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 OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, volunteer organization made up of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court. That includes numerous defendants whom prosecutors charge (and threaten to charge) with violations of 18 U.S.C. § 1028A, the aggravated identity theft statute at issue here. Accordingly, NAFD members have particular expertise and interest in the subject matter of this litigation.

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus* and its counsel made any monetary contribution toward the preparation and submission of this brief. Petitioner has filed a blanket consent with this Court, and NAFD has obtained consent from the United States to file this brief.

## SUMMARY OF ARGUMENT

**The crime**. "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" commits a federal crime called "[a]ggravated identity theft." 18 U.S.C. § 1028A(a)(1). The enumerated predicate felonies include commonly charged fraud offenses, including (but by no means limited to) mail fraud (18 U.SC. § 1341), wire fraud (§ 1343), bank fraud (§ 1344), health care fraud (§ 1347), and conspiracy to commit those frauds (§ 1349). 18 U.S.C. § 1028A(c)(5).

**The penalty**. Aggravated identity theft carries a two-year mandatory prison sentence. § 1028A(a)(1). And that sentence must run consecutive to any sentence imposed on the predicate felony offense. § 1028A(b)(2). Moreover, the statute precludes the district court from reducing the sentence on the predicate offense "so as to compensate for, or otherwise take into account" of, Section 1028A's two-year mandatory minimum. § 1028A(b)(3).

**I.** Section 1028A's two-year mandatory consecutive penalty gives federal prosecutors enormous bargaining power. And they are not afraid to use it. Specifically, prosecutors employ Section 1028A to coerce defendants into pleading guilty to the predicate offense—and it works. As federal defenders, we witness our clients experience overwhelming pressure to forego their constitutional right to a jury trial. The practice is so successful and pervasive that some

prosecutors openly encourage it. Indeed, one prosecutor wrote a memorandum (attached to this brief) urging fellow prosecutors to use Section 1028A to extract guilty pleas. Data from the Sentencing Commission and real-world cases confirm that this coercive charging practice is not only real but systemic.

Unsatisfied with the immense power that prosecutors already wield, the government seeks more. Here, it argues that any time another person's name appears during a fraud, the fraud offender also violates Section 1028A—even where he has not done anything remotely resembling identity theft. Accepting that sweeping position would effectively extinguish the right to trial in minor fraud cases. Defendants who would otherwise receive little or no prison time on the predicate fraud offense will not go to trial and risk a mandatory two-year prison sentence.

This expansion of prosecutorial discretion would risk other pernicious consequences too. It would encourage prosecutors to pursue even more aggressive theories of liability than they already have; in one case, for example, prosecutors argued that a fraud defendant violated Section 1028A merely by receiving a check bearing the signatory's name. It would also risk exacerbating racial disparities that the Commission has previously documented in the Section 1028A context. And it would allow prosecutors to retaliate against defendants for litigating pre-trial matters, abuse that may already be occurring. Ruling for the government would perpetuate these problems and compound the coercion.

**II.** Our clients experience similar coercion in the context of 18 U.S.C. § 924(c), which makes it a crime to use or carry a gun "during and in relation to" a crime of violence or drug trafficking crime. As with Section 1028A, prosecutors use Section 924(c)'s mandatory minimum to extract guilty pleas on the predicate offense. Thus, cases interpreting Section 924(c) are instructive. And this Court has been careful to limit Section 924(c)'s scope. For example, in *Smith v. United States*, 508 U.S. 223, 237–38 (1993), the Court held that Section 924(c)'s "in relation to" language required the gun to have some "purpose or effect" as to the predicate offense; the gun's presence could not be merely "accidental" or "coincidental."

That requirement applies with full force here. Indeed, Section 1028A contains the exact same "during and in relation to" language. Thus, Section 1028A is not violated where the defendant's use of another person's identity is merely incidental to the fraud. This limitation will prevent prosecutors from continuing to use Section 1028A to extract guilty pleas in fraud cases where there is no actual identity theft. At the same time, the government can continue to convict on the predicate fraud offense itself. And the government can continue to convict under Section 1028A where the defendant actually steals someone's identity, impersonates someone else, or makes misrepresentations about someone's identity.

