

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID FOX DUBIN, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-10  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Place: Washington, D.C.  
Date: February 27, 2023

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DAVID FOX DUBIN, )

Petitioner, )

v. ) No. 22-10

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Monday, February 27, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQUIRE, Stanford, California; on behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-10, Dubin versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit's decision here stretches the aggravated identity theft statute beyond its breaking point. Overbilling Medicaid by \$101 may provide fodder for a simple healthcare fraud prosecution, but, as even the concurring judges below recognized, it does not meet any ordinary understanding of the term "identity theft."

Nor, for two independent reasons, does Mr. Dubin's conduct fall within the terms of Section 1028A. First, he did not use Patient L's name in relation to his healthcare fraud offense. That statutory element requires that the use of the name be instrumental, not merely incidental, to the fraud.

1           In a fraud case, another way to think  
2 about that is it requires the name to be the  
3 "who" in the fraud, that is, misrepresenting who  
4 received services, not merely how or when those  
5 services were received. And Mr. Dubin's conduct  
6 falls only in the latter camp.

7           Second, Mr. Dubin did not use Patient  
8 L's identity without lawful authority. He had  
9 permission to use Patient L's identity to bill  
10 Medicaid for psychological services, and that's  
11 precisely what he did.

12           A contextual perspective confirms this  
13 analysis. The federal fraud statute that's the  
14 predicate here, like the other federal fraud  
15 statutes, covers an enormously broad swath of  
16 conduct, and, therefore, Congress has made  
17 prison time discretionary in those instances.

18           And as the Federal Defenders' brief  
19 explains, the median sentence in a fraud case in  
20 this country is 12 months. Twenty-five percent  
21 of offenders receive only probation. The  
22 sentence -- this statute, by contrast, requires  
23 a two-year mandatory minimum.

24           So all indications are what Congress  
25 was doing is targeting a particularly egregious

1 form of fraud, use of somebody's name through  
2 stealing it, misappropriating it, or -- or  
3 impersonating the person, identity theft.

4 But, if the government is right and if  
5 the Fifth Circuit is right about how broad the  
6 statute is, what it would do is it would  
7 transform fraud prosecutions to having every one  
8 of them be essentially an aggravated identity  
9 theft prosecution too, and that would thwart's  
10 Congress's careful design.

11 The Court should reverse, and I'm  
12 happy to answer any questions the Court has.

13 JUSTICE THOMAS: Mr. Fisher, you said  
14 that -- that Mr. Dubin was authorized to use  
15 Patient L's identity. Was Dubin authorized to  
16 use Patient -- Patient L's identity for this  
17 particular transaction?

18 MR. FISHER: Well, I think the best I  
19 can answer is yes, he was in the sense that he  
20 was authorized to use Patient L's identity for  
21 billing Medicaid. That was the name that was at  
22 the center --

23 JUSTICE THOMAS: Well, I understand --  
24 that's a little broader. Well, you could say  
25 that if you drop a car off at a valet, your

1 Porsche -- I don't have one -- but, if you had a  
2 Porsche, you'd be concerned about the use of it,  
3 and the valet is authorized to drive it  
4 generally but not to drive it around the city,  
5 but to park it.

6 So I don't see how this is any  
7 different from that. He's authorized to bill at  
8 the appropriate charges, but it's not a general  
9 authorization.

10 MR. FISHER: Well, I think, Justice  
11 Thomas, the only way to make sense of that  
12 element in the statute is to do it more  
13 generally, and I think there's a couple of  
14 reasons why that is so.

15 And, first, let me just start with the  
16 record in this case. The only thing the  
17 government ever argued in this case was that the  
18 unauthorized use was the fact that Mr. Dubin  
19 committed a crime with the name. That's at  
20 Joint Appendix page 31 and 32, and it's also at  
21 the Pet. App. 66a and 67a. So the Fifth  
22 Circuit's theory and the government's theory was  
23 simply using the name to commit a crime is what  
24 makes it unauthorized use.

25 And so, when you turn to the statute,

1 that cannot be right for two reasons. One is  
2 because the statute already requires a  
3 violation. That's the predicate crime. And  
4 this would just make it superfluous.

5 And, second of all, remember, just as  
6 a matter of grammar, lawful authorized --  
7 "lawful" modifies use, not -- I'm sorry,  
8 "lawful" modifies "authority," not "use."

9 And so what the government would do  
10 and I think, with all due respect, what your  
11 hypothetical would do would ask whether the --  
12 whether the item was used lawfully, not whether  
13 the person had authority in a general sense.

14 And I think one other analogy -- one  
15 other analogy that -- that we give the Court in  
16 our brief is burglary law, which is a common  
17 criminal law thing, where you don't ask whether  
18 the person had authority to enter the building  
19 to commit a crime, because nobody has that kind  
20 of authority. You ask whether they had general  
21 authority to enter the building. We think  
22 that's what the element is doing in the statute.

23 JUSTICE JACKSON: But how general are  
24 you -- you know, is your analysis? I mean, I --  
25 you use a reference to a hypo about a waiter,



1 and I thought that was very interesting and  
2 maybe illuminating in this regard.

3 So, you know, I give the waiter my  
4 credit card, and rather than charging me for the  
5 food, he charges me -- you know, he pays down  
6 his mortgage with my credit card.

7 Is that use with or without lawful  
8 authority and why?

9 MR. FISHER: I think that's probably  
10 use without lawful authority because, when you  
11 give your credit card to the waiter, you are  
12 assuming that the waiter's going to charge you  
13 for the meal or at least -- at least something  
14 from the restaurant.

15 JUSTICE JACKSON: All right. So, if  
16 he charges --

17 MR. FISHER: And so, if the waiter --

18 JUSTICE JACKSON: Yeah.

19 MR. FISHER: Sorry.

20 JUSTICE JACKSON: So go ahead.

21 Mm-hmm.

22 MR. FISHER: So, if the waiter uses it  
23 to charge something else, that's an additional  
24 transaction that is not authorized.

25 JUSTICE JACKSON: What if he charges

1 me for a bunch of things I didn't order? So it  
2 is using for the meal, right? We're not in that  
3 other scenario. But I didn't order all these  
4 things, and suddenly they're on the bill.

5 MR. FISHER: So I think that is --  
6 that is without lawful authority, but I think it  
7 might be -- you might -- it might still not be  
8 in relation to the crime because there --

9 JUSTICE JACKSON: Right, right. But  
10 I'm just -- so -- so you -- so isn't that the  
11 same thing as is being alleged here with respect  
12 to your client?

13 MR. FISHER: I don't think so because,  
14 if you look at the actual bill in this case or  
15 the Medicaid claim -- it's at the very last two  
16 pages of the Joint Appendix -- it is -- under --  
17 there's a procedure code that -- that says what  
18 you are billing for, and the procedure code is  
19 exactly the same as whether or not -- the  
20 dispute here is whether a licensed psychologist  
21 versus a licensed psychological associate  
22 provided the services.

23 JUSTICE JACKSON: But that's not what  
24 he ordered. I mean, that's not what the law --  
25 what the law orders. I don't see how that's any

1 different than the waiter putting something on  
2 the bill that was not -- you know, fraudulently,  
3 that -- that was not actually ordered.

4 MR. FISHER: Well, I think that the --  
5 the -- the mortgage example is easier. And I  
6 think that is why "without lawful authority" as  
7 -- I mean, I -- I acknowledge that it's -- that  
8 it's -- that it's challenging to figure out  
9 exactly what level of generality you're asking,  
10 but I think the best way to do it is say, did  
11 the person give authority to -- to bill for this  
12 type of service or this type of product? So --

13 JUSTICE KAGAN: So, when you --

14 MR. FISHER: -- I think, Justice --  
15 sorry.

16 JUSTICE KAGAN: Go ahead. Sorry.

17 MR. FISHER: I think, Justice Jackson,  
18 if it's just extra food on the bill, that may  
19 not be without lawful authority, but, if it's  
20 something different from the items in the  
21 restaurant, then that would be outside of the  
22 expectation of the transaction.

23 JUSTICE SOTOMAYOR: But that's not --

24 JUSTICE KAGAN: Same --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 JUSTICE KAGAN: No, go ahead.

2 JUSTICE SOTOMAYOR: That's not  
3 identity theft, meaning there's two --

4 MR. FISHER: It's still not identity  
5 theft --

6 JUSTICE SOTOMAYOR: -- there's two  
7 elements.

8 MR. FISHER: That's right.

9 JUSTICE SOTOMAYOR: And, as I  
10 understand your description of "in relation to,"  
11 you keep going back to that means that the name  
12 must be a part of what makes the predicate  
13 conduct fraudulent. And the name there isn't  
14 because the extra food isn't helping the --  
15 isn't on the who may -- who you're -- who that  
16 person is. They gave you the credit card.  
17 You're charging extra food.

