No. 22-10

In the Supreme Court of the United States

DAVID FOX DUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, "during and in relation to" healthcare fraud, "use[d], without lawful authority, the means of identification of another person," in violation of 18 U.S.C. 1028A(a)(1), when he submitted a Medicaid claim invoking a specific patient's limited reimbursement rights to seek payment for a fictitious three-hour examination by a licensed psychologist.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-55a) is reported at 27 F.4th 1021. The opinion of the court of appeals panel (Pet. App. 56a-81a) is reported at 982 F.3d 318.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2022. 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 was filed on June 30, 2022, and granted on November 10, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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.

Other pertinent statutory provisions are reproduced in the appendix. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of healthcare fraud, in violation of 18 U.S.C. 1347 and 2; one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1349; and one count of using a means of identification of another during and in relation to a predicate felony, in violation of 18 U.S.C. 1028A. Judgment 1. He was sentenced to 36 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 56a-81a. The court of appeals then granted rehearing en banc and again affirmed. *Id.* at 1a-55a.

1. Petitioner was the managing partner of Psychological A.R.T.S., P.C. (PARTS), a psychology practice in Texas founded by his father. Pet. App. 57a; C.A. App. 3460. PARTS was an enrolled provider in Texas's Medicaid program, and petitioner's role in the company included managing its Medicaid billing. Pet. App. 57a; C.A. App. 3468-3479.

In April 2013, a treatment facility asked PARTS to evaluate a child known as Patient L. Gov't En Banc Br. 4. PARTS sent an associate who was not a licensed psychologist to the facility. *Ibid.* The associate spent two and a half hours with Patient L, at which point peti-

tioner's father directed the associate to stop working. C.A. App. 3151-3152.

Medicaid would not have covered that visit. Among other things, as petitioner explains (Br. 6-7), the courts below understood the requirements of state law to preclude obtaining reimbursement on behalf of a patient who had already received eight hours of psychological evaluation during a particular 12-month period. And here, Patient L had already received eight hours of psychological testing within the preceding 12 months. C.A. App. 3151-3152, 4376-4377.

In May 2013, once Patient L's Medicaid eligibility had renewed, the associate asked petitioner whether he should return to the treatment facility to complete the evaluation of Patient L. C.A. App. 3156. Petitioner told the associate not to do so because Patient L had already been discharged from the facility. *Ibid.*

Petitioner nevertheless directed an employee to submit a fraudulent claim to Medicaid that invoked Patient L's just-renewed right to reimbursement for psychological services. Pet. App. 70a. The claim asserted that a licensed psychologist had provided Patient L a complete, three-hour psychological evaluation in May 2013, even though Patient L had received no such service. *Ibid.*; see *id.* at 12a-13a (Richman, C.J., concurring); C.A. App. 3605-3608. Medicaid paid the claim. J.A. 48-49.

2. A grand jury in the Western District of Texas indicted petitioner on one count of conspiring to receive healthcare kickbacks, in violation of 18 U.S.C. 371; five counts of offering to pay and paying illegal kickbacks, in violation of 42 U.S.C. 1320a-7b(b)(2); one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1349; seven counts of healthcare fraud, in violation of 18 U.S.C. 1347 and 2; and six counts of using a

means of identification of another during and in relation to a listed felony, in violation of 18 U.S.C. 1028A and 2. Superseding Indictment 1-24. One of the counts of healthcare fraud and one of the Section 1028A counts specifically concerned the false claim about Patient L. *Id.* at 22-23. The indictment did not tie the conspiracy count to any single patient. *Id.* at 17-18.

Section 1028A(a)(1) provides that a person commits a crime, punishable by a mandatory two-year sentence, if, "during and in relation to any felony violation enumerated in subsection (c)," he "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(b). Section 1028A(c) lists the predicate crimes to which that provision applies, which include healthcare fraud, along with other forms of federal fraud, theft of government property, and immigration crimes. 18 U.S.C. 1028A(c). The term "'means of identification'" is defined to mean "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." 18 U.S.C. 1028(d)(7).

The jury found petitioner guilty on one count of healthcare fraud and one Section 1028A count, both of which were based on the conduct that related to Patient L, as well as the count of conspiring to commit healthcare fraud, which had not been premised on any specific patient. Judgment 1. It found petitioner not guilty on the remaining counts, which concerned other conduct. *Ibid.* Petitioner moved for a judgment of acquittal, but the district court denied the motion. See D. Ct. Doc. 221 (Feb. 19, 2019).

Petitioner then sought reconsideration, arguing for the first time that he had not "used" Patient L's means

of identification "during and in relation to" the predicate healthcare-fraud offense. D. Ct. Doc. 239, at 43 (Aug. 26, 2019). The court denied the motion, relying on a circuit decision applying Section 1028A in another case involving healthcare fraud. J.A. 37, 41 (citing *United States* v. *Kelly-Tuorila*, 759 Fed. Appx. 236 (5th Cir. 2019) (per curiam)).

The district court later sentenced petitioner to 36 months and one day of imprisonment—a year and a day for the fraud and conspiracy, and an additional two years under Section 1028A. Judgment 2.

3. The court of appeals affirmed. Pet. App. 56a-78a.

The court of appeals rejected petitioner's contention that he did not "use" Patient L's identifying information within the meaning of Section 1028A. See Pet. App. 66a-71a. The court observed that the "plain meaning" of the word "'use'" is "'to employ for the accomplishment of some purpose'" or "'to avail oneself of.'" *Id.* at 67a-68a (citations omitted). And the court determined that, in this case, petitioner had "used" Patient L's means of identification—his name and Medicaid identification number—"when he took the affirmative acts in the health-care fraud, such as his submission for reimbursement of Patient L's incomplete testing." *Id.* at 71a.

Judge Elrod concurred. Pet. App. 79a-81a. She stated that, if she "were writing on a blank slate," she would have reversed the conviction, but was adhering to circuit precedent that required affirmance. *Id.* at 81a; see *id.* at 79a.

4. The court of appeals granted rehearing en banc and again affirmed. Pet. App. 1a-55a.

In a per curiam order, the court stated that it "affirm[ed] the district court's judgment for the reasons set forth in the panel majority's opinion." Pet. App. 2a.

The court noted that it "need not resolve whether [its] review of the § 1028A issue is de novo or for plain error because the conviction stands regardless of which standard of review applies." *Ibid.*

Chief Judge Richman (Chief Judge Owen at the time of the decision below) filed a concurring opinion, which was joined by four other judges. Pet. App. 3a-28a. She found it "beyond debate that [petitioner] 'used' Patient L's identifying information 'during and in relation to' the offenses for which he was convicted," given that he "could not have effectuated the health care fraud * * * without using Patient L's identifying information." *Id.* at 10a-11a (footnote omitted). She reasoned that the focus should thus be on whether, as Section 1028A requires, that use occurred "without lawful authority." *Id.* at 11a. And she explained that petitioner "had no 'lawful' authority to use the information in the manner he did when he committed the felonies for which he was convicted." *Id.* at 12a.