**III.** Limiting Section 1028A to true "identity theft" is supported by the statute's title and this Court's precedents interpreting the Armed Career

Criminal Act, another statute with which we as federal defenders are intimately familiar. The ACCA mandates at least fifteen years in prison for certain federal firearm offenses where the defendant has three prior "violent felonies" or "serious drug offenses." Over the last three decades, the Court has consistently interpreted the ACCA in accordance with its titular purpose, considering whether the defendant's prior convictions make him a "career criminal." And for good reason: that phrase was contained in the public laws that Congress enacted.

So too here: the phrase "identity theft" was repeated throughout the public law version of Section 1028A that Congress enacted. Given that statutory text, the Court should consider whether the defendant's conduct constitutes "identity theft," as an average person would understand it. In fact, the Court already has considered Section 1028A's title—"Aggravated identity theft"—in *Flores-Figueroa v. United States*, 556 U.S. 646, 654–55 (2009). Doing so here would strengthen the common-sense conclusion that incidentally using another's name while committing a fraud—without more—is not aggravated "identity theft" and does not violate Section 1028A.

The judgment below, along with Petitioner's Section 1028A conviction, should be reversed.

## ARGUMENT

### I. Federal Prosecutors Routinely Use Section 1028A to Coerce Guilty Pleas

**1.** Mandatory minimums give prosecutors tremendous power. By very definition and operation, they "eliminate judicial control over sentence length, which strengthens prosecutors' hands during plea negotiations by eliminating the possibility of a reduced sentence from a clement judge." Clark Neily, Jury Empowerment as an Antidote to Coercive Plea Bargaining, 21 Fed. Sent. R. 284, 287 (2019). And in "transfer[ing] power over sentencing away from judges and into the hands of prosecutors," mandatory minimums "provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains." Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. Rev. of Books (Nov. 20, 2014).

Section 1028A perfectly illustrates this coercive dynamic. Because it carries a two-year mandatory minimum sentence that must run consecutively to any sentence on the predicate offense, Section 1028A provides federal prosecutors with massive leverage. As federal defenders, our experience is that prosecutors routinely deploy Section 1028A to pressure defendants to plead guilty to the predicate offense. Prosecutors do so by charging a violation of Section 1028A, and then dropping that count in exchange for a guilty plea to the predicate offense. Or they do so by threatening to charge a violation of

Section 1028A, particularly where a defendant indicates that he may exercise his constitutional right to a jury trial on the predicate offense.

But don't just take our word for it. Attached to this brief is a 2016 memorandum written by a federal prosecutor in the Central District of California—one of the largest districts in the country with the second highest number of Section 1028A convictions between 2017 and 2021.[2] The sole purpose of that memorandum was to urge fellow prosecutors in that district to use Section 1028A as a means to extract guilty pleas. This is from the introduction: "Because 1028A carries a mandatory minimum, mandatory consecutive prison term of two years, it is one of the most powerful statutes available to us in fraud cases; it gives us plea bargaining leverage that can be used to resolve cases early." Memorandum from Andrew Brown to Assistant U.S. Attorneys 1 (2016); App. 1. But, the same prosecutor lamented, "Section 1028A is undercharged . . . because too many AUSAs do not understand the statute, and others are overly cautious in their charging decisions." *Id*.

In fact, prosecutors have *not* been overly cautious with Section 1028A. In a 2018 Report, the Sentencing Commission found an "increased use of the section 1028A mandatory minimum penalties as a prosecutorial tool against identity theft offenders."

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[2] This data was extracted from the U.S. Sentencing Commission's Individual Offender Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles.

U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Identity Theft Offenses in the Federal Criminal Justice System 14 (Sept. 2018) ("1028A Report"). Specifically, "the percentage of identity theft offenders"[3] who were "convicted under section 1028A has steadily increased since shortly after the statute was enacted" in 2004—going from 21.9% in 2006, to 42.6% in 2010, to 53.4% in 2016. *Id*. at 14–15.