18 MR. FISHER: That's right, Justice  
19 Sotomayor. I think it --

20 JUSTICE SOTOMAYOR: It's like, if I  
21 ordered a tomahawk steak and they gave me a big  
22 sirloin steak, that would be a fraud, but my  
23 name isn't used in that way, correct?

24 MR. FISHER: Right. That's right. I  
25 think it's important to keep -- these are --

1 CHIEF JUSTICE ROBERTS: Well, but --  
2 but you needed to use an actual patient's name,  
3 right? So it's not just like you got a credit  
4 card and you don't care whose it is and you're  
5 just sort of charging it. It had to be, if it's  
6 not Patient L, it had to be Patient A, B, C or  
7 whatever, because I assume they check that this  
8 is somebody covered by whatever it is, Medicare  
9 or Medicaid.

10 MR. FISHER: Well, two things, Your  
11 Honor. First of all, as a technical matter,  
12 under the Medicaid -- under the healthcare fraud  
13 statute here, there doesn't have to be any name  
14 at all, let alone a Medicaid-eligible name, on  
15 the claim to violate the statute. So, as a  
16 technical matter, I think a name is not required  
17 to violate the statute.

18 And I think this was --

19 CHIEF JUSTICE ROBERTS: There has to  
20 be --

21 MR. FISHER: -- the General's point --

22 CHIEF JUSTICE ROBERTS: Does there  
23 have to be a name not to violate the statute?

24 MR. FISHER: Pardon me?

25 CHIEF JUSTICE ROBERTS: Does there

1 have to be a name not to violate a statute? In  
2 other words, you're saying you could -- could  
3 put any name, somebody who doesn't have any  
4 coverage or any relation at all?

5 MR. FISHER: Yes, it would still be  
6 healthcare fraud if you were listing a service  
7 you didn't provide or overbilling or what -- or  
8 whatever else. So the name is not essential to  
9 commit the crime.

10 But I would add to that, even if the  
11 name were essential to commit the crime, we  
12 still think that's too low a bar for "in  
13 relation to." And, as we point out, one example  
14 is, if all you need is a but-for relationship to  
15 satisfy the "in relation to" element, then every  
16 mail or wire fraud case that has a name on an  
17 envelope or a name in the e-mail address or the  
18 phone number becomes identity theft.

19 JUSTICE SOTOMAYOR: Isn't that why --

20 MR. FISHER: Every time --

21 JUSTICE SOTOMAYOR: -- isn't that why  
22 the government disclaims that and it comes up  
23 with a theory that says a name on an envelope is  
24 something that anybody can use, correct?

25 MR. FISHER: Well, that's right,

1 Justice Sotomayor. That's what the government  
2 says, but, again, it's important to distinguish  
3 the elements, one from the other. I don't think  
4 the government disputes that the name on the  
5 envelope satisfies its but-for test under the  
6 "in relation to" element.

7 JUSTICE SOTOMAYOR: Right.

8 MR. FISHER: And so they do have a  
9 different answer for the mail fraud hypo there.  
10 On "without lawful authority," they say somebody  
11 is assumed to have authority to send an  
12 unsolicited letter, but that brings me back to  
13 the level of generality question. That answer  
14 violates their own rule.

15 Their rule is you have to have  
16 specific authorization to the exact thing you  
17 did in the manner you did it. So you would not  
18 ask whether somebody has authorization to send  
19 an unsolicited letter. You'd ask whether  
20 somebody has authorization to send a fraudulent  
21 letter, and the answer to that would be no, just  
22 like here.

23 JUSTICE JACKSON: But why isn't that  
24 right? I mean, I -- I -- I'm still struggling  
25 with the -- with the waiter hypo. Isolating

1 "without authority," I understand your point in  
2 -- "during and in relation," it probably still  
3 wouldn't be --

4 MR. FISHER: Yes.

5 JUSTICE JACKSON: -- triggering this  
6 statute because of the nature of it. Fine.

7 But, without authority, if the waiter  
8 is charging things, you've given him permission  
9 to charge it for food, you say that's enough to  
10 allow it to be with authority.

11 But I guess I don't understand why, if  
12 he's charging it for food that I didn't order  
13 fraudulently, that is with authority.

14 MR. FISHER: No, I think if I -- I may  
15 have misunderstood then if I said that. As to  
16 food on the menu, I think, if something is  
17 charged that was not ordered, you do -- you are  
18 giving authority at least for the -- for the  
19 transaction where you give the credit card to  
20 charge the bill.

21 Now, if the next day the waiter were  
22 to charge something else after you've left the  
23 restaurant and after that charge has been done,  
24 then I think the authority is expired after you  
25 leave the restaurant. But -- but maybe I



1       misunderstood in the mix of --

2                   JUSTICE JACKSON:  I mean, where does  
3       that come from?  I mean, that just sort of --  
4       why does it matter whether I'm still sitting in  
5       the restaurant or he does it the next day?  The  
6       point is, what is the scope of my authority?  
7       When I give him the card, I am giving him the  
8       card, I think, to charge the food I ordered.

9                   If he charges, you know, either the  
10      food I didn't order or something on Amazon or  
11      pays down his mortgage, aren't all of those  
12      scenarios the same with respect to the scope of  
13      my authority?

14                  MR. FISHER:  I don't think so, Justice  
15      Jackson.  I think that, as I said to Justice  
16      Thomas, you need to say something more than  
17      you're billing for something other than exactly  
18      what was ordered because, if that's what the  
19      rule is, then it collapses into the requirement  
20      that there be a predicate fraud.

21                  And the Solicitor General's rule or  
22      the Fifth Circuit's rule would then cover any  
23      misbilling anytime a cashier bills anything  
24      wrong.  That cannot be right under the identity  
25      theft statute.

1 JUSTICE KAGAN: But just -- just the  
2 same line of questions, but, you know, put it in  
3 a context that's closer to this one. I mean,  
4 suppose -- I think you say at one point that if  
5 he had charged for cancer services, that would  
6 fail your test, is that correct?

7 MR. FISHER: I think that would likely  
8 be outside of the scope of authority, so it  
9 would -- so it -- so it would do so --

10 JUSTICE KAGAN: Yeah, that -- that's  
11 right. That's what I'm talking about.

12 MR. FISHER: So, if we had more facts  
13 in the record, it may be without authority. It  
14 would not be in relation to the crime for the  
15 reasons you're talking about right now.

16 JUSTICE KAGAN: Yeah. So it's outside  
17 the scope of authority for cancer services  
18 because the patient is only supposed to get  
19 psychological services.

20 But, you know, it's the same question  
21 as Justice Jackson is asking. Suppose now he  
22 bills for a hundred hours of sessions with a  
23 full-bore psychiatrist, right, very different  
24 both in type and in quantity of the services he  
25 actually received.

1                   Why should that be anything -- any  
2                   less outside the authority that's been given?

3                   MR. FISHER: I think the answer would  
4                   be because, again, in that scenario, Mr. Dubin  
5                   would have -- would have authority to bill for  
6                   those kinds of services.

7                   Now, Justice Kagan, to bill a hundred  
8                   hours instead of three would be an egregious  
9                   fraud for which he could be prosecuted and  
10                  punished and perhaps severely, but it doesn't  
11                  make it outside of his authority for when --

12                  JUSTICE KAGAN: Right. I guess I --  
13                  what I'm not getting, and it's the same thing  
14                  that Justice Jackson is not getting, is -- is --  
15                  is why you're drawing the line between, you  
16                  know, here, cancer and psychological, as opposed  
17                  to drawing the line between the psychological  
18                  services I received and other psychological  
19                  services that I never received and, indeed,  
20                  didn't come close to.

21                  MR. FISHER: I think the reason I'm  
22                  drawing the line there with admittedly blunt  
23                  textual tools that -- that Congress has given  
24                  us, but the reason I'm drawing the line there is  
25                  because the only alternative that I think I see

1 on the table is that literally every mischarge  
2 becomes without lawful authority.

3 JUSTICE ALITO: Mr. Fisher --

4 MR. FISHER: So it sweeps in --

5 JUSTICE ALITO: I'm sorry. Finish.

6 MR. FISHER: So it would just sweep in  
7 every misbilling, a lawyer who bills 4.9 hours  
8 when he worked 4.8, bills for a second-year  
9 associate when it was really a first-year, et  
10 cetera.

11 JUSTICE ALITO: Your argument has a  
12 lot of intuitive appeal because this does not  
13 seem like what one normally thinks of as  
14 identity theft, but I'm wondering if you are  
15 trying to get too much out of the caption of  
16 this -- out of this provision.

17 And I know it's a little -- it's  
18 unfair to ask you about a case that we heard  
19 argument in last week, but I know you follow our  
20 cases, so I'm going to do it. If you just want  
21 to take a pass, that's fine.

22 But we heard very extensive argument  
23 on the meaning of Section 230 of the  
24 Communications Act, which provides -- has been  
25 held by the lower courts to provide pretty broad

1 immunity from civil liability for Internet  
2 service providers. But the -- the caption of  
3 that section is "Protection for Good Samaritan  
4 Blocking and Screening of Offensive Material."