Judge Oldham also filed a concurring opinion, which was joined by the same four judges. Pet. App. 29a-37a. He observed that the question whether petitioner had "use[d]" Patient L's identifying information was "not properly before" the court of appeals because petitioner had forfeited that issue by failing to raise it in his initial motion for a judgment of acquittal and by failing to object to the district court's jury instructions. *Id.* at 29a. And Judge Oldham explained that petitioner could not establish the prerequisites for plain-error relief of a forfeited claim. *Id.* at 36a; see Fed. R. Crim. P. 52(b).

Judge Elrod authored a dissent, joined by six other judges, noting that Section 1028A bears the caption "Aggravated identity theft" and concluding that petitioner's conduct did not amount to "identity theft." Pet.

App. 38a-47a. Judge Haynes authored a dissent stating that she agreed with Judge Elrod in part. *Id.* at 47a. And Judge Costa authored a dissent, joined by the same judges who joined Judge Elrod, in which he took the view that Section 1028A may apply in cases where a patient "didn't receive any service" at all, but not in cases involving only "overbilling." *Id.* at 53a; see *id.* at 48a-55a.

SUMMARY OF ARGUMENT

In 18 U.S.C. 1028A(a)(1), Congress prohibited knowingly using another person's means of identification, without lawful authority, during and in relation to healthcare fraud. Petitioner violated that prohibition by employing Patient L's name and Medicaid identification number to seek reimbursement for three of the eight hours of annual psychological examination allotted to Patient L, based on an examination that never occurred.

Petitioner's conduct fits squarely within the terms of the only two statutory elements whose application he challenges. Petitioner plainly used Patient L's name and number "in relation to" the healthcare fraud. The inclusion of that information in the Medicaid reimbursement claim was critical to the fraud's success, which required a Texas Medicaid enrollee with a sufficient allotment of reimbursable psychological-examination hours. Petitioner just as plainly acted "without lawful authority" in using Patient L's information as he did. He may have had permission from the treatment facility to use Patient L's name and number to seek reimbursement for the specific services that he actually provided, but he had no authority to apply Patient L's limited reimbursement rights to fictitious services purportedly provided after Patient L had left the facility.

Petitioner contends that he did not violate Section 1028A(a)(1) because he neither stole nor misrepre-

sented Patient L's identity. But the statute nowhere requires proof that the defendant "stole" anything. The statute asks whether the defendant has "used" the means of identification without lawful authority, not whether he has "acquired" it without lawful authority. Nor does the statute require proof that the defendant misrepresented anyone's identity. Congress has enacted other statutes that punish defendants for "personating," "pretending to be," or "falsely representing oneself to be" someone else, but no such element appears in Section 1028A(a)(1).

Applying Section 1028A(a)(1) to petitioner's conduct also comports with the section's title, "Aggravated identity theft." Dictionaries define "identity theft" to include using someone else's means of identification to facilitate a crime such as fraud. That is precisely what Section 1028A(a)(1) prohibits and precisely what petitioner did. In any event, the title could not override the plain meaning of the statutory text, and Section 1028A(a)(1)'s text unambiguously encompasses petitioner's actions.

Applying Section 1028A(a)(1) to petitioner's conduct also furthers the statute's purpose, punishing criminals for the distinct harms they cause when they use others' identifying information to facilitate their crimes. Petitioner's filing of a false reimbursement claim harmed Medicaid, and his sentence for the underlying healthcare fraud reflected that harm. But petitioner's use of Patient L's name and number separately harmed Patient L, creating a false medical record and depriving him of three of the eight hours of psychological-testing benefits to which he was entitled. The additional two-year sentence under Section 1028A is meant to reflect just such an additional harm.

Contrary to petitioner's characterization, neither the government nor the Fifth Circuit has read Section 1028A(a)(1) to apply whenever a defendant recites someone else's name while committing a predicate crime. Among other things, the statute's "in relation to" element precludes prosecution where the defendant's use of the means of identification has nothing to do with the underlying crime. And the statute's "without lawful authority" requirement precludes prosecution where the defendant had valid permission to use the means of identification in the way he did. Petitioner is therefore incorrect in suggesting that his atextual limitations are necessary to preclude the criminalization of conduct like including a child's name on a tax form that contains unrelated fraud or making common public use of someone's name by placing it on an envelope in the course of committing mail fraud.

Finally, neither the canon of constitutional avoidance nor the rule of lenity justifies reversal. Neither of those tools has any role to play when the statutory text is as clear as Section 1028A(a)(1)'s. Nor would applying Section 1028A(a)(1) to petitioner's conduct raise any serious constitutional concerns. Petitioner's Section 1028A conviction should be affirmed.

ARGUMENT

PETITIONER VIOLATED 18 U.S.C. 1028A(a)(1) WHEN HE APPLIED PATIENT L'S LIMITED MEDICAID REIMBURSEMENT RIGHTS TO A FICTITIOUS THREE-HOUR EXAM BY A PSYCHOLOGIST

In 18 U.S.C. 1028A(a)(1), Congress provided that a person commits a crime, punishable by a mandatory two years of additional imprisonment, if he "knowingly" "uses, without lawful authority, a means of identification of another person," "during and in relation to" a

predicate felony. Read naturally, that provision applies if the defendant employed someone else's identifying information, without valid permission, to facilitate a predicate offense. That is exactly what petitioner did here. He employed Patient L's name and Medicaid number, without valid permission from Patient L, to facilitate healthcare fraud—asserting that three of Patient L's eight hours of psychological-testing coverage beginning in May 2013 should be expended on a fictitious three-hour exam by a licensed psychologist.

A. Section 1028A's Text Encompasses Petitioner's Conduct

Petitioner takes only limited issue with the straightforward application of Section 1028A's text to his conduct. He does not deny that Patient L is "another person"; that Patient L's name and Medicaid number are "means of identification"; that he "used" those means of identification "during" qualifying predicate crimes; or that he did so with the requisite mens rea. Petitioner argues (Br. 17-44) only that he did not use Patient L's name and number (1) "in relation to" the underlying crimes and (2) "without lawful authority." He is incorrect in both respects, each of which relies on a misplaced effort to add elements to the statute's text.