Moreover, those figures substantially understate the use of Section 1028A, for they do not include the many cases where prosecutors charged and dropped, or threatened to charge, a Section 1028A count in order to extract a guilty plea on the predicate offense. While Sentencing Commission data does not capture those cases, the data it *does* capture shows that "[o]ffenders convicted under section 1028A were considerably more likely to proceed to trial than identity theft offenders who were not convicted of section 1028A," and even more likely than the average defendant. In 2016, "6.2% . . . of offenders convicted under section 1028A proceeded to trial,

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[3] As used in the Report, "identity theft offenders" covered those who were convicted under an identity theft statute or received an identity theft enhancement. That definition is over-inclusive because some Section 1028A convictions, like the one in this case, did not involve "identity theft." It may also be under-inclusive because, according to the Report, "[t]here are other offense types, particularly immigration offenses, in which an offender may have engaged in identity theft or similar conduct but was not convicted of identity theft" and did not receive an identity theft enhancement. 1028A Report at 2, 38 n.4

compared to 0.7 percent . . . of identity theft offenders not convicted under section 1028A. By contrast, only 2.7 percent of all federal offenders proceeded to trial." 1028A Report at 26. And the trial rate for cases involving multiple Section 1028A counts was a staggering 33%. *Id*. These figures confirm our experience that Section 1028A charges are routinely dropped, or threatened but never brought, where a defendant pleads guilty to the predicate offense. That explains why the trial rate is so high for cases that *do* result in a Section 1028A conviction.

Bolstering the data, other observers have reported that prosecutors aggressively use Section 1028A to extract guilty pleas. In 2008, for example, prosecutors raided a meat packing plant in Pottsville, Iowa and arrested hundreds of undocumented workers, the largest immigration raid up to that point. A case study revealed that, "[f]or the vast majority of defendants, § 1028A(a)(1) drove the entire plea process" because prosecutors used it "to leverage expedited plea agreements." Peter R. Moyers, Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law, 32 Seattle U. L. Rev. 651, 651–52, 671 (2009). Charged with the unlawful use of a social security number or the use of a fraudulent identification document for employment—two predicate offenses under Section 1028A(c)—prosecutors offered the defendants a plea deal of five months, which would have fallen within the guideline range for first-time offenders. Out of 305 defendants, 260 took the deal. *Id*. at 671–73. Why? Because prosecutors made a "credible threat

of prosecution under § 1028A(a)(1), which would entail a two-year mandatory minimum." *Id*. at 673. In exchange for pleading guilty to the predicate offense, prosecutors "dismiss[ed] the § 1028A(a)(1) charge and recommend[ed] [that] the client serve only five months[']  imprisonment." *Id*. at 675. Notably, the government's threat of prosecution under Section 1028A "was a credible one because, in the Eighth Circuit," the government did not then need to prove that the defendant knew that the means of identification belonged to another actual person, *id*. at 673—a theory this Court would later reject in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). The upshot is that hundreds of guilty pleas "were the product of a subtle systemic coercion: specifically, the threat of a consecutive, mandatory two-year sentence of imprisonment" that "did not present the defendants with a live option" to exercise their right to a jury trial on the predicate offense. *Id*. at 674.

Even after *Flores-Figueroa*, prosecutors have systematically used Section 1028A to extract guilty pleas in the immigration context. In the District of Arizona, for example, prosecutors have used Section 1028A to do so in certain illegal entry cases, charging a violation of 18 U.S.C. § 1028(a)(4) for knowingly possessing someone else's identification—a misdemeanor, § 1028(b)(6)—along with a violation of Section 1028A.[4] Facing Section 1028A's two-year

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[4] *See, e.g.*, *United States v. Soto-Bojorquez*, 18-mj-6279; *United States v. Martinez-Verdugo*, 16-mj-8589; *United States v.*

mandatory minimum, those defendants pled guilty to the misdemeanor. In exchange, prosecutors dropped the Section 1028A count, and the defendants were sentenced to a few months in prison.

A similar dynamic exists in the fraud context. Since 2018, the median sentence in federal fraud cases has been 12 months or less. U.S. Sentencing Comm'n, 2018, 2019, 2020, and 2021 Annual Report & Sourcebook of Federal Sentencing Statistics 64 tbl. 15. And, for federal fraud defendants who were *not* subject to Section 1028A's two-year mandatory minimum, more than 70% of them have received a sentence of less than 2 years since 2018.[5]

Fraud defendants likely to receive such a low sentence will be reluctant to go to trial and risk a two-year mandatory minimum. That is especially true in the lowest-level fraud cases, where a defendant might otherwise receive probation. Since 2018, over 1,000 federal fraud defendants each year—about a quarter of that category—have received probation. U.S. Sentencing Comm'n, 2018, 2019, 2020,

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*Parra-Rendon*, 15-mj-8507; *United States v. De La Cruz-Rodriguez*, No. 15-mj-1511; *United States v. Martinez-Valdes*, No. 15-mj-4513; *United States v. Espinosa-Lopez*, No. 14-mj-8501; *United States v. Sepulveda-De Magana*, 14-mj-7116; *United States v. Felix-Ramirez*, 14-mj-4706; *United States v. Mendoza-Pacheco*, 14-mj-4518; *United States v. Cruz-Tapia*, No. 13-mj-10013; *United States v. Aguiar-Bojorquez*, No. 13-mj-12009.