5 So the -- the interpretation that the  
6 lower courts have given to that provision goes  
7 way beyond what you might think of just by  
8 looking at the caption. So, I mean, how far can  
9 we go in reading -- taking the caption as the  
10 gloss on the actual text in the statute?

11 MR. FISHER: So I don't think the tech  
12 -- I don't think the caption can trump otherwise  
13 clear language in the statute. I think the high  
14 watermark perhaps for the -- for -- for the  
15 title mattering, if I could turn the Court back  
16 to criminal law, would be the Yates case, where  
17 the Court dealt with the -- the provision in the  
18 Sarbanes-Oxley Act that said that any tangible  
19 object was covered by the statute, and what the  
20 Court said was that -- was that "records," the  
21 word in the title, limited actually the scope of  
22 that. And I think that was perhaps a quite  
23 muscular use of the title, nowhere near what  
24 we're asking for here.

25 Our point here, which goes all the way

1 back to 1805 and Chief Justice Marshall's  
2 opinion in the Fisher case, is that the title  
3 can illuminate and make you better understand  
4 what the statutory text means.

5 And so the title here, "Aggravated  
6 Identity Theft," simply gives you a lens through  
7 which you can understand these very ambiguous  
8 phrases like "without lawful authority" and "in  
9 relation to" and those sorts of things.

10 JUSTICE KAGAN: The dissent in Yates  
11 --

12 MR. FISHER: And we think --

13 JUSTICE KAGAN: -- pointed out that --  
14 pointed out that titles are always abridgements,  
15 right? I mean, you know, given the complexity  
16 of statutory language, you couldn't possibly put  
17 everything that statutory language is about into  
18 a three-word title.

19 So this seems like an unfortunate  
20 abridgement in -- in a way. It doesn't really  
21 get at the gist of what the statutory text seems  
22 to be about or it doesn't get to the scope of  
23 the apparent -- the apparent scope of the  
24 statutory text, but it is just -- you know, it's  
25 -- it's Congress's attempt to abridge a

1 complicated statutory provision.

2 MR. FISHER: Well, let me say two  
3 things, Justice Kagan. First of all, with due  
4 respect to the dissent in Yates, I'm not looking  
5 to use the title as -- as -- as aggressively as  
6 there. Really, there, the word "records" did  
7 limit the language quite directly.

8 Here, I'm just saying it gives you a  
9 lens through which to understand the words, and  
10 I think that is well in the Court's mainstream  
11 of cases, majority or dissents.

12 JUSTICE SOTOMAYOR: Mr. Fisher, when  
13 you look at the word "theft," I've gone through  
14 burglary statute -- not burglary statute -- a  
15 variety of different state statutes, and theft  
16 is always defined as transfer, possession, or  
17 use.

18 So it's not as if the title is not in  
19 the very words of the statute. Most theft  
20 statutes are using transfer, possession, or  
21 using of someone else's property, correct?

22 MR. FISHER: I think that's right, and  
23 in Flores-Figueroa, the Court actually, with  
24 this particular statute in mind, looked at the  
25 title. So there's precedent on the books from

1 this Court as to the usefulness of this title.

2 JUSTICE SOTOMAYOR: So why do you rely  
3 on "in relation to"? I relied on -- just on the  
4 word "use." If I look at it through the lens of  
5 the words that are being used, "transfer,  
6 possession, or use," I think of a theft because  
7 that's what's generally defined as thieving, and  
8 the question is, are you lying about the person  
9 who gave you permission, and you're not,  
10 correct?

11 MR. FISHER: I think "use" gives you  
12 all you would need to get there. The Solicitor  
13 General itself recognized in this Court a couple  
14 terms ago that "use" can mean "instrumental to."  
15 That was the definition they used from the  
16 dictionary in Van Buren. And I think, when you  
17 couple "use" with the phrase "means of  
18 identification," it's a particular kind of  
19 instrumental use.

20 And I think, Justice Sotomayor, you  
21 could say that's enough, but my point in this  
22 Court is that when you couple that yet more with  
23 "in relation to," that cements the notion that  
24 you need a nexus and you need something that is  
25 instrumental.



1           And, Justice Kagan, I did want to turn  
2 back to the second thing I wanted to say on your  
3 point about titles, which is that I understand  
4 that a title can be an abridgement and a  
5 shorthand, and there's courts -- the Court has  
6 cases that say every last little subsection  
7 within a provision is not going to be captured  
8 by a title, and we understand that.

9           But that's not the submission that  
10 you're being given today. The submission you're  
11 given today is the conduct by Mr. Dubin is the  
12 heartland of identity theft. Their argument is  
13 that this very conduct is exactly what Congress  
14 intended to capture. And so what they're saying  
15 is that the title -- if you disagree with that,  
16 and maybe like Justice Alito was suggesting,  
17 that the words "identity theft" don't really  
18 cover this conduct, that they're suggesting that  
19 you should nevertheless read the statute to  
20 cover all this thing that doesn't fall under  
21 there, the -- you know, this vast swath of  
22 conduct.

23           And I think that's what I was trying  
24 to say at the end of my opening, is that think  
25 about what this would mean for the fraud

1 statutes. You know, you have a two-year  
2 mandatory minimum, which is a very, very big  
3 deal both for plea bargaining and back-end  
4 sentencing if somebody goes to trial, and that  
5 should be strong medicine for particularly  
6 egregious frauds. It's not something that ought  
7 to be there for every single case for charging.

8 JUSTICE JACKSON: And Mr. --

9 JUSTICE GORSUCH: Mr. Fisher --

10 JUSTICE JACKSON: -- Mr. Fisher, don't  
11 we know that in part because we have another  
12 statute that sort of covers this same conduct?  
13 So the reason why I thought you weren't  
14 necessarily relying on the title is because this  
15 seemed to me to be a pretty standard thing that  
16 Congress does, that in (a)(7) of -- of 1028,  
17 they're laying out the base offense --

18 MR. FISHER: Yes.

19 JUSTICE JACKSON: -- because it uses  
20 almost identical terms, right, "knowingly  
21 transfer, possess, or use," and then we have "in  
22 connection with" unlawful activity. So that's  
23 kind of like the base offense. And then, in  
24 1028A, we have the aggravated offense, where  
25 they say not just "in connection with" but

1 "during and in relation to" the particular  
2 enumerated crimes.

3 So it seemed to me to be a -- a  
4 familiar structure in penalty statutes at least,  
5 where Congress -- you have -- you have one that  
6 doesn't have a mandatory minimum that's sort of  
7 the base, and then you get aggravated with this  
8 different level of, you know, egregiousness.

9 Is that -- is that close to your  
10 argument?

11 MR. FISHER: Yes and no --

12 JUSTICE JACKSON: Okay.

13 MR. FISHER: -- Justice Jackson. So,  
14 yes, in the sense I agree that (a)(7) is  
15 something of a base offense, and this is the  
16 aggravating offense, but I don't think it's so  
17 much with the "in connection to" versus "in  
18 relation to" language. You know, the Court has  
19 said in ERISA cases, for example, that those are  
20 basically interchangeable phrases.

21 The difference between (a)(7) and this  
22 statute is that you have a much -- you have a  
23 tighter group of predicate offenses. In (a)(7),  
24 you have any federal offense or any state  
25 offense, and there are federalism consequences

1 for the reading that you're being urged to  
2 follow today that we lay out in our brief.

3 The narrowing effect of -- of -- of  
4 the statute you have in front of you today is  
5 the particular list of federal offenses.

6 JUSTICE JACKSON: Yeah, but it's a  
7 subset, right? It --- it has to be. There has  
8 to be a difference in terms of the egregiousness  
9 of the conduct because the -- the -- the federal  
10 offenses in this --

11 MR. FISHER: Yeah.

12 JUSTICE JACKSON: -- aggravated is a  
13 subset of the other.

14 MR. FISHER: That's right, but I just  
15 want to say that the predicate offenses under  
16 1028A are still a quite long list. And like the  
17 predicate offense here, the healthcare fraud  
18 offense, and like the mail and the wire fraud  
19 statutes, there is no required jail time at all  
20 for those offenses.

21 So the aggravated identity theft  
22 kicker on top of any conviction there, predicate  
23 offense conviction, is quite serious and quite a  
24 big deal. And that's my point, that Congress  
25 would have not expected --

1 JUSTICE JACKSON: And that's why you  
2 have to have more egregious conduct in order to  
3 trigger it, right?

4 MR. FISHER: That's right. And the  
5 more --

6 JUSTICE JACKSON: Yeah.

7 MR. FISHER: -- egregious conduct  
8 should be more than just incidentally using  
9 somebody's name while you're committing that  
10 crime. So my point is, if the government is  
11 right, then every provider who provides an  
12 improper bill and commits healthcare fraud is  
13 also committing identity theft. Everyone who  
14 sends a letter to somebody else or every cashier  
15 who mischarges a bill, et cetera, is also  
16 committing identity theft.