1. Petitioner used Patient L's means of identification "in relation to" healthcare fraud

Petitioner's invocation of Patient L's specific right to reimbursement for eight hours of psychological testing was plainly "in relation to" the fraudulent Medicaid claim that he submitted. A defendant uses a means of identification "in relation to" a predicate offense if the use of that means of identification "facilitates or furthers" the predicate offense in some way. *Smith* v. *United States*, 508 U.S. 223, 232 (1993). And here, peti-

tioner's healthcare fraud would have failed altogether without the use of Patient L's particular, just renewed, annual right to reimbursement for a limited amount of psychological testing.

a. Section 1028A(a)(1)'s requirement that the defendant use another person's means of identification "during and in relation to" a predicate crime mirrors, and should be informed by, decisions construing the identically worded requirement in 18 U.S.C. 924(c). 18 U.S.C. 924(c)(1)(A); see, *e.g.*, *Dean* v. *United States*, 556 U.S. 568, 573 (2009); *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998); *Smith*, 508 U.S. at 237-238. This Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent" interpreting identical language in related contexts. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010). And when Congress enacted Section 1028A in 2004, see Identity Theft Penalty Enhancement Act (Act), Pub. L. No. 108-275, 118 Stat. 831, it was presumably aware of Section 924(c) and precedent construing the "in relation to" phrase that Congress then incorporated into Section 1028A(a)(1).

Section 924(c), which prescribes a mandatory sentence for using a firearm "during and in relation to" a crime of violence or a drug-trafficking crime, 18 U.S.C. 924(c)(1)(A), is Section 1028A's "close legislative cousin." *United States* v. *Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) (Gorsuch, J.). Each statute specifies a mandatory consecutive term of imprisonment for employing something (a gun or a means of identification) "during and in relation to" a qualifying underlying crime. 18 U.S.C. 924(c)(1)(A); 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 924(d); 18 U.S.C. 1028A(b)(1)-(2). And well before Section 1028A was enacted, this Court had

described the words "'in relation to'" as "expansive" in that context. *Smith*, 508 U.S. at 237.

In particular, the Court made clear that a defendant uses a firearm "in relation to" a predicate crime if the firearm has "some purpose or effect with respect to" that crime. *Smith*, 508 U.S. at 238. The requirement is therefore satisfied if the firearm "facilitate[s], or ha[d] the potential of facilitating," the underlying crime. *Ibid.* (citation omitted). Thus, a drug dealer would be using a firearm "in relation to" a drug-trafficking crime by, for example, firing it at a witness, pistol-whipping a suspected informant with it, brandishing it to intimidate a rival drug dealer, or trading it for drugs. See *Bailey* v. *United States*, 516 U.S. 137, 148 (1995); *Smith*, 508 U.S. at 237-239.

The phrase "in relation to" is not, however, limitless. In the Section 924(c) context, it precludes punishment where "guns 'played' no part in the crime," *Muscarello*, 524 U.S. at 137; where the defendant committed "an entirely unrelated crime while in possession of a firearm," *ibid.* (citation omitted); where "the firearm's presence is coincidental," *Smith*, 508 U.S. at 238; or where the defendant uses the firearm for an "innocuous purpose" (such as "scratching one's head") that does not facilitate the underlying crime, *id.* at 232. The phrase makes clear that the involvement of an instrumentality "cannot be the result of accident or coincidence." *Dean*, 556 U.S. at 573 (citation omitted).

b. Applying that plain and ordinary definition, petitioner unquestionably used Patient L's name and Medicaid number "in relation to" his healthcare-fraud crimes. Indeed, petitioner's use of that information did more than just facilitate or further his fraud; it was indispensable to the fraud's success. And because petitioner

"could not have effectuated the health care fraud or the conspiracy to commit health care fraud without using Patient L's identifying information," it "should be beyond debate" that he used that information "'in relation to' the offenses." Pet. App. 10a-11a (Richman, C.J., concurring).

In order to receive payment from Medicaid, a provider has to submit a claim containing the beneficiary's name and Medicaid identification number. See 1 *Texas Medicaid Provider Procedures Manual* § 6.2.3 (2012). If that identifying information is missing or incorrect, or does not establish eligibility, the claim will be denied. See C.A. App. 3500-3501, 3652. The success of petitioner's fraud thus depended on using Patient L's information in particular.

To deceive Medicaid into reimbursing him for a nonexistent psychological examination, petitioner had to list a Medicaid beneficiary whose coverage would have encompassed the claimed examination. A randomly selected identity would have been unsuitable; it needed to be a Texas Medicaid enrollee who had at least three hours of psychological-testing reimbursement left in his or her account. For purposes of the fictitious three-hour psychologist exam in May 2013, that was Patient L.

c. Petitioner does not dispute that his use of Patient L's identification was indispensable to the success of the fraud. But he nonetheless asserts (Pet. Br. 15, 22) that the link was insufficiently "genuine" or "meaningful" to satisfy Section 1028A(a)(1). In doing so, petitioner narrows the phrase "in relation to" beyond recognition.

The Court has described that phrase as "broad," *Smith*, 508 U.S. at 237 (citation omitted); "expansive," *Travelers Indemnity Co.* v. *Bailey*, 557 U.S. 137, 148 (2009) (citation omitted); and "sweeping," *Yates* v.

United States, 574 U.S. 528, 542 n.5 (2015) (opinion of Ginsburg, J.). If, as here, one thing "would not have been possible" without another, the two are related under "any reasonable construction" of the term. *Smith*, 508 U.S. at 238.

Contrary to petitioner's suggestion (Br. 22), giving the phrase its only reasonable meaning would not result in "virtually limitless" coverage. Even putting aside the limitations imposed by all the other offense elements, see pp. 29-31, *infra*, Section 1028A requires the use of the means of identification to occur "during *and* in relation to" the predicate offense. 18 U.S.C. 1028A(a)(1) (emphasis added). The word "during" already significantly limits the statute's scope, precluding punishment where the defendant used the means of identification only before starting the crime or after completing it. And the addition of a phrase like "in relation to" serves to allay "the concern that a person could be prosecuted . . . for committing an entirely unrelated crime" while fortuitously using someone else's means of identification. *Muscarello*, 524 U.S. at 137 (citation omitted). But where, as here, no such concern arises, that phrase cannot be deemed an all-purpose vessel for whatever atextual limitations a defendant might prefer.