[5] This data was extracted from the U.S. Sentencing Commission's Individual Offender Datafiles. *See supra* n.2.

and 2021 Annual Report & Sourcebook of Federal Sentencing Statistics 62 tbl. 13. Where probation (or time served) is a potential sentence for the predicate fraud offense, prosecutors can easily extract guilty pleas by charging, or threatening to charge, a Section 1028A violation. The Section 1028A charge will hang over the defendant like a sword of Damocles.

In short, our collective experience, a candid prosecutor's own written memorandum, Sentencing Commission data, and real-world cases all confirm what common sense suggests: Section 1028A's two-year mandatory minimum provides prosecutors with massive leverage to pressure criminal defendants to plead guilty to the predicate offense and relinquish their constitutional right to a jury trial.

**2.** That dynamic should give this Court great pause before accepting the government's position in this case. Under the government's all-encompassing interpretation, any time another person's name appears during the commission of a fraud, the defendant would automatically violate Section 1028A. And the defendant would be guilty of aggravated identity theft even where he does not steal another person's identity, impersonate another person, or make any misrepresentation about another person's identity. Although the defendant commits only one act of criminal wrongdoing (*i.e.*, the fraud itself), he would be subject to two federal crimes—the predicate fraud offense and Section 1028A—the latter of which carries a two-year mandatory consecutive penalty.

The government's position would thus give prosecutors unnecessary *additional* leverage to extract guilty pleas on the predicate offense. Congress authorizes mandatory minimums to penalize some aggravating misconduct attributable to the defendant. *See Alleyne v. United States*, 570 U.S. 99, 113 (2013). But the government's interpretation of Section 1028A here would endow prosecutors with that massive source of leverage, even though the defendant has not engaged in any additional misconduct that is distinct from the underlying fraud. So even where a defendant commits just one blameworthy act of wrongdoing (*i.e.*, the fraud), prosecutors would still be able to deploy Section 1028A's mandatory minimum in order to pressure the defendant to plead guilty to the predicate fraud offense.

Prosecutors would even be able to do so where the fraud would have benefitted rather than victimized the person whose identity was used. After all, it is not uncommon for fraud offenders to use another's identity—with that person's permission—to help that person obtain a benefit to which that person is not entitled. *See, e.g.*, *United States v. Chen*, No. 21-cr-75, Dist. Ct. ECF No. 257 (C.D. Cal. Aug. 7, 2022) (Section 1028A defendant used another person's name to fraudulently obtain that person a student visa); *United States v. Tierney*, No. 21-cr-32, Dist. Ct. ECF No. 37 (E.D. Va.) (Section 1028A defendant used other's names, with their permission, to seek pandemic unemployment assistance for which they were not eligible). That conduct is fraud, but it does

not remotely resemble identity theft. Yet prosecutors could still use Section 1028A's mandatory minimum to extract guilty pleas on the predicate offense.

**3.** Prosecutors have not demonstrated that they would wield this additional power responsibly.

**a.** To the contrary, they have already employed dubious theories of liability for Section 1028A. In one case, prosecutors alleged that a postal employee committed mail fraud by falsely stating that postage for bulk packages had been paid; in exchange, he would receive a bribe from the mailer. In addition to charging him with mail fraud conspiracy (and money laundering), the government also charged him (and two co-defendants) with violating Section 1028A. *United States v. Caudillo*, No. 19-cr-11, Dist. Ct. ECF No. 11 (C.D. Cal.). According to the criminal complaint, the government believed that the defendant had committed aggravated identity theft by: (1) receiving a postal form (falsely stating postage had been paid) that bore the name of the mailer's employee; (2) generating a postal form that bore the mailer's name as a contact; and (3) receiving bribes in the form of checks that bore the mailer's name and signature. ECF No. 1 at 13 ¶ 42.