17 And I don't think Congress would have  
18 wanted to transform those discretionary  
19 sentencing regimes for those low-level frauds to  
20 all situations where somebody is facing a  
21 two-year mandatory minimum.

22 And if -- and I see my white light and  
23 I wanted to circle back to one thing before the  
24 one-by-one questioning, which is we've talked a  
25 lot about "without lawful authority," and I just

1 wanted to underscore one feature of the "in  
2 relation to" argument that I'm making here,  
3 which is the instrumental use, not merely  
4 incidental use.

5           Judge Sutton on the Sixth Circuit  
6 wrote a very -- I think probably the best  
7 opinion in the lower courts I've seen on that  
8 issue that describes how the idea is, because  
9 we're dealing with identity theft, it has to be  
10 a lie about who receives services or who obtains  
11 services, not a lie about how those services  
12 were rendered, when those services were  
13 rendered, et cetera. And that rule of thumb, I  
14 think, is very, very helpful for sorting out the  
15 "in relation to" element as it works in the  
16 statute here.

17           And it's also just intuitively  
18 correct. Remember, whether you want to rely on  
19 the -- the title "Identity Theft" or whether you  
20 want to just look at the words "means of  
21 identification" in the statute itself, you're  
22 being asked to decide whether the fraud had to  
23 do with the misuse of somebody's name, whether  
24 it was instrumental -- that the name was  
25 instrumental to the crime, and you have a case

1 like this, whereas the government put it in its  
2 own closing argument at pages 31 and 32, this is  
3 incorrect billing for services rendered. That's  
4 how the government put it to the jury when it  
5 described the fraud.

6 In the Fifth Circuit, where the  
7 government was asked to describe the fraud, the  
8 government said the fraud here is that Mr. Dubin  
9 claimed that the services were provided by a  
10 licensed psychologist when they were really  
11 provided by a licensed psychological associate.  
12 That's the fraud here.

13 So, when the government is asked in  
14 ordinary English to describe what the fraud is,  
15 it's described having nothing to do with Patient  
16 L's identity or who received the services. It's  
17 only in its brief, when forced to defend an  
18 aggravated identity thought -- theft conviction,  
19 that they twist the notion here and say these  
20 are fictional services somehow or this is really  
21 about who received the services.

22 But, if you just use Judge -- Chief  
23 Judge Sutton's heuristic, I think that helps you  
24 sort out the cases in a way on the "in relation  
25 to" side that can do all the work you need in

1 this case.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. It seems to me that one of the factors  
4 that might be pertinent is whether it makes a  
5 difference whose name is used. Now the -- the  
6 Solicitor General says that here it did because  
7 the overbilling for the three hours deprived  
8 Patient L of three of the eight hours to which  
9 he was entitled.

10 First of all, do you agree with that  
11 statement of the facts?

12 MR. FISHER: Well, I agree in the  
13 sense that billing for three hours takes three  
14 hours away, but, remember, Patient L did receive  
15 services here. And I think the more -- the more  
16 -- the more narrow argument the Solicitor  
17 General makes is that billing those services in  
18 May instead of April had some effect, but, as we  
19 explain at pages 1 and 15 of our reply brief,  
20 that's just factually incorrect. And the  
21 government itself admitted that in the district  
22 court, that that argument had been debunked.

23 So you could have cases -- I -- I --  
24 can I say one more thing, Mr. Chief Justice?

25 CHIEF JUSTICE ROBERTS: Sure.



1           MR. FISHER: You could have cases  
2 where somebody would be, I think, sometimes  
3 deprived of benefits they would have due. We  
4 don't disagree that could exist. It's not in  
5 this case, but we don't disagree.

6           But those would be case-by-case  
7 situations, where that could be, I think, better  
8 taken into account at sentencing. The statute  
9 itself is not keyed to that kind of harm. That  
10 would just be something a district judge in an  
11 ordinary fraud sentence could take account of.

12           CHIEF JUSTICE ROBERTS: The -- the  
13 representative of the Solicitor General, I'll  
14 ask him about the three hours --

15           MR. FISHER: Mm-hmm.

16           CHIEF JUSTICE ROBERTS: -- as well,  
17 but, if it does make a difference how much harm  
18 the person whose name is being used suffers,  
19 wouldn't that be a significant factor? I mean,  
20 if it -- if it, you know, caused him to lose all  
21 his credit and it took -- you know, it can take  
22 a year and a half or whatever to restore that,  
23 shouldn't that be taken into consideration if  
24 the -- in deciding whether or not this is the  
25 sort of identity theft that's covered?

1           MR. FISHER: I don't think there's any  
2 language in the statute that directs you to the  
3 type of harm. I think a better-written statute  
4 might have looked at the type of harm, whether  
5 --

6           CHIEF JUSTICE ROBERTS: It's not so  
7 much the type of harm that I -- that I'm  
8 concerned with but who is harmed. In other  
9 words, it makes a difference that this is  
10 Patient L rather than somebody else.

11           MR. FISHER: Well, no, I think,  
12 Mr. Chief Justice, just take your garden-variety  
13 fraud case where somebody is, you know, swindled  
14 out of money. They're harmed. They've lost  
15 their money, just like, in the hypothetical  
16 you're giving, somebody in an ordinary  
17 healthcare benefit case has been deprived of,  
18 you know, possible insurance coverage or  
19 overbilled or the like. So people are harmed  
20 quite regularly in these fraud statutes.

21           The question is whether their identity  
22 was stolen, to use the sort of colloquial here,  
23 and whether the crime involves misrepresenting  
24 what they received or how they received it. And  
25 so that's what is -- that's what makes an

1 identity theft case different from an ordinary  
2 fraud case, not the fact that the victim is  
3 harmed but that they're harmed in the sense that  
4 their identity is stolen.

5 CHIEF JUSTICE ROBERTS: Thank you.  
6 Justice Thomas?

7 JUSTICE THOMAS: Mr. Fisher, beyond  
8 the title, there is no reference to "identity  
9 theft," right?

10 MR. FISHER: Those words do not  
11 otherwise appear in the statute.

12 JUSTICE THOMAS: Let's assume that the  
13 title wasn't there. What would your argument  
14 look like?

15 MR. FISHER: I think it would look  
16 like most of what I've said today, which is  
17 understanding the broad abstract phrases "in  
18 relation to" and "without lawful authority"  
19 needs to be done through the lens of  
20 understanding this is a sentence enhancement for  
21 a particularly egregious form of an underlying  
22 crime, the predicate offense.

23 And I think what I would direct the  
24 Court to are cases like Marinello, cases like  
25 Yates, your honest services cases, where over

1 and over the Court has said, when Congress uses  
2 broad language, we don't construe those  
3 literally in a maximalist way. Instead, because  
4 we're dealing with criminal statutes, we give  
5 them a measured reach.

6 And I think that's underscored in this  
7 case, Justice Thomas, to end where I began,  
8 where you have -- you have a statute that is an  
9 enhancement, in effect, for a base offense. So  
10 you have to be understanding that you're dealing  
11 with a subset that are an egregious version of  
12 that underlying offense.

13 JUSTICE THOMAS: But didn't we  
14 confront a similar problem with use in Smith?

15 MR. FISHER: I don't think so. I  
16 don't -- I -- I think what you said in Smith  
17 were two things. One is you said the phrase "in  
18 relation to" limits the reach of "use." And the  
19 other thing is you said those words have to be  
20 read contextually.

21 And so I -- on that score, I pull two  
22 things out of Smith. What the Court ended up  
23 saying in Smith was that the gun there was used  
24 in relation to the crime because it was integral  
25 to the offense. And I think "integral" is a

1 synonym for "instrumental," which is the word  
2 that I've been using today.

3 And I think that just shows that when  
4 you take that word in context, it has to be  
5 narrow and I think all the more so here.

6 JUSTICE THOMAS: So how would this  
7 particular crime that's charged have been  
8 effectuated without the use of Patient L's  
9 identity?

10 MR. FISHER: Well, I think, if the  
11 exact same bill had been submitted to Medicaid  
12 without Patient L's name on it, it likely would  
13 have still been healthcare fraud. It would have  
14 violated Section 1347 because it covers  
15 artifices and schemes that attempt to defraud  
16 the government. So, even if the bill had not  
17 been paid, it still would have been healthcare  
18 fraud.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE ALITO: Suppose we think that  
21 "without lawful authority" can plausibly be read  
22 in a number of different ways. Then you need  
23 something to persuade us that you -- we should  
24 adopt your interpretation.

25 Now one would be something, the force

1 you can get from the title. Put that aside.  
2 Another would be perhaps some version of the  
3 Rule of Lenity. But you have accepted some  
4 limiting principles. So you would not read  
5 "without lawful authority" in its broadest  
6 sense, which might be where the Rule of Lenity  
7 would lead.

8           So, in the next case -- suppose we  
9 rule in your favor. The next case involves a  
10 different type of service, and the case after  
11 that involves a person who was once a patient of  
12 this doctor but hasn't been for a while.