2. Petitioner used Patient L's means of identification "without lawful authority"

Petitioner's use of Patient L's identity was also plainly "without lawful authority," 18 U.S.C. 1028A(a)(1). The word "authority" means "[p]ower derived from or conferred by another; the right to act in a specified way, delegated from one person to another; official permission, authorization." *Oxford English Dictionary* (3d ed. Dec. 2022). And "lawful" means "[a]ccording or not contrary to law, permitted by law." *Oxford English Dic-*

tionary (3d ed. Mar. 2021). A defendant thus lacks lawful authority if he uses a means of identification without permission, or if he uses it with permission but the conferral of that permission contravened some statute, regulation, or other source of law. Here, petitioner lacked any authority to use Patient L's identity to claim reimbursable hours of psychological testing for fictitious services that Patient L did not actually receive.

a. As petitioner acknowledged in his petition for a writ of certiorari, a person acts without authority not only when he acts in the total absence of authority, but also when he acts "in excess of [the] permission" that has been granted. Pet. 24 n.6 (citation omitted). If a parent gives her child money to buy apples at the store, the child uses the funds without authority by buying candy. If someone lends his friend a car for a weekend trip, the friend uses the car without authority by entering it in a demolition derby. And if a manager gives an employee a company credit card to buy stationery, the employee uses the card without authority by charging a personal vacation.

Application of Section 1028A, therefore, requires an assessment of the scope of any authority that a defendant may have received to use the other person's means of identification. That is a familiar task. Authority "need not be express but may be fairly inferred from context." *Birchfield* v. *North Dakota*, 579 U.S. 438, 476 (2016). The scope of such an implied authorization turns on "what it is reasonable * * * to infer" in the circumstances. Restatement (Second) of Agency § 33 (1958). The "legality or illegality of the act" to be performed is likewise pertinent to determining the extent of an authorization; "[a]uthority to do illegal or tortious acts * * * is not readily inferred." *Id.* § 34(d) & cmt. g.

b. In this case, petitioner lacked the authority to use Patient L's means of identification as he did. The trial evidence suggests that petitioner received Patient L's name and Medicaid number from Patient L's treatment facility. See C.A. App. 3945. In providing that information, the facility was presumably authorizing petitioner to use it to charge Medicaid for the services that petitioner actually provided to Patient L while housed in that facility. But it surely was not authorizing petitioner to use the name and number to charge Medicaid for fictitious services after Patient L was no longer at the facility.

Thus, even assuming that petitioner had lawful authority to use Patient L's name and number to bill Medicaid for the incomplete psychological examination actually conducted by an associate in April 2013 (a charge that would have been denied), he lacked authority to use that information to bill Medicaid for the (invented) complete examination by a (phantom) licensed psychologist on a (falsified) date in May 2013, when Patient L had already been discharged from the treatment facility. Whatever the scope of petitioner's lawful authority, the facility could not have authorized petitioner to bill Medicaid for services purportedly provided to Patient L at a time when Patient L was not even there.

Petitioner's lack of authority is particularly clear since the submission of false claims to Medicaid violates multiple federal and state laws. See, *e.g.*, 18 U.S.C. 287 (criminal penalties for knowingly presenting false claims to the government); 18 U.S.C. 1347 (criminal penalties for healthcare fraud); 42 U.S.C. 1320a-7b (criminal penalties for false Medicaid claims); Texas Penal Code Ann. § 35.02 (West 2016) (state criminal penalties for healthcare fraud). A factfinder should not

readily infer that the treatment facility tacitly authorized petitioner to use Patient L's information to violate those laws.

c. Petitioner tries (Br. 26 n.3) to avoid the plain meaning of "without lawful authority" by framing his authority at a high level of generality. He asserts (*ibid.*) that the treatment facility authorized him to use Patient L's name and number to bill Medicaid for "psychological services," though "not for other types of medical services." But the treatment facility did not authorize petitioner to use patients' information to bill Medicaid for "psychological services" writ large, at whatever time and place they might have been provided. Nor did it authorize petitioner to bill for fictitious services. Instead, it authorized him to use that information only to charge for the specific services that he actually provided while Patient L was in its care.

Petitioner provides no sound reason why "lawful authority" should be defined in a counterintuitive manner that would work differently here from the way it works in other contexts. The scope of a seller's authority to use a customer's payment information normally turns on what goods or services the seller has actually provided —not on what goods or services the seller could theoretically have provided but did not. If a buyer gives a car dealer financial information when buying a used Ford, the dealer acts without authority if he later uses that information to charge for a new Ferrari. Likewise, when a treatment facility gives a psychologist a patient's insurance number to pay for services rendered while in that facility, the psychologist acts without authority by later using that number to bill for different services that were not rendered at the facility—or at all.

3. Petitioner's reading adds elements that the statute's text does not contain

Petitioner contends (Br. 3) that Section 1028A does not apply to him because he never "stole or otherwise misrepresented anyone's identity." See, *e.g.*, *id.* at 2-3, 23, 31-32 & n.5. But no such requirements are found in the statute.

a. Petitioner did not object when the district court instructed the jury that, "[t]o be found guilty of this crime, the defendant does not actually have to steal a means of identification. Rather, the statute criminalizes a situation in which a defendant gains access to a person's identifying information lawfully but then, proceeds to use that information unlawfully and in excess of that person's permission." Pet. App. 34a (Oldham, J., concurring) (quoting instruction). But even irrespective of preservation issues, petitioner is mistaken in his belated suggestion that a violation of Section 1028A might require proof that the defendant "stole" someone's identity.

As the courts of appeals have uniformly recognized, a defendant can violate Section 1028A even if he has not stolen the means of identification, because the text "easily encompasses situations in which a defendant gains access to identity information legitimately but then uses it illegitimately." *United States* v. *Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013); see, *e.g.*, *United States* v. *Ozuna-Cabrera*, 663 F.3d 496, 498-501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); *United States* v. *Abdelshafi*, 592 F.3d 602, 606-610 (4th Cir.), cert. denied, 562 U.S. 874 (2010); *United States* v. *Lumbard*, 706 F.3d 716, 721-725 (6th Cir. 2013); *United States* v. *Retana*, 641 F.3d 272, 274-275 (8th Cir. 2011); *United States* v. *Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir.) (per cu-

riam), cert. denied, 577 U.S. 913 (2015); *United States* v. *Zitron*, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam).

This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). And the text of Section 1028A(a)(1) nowhere uses the terms "steal," "stolen," or "theft." Section 1028A prohibits "*us[ing]*, without lawful authority, a means of identification," 18 U.S.C. 1028A(a)(1) (emphasis added)—not "*acquiring*, without lawful authority, a means of identification."

The relevant inquiry thus turns on whether the defendant had authority to engage in the particular use at hand, not on whether he had authority to acquire the personal information in the first place. A cashier may lawfully acquire credit-card information when a customer pays for a volume of Faulkner; the cashier nonetheless acts without lawful authority by later using the card number to charge for a volume of Hemingway.