That's not just one but three specious theories in a single case, reflecting the government's view that Section 1028A is violated *any time* someone else's name makes an appearance in a fraud. Notwithstanding those baffling theories of liability, the government successfully used them to extract guilty

pleas. Following the same familiar pattern, the government ultimately dismissed the Section 1028A count after the defendants agreed to plead guilty to the predicate fraud offense. ECF Nos. 102, 114, 145.

There are other examples. In another bizarre case, the defendant represented that he was selling puppies online, and he then made misrepresentations to induce the putative buyer to send money. *United States v. Bobga*, No. 21-cr-430 (W.D. Pa.). In addition to alleging wire fraud conspiracy, the government also alleged a Section 1028A violation. According to the criminal complaint and supporting affidavit, the defendant violated Section 1028A because, in one email assuring a buyer that money for a dog crate and vaccine would be refunded, he attached a document bearing the seal of this Court and the name of its former Clerk, William K. Suter. According to the government, that invocation of Mr. Suter's name violated Section 1028A. ECF No. 3 at 4; ECF No. 4 at 12–13 ¶¶ 33–35. Ultimately, the government did not bring a Section 1028A charge after the defendant agreed to plead guilty via information to the predicate fraud. ECF Nos. 38, 46-1, 71.

In addition to pursuing extreme theories of liability, the government has otherwise overcharged. It has filed or threatened Section 1028A charges in fraud cases where the defendant ultimately received probation. In fact, the government has even charged *multiple* Section 1028A counts in such cases. *See, e.g.*, *United States v. Vazquez-Morales*, No. 17-cr-371, ECF No. 3 at 52–53; ECF No. 155 at 7 ¶ 13; ECF

No. 626 at 2 (D. P.R.); *United States v. Trujillo*, No. 16-cr-1973, ECF No. 21 at 3–4; ECF No. 54 at 3; ECF No. 65 at 1 (D. Ariz.). Given that prosecutors have charged Section 1028A in cases where no prison time at all was warranted—let alone a minimum of two years—the Court should be especially wary about handing prosecutors even more charging power.

**b.** Expanding prosecutorial discretion in this area would carry other risks too. For example, the Sentencing Commission has already reported significant and increasing racial disparities in the Section 1028A context. Using 2016 figures, the Commission found that, among all identity theft offenders (as defined in footnote 3 above), "Black offenders were convicted under section 1028A at a higher rate than any other racial group." 1028A Report at 20. Although they comprised only 49.8% of all identity theft offenders, they comprised 58.7% of all offenders convicted under Section 1028A. By contrast, "[s]maller percentages of White offenders . . . and Hispanic offenders . . . were convicted under section 1028A as compared with their portion of identity theft offenders overall." *Id*. And that racial disparity has widened over time, with Black offenders increasing and White offenders decreasing in proportion. *Id*. at 21.

Analyzing identity theft offenders *within* each racial group revealed similar disparities. The Commission found that "a majority (63.1%) of Black identity theft offenders were convicted under section 1028A." *Id*. But that "rate was higher than the rate for White offenders (47.8%), Other Race offenders

(42.0%), and Hispanic offenders (41.1%)." *Id*. Finally, "Black offenders were also most likely to be convicted of multiple counts under section 1028A." *Id.* at 22. Given these extant disparities, the Court should not give prosecutors even more discretion over who to charge or threaten with Section 1028A.

**c.** Accepting the government's position would also allow prosecutors to retaliate against defendants for litigating pre-trial matters. Two real-world cases illustrate that danger. In one case, the criminal complaint alleged only that the defendant committed access device fraud; it made no mention of aggravated identity theft. *United States v. Berry*, No. 20-cr-498, Dist. Ct. ECF No. 1 (N.D. Tex.). The government then moved for pre-trial detention. ECF No. 5. The defendant contested that motion and prevailed after a hearing, obtaining his conditional release. ECF Nos. 8–9. At that point, the government filed an indictment charging the defendant not only with access device fraud (and theft of government money), but also aggravated identity theft. ECF No. 11. Ultimately, the government dropped the Section 1028A count after the defendant agreed to plead guilty to the other counts (for which he received a sentence of one year and a day). ECF Nos. 29, 78.