13           How would you justify your limiting  
14 principles?

15           MR. FISHER: Well, Justice Alito, let  
16 me say a couple things about the other tools I  
17 would use to construe it and then how I would  
18 justify.

19           So, first, beyond the title and the  
20 Rule of Lenity, I would also look at the canon  
21 that says all elements of the statute have to  
22 have independent meaning. And so it has to mean  
23 something more than simply you've committed a  
24 crime, committed a fraud, or put in the other  
25 words that I was answering questions this

1 morning, it has to mean something more than  
2 you've billed for something other than the exact  
3 services provided. And so I think that pushes  
4 you towards something that narrows it.

5 Now -- now how I would answer those  
6 other cases is I think the "in relation to"  
7 element comes into play there. So, if you're  
8 billing for one service instead of another, I  
9 think, at some point, the other service becomes  
10 so different that you would lack authority to do  
11 so. But "in relation to," as Justice Sotomayor  
12 was saying, would still prevent some of those  
13 instances from being aggravated identity theft  
14 because you'd be lying about the service  
15 provided, not who received the service.

16 Now, when you get into additional  
17 billing for additional types of things, I think,  
18 there, you could start to be in the actual  
19 territory of identity theft. And, you know, I  
20 hope -- what I'm trying to do is give the Court  
21 some measured understanding of these terms that  
22 makes sense of them with a difficult statute  
23 you've been provided.

24 Yes, I could say the whole thing is  
25 vague or the whole thing should be construed

1 down to a nub of almost nothing, but I'm trying  
2 to give the Court a sensible understanding that  
3 at least gives the terms meaning and context and  
4 doesn't just say everything constitutes  
5 aggravated identity theft.

6 JUSTICE ALITO: All right. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9 JUSTICE SOTOMAYOR: If you take the  
10 government's definition at face value, it's hard  
11 to define exactly what their definition is  
12 because every time you point to something that  
13 seems absurd, they come up with a limiting rule.  
14 So the vagueness is a problem.

15 But let's talk about those  
16 absurdities. The patient tells the doctor: You  
17 can submit this a month later, it's okay by me,  
18 a co-conspirator, in other words.

19 The government -- on the government's  
20 reading, even though they have the permission of  
21 the person to use their name in the fraud, that  
22 would still be aggravated theft, correct?

23 MR. FISHER: I think that's right.  
24 I'm not a hundred percent sure what the  
25 government would say on that, but I think that's



1 right. And that's certainly the argument they  
2 ran to the jury and in the lower courts.

3 JUSTICE SOTOMAYOR: That's what I  
4 read --

5 MR. FISHER: Yes.

6 JUSTICE SOTOMAYOR: -- in the Fifth  
7 Circuit's ruling as well.

8 MR. FISHER: Right. And so they say,  
9 as soon as you use the name to commit a crime,  
10 you are acting without lawful authority. And  
11 that was the -- that was the argument also if  
12 you look at the charging memo in the appendix to  
13 the Federal Defenders' brief --

14 JUSTICE SOTOMAYOR: I just want to  
15 give some of the other absurdities.

16 MR. FISHER: Yes.

17 JUSTICE SOTOMAYOR: Tax return, a  
18 parent lists their child as a dependent and lies  
19 about childcare services.

20 There's no way to exempt that out  
21 because -- under the government's broad  
22 definition of the statute because they use the  
23 child's name to commit a fraud on the  
24 government, correct?

25 MR. FISHER: I think that's right.

1 And Justice -- Judge Easterbrook recognized that  
2 in his opinion dealing with the statute that  
3 talked about tax and immigration cases where  
4 every one of those --

5 JUSTICE SOTOMAYOR: You talked about  
6 the envelope case.

7 MR. FISHER: Yeah.

8 JUSTICE SOTOMAYOR: You put the name  
9 of your victim on an envelope and mail it to  
10 them, that's using their name without their  
11 permission, correct?

12 MR. FISHER: Well, it's certainly  
13 using their name, and, under the government's  
14 theory, it's without permission because you're  
15 committing a crime by --

16 JUSTICE SOTOMAYOR: Now they come up  
17 later and say no, but you're socially permitted  
18 to use anybody's name on an envelope.

19 MR. FISHER: But, again, that's not  
20 the way their test works when you look at it in  
21 this case and everything else. They ask whether  
22 you're permitted to send it for that purpose, in  
23 other words, to commit a fraud.

24 JUSTICE SOTOMAYOR: I'm defrauding a  
25 friend or someone that I'm trying to pretend I'm

1 being a friend with, and I say: You know  
2 something, you should enter this deal with me.  
3 Bill Gates is a personal friend of mine and he  
4 taught me everything I know.

5 Would that be aggravated theft?

6 MR. FISHER: I think so. I think  
7 that's -- that's the problem here, is that at  
8 least when you have any situation where -- this  
9 goes back to the Chief Justice's questions --  
10 where you can say you couldn't have committed  
11 that fraud the way you did without using the  
12 name, then I think that falls within the  
13 government's test.

14 JUSTICE SOTOMAYOR: So the issue of  
15 vagueness permeates this statute on both sides  
16 potentially?

17 MR. FISHER: I think that's right. I  
18 think the government's argument or at least the  
19 Fifth Circuit's rule is vague in the sense that  
20 it covers -- seems to cover basically  
21 everything, and then it leads into the line of  
22 cases about vagueness that have just absolute  
23 standardless --

24 JUSTICE SOTOMAYOR: All right. So  
25 what --

1           MR. FISHER: -- discretion left in  
2 prosecutors.

3           JUSTICE SOTOMAYOR: -- what principles  
4 of ours besides lenity would lead us to accept  
5 your narrower definition as opposed to the  
6 government's narrow individual doctrines?

7           MR. FISHER: Well --

8           JUSTICE SOTOMAYOR: The government  
9 seems to be creating exceptions --

10          MR. FISHER: Right.

11          JUSTICE SOTOMAYOR: -- as --

12          MR. FISHER: Well, I think, for one  
13 thing, constitutional avoidance, so when you do  
14 start to come up against vagueness, that's  
15 another principle that is operating in the  
16 background. For some of you, I think I would  
17 say the title, I think, does carry some weight.

18                 And I think consequences. You know,  
19 the Court has had a lot of cases in recent  
20 years, I gave Marinello as one example, Van  
21 Buren was another recent example that held --  
22 some of the honest services cases are examples  
23 where the Court has said not in -- not -- not so  
24 much the Rule of Lenity, but they've just said  
25 understanding what Congress meant by words, we

1 would not assume Congress would sweep in vast  
2 arrays of conduct without doing it clearly.

3 And so I think, as Justice Breyer put  
4 it in *Marinello*, we use interpretive restraint  
5 in that setting, and I think that's what I'm  
6 asking the Court for today.

7 JUSTICE SOTOMAYOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Fisher, you  
10 referred us to what you called Judge Sutton's  
11 heuristic, and I just want to make sure that I  
12 understand how that would work, and -- and --  
13 and maybe I'll ask it in reference to what I  
14 think is the toughest line that you're drawing,  
15 which is on the one hand, if you bill for cancer  
16 services, that falls within the enhancement,  
17 but, if you bill for psychiatric services that  
18 weren't rendered, it doesn't. So, to me,  
19 neither of those seems very much like a who.  
20 They both seem like whats.

21 MR. FISHER: Yeah.

22 JUSTICE KAGAN: So how does Judge  
23 Sutton's heuristic work to draw that line? And,  
24 if it doesn't work, doesn't that suggest that we  
25 need something else?

1           MR. FISHER: So -- so two things, and  
2 I want to point out I think there's a little bit  
3 of a misconception in your question. So the --  
4 so the two things, there's the heuristic that  
5 just -- Judge Sutton lays out is who on the one  
6 category versus how or when on the other.

7           And so those are the easy cases. And  
8 that's where this case is. This is just a how  
9 or when case. And just like the stretchers case  
10 that Judge Sutton was deciding, the ambulance  
11 that lied -- the ambulance service that lied  
12 about whether stretchers were required, that's a  
13 how, the nature of the services provided.  
14 That's what this case is.

15           JUSTICE KAGAN: Well, I mean, it's  
16 certain --

17           MR. FISHER: And so --

18           JUSTICE KAGAN: -- there's certainly a  
19 "when" in this case, but there's also a "what."  
20 It's like, which psychiatric services did you  
21 get? And that's the same for the cancer  
22 services. And how does this supposed heuristic,  
23 you know, separating out three-letter words help  
24 us?

25           MR. FISHER: So -- so two things. One

1 is I think this is not a "what" case because the  
2 procedure code used is the same whether it's a  
3 licensed psychologist or a psychological  
4 associate.

5 Now, even if it were a "what" case,  
6 what services were provided --

7 JUSTICE KAGAN: Okay. So, if the code  
8 were different for, let's say, a full-fledged  
9 psychiatrist, that would make all the  
10 difference?