Indeed, if Section 1028A applied only to defendants who steal information, the word "uses" would do no work. Section 1028A punishes a defendant who "transfers, possesses, *or* uses" someone else's means of identification without lawful authority. 18 U.S.C. 1028A(a)(1) (emphasis added). One who steals another person's information has already "possess[ed]" it without lawful authority. *Ibid.*

Finally, "[a]textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019). When Congress means "steal," it says so. The nearby Section 1028 punishes defendants who transfer or possess "sto-

len" identification documents. 18 U.S.C. 1028(a)(2) and (6). Section 1028A, in contrast, does not ask whether the defendant has "stolen" anything.

b. Petitioner likewise errs in contending (Br. 23) that a defendant violates the statute only when he misrepresents "*who* received" a service, and not when he misrepresents "*how* or *when* a service was performed." That contention again adds an element that the statute does not contain.

Section 1028A(a)(1) does not require proof that the defendant made a "misrepresentation." Much less does it require proof of a particular type of misrepresentation —one concerning identity rather than timing. It instead focuses on whether the defendant used someone else's information without valid permission to facilitate a predicate crime (which may itself require some form of misrepresentation). It requires nothing more.

When Congress intends to punish falsehoods about identity, it says so. A different clause of Section 1028A prohibits using a "false identification document" during and in relation to terrorism offenses, 18 U.S.C. 1028A(a)(2), and the neighboring Section 1028 addresses the production, transfer, and possession of "false identification document[s]," 18 U.S.C. 1028(a). A variety of other statutes prescribe punishment for a defendant who, for example, "personates or falsely represents himself to be * * * a person to whom [a military] pass or permit has been duly issued," 18 U.S.C. 499; "falsely represents himself to be an officer, agent, or employee of the United States," 18 U.S.C. 913; "falsely assumes or pretends to be" a foreign diplomat, 18 U.S.C. 915; uses a "false * * * name" to conduct mail fraud, 18 U.S.C. 1342; or "personates" or "appears falsely in the name of" another person in a naturaliza-

tion proceeding, 18 U.S.C. 1424. Section 1028A, in marked contrast, does not speak of falsehood, personation, or falsely representing oneself as someone else.

Petitioner's additional element also lacks substance and is wholly manipulable. Falsehoods can often be characterized in different ways. In suggesting that the statute does not apply so long as the defendant can claim not to have assumed someone else's identity, petitioner threatens to eviscerate Section 1028A's application to archetypal scenarios in which a defendant "uses, without lawful authority, a means of identification" in furtherance of a predicate crime.

If a waiter uses a diner's credit-card number to buy a new television—a scenario that petitioner agrees the statute covers, see Br. 26—the waiter has lied about what the diner has bought; the diner agreed to pay for food, not for a television. Likewise, if a psychologist uses a patient's insurance number to charge for cancer treatment—a scenario about which petitioner equivocates, see *ibid.*—the psychologist has lied about what the patient has received; the patient received psychological services, not oncological ones.

But on petitioner's view, such an understanding of those scenarios would immunize them from liability. He would require that they instead be reframed as involving misrepresentations about *who* someone is, rather than *what* products or services someone else has agreed to buy. The scenarios could be viewed that way: the waiter is impersonating the diner when the waiter purchases the television, and the psychologist is claiming to act on behalf of the patient when he bills for oncological services. But nothing in the straightforward language of the statute turns its application into an inherently

malleable and indeterminate framing exercise—or even requires a misrepresentation at all.

c. At all events, petitioner's challenge to the sufficiency of the evidence should fail under his own standard. He acknowledges (Pet. Br. 21) that a pharmacist would violate Section 1028A by using a patient's name to claim reimbursement for a drug that the patient never received. But that is precisely analogous to what petitioner did: using a patient's name and number to claim reimbursement for a service that the patient never received (a fictitious complete psychological evaluation by a non-existent licensed psychologist).

Just as petitioner would accept that the pharmacist has "stolen" the identifying information of the patient that the pharmacist was authorized to use for other things, petitioner "stole" the identity of Patient L. And just as the pharmacist falsified "*who* received the drug" (no one did, for there was no drug), Pet. Br. 21, petitioner falsified who received the examination by a licensed psychologist (no one did, for there was no licensed psychologist). Thus, even on petitioner's own atextual reading, he violated Section 1028A.

B. Application Of Section 1028A To Petitioner's Conduct Is Consistent With The Statutory And Section Titles

Finding little support for his position in the statutory text, petitioner emphasizes (Br. 28-32) that Congress enacted Section 1028A as part of the Identity Theft Penalty Enhancement Act and that Section 1028A bears the heading "Aggravated identity theft." But the term "identity theft" readily encompasses the use of someone's identifying information to facilitate a crime. In any event, petitioner's effort to overcome the plain statutory language with a narrower definition derived from the title contravenes the cardinal principle that a "title

or heading should never be allowed to override the plain words of a text." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (citation omitted).

1. Dictionaries define "identity theft" as "the unauthorized use of another's means of identification * * * for the purpose of committing theft or another crime," *Merriam-Webster's Dictionary of Law* 494 (1996), or as "the illegal use of someone else's personal information," *Merriam-Webster's Collegiate Dictionary* 616 (11th ed. 2004). The President's Identity Theft Task Force has likewise observed that, while "identity theft is defined in many different ways, it is, fundamentally, the misuse of another individual's personal information to commit fraud." President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* 2 (Apr. 2007). That is exactly what Section 1028A(a)(1) forbids: the unauthorized use of someone else's identifying information to facilitate crimes.

The particular type of conduct in which petitioner engaged is accordingly described as "medical identity theft." The Department of Health and Human Services explains that "[m]edical identity theft" occurs when someone "uses your personal information (such as your name * * * or Medicare number) to submit fraudulent claims to Medicare and other health insurers without your authorization." Office of Inspector General, Department of Health and Human Services, *Medical Identity Theft & Medicare Fraud* 1 (OIG, *Medical Identity Theft*). The Centers for Medicare and Medicaid Services define "[m]edical identity theft" to include the "'misuse of a patient's * * * unique medical identifying information to * * * bill public or private payers for fraudulent medical goods or services.'" Centers for Medicare and Medicaid Services, Department of Health

and Human Services, *Safeguarding Your Medical Identity: Understanding and Preventing Provider Medical Identity Theft* 3 (Apr. 2016) (citation omitted). And the Federal Trade Commission warns that "medical identity theft" can happen "when dishonest people working in a medical setting use another person's information to submit false bills to insurance companies." Bureau of Consumer Protection, Federal Trade Commission, *Medical Identity Theft: FAQs for Health Care Providers and Health Plans* 1 (Jan. 2011).

2. Petitioner notes (Br. 31) that the term "identity theft" may be used more narrowly to refer to the theft of personal information, rather than to refer to the unauthorized use of personal information to facilitate crime. But that shows, at most, that Section 1028A's *heading* is ambiguous, not that its *text* is. The text, after all, "does not contain the words 'identity theft' or even 'theft.'" Pet. App. 3a (Richman, C.J., concurring). And while a clear heading can illuminate an ambiguous statute, an ambiguous heading cannot muddy a clear statute. "The ambiguity must be in the context and not in the title to render the latter of any avail." *United States* v. *Oregon & California R.R.*, 164 U.S. 526, 541 (1896).