A similar sequence unfolded in *United States v. Robinson*, No. 4:15-cr-78 (E.D. Va.). There, the indictment charged the defendant with just one count of access device fraud—and nothing else. ECF No. 11. The defendant then filed a motion to suppress, to which the government responded. ECF Nos. 15, 18.

Just one month after the defendant filed the motion, and three days after he replied to the government's response, the government filed a superseding indictment adding a Section 1028A count. ECF No. 22 at 2. The defendant ultimately pled guilty to both counts. While we cannot know for certain, the timing suggests that filing the suppression motion cost the defendant two years. That risk of retaliation will exist whenever defendants (including fraud defendants) litigate a pre-trial motion. Expansively interpreting Section 1028A would exacerbate that risk.

* * *

In sum, accepting the government's sweeping interpretation of Section 1028A would expand prosecutorial discretion in an area where too much exists already. It would allow prosecutors to intensify their aggressive use of Section 1028A's mandatory minimum to extract guilty pleas, especially in low-level fraud cases. It would embolden prosecutors to pursue even more outlandish Section 1028A theories of liability (for which the average American could have no notice). It would allow prosecutors "to pursue their personal predilections" about who to target, *Marinello v. United States*, 138 S. Ct. 1101, 1108–09 (2018) (quotation omitted), even though the Commission has documented racial disparities. And it would allow prosecutors to retaliate against defendants for litigating routine but crucial pre-trial matters. In case after case, this Court has refused to "construe a criminal statute on the assumption that

the Government will use it responsibly." *Id*. (quotation omitted). That cautious approach is especially warranted in this context given how federal prosecutors have already used (and misused) Section 1028A.

## II. This Court's Case Law Interpreting and Limiting Section 924(c) Is Instructive

**1.** We have witnessed a similar coercive dynamic with 18 U.S.C. § 924(c), which provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . use or caries a firearm" commits a federal crime. 18 U.S.C. § 924(c)(1)(A). That offense is analogous to Section 1028A in two key respects. First, like Section 1028A, Section 924(c) has as an element a predicate federal offense—*i.e.*, a "crime of violence" or a "drug trafficking crime." Second, like Section 1028A, Section 924(c) requires the court to impose a mandatory minimum term of imprisonment that must run consecutive to any sentence on the predicate offense. 18 U.S.C. § 924(c)(1)(D)(ii).[6] Thus, as with Section 1028A, prosecutors can leverage Section 924(c)'s mandatory minimum to pressure defendants to plead guilty on the predicate offense. *See* Human

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[6] Section 924(c) mandates at least five (and in some cases many more) years in prison, whereas Section 1028A mandates only two years. However, the district court may consider Section 924(c)'s mandatory minimum when sentencing a defendant on the predicate offense. *See Dean v. United States*, 581 U.S. 62 (2017). Section 1028A, by contrast, expressly prohibits such judicial consideration. 18 U.S.C. § 1028A(b)(3).

Rights Watch, An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty 60–66 (2013) (documenting this practice). Given those structural similarities, this Court's case law interpreting Section 924(c) is instructive here.

Recognizing that Section 924(c) generates a "second felony conviction [requiring] years or decades of further imprisonment" on top of the predicate offense, *United States v. Taylor*, 142 S. Ct. 2015, 2019 (2022), the Court has carefully cabined its scope. It has done so by limiting: the "crime of violence" definitions, *see id*. at 2020–21, 2025–26 (holding that attempted Hobbs Act robbery is not a "crime of violence" under Section 924(c)'s elements clause); *United States v. Davis*, 139 S. Ct. 2319 (2019) (invalidating as unconstitutionally vague Section 924(c)'s residual clause); the "use" element, *see Watson v. United States*, 552 U.S. 74, 76 (2007) (holding that a person "who trades his drugs for a gun" does not "use" it); *Bailey v. United States*, 516 U.S. 137, 143 (1995) ("hold[ing] that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm"); attempt liability, *see Rosemond v. United States*, 572 U.S. 65, 67 (2014); and provisions relating to the sentence, *see Castillo v. United States*, 530 U.S. 120, 121 (2000) (holding that a provision in Section 924(c) requiring a 30-year sentence for a machine gun stated a separate offense element).