11 MR. FISHER: It might. I'm just  
12 saying this is the easy case if you want to take  
13 the easy case. I think the "what" cases, which  
14 is what you're asking about, that's what the --  
15 that's what the cancer hypo is, and that's where  
16 the government moves in its brief, to the "what"  
17 category, which, I agree with you, Justice  
18 Kagan, is the hardest category. So that's the  
19 in between category, between the "who" or the  
20 "how" and the "when."

21 JUSTICE KAGAN: Okay. So you're  
22 saying --

23 MR. FISHER: And I think --

24 JUSTICE KAGAN: -- that the Sutton  
25 heuristic has nothing to say about that?

1           MR. FISHER: I don't think it speaks  
2 directly to it. So it's separating out who on  
3 the one side from how and when on the other.  
4 And I think -- and this gets to the  
5 misconception -- I'm agreeing that the cancer  
6 hypothetical would be potentially without lawful  
7 authority. That might be without lawful  
8 authority. It still would not be in relation  
9 to, and it still wouldn't violate the statute.

10           So I think what you should do is --  
11 the best way to read the statute is that the  
12 "who" cases, the lies about who received the  
13 services, are on one side of the line, and all  
14 the other lies about how, when, or even what are  
15 on the other side of the line.

16           And, again, I'm not saying those  
17 aren't fraud, and sometimes it can be egregious  
18 fraud. If it's a hundred hours instead of one  
19 or if it's a -- the Rolls Royce version of the  
20 service instead of the -- the base level, those  
21 can be frauds and they can be punished quite  
22 severely, but they're not lies about who  
23 received the services, and they're not using the  
24 person's identity as the instrumentality, core  
25 instrumentality of the offense.



1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch?

4 JUSTICE GORSUCH: So, Mr. Fisher,  
5 you've talked about various canons that you  
6 think might help us resolve this case, but one  
7 that hasn't been mentioned much is the  
8 federalism canon.

9 MR. FISHER: Mm-hmm.

10 JUSTICE GORSUCH: In Bond, for  
11 example, we -- we made clear that we don't  
12 normally interpret federal law to swallow up  
13 vast swaths of state law authority as  
14 traditionally understood.

15 And I wanted to return to the question  
16 about the impact of (a)(7) --

17 MR. FISHER: Yes.

18 JUSTICE GORSUCH: -- on -- on that.  
19 If the government's theory is correct and every  
20 time I order salmon at a restaurant I'm told  
21 it's fresh, but it's frozen, and my credit card  
22 is run for fresh salmon, that's identity theft,  
23 what's left of state law?

24 MR. FISHER: I don't think much,  
25 Justice Gorsuch. And with all due respect to

1 the government, I don't think they give an  
2 answer to our point that if they're right about  
3 what "in relation to" means and they're right  
4 about "without" -- "without lawful authority,"  
5 then every state law offense that uses  
6 somebody's name becomes identity theft.

7 JUSTICE GORSUCH: Whether it's in a  
8 restaurant billing scenario, a healthcare  
9 billing scenario, or lawyers who round their  
10 hours up, and I'm sure nobody --

11 (Laughter.)

12 JUSTICE GORSUCH: -- in this audience  
13 has ever done that.

14 MR. FISHER: Right. And I want to  
15 underscore -- I mean, we could think of even the  
16 salmon example as wire fraud if the credit card  
17 is run through --

18 JUSTICE GORSUCH: Sure.

19 MR. FISHER: -- so there's a federal  
20 predicate offense.

21 JUSTICE GORSUCH: But -- but -- but  
22 put aside the federal --

23 MR. FISHER: But we give examples of  
24 graffiti and DUI --

25 JUSTICE GORSUCH: -- put aside the

1 federal statutory crime that might be committed.

2 MR. FISHER: Yeah.

3 JUSTICE GORSUCH: All state  
4 misrepresentations become federal crimes under  
5 (a)(7).

6 MR. FISHER: That's right. That's  
7 right. And I think we give other examples in  
8 our brief of just using somebody's name in the  
9 course of committing the crime. That would all  
10 be chargeable as federal identity theft.

11 And, remember, the way these statutes  
12 works is -- I've called them enhancements,  
13 which, in a sense, they are, but they're truly  
14 stand-alone crimes. So a federal prosecutor  
15 could -- could -- could charge that even if the  
16 predicate offense under (a)(7) was nothing more  
17 than a state law offense.

18 JUSTICE GORSUCH: I guess my second  
19 question is, do we need to decide whose  
20 heuristic is right if we reject the government's  
21 view? Wouldn't it be enough for the day to say  
22 that this reading of the statute was overbroad  
23 and that it cannot possibly mean that every time  
24 I order fresh salmon at a restaurant and get  
25 billed for -- given frozen salmon and billed for

1 fresh, that cannot be federal identity theft --

2 MR. FISHER: Yes. I --

3 JUSTICE GORSUCH: -- and just simply  
4 reject that principle? And, as I understand it,  
5 there are at least two heuristics that are  
6 knocking around in the lower courts. One is  
7 Judge Sutton's thought, and the other is Judge  
8 Easterbrook's thought in the Seventh Circuit,  
9 which is slightly different --

10 MR. FISHER: Right.

11 JUSTICE GORSUCH: -- as I read it.  
12 And you've kind of advanced echoes of both.

13 MR. FISHER: Yeah.

14 JUSTICE GORSUCH: Do we need to decide  
15 between them, or perhaps they're both right?  
16 Can't we just reject the Fifth Circuit's?

17 MR. FISHER: I think that would be  
18 enough, Justice Gorsuch. I've pointed the Court  
19 a couple of times to the government's closing  
20 argument, which I think is the best  
21 encapsulation of what it put in front of the  
22 jury, and its argument was that you cannot use  
23 somebody's name to commit a crime. That's what  
24 "unlawful authority" means.

25 And if you just reject that, that was

1 their only theory. They provided no other  
2 evidence that Mr. Dubin acted beyond the scope  
3 of authority. And maybe this is also responsive  
4 to Justice Kagan and some of the other  
5 hypotheticals, all the things about could you  
6 bill for this, could you bill for the other.  
7 Even the contract was not introduced by the  
8 government in this case.

9           The only theory they ran -- and this  
10 is also reflected in the charging memo in the  
11 appendix to the Federal Defenders' brief, this  
12 is the argument that prosecutors have been  
13 circulating with each other -- is that all you  
14 have to do is prove to the jury that an  
15 underlying crime was committed and you're home.

16           And if you reject that, that's enough  
17 to overturn the Fifth Circuit.

18           JUSTICE GORSUCH: And if that were  
19 right, maybe there's another canon besides  
20 federalism that we can mention, and you've  
21 alluded to it as well, which is vagueness. What  
22 notice does a statute like that provide to the  
23 world, to every waiter in America who misbills a  
24 client for the food he -- he -- he purchases?

25           MR. FISHER: Right. I think -- I

1 think you start to get into very serious  
2 vagueness problems here because of the  
3 incredible breadth, which I think, as we put in  
4 our brief, are compounded by the kind of  
5 misleading nature of the title. If somebody  
6 were looking at the table of contents of the  
7 U.S. Code, if that waiter were looking at the  
8 title of the U.S. Code, that waiter would  
9 probably not see, oh, I better look and see what  
10 identity theft is before I do that.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh?

14 JUSTICE KAVANAUGH: In response to  
15 Justice Kagan, you said that the cancer  
16 hypothetical would still not fall within the  
17 statute because it wouldn't meet the "in  
18 relation to" requirement. Can you just spell  
19 that out for us?

20 MR. FISHER: Yes, Justice Kavanaugh.  
21 The reason it wouldn't is because it would be a  
22 lie about what services are provided, not who  
23 received those services, or, if it were a  
24 product, about what product was sold, not who  
25 received the product.

1           And that makes sense under the statute  
2 because we're asking whether the person's name,  
3 whether, as the statute puts it, the means of  
4 identification, was used in relation to the  
5 offense. And so the -- the critical nexus in  
6 the instrumentality requirement in the statute  
7 would not be satisfied.

8           And I think the government -- the  
9 government's only response to that in its brief,  
10 Justice Kavanaugh, is, well, we can kind of play  
11 word games and we can say, well, these cases  
12 about what services were provided could also be  
13 thought of as lies about who received them.

14           But, if you just use ordinary speech  
15 and imagine complaining to somebody the next day  
16 about being charged for something different than  
17 what you've -- than what you ordered, you  
18 probably wouldn't say -- you'd say they charged  
19 me for the wrong thing. You wouldn't say they  
20 stole my name and used my name improperly.

21           JUSTICE KAVANAUGH: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24           JUSTICE BARRETT: I have a question  
25 that's similar to Justice Sotomayor's. So you

1 didn't make much of ejusdem generis in your  
2 brief, but I looked at "transfer and possess,"  
3 you know, "transfer to sell or give, convey or  
4 remove from one place to another." "Possess,"  
5 you know, to have possession of. And it seems  
6 to me that you can't transfer or possess unless  
7 something is stolen. It seems to me like that's  
8 a tie to the title to identity theft.