This Court has long adhered to the "wise rule" that, although titles and headings can help "shed light on some ambiguous word or phrase," "they cannot undo or limit that which the text makes plain." *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947); see, *e.g.*, *Fulton*, 141 S. Ct. at 1879. Titles and headings "are not meant to take the place of the detailed provisions of the text," or even to provide "a synopsis." *Trainmen*, 331 U.S. at 528. They are instead meant to provide "useful navigational aids" for the reader. Antonin Scalia &

Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 35, at 221 (2012).

Petitioner's comparison (Br. 30) of the heading of Section 1028A to a defined term and the text to a definition simply proves the point. When "a statute includes an explicit definition," a court must "follow that definition, even if it varies from a term's ordinary meaning." *Van Buren* v. *United States*, 141 S. Ct. 1648, 1657 (2021) (citation omitted). The question thus is not, as petitioner would have it (Br. 31), whether petitioner's conduct fits within the "ordinary understanding of identity theft," whatever that may be. The question is instead whether petitioner used Patient L's name and number "without lawful authority" "during and in relation to" the predicate crimes—a type of conduct that Congress explicitly prohibited and in which petitioner clearly engaged.

3. A title, moreover, is by definition an abridgment; it can only "indicate the provisions in a most general manner." *Trainmen*, 331 U.S. at 528. "For the legal drafter, it can be quite a challenge to devise headings that adequately disclose the contents of a provision." Scalia & Garner § 35, at 221. Accordingly, "matters in the text" are "frequently unreflected" in the title. *Trainmen*, 331 U.S. at 528; see, *e.g.*, *Lawson* v. *FMR LLC*, 571 U.S. 429, 446 (2014) ("The underinclusiveness of the two headings * * * is apparent."). And it is clear from the face of Section 1028A that the section heading is (as section headings often are) underinclusive in certain ways.

Section 1028A forbids a range of crimes related to identity, not just identity theft in the narrow sense. As one lawmaker noted during a committee hearing, the legislation would cover "a whole host of identity related crimes," including conduct that "is not necessarily iden-

tity theft." *Identity Theft Penalty Enhancement Act, and the Identity Theft Investigation and Prosecution Act of 2003: Hearing on H.R. 1731 and H.R. 3693 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 3 (Mar. 23, 2004) (*House Hearing*) (statement of Rep. Scott).

In particular, although the "identity theft" title applies to the entire section, one clause of Section 1028A, not at issue here, punishes the use of any "false identification document," even if it is not "the means of identification of another person," during and in relation to a terrorism offense. 18 U.S.C. 1028A(a)(2). That crime is more precisely described as "identity fraud (use of a false ID)" rather than "identity theft (use of an ID belonging to someone else)." *Flores-Figueroa* v. *United States*, 556 U.S. 646, 655 (2009).

At most, even accepting the narrowest possible view of "identity theft," the statutory title and section heading suggest only that "identity theft" was the principal evil that Congress meant to address in Section 1028A. But "statutory prohibitions often go beyond the principal evil," "and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). A court should not "rewrite [the] statute so that it covers only what [the court] think[s] is necessary to achieve what [the court] think[s] Congress really intended." *DePierre* v. *United States*, 564 U.S. 70, 85 (2011) (citation omitted).

C. Application Of Section 1028A To Petitioner's Conduct Furthers The Statutory Design

Here, furthermore, the plain application of the statutory text to crimes like petitioner's accords with the

principle that a "textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner § 4, at 63. A principal purpose of Section 1028A was protecting individuals whose identifying information is used to facilitate the commission of crimes.

Section 1028A's scope was deliberate. In debates about Section 1028A, members of Congress expressed serious concerns about so-called "insider" identity crimes—that is, cases in which the criminal misuses identifying information "that was originally collected for an authorized purpose." H.R. Rep. No. 528, 108th Cong., 2d Sess. 4-5 (2004); see, *e.g.*, *id.* at 49 (statement of Rep. Carter); *House Hearing* 36 (statement of Rep. Coble); 150 Cong. Rec. 13,668 (2004) (statement of Rep. Sensenbrenner); *id.* at 13,670 (statement of Rep. Carter); *ibid.* (statement of Rep. Schiff).

By using the phrase "without lawful authority" rather than "stolen," Congress ensured that Section 1028A applies even when a defendant obtains personal information lawfully but then uses it in an unauthorized way. However a defendant might have acquired the identifying information, his unauthorized use of it to facilitate the felony causes, or at least threatens to cause, distinct harms to the person to whom the information belongs.

Thus, as one lawmaker explained during Congress's consideration of Section 1028A(a)(1), the statute ensures that the defendant's total sentence "reflect[s] the impact on the victim, in addition to the impact and loss to the [defrauded] institution." 150 Cong. Rec. at 13,670 (statement of Rep. Schiff). Applying Section 1028A(a)(1) to the type of conduct at issue here—defrauding an insurer by lying about what services have been provided to a specific patient—furthers that purpose. A defend-

ant who engages in that conduct does more than simply defraud the insurer; he can also seriously harm the patient whose name and insurance number he has used without valid permission to facilitate the fraud.

For one thing, when a doctor submits a false claim about a specific patient, "the wrong information ends up in your medical record." OIG, *Medical Identity Theft* 1. The error "can disrupt your medical care," and in "extreme circumstances" can even be "life-threatening." *Ibid.* In an illustrative case, a psychiatrist defrauded an insurer by falsely claiming to have treated patients for various mental-health problems. *United States* v. *Skodnek*, 933 F. Supp. 1108, 1121 (D. Mass. 1996). That conduct "created a paper trail"—"official records purporting to show that [the patients] suffered from grave mental and emotional problems, drug addiction and abuse, and so forth." *Ibid.* Those records, which were "vulnerable to disclosure to any number of sources," threatened "incalculable" harm to the patients' "reputations," "careers," and "lives." *Ibid.*

In addition, because insurance coverage is usually capped, beneficiaries "risk exhaustion of their insurance benefits" when "false information [is] included in claims that use their names." Office of Special Investigations, U.S. General Accounting Office, B-283695, *Health Care: Fraud Schemes Committed by Career Criminals and Organized Criminal Groups and Impact on Consumers and Legitimate Health Care Providers* 4 (Oct. 5, 1999). In an illustrative case, a psychologist "billed certain insurance companies for services that he did not provide to his patients." *United States* v. *Burgos*, 137 F.3d 841, 842 (5th Cir. 1998) (per curiam), cert. denied, 525 U.S. 1085 (1999). As a result, "the patients' treatment benefits were often exhausted"

—in some cases, "for a life-time." *Id.* at 844. If the patients had "future treatment needs," those needs "would not be covered under their [insurance] policy." *Ibid.*

The harms that petitioner caused Patient L were similar. Patient L was eligible for eight hours of psychological testing for the 12-month period beginning in May 2013. See p. 3, *supra*. By falsely claiming that a licensed psychologist had seen and evaluated Patient L for three hours in that May, petitioner deprived Patient L of part of those benefits. If Patient L had needed more testing later that year, Patient L might have been denied coverage. Petitioner thus caused distinct harms —over and above the harms caused by the underlying healthcare fraud—when he used Patient L's personal information to facilitate his crimes. Section 1028A exists to punish just such superadded harms.

