* squarely addresses the issue presented in this case and rejects the Eleventh Circuit's reasoning and holding. The courts of appeals are therefore divided on the question presented here.

The defendant in *Mitchell*, Dwight Mitchell, used a false Georgia driver's license—bearing the name Marcus Jackson—during the commission of certain felonies. 518 F.3d at 231-232. The district court found that Mitchell's use of the name violated the aggravated identity theft statute, holding "as a matter of law that the use of another person's name by itself

constitutes the use of a means of identification of another person (a specific individual) under [Section] 1028A." *Id.* at 235.

The Fourth Circuit reversed and vacated Mitchell's conviction, holding that a means of identification must identify *one* specific person, but "[t]wo persons named Marcus Jackson ha[d] a driver's license issued by the Georgia Department of Driver Services." *Mitchell*, 518 F.3d at 235.

Indeed, the Eleventh Circuit in *Wilson*—the decision on which the Eleventh Circuit's holding below relied—expressly recognized the "conflict in the circuits on whether the use of someone's name qualifies as a 'means of identification' under 18 U.S.C. § 1028A," stating that the Fourth Circuit held in *Mitchell* that "a bare name alone was not sufficient to identify the specific individual as required under the statute." *Wilson*, 788 F.3d at 1310. That conflict is thus undeniable.

C. The construction of Section 1028A adopted by the court below, and five other circuits, intrudes deeply into the province of state law.

The petition explains (at 16-18) that interpreting "means of identification" to include the use of a name alone dramatically expands the reach of Section 1028A and, even more significantly, of Section 1028 as well. The mere use of another person's name during the commission of a crime transforms what ordinarily would be a state offense into a federal felony, a significant expansion of federal power into an area traditionally reserved to the States.

Section 1028A's reach is limited by the requirement that the defendant commit one of the specified

predicate felony offenses. But Section 1028 contains no such limitation.

The government does not seriously argue otherwise: it points only to the requirement in Section 1028(a)(7) that "either (i) the misuse 'is in or affects interstate or foreign commerce' or (ii) 'the means of identification * * * is transported in the mail.'" Opp. 11-12 (quoting 18 U.S.C. § 1028(c)(3)).

The "in or affecting" language is interpreted by this Court as an invocation of Congress' broad power under the Commerce Clause. See *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977). That is hardly a significant limitation in light of this Court's broad interpretation of the reach of Congress' Commerce Clause power. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 308 (1981); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947); *Wickard* v. *Filburn*, 317 U.S. 111, 120, 124-125 (1942); *United States* v. *Darby*, 312 U.S. 100, 114 (1941).

That the two "restrictions" are framed in the alternative (see 18 U.S.C. § 1028(c)(3)) alone demonstrates the expansive reach of the provision. To the extent that the second, "in the mail" clause is less restrictive, that is irrelevant.

Thus, the government's claim (Opp. 11-12) that Section 1028(c)(3) provides a "safeguard" for state authority is simply false. Interpreting Section 1028(a)(7) to encompass offenses involving the use of a name alone would thus transform into federal crimes every forgery and many fraud offenses traditionally within the purview of state law.

Certainly, the text of the statute provides no clear evidence of congressional intent to intrude so drama-

tically into the States' domain. Importantly, this Court has held that the absence of such a textual indication means that a criminal statute should not be interpreted to extend to areas traditionally policed by the States. See *Bond* v. *United States*, 572 U.S. 844, 866 (2014).

This Court should grant review to rein in the expansive interpretation of the statute adopted by the court below and five other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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