9 MR. FISHER: Mm-hmm. Mm-hmm.

10 JUSTICE BARRETT: And so it seems to  
11 me that if you're trying to interpret "use,"  
12 which is a really broad route -- a really broad  
13 "word" in the context of that trio, that that  
14 serves a narrowing function. Why didn't you  
15 advance that argument?

16 MR. FISHER: I think some lower courts  
17 have pointed that out, and we -- we -- we agree  
18 with it. I think, Justice Barrett, the only  
19 thing that I would acknowledge is I don't think  
20 it's a requirement under the statute that  
21 something be stolen. I think you can -- like,  
22 you can get something legitimately and then  
23 misappropriate it. So there are examples in  
24 legislative history of government -- government  
25 workers who get somebody's Social Security



1 number by way of their ordinary work, and then  
2 they misuse it to do other things or sell those  
3 security numbers to somebody else. Or we give a  
4 hypothetical in our -- in our reply brief of a  
5 landlord who gets credit information of a -- of  
6 a would-be tenant and then uses -- misuses that  
7 credit information.

8 So I think that's where "uses" comes  
9 in for this narrow slice of misappropriation  
10 cases. But they're still for entirely fictional  
11 services where you are, in effect, making the  
12 identity the sole driver of the offense.

13 JUSTICE BARRETT: And I agree with  
14 you, and it seems to me that that's the  
15 different work that "use" does --

16 MR. FISHER: Mm-hmm.

17 JUSTICE BARRETT: -- to transfer and  
18 possession --

19 MR. FISHER: Mm-hmm.

20 JUSTICE BARRETT: -- are the kinds of  
21 cases that you're talking about, but it still  
22 seems to me that all of those verbs have as  
23 their focus the unlawful possession of the  
24 identity itself, the who --

25 MR. FISHER: Yes.

1 JUSTICE BARRETT: -- in Judge Sutton's  
2 heuristic.

3 Okay. Second question. I appreciate  
4 Justice Gorsuch's point about we could decide  
5 the case narrowly by just saying whatever it  
6 means this is wrong, but what if we wanted to  
7 rule in your favor? What does the holding look  
8 like? Because it can't quite be Judge Sutton's  
9 heuristic, right, because it won't solve all the  
10 cases. Maybe it solves some heartland cases.

11 You've said must be instrumental, not  
12 incidental.

13 MR. FISHER: Mm-hmm.

14 JUSTICE BARRETT: But you could say  
15 Patient L's identity was instrumental because he  
16 was a Medicaid, you know, recipient, and so,  
17 without Patient L's name on the form, the crime  
18 couldn't have been completed.

19 So I'm not sure instrumental, not  
20 incidental, will kind of do the work for the  
21 lower court having to decide the case. So tell  
22 me what the -- the decision line should say.

23 MR. FISHER: So I think you could do  
24 two things, and it might be quite helpful to the  
25 lower court if you talked about both elements.

1 I think the "without lawful authority" element,  
2 as I described with Justice Gorsuch, can be  
3 decided the way we talked about, and that would  
4 -- that would be enough to reverse.

5 But, if you look at the "in relation  
6 to" element, which the lower courts are also  
7 struggling mightily -- mightily with, I think I  
8 agree with you, Justice Barrett, "instrumental"  
9 is a standard, it's a more descriptive term, but  
10 it could use some fleshing out. And I think  
11 that's where the Judge Sutton heuristic --  
12 forgive me for returning to that -- actually,  
13 that's the work it could do.

14 JUSTICE BARRETT: No, I like Judge  
15 Sutton. I'm fine with that.

16 MR. FISHER: But that's actually the  
17 work it's doing, is it's saying when is  
18 something -- he used the word "integral" -- when  
19 is something integral, and that's -- and that --  
20 his heuristic is enough to decide this case "in  
21 relation to."

22 I mean, this case is remarkably like  
23 the one he described, which is the example of  
24 the -- the ambulance operator that lied about  
25 using stretchers when they did the service.

1                   And he said, if you lie about the  
2                   nature of the services provided, not who  
3                   received those services, you are not committing  
4                   the crime in relation to -- you're not using the  
5                   name in relation to the crime. And that would  
6                   totally decide this case.

7                   JUSTICE BARRETT: Thank you.

8                   CHIEF JUSTICE ROBERTS: Justice  
9                   Jackson?

10                  JUSTICE JACKSON: So you've given us a  
11                  number of ways in which we could rule in your  
12                  favor and things we can look at and rely on.  
13                  I -- I was trying to keep a list. We have  
14                  title, the Rule of Lenity, all the statutory  
15                  terms have meaning, federalism canon, and then  
16                  there was this talk of constitutional avoidance.

17                  And I am interested in particular in  
18                  sort of the species of constitutional avoidance  
19                  that I was bringing up with you before, which  
20                  basically looks at this provision in context and  
21                  in relation to (a)(7). In other words, this is  
22                  an aggravated penalty and we have a mandatory  
23                  minimum that attaches.

24                  MR. FISHER: Mm-hmm.

25                  JUSTICE JACKSON: And so don't we have

1 to believe that it is calling for something more  
2 than just use in connection with the crimes?

3 MR. FISHER: I don't think so, Justice  
4 Jackson, and I hope I can be clear on this. The  
5 difference between (a)(7) --

6 JUSTICE JACKSON: Yeah.

7 MR. FISHER: -- and -- and 1028A,  
8 which is what you have here, is the list of  
9 predicate offenses, so --

10 JUSTICE JACKSON: No, I understand.  
11 You said that before. But I guess what I'm  
12 saying is the list of predicate offenses in this  
13 statute --

14 MR. FISHER: Mm-hmm.

15 JUSTICE JACKSON: -- in this one, is a  
16 subset of all federal crimes --

17 MR. FISHER: Correct.

18 JUSTICE JACKSON: -- which is in the  
19 other statute.

20 MR. FISHER: Right.

21 JUSTICE JACKSON: And if I'm wrong  
22 about this, then we have two statutes that would  
23 be calling for exactly the same thing, and --

24 MR. FISHER: I see, I see.

25 JUSTICE JACKSON: -- the second one

1 gives you a mandatory minimum. And I feel like  
2 there's a constitutional problem if the  
3 executive could look at these two statutes and  
4 arbitrarily pick between the two, some people  
5 get the one with the mandatory minimum, some  
6 don't. If their elements are exactly the same,  
7 you would have that problem.

8 So the (a)(7) says use, you know,  
9 without lawful authority, the same language, a  
10 means of identification, right, in connection  
11 with the crime.

12 And this one says use -- everything is  
13 the same --

14 MR. FISHER: Yeah.

15 JUSTICE JACKSON: -- during and in  
16 relation to the crime. And it's a list of  
17 crimes. I get that. But --

18 MR. FISHER: Yeah. Uh-huh.

19 JUSTICE JACKSON: -- don't we have to  
20 believe that what Congress is calling for to  
21 attach the mandatory minimum is something more  
22 than just in connection with?

23 MR. FISHER: I think that's one -- so  
24 now I'm following you. And forgive me.

25 JUSTICE JACKSON: Yes.

1           MR. FISHER: I think that's one way to  
2 answer, that would be one way to compare the two  
3 statutes and read "in relation to" the way that  
4 I'm describing.

5           I think the push-back from that could  
6 be, well, they could still mean the same thing  
7 and all you're dealing with then is a lesser  
8 included offense, which doesn't create a  
9 constitutional problem.

10           But I think then my reply to that  
11 would be you nevertheless under the government's  
12 theory are left with this incredibly broad  
13 statute that makes every fraud prosecution also  
14 punishable as aggravated identity theft, and  
15 that --

16           JUSTICE JACKSON: And it's vague to  
17 know in the world when you would get the  
18 mandatory minimum or not, right?

19           MR. FISHER: Exactly. And so that  
20 creates exactly the kind of standardless sweep,  
21 to use a term from this Court's cases, that the  
22 -- that the Due Process Clause is directly  
23 concerned with and gives you very serious pause.

24           JUSTICE JACKSON: Thank you.

25           CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Fisher.

2 Mr. Suri.

3 ORAL ARGUMENT OF VIVEK SURI

4 ON BEHALF OF THE RESPONDENT

5 MR. SURI: Mr. Chief Justice, and may  
6 it please the Court:

7 I'd like to start with the  
8 hypothetical that Justice Jackson was discussing  
9 with Mr. Fisher about the waiter who uses a  
10 customer's credit card to bill for something  
11 that the customer didn't order. Let's say the  
12 customer ordered steak, and the waiter uses the  
13 credit card to ring up a bottle of wine as well.

14 And I think the discussion earlier  
15 today established that the waiter was acting  
16 without lawful authority. He had the authority  
17 to use the credit card number to bill only for  
18 the food that was ordered. He didn't have the  
19 authority to use it for other things, whether it  
20 be wine or Amazon.com products or paying down  
21 his mortgage.