**2.** Most relevant here is *Smith v. United States*, 508 U.S. 223 (1993). In that case, the Court interpreted Section 924(c)'s "during and in relation

to" language. It explained that, while "[t]he phrase 'in relation' to is expansive," it nonetheless, "at a minimum, clarifies that the firearm must have some purpose or effect with respect to the [predicate] drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Id.* at 237–38. In that way, "the 'in relation to' language 'allays explicitly the concern that a person could be' punished under § 924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at 238 (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.) (brackets omitted)).

*Smith* is on point here. Not only are Section 924(c) and Section 1028A structurally analogous; Section 1028A contains the exact same statutory language. Just as Section 924(c) requires that the defendant carry a gun "during and in relation to" the predicate crime of violence/drug-trafficking offense, Section 1028A requires that the defendant use a means of identification "during and in relation to" the predicate offense. 18 U.S.C. § 1028A(a)(1). Applying *Smith* here means that a defendant does not violate Section 1028A where another person's identity was merely incidental to, and had no purpose or effect with respect to, the predicate fraud offense.

There is no textual reason why the "in relation to" language would not carry the same meaning under Section 1028A. After all, Congress enacted Section 1028A in 1994, just one year after *Smith*

construed that language in Section 924(c). Plus, the statute neighboring Section 1028A makes it a crime—namely, *non*-aggravated identity theft—to use another person's identity "in connection with" any unlawful activity. 18 U.S.C. § 1028(a)(7). However, for *aggravated* identity theft in Section 1028A, Congress insisted on a higher degree of culpability, in part by requiring that the use be "during and in relation to" the predicate offense. Thus, the use of another person's identity must also be more than merely "in connection" with the predicate offense.

Logically too, if coincidentally carrying a gun during a crime of violence or a drug trafficking crime does not support a Section 924(c) offense, then incidentally using someone's name to commit a fraud should not support a Section 1028A offense. In *Smith*, the Court cabined Section 924(c)'s mandatory minimum even though there are risks from fortuitously carrying a gun during a crime of violence or a drug trafficking crime. But lawfully possessing another person's identity and using it to commit a fraud does not entail analogous aggravating risks. Thus, both statutory text and logic compel applying *Smith*'s interpretation to Section 1028A.

Applying *Smith* will not prevent prosecutors from obtaining convictions on the predicate fraud offense. Nor will it prevent them from obtaining Section 1028A convictions where the defendant steals someone's identity, impersonates someone else, or makes misrepresentations about another's identity. But *Smith will* prevent prosecutors from bringing or

threatening Section 1028A charges (to extract guilty pleas) where the use of someone's identity is merely incidental to the fraud. Instead, prosecutors could use Section 1028A in that coercive manner only where the defendant engaged in actual "identity theft." After all, that is what Section 1028A targets.

## III. Section 1028A Should Be Interpreted in Accordance With its Title, Just Like the Armed Career Criminal Act

Section 1028A is entitled "Aggravated identity theft." In response to the certiorari petition here, the government argued that Section 1028A's statutory title was "irrelevant." U.S. Br. in Opp. 10–11. But that categorical argument is belied by this Court's precedents. Here, we focus on those precedents interpreting the Armed Career Criminal Act, another federal mandatory minimum with which we as federal defenders have substantial experience.

**1.** The ACCA mandates at least fifteen years in prison where the defendant has committed certain federal firearms offenses and has three prior "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). As its title reflects, Congress reserved this harsh penalty for "armed career criminals." And this Court has repeatedly interpreted the statute in accordance with that titular purpose.

Just last Term, for example, the Court in *Wooden v. United States*, 142 S. Ct. 1063 (2022) interpreted the ACCA's requirement that the prior

convictions be "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The defendant in that case had previously burglarized ten storage units on a single night. The government argued that each burglary represented a separate "occasion." *Wooden*, 142 S. Ct. at 1069. But this Court rejected the government's argument, in part because it could "make someone a career criminal in the space of a minute." *Id*. at 1070. And that would defy the statute's purpose: "Congress enacted ACCA to address the 'special danger' posed by the eponymous 'armed career criminal.'" *Id*. at 1074 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)).

In the part of *Begay* that *Wooden* reaffirmed, this Court repeatedly relied on the ACCA's title. There, the Court held that a strict-liability DUI offense did not qualify as a "violent felony." In so holding, it explained: "As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." 553 U.S. at 146. Given those "basic purposes," the Court declined to read the ACCA in a manner that "would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Id*.; *see id.* at 147 (emphasizing the need "to effectuate Congress' purpose to punish only a particular subset of offender, namely, career criminals"); *id*. at 148 (contrasting DUI with crimes that "are associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior").