D. Petitioner's Assertion Of Statutory Overbreadth Is Unfounded

Petitioner portrays (Pet. i) the government and the court of appeals as interpreting Section 1028A(a)(1) to apply "any time [a defendant] mentions or otherwise recites someone else's name while committing a predicate offense." That is a strawman. The government did not prosecute petitioner based on that boundless theory, did not advance that theory in the court of appeals, and does not defend that theory here. Nor did the court of appeals adopt it. The en banc court affirmed the conviction "for the reasons set forth in the panel majority opinion." Pet. App. 2a. The panel, in turn, noted that at that stage, petitioner "claim[ed] only that he did not *use*" Patient L's means of identification. *Id.* at 67a. The panel accordingly discussed the meaning of the word "use," and had no occasion to discuss the meaning of Section 1028A's other elements. *Ibid.* Petitioner can

characterize (Br. 3) the court of appeals' decision as "maximalist" only by treating its reading of the word "use" as its reading of the whole statute.

1. Section 1028A includes a number of elements that limit its scope. For one thing, it applies only to defendants who have committed specified predicate crimes. It therefore raises no danger of turning "otherwise law-abiding citizens [into] criminals." *Van Buren*, 141 S. Ct. at 1661.

In addition, Section 1028A(a)(1) applies only to defendants who use the means of identification of "another person." The statute thus does not apply if the defendant uses a made-up identity. See *Flores-Figueroa*, 556 U.S. at 648. The statute also applies only to those who use someone else's means of identification "without lawful authority." 18 U.S.C. 1028A(a)(1). It accordingly does not apply to a defendant who has valid permission to use someone else's means of identification, even if the defendant happens to use that means of identification while committing a crime.

Section 1028A(a)(1) further requires that the defendant use the means of identification "during and in relation to" a predicate crime. As explained above, those words preclude prosecution where the means of identification "'played' no part in the crime," *Muscarello*, 524 U.S. at 137 (citation omitted), or where its "presence or involvement [was] the result of accident or coincidence," *Smith*, 508 U.S. at 238. The requirement accordingly "prevent[s] misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims." *Muscarello*, 524 U.S. at 139.

Finally, the statute punishes only someone who "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another per-

son." 18 U.S.C. 1028A(a)(1) (emphasis added). That mens rea element requires the government to prove that the defendant knew not only that he was using a means of identification, but also that the means of identification belonged to another person. See *Flores-Figueroa*, 556 U.S. at 647. And while the Court has not itself reached the issue, see *id.* at 648, the government accepts that Section 1028A(a)(1) applies only if the defendant knew that he lacked "lawful authority." Such mens rea elements afford criminal defendants significant protection from unfair prosecutions. See *Wooden* v. *United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring).

2. Those textual requirements preclude prosecution in the fanciful hypotheticals that petitioner offers.

For example, Section 1028A would not apply to a taxpayer who names a child as a dependent on one part of his tax return and "claims an improper deduction" somewhere else on the return (Pet. Br. 3). As a threshold matter, Section 1028A's list of predicate offenses does not even include any of the tax crimes created by the Internal Revenue Code. See 18 U.S.C. 1028A(c). In any event, a parent has the lawful authority to use a child's name on a tax return. Furthermore, the inclusion of a child's name would not facilitate a fraudulent claim, because the fraud's chances of success would remain just the same with or without the child's name on the tax return.

For similar reasons, an applicant for a bank loan does not violate Section 1028A if he "slightly inflates his salary while correctly identifying the co-signer" (Pet. Br. 3). If the co-signer agreed to sign for that particular loan, the applicant has used the co-signer's name with

lawful authority. And the inclusion of the co-signer's name is not "in relation to" the fraud.

Nor would Section 1028A apply to a defendant who simply writes someone's name on an envelope in the course of committing mail fraud (Pet. Br. 3, 22, 34). The phrase "uses, without lawful authority," taken as a whole, is sensibly read to apply only to the types of uses that would ordinarily require authorization in the first place. It is natural to say that Smith uses Jones's means of identification "without lawful authority" if Smith uses Jones's credit-card number to buy himself a new computer, or uses his insurance number to charge for fictitious medical care. But it would not be natural to say that Smith uses Jones's means of identification "without lawful authority" if Smith sends Jones an unsolicited letter, or shouts his name while passing him in the street. Those types of uses do not require permission in the first place; or, to view the matter another way, everyone is presumed to have permission to use other people's names in those ways. Cf. *Florida* v. *Jardines*, 569 U.S. 1, 8 (2013) (discussing a visitor's "implicit license" to "approach the home by the front path").

3. Petitioner's asserted concern (Br. 27) that Section 1028A will "automatically" apply "whenever many of its predicate offenses are committed" is unfounded. The predicate offenses that petitioner mentions (Br. 32-34) —mail fraud, wire fraud, bank fraud, and healthcare fraud—can be and often are committed without using anyone else's means of identification. See, *e.g.*, *Schmuck* v. *United States*, 489 U.S. 705, 707 (1989) (mail-fraud prosecution for the "common and straightforward" fraud of selling cars with falsified "low-mileage readings"). In those cases, Section 1028A would have no application.

The healthcare-fraud predicate at issue in this case is illustrative. Section 1028A would not apply if, for example, a patient defrauds a healthcare benefit program by lying about the patient's own eligibility for benefits. See, *e.g.*, *United States* v. *Perry*, 757 F.3d 166, 174 (4th Cir. 2014) (healthcare fraud involving a beneficiary's lies about his own eligibility), cert. denied, 574 U.S. 1098 (2015). Nor would it apply if a doctor seeks payment for serving wholly fictitious patients. See, *e.g.*, *United States* v. *Ruiz*, 698 Fed. Appx. 978, 984 (11th Cir. 2017) (healthcare fraud involving "non-existent patients"), cert. denied, 138 S. Ct. 1013 (2018). And healthcare fraud can be committed in still other ways that do not involve using someone else's means of identification without valid permission. See, *e.g.*, *United States* v. *Lucien*, 347 F.3d 45, 49 (2d Cir. 2003) (healthcare fraud involving staging car accidents).