*Begay*, in turn, relied on this Court's landmark decision in *Taylor v. United States*, 490 U.S. 575 (1990). *Begay*, 553 U.S. at 146. To interpret the term "burglary" in the ACCA, the Court in *Taylor* "relied heavily on the connection between that term and the congressional object of heavily punishing 'armed career criminals.'" *United States v. Begay*, 470 F.3d 964, 981 n.3 (10th Cir. 2006) (McConnell, J., dissenting in part) (cited with approval in *Begay*, 553 U.S. at 146)). The Court explained that, "throughout the history of the [ACCA], Congress focused its effort on career offenders," *Taylor*, 495 U.S. at 587, and it included only those burglaries "that were likely to be committed by career criminals," *id.* at 588. Thus, this Court's precedents make "clear that the title—the 'Armed Career Criminal Act'—was not merely decorative" but operative. *Begay*, 470 F.3d at 981 n.3 (McConnell, J., dissenting in part).

**2.** Just as the ACCA focuses on armed career criminals, Section 1028A focuses on identity thieves.

As a textual matter, the titles of the two statutes are indistinguishable. As to the ACCA, Congress entitled the original law the "Armed Career Criminal Act of 1984." Pub. L. No. 98-473, ch. XVIII § 1801, 98 Stat. 2185. And when Congress amended the statute two years later, it entitled the law the "Career Criminals Amendment Act of 1986." Pub. L. No. 99-570, subtit. I § 1401, 100 Stat. 3207-39. Critically, the phrase "career criminal" was not subsequently inserted by those who codified the law. Rather, that phrase was contained in the very public

laws that Congress enacted. And although that phrase was contained only in the short titles—and nowhere in the substantive or operative part of the ACCA—this Court has nonetheless consistently considered that phrase when interpreting the statute.

The same methodological approach should apply equally to Section 1028A. Indeed, the phrase "identity theft" appears numerous times in the public law that Congress enacted. It appears in the preamble: Pub. L. No. 108-275, 118 Stat. 831 (2004) ("An Act [t]o amend title 18, United States Code, to establish penalties for aggravated identity theft, and for other purposes"); in the short title, *id*. § 1 ("This Act may be cited as the 'Identity Theft Penalty Enhancement Act.'"); and in the headings of the substantive prohibition, *id*. § 2 ("Aggravated Identity Theft. (a) In General.—Chapter 47 of title 18, United States Code, is amended by adding after section 1028, the following: '§ 1028A. Aggravated identity theft.'"). Thus, there is no textual basis for considering the ACCA's title but not Section 1028A's title.

Moreover, this Court *has* previously considered Section 1028A's title when construing the statute. In *Flores-Figueroa*, the Court analyzed whether Congress intended Section 1028A to cover only those who engaged in "identity theft" (*i.e.*, use of an identity belonging to a real person), or whether it also covered "identity fraud" (*i.e.*, use of a fake identity). 556 U.S. at 654–55. While "some statements in the legislative history" supported the broader reading, the Court observed that statutory titles supported

the narrower reading. *Id*. at 655. Specifically, the Court observed that "Congress separated the fraud crime from the theft crime in the statute itself. The title of one provision (not here at issue) is 'Fraud and related activity in connection with identification documents, authentication features, and information.' 18 U.S.C. § 1028. The title of another provision (the provision here at issue) uses the words 'identity *theft*.' § 1028A (emphasis added)." *Id*.

Relying on that passage of *Flores-Figueroa*, a unanimous en banc Seventh Circuit has correctly recognized that Section 1028A's title—referring to "identity *theft*"—can at least "help explicate [the] text" and be "clear up ambiguities." *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013) (en banc) (Easterbrook, J.). Thus, to the extent any ambiguities exist here, the Court should confine Section 1028A to true "identity theft"—*e.g.*, stealing someone's identity, impersonating someone else, or making misrepresentations about someone's identity. But Section 1028A does not encompass every fraud that inherently involves another person's name. Where someone lawfully possesses another's identity and uses it to commit fraud, that person is guilty of fraud. But no average person would think that person is *also* guilty of "identity theft," just as no average person would think burglarizing ten storage units on one night makes one a "career criminal."

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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