This case happens to involve one common type of healthcare fraud that does generally involve use of someone's means of identification without lawful authority: filing false reimbursement claims on behalf of real patients. That species of healthcare fraud will usually involve the unauthorized use of the patient's name or number to facilitate the fraud—precisely the conduct that Section 1028A targets. It makes sense that Section 1028A would apply in such circumstances; as discussed above, the invocation of a specific patient's right to reimbursement can cause serious harm to the patient, over and above the harm to the insurer from the underlying fraud. See pp. 27-29, *supra*.

Regardless, the prospect that a particular "subset" of healthcare-fraud prosecutions can regularly trigger Section 1028A "is not particularly noteworthy." *Abdelshafi*, 592 F.3d at 609. The separate and tailored re-

quirements of Section 1028A necessitate proof that the particular fraud at issue falls within that subset.

4. Finally, petitioner errs in suggesting (Br. 35-36) that his constrained reading of Section 1028A is necessary to preclude untoward spillover consequences for the nearby Section 1028(a)(7). Section 1028A and Section 1028(a)(7) use different language. Section 1028A punishes a defendant if he uses someone else's means of identification "without lawful authority" "during and in relation to" a listed federal felony. 18 U.S.C. 1028A(a)(1). Section 1028(a)(7), in contrast, punishes someone who uses another person's means of identification "without lawful authority" "with the intent to commit, or to aid or abet, or in connection with" a violation of federal law or a state felony. 18 U.S.C. 1028(a)(7).

Even assuming for the sake of argument that those provisions should be read in lockstep, Section 1028(a)(7) would not apply whenever someone "employs another's identity while committing a qualifying offense" (Pet. Br. 36). For the reasons explained above, Section 1028A's "without lawful authority" and "in relation to" elements limit the circumstances in which Section 1028A applies. Section 1028(a)(7)'s "without lawful authority" and "in connection with" elements would do similar work.

E. Petitioner Fails To Identify Any Rule Of Statutory Construction That Supports His View Of The Statute

In an effort to bolster his other arguments, petitioner invokes the canon of constitutional avoidance (Br. 37-42) and the rule of lenity (Br. 42-44). His reliance on those doctrines is misplaced.

1. Constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings* v. *Rodriguez*, 138 S. Ct. 830,

842 (2018) (citation omitted). Here, application of ordinary textual analysis leaves no significant question that petitioner lacked lawful authority to use Patient L's name and number to charge Medicaid for a fictitious service, and that petitioner's use of that information was "in relation to" his healthcare fraud. Constitutional avoidance also applies only when "'a *serious* doubt' is raised about the constitutionality of an act of Congress," *id.* at 842 (emphasis added; citation omitted), and petitioner's vagueness argument (Br. 37-42) creates no such doubt.

Section 1028A's "in relation to" requirement is not vague, and it draws content from this Court's decisions interpreting the similar requirement of Section 924(c), whose application has encountered no constitutional obstacle. See pp. 11-12, *supra*. Similarly, nothing is vague about the words "without lawful authority"; authority is a familiar concept in the law. See Restatement (Second) of Agency §§ 26-81 (principles governing the creation and interpretation of authority). And while the application of those requirements to specific circumstances may sometimes be debatable, a statute is not vague simply because "it may be difficult in some cases to determine whether [its] clear requirements have been met." *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

Petitioner asserts (Br. 39) that Section 1028A is vague because of a "dissonance" between its text and title. But no such dissonance exists; as explained above, the statute's text is consistent with a common definition (even if not the only definition) of "identity theft." See pp. 23-24, *supra*. In any event, under this Court's precedents, any dissonance between the title and the text would be resolved by applying the text—not by pronouncing the text void for vagueness. See p. 24-25, *supra*.

Petitioner cites (Br. 41) state cases holding state statutes unconstitutional because of mismatches with their titles, but those courts were applying state constitutional provisions requiring accurate titles. See, *e.g.*, Va. Const. Art. IV, § 12 ("No law shall embrace more than one object, which shall be expressed in its title."). The federal Constitution contains no such requirement.

2. The rule of lenity "comes into operation at the end of the process" of statutory interpretation, "not at the beginning as an overriding consideration of being lenient to wrongdoers." *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013) (citation omitted). It applies only if the criminal statute contains a "grievous ambiguity"—that is, only if, even after applying all the traditional principles of statutory construction, a court "can make no more than a guess as to what Congress intended." *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (citation omitted). This case creates no occasion for such a guess, because Section 1028A(a)(1)'s plain language encompasses petitioner's conduct.

Contrary to petitioner's suggestion (Br. 43-44), the rule of lenity is not triggered here simply because the judges on the court of appeals disagreed about how to read Section 1028A or because some courts of appeals have invoked the rule in interpreting Section 1028A. A finding of a grievous ambiguity turns on application of the traditional rules of statutory interpretation, not a show of hands. Indeed, this Court has rejected an attempt to invoke the rule of lenity even where the courts of appeals had "almost uniformly" reached an interpretation contrary to the one at which the Court—applying ordinary statutory-interpretation principles—ultimately arrived. *United States* v. *Castleman*, 572 U.S. 157, 169 n.8 (2014); see *Voisine* v. *United States*, 579 U.S. 686,

698 n.6 (2016); see also *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring) (observing that the rule of lenity has "appropriately played only a very limited role in this Court's criminal case law").

* * * * *

Those ordinary statutory-interpretation principles dictate the result here. This Court should follow Section 1028A's text where it leads and affirm the court of appeals' judgment. If, however, the Court accepts petitioner's view of the statute, it should vacate the judgment and remand the case so that the court of appeals can consider whether petitioner has forfeited his challenge to the sufficiency of the evidence and, if so, whether he is entitled to plain-error relief. See Pet. App. 2a (declining to resolve the standard of review); *id.* at 29a (Oldham, J., concurring) (rejecting petitioner's challenge under the plain-error rule); Pet. 23 (urging the Court to "remand for consideration by the full court of appeals in the first instance whether the plain-error doctrine applies"); *Rosemond* v. *United States*, 572 U.S. 65, 83 (2014) (remanding for court of appeals to assess applicability of the plain-error rule).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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1. 18 U.S.C. 1028(d)(7) provides:

Fraud and related activity in connection with identification documents, authentication features, and information

(d) In this section and section 1028A—

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

2. 18 U.S.C. 1028A provides:

Aggravated identity theft

(a) OFFENSES.—

(1) IN GENERAL.—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.

(2) TERRORISM OFFENSE.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only

with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) DEFINITION.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards[1]), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

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[1] So in original. Probably should be "records".

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).