22 But I think, Justice Sotomayor, you  
23 had suggested that the "in relation to" element  
24 might do some work there and might keep that  
25 hypothetical out of the statute.



1           I don't think that's correct, and the  
2 reason it's not correct is that no matter how  
3 you define "in relation to" -- you can say a  
4 substantial nexus, you can say instrumental to,  
5 integral to, facilitates further -- on any of  
6 those definitions, the use of the credit card  
7 number is going to be in relation to the fraud  
8 of charging that credit card account improperly.

9           Of course, you can't charge a  
10 particular credit card without using that credit  
11 card number. And that's analogous to the  
12 relationship that's at issue here. In this  
13 case, you can't possibly charge a particular  
14 Medicaid account fraudulently without using that  
15 patient's Medicaid number. And, therefore, the  
16 use of the Medicaid number is on any reasonable  
17 definition in relation to that particular fraud.

18           Now I understand the argument on the  
19 other side about the title. Maybe, as Justice  
20 Alito pointed out, that doesn't seem like  
21 identity theft. But the test that this Court  
22 should be applying is not "does it seem like  
23 identity theft." Congress translated the  
24 concept of identity theft into specific textual  
25 elements in the statute, and because that

1 hypothetical, like this case, falls within those  
2 elements, that's covered by the statute.

3 I'll turn to the Court's questions.

4 JUSTICE THOMAS: The -- we're talking  
5 about very broad language. I mean, when I first  
6 came on the Court, in ERISA, we wrestled with  
7 "in relation to," and, of course, in Smith and  
8 some of the others, we wrestled with "use." I'd  
9 like to see how far you will go with this.

10 Let's say the only allegation here  
11 involved the rounding up from 2.5 hours to three  
12 hours. Would that be sufficient to violate this  
13 provision?

14 MR. SURI: Yes, Justice Thomas. And I  
15 appreciate that that may seem an unattractive  
16 result.

17 JUSTICE THOMAS: Well, I think  
18 unattractive is -- is an understatement.

19 (Laughter.)

20 MR. SURI: It is nevertheless the  
21 correct reading of the statute. The reason that  
22 result seems unattractive is that the fraud in  
23 that context is a relatively small fraud. It's  
24 not a big fraud.

25 But it's inherent in this statute,

1 which has a flat two-year penalty, regardless of  
2 the size of the fraud in a particular case, that  
3 the small fraud is going to be punished the same  
4 way as the big fraud.

5 JUSTICE THOMAS: How -- how would you  
6 distinguish in this context between a mistake  
7 and a fraud? Let's say it's 2.75 to 3.0.

8 MR. SURI: Well, we still have to  
9 prove that there was a fraud. That has a  
10 scienter element. We have to prove that it  
11 wasn't just an accident, that the person had the  
12 requisite fraudulent intent.

13 So, if we couldn't prove beyond a  
14 reasonable doubt that the person fraudulently,  
15 rather than accidentally, overbilled, then we  
16 wouldn't have the predicate crime in the first  
17 place and this additional --

18 JUSTICE THOMAS: I mean, we're dealing  
19 with small amounts in this case, so it doesn't  
20 seem inconceivable that you could be successful  
21 in prosecuting someone for a smaller amount.

22 MR. SURI: First, with respect to this  
23 case, it's true that this one claim was \$338,  
24 but the entire conspiracy the district court  
25 found involved a lot of claims, \$282,000.

1                   Second, I acknowledge, yes, it is  
2 possible that when it's a small amount, we could  
3 still prosecute. But we'd have hurdles that  
4 we'd have to overcome when it's a small amount.  
5 It's going to be harder to convince a jury of  
6 fraudulent intent when the amount is extremely  
7 small.

8                   I take, however, the point of the  
9 question --

10                   JUSTICE GORSUCH: Counsel, it seems to  
11 me you've just given up the ghost and -- and  
12 clarified things substantially that every time  
13 anyone overbills for anything, that triggers  
14 this statute, and all you have to prove -- now  
15 it may be small, as the amounts here were, \$338,  
16 or it might be rounding up, a lawyer rounding up  
17 his hours to the next tenth of an hour, but that  
18 is still identity theft because you are using  
19 somebody's identity in a way that is unlawful  
20 and perhaps arguably exceeds their permission.

21                   If that's true, where do we stand in  
22 terms of federalism, given that (a)(7) speaks in  
23 much the same language and would seem to  
24 federalize pretty much every state  
25 misrepresentation claim? Where do we stand in

1 terms of vagueness, notice to the world, fair  
2 notice to the world?

3 I'm not sure most waiters in America  
4 appreciate that they're committing identity  
5 theft when they bill for that bottle of wine.

6 MR. SURI: Let me start with  
7 federalism and (a)(7). (a)(7)'s language is not  
8 the same as the language of 1028A. (a)(7) uses  
9 the phrase "with intent to commit or aid or abet  
10 or in connection with." And you could read "in  
11 connection with" differently from "during and in  
12 relation to" and there --

13 JUSTICE GORSUCH: We could. But, if  
14 we read them the same, as this Court has done in  
15 the past --

16 MR. SURI: Well, if you read them --

17 JUSTICE GORSUCH: -- then we'd have a  
18 serious federalism problem, wouldn't we?

19 MR. SURI: -- if you read them the  
20 same, you'd be creating a federalism problem  
21 that you could avoid by reading them  
22 differently.

23 (Laughter.)

24 MR. SURI: And --

25 JUSTICE GORSUCH: That seems a bit

1 question-begging, but --

2 JUSTICE KAGAN: Well, but in this  
3 case, necessarily, really, "in connection with,"  
4 "in relation to," who draws a distinction  
5 between those words?

6 MR. SURI: Let me explain why there's  
7 a distinction. First of all --

8 JUSTICE GORSUCH: Let -- let -- let --  
9 first of all -- first of all, just so we're  
10 clear -- I'm sorry to interrupt.

11 JUSTICE KAGAN: No, please. I  
12 interrupted you.

13 JUSTICE GORSUCH: Well, okay. Suppose  
14 we did read them the same way. Then you would  
15 concede there would be a federalism problem?

16 MR. SURI: No, I wouldn't concede that  
17 because there's also a jurisdictional element in  
18 1028(a)(7). That's contained in 1028(c). And  
19 that jurisdictional element ensures that every  
20 prosecution is within --

21 JUSTICE GORSUCH: How?

22 MR. SURI: -- the federal government's  
23 authority.

24 It has a list of elements that must be  
25 satisfied in order for an (a)(7) prosecution to

1 be brought. And I grant one of them is affects  
2 commerce, but --

3 JUSTICE GORSUCH: Yeah. So, if he  
4 runs the credit card and it goes across state  
5 lines, good to go?

6 MR. SURI: But this Court has held  
7 that --

8 JUSTICE GORSUCH: Can't you concede  
9 that's a serious federal -- federalism problem  
10 if we were to read those terms the same way?

11 MR. SURI: No, because this Court has  
12 held that that's within the scope of the  
13 Commerce Clause. So it's not a federalism --

14 JUSTICE GORSUCH: Every fraud in  
15 America is within the scope of the Commerce  
16 Clause, counsel?

17 MR. SURI: If that's a problem,  
18 Justice Gorsuch, it's attributable to the  
19 Court's Commerce Clause cases and not to this --

20 (Laughter.)

21 JUSTICE GORSUCH: Okay. All right.  
22 It's our -- it's our fault. Fine. How about  
23 the -- how about the vagueness problem then?

24 MR. SURI: I -- I -- I -- might I  
25 finish explaining why --

1 JUSTICE GORSUCH: Well, move on to the  
2 vagueness problem.

3 MR. SURI: Yes.

4 JUSTICE GORSUCH: You know, what about  
5 the vagueness problem? What notice does this  
6 provide to people in the world that they're  
7 committing a federal felony?

8 MR. SURI: Again, Justice Gorsuch, you  
9 can avoid that problem by reading "in connection  
10 with" --

11 JUSTICE GORSUCH: I understand that.  
12 Put that aside. I asked you to put that aside,  
13 counsel. Please do so.

14 MR. SURI: Yes.

15 JUSTICE GORSUCH: Answer my question  
16 about vagueness.

17 MR. SURI: The Court's vagueness  
18 precedents are concerned with ensuring that  
19 law-abiding people aren't trapped into being  
20 prosecuted for a violation that they couldn't  
21 have anticipated. And that problem doesn't  
22 arise with respect to either of these statutes  
23 because these statutes apply only if an  
24 individual has committed a predicate crime in  
25 the first place. So --



1 JUSTICE GORSUCH: Well, we -- we know,  
2 though, that the law has to provide notice not  
3 just that you committed some crime; it has to  
4 provide notice to the bad man that there are  
5 more consequences for worse crimes.

6 And I don't doubt that the waiter who  
7 overbills for that bottle of wine knows he's  
8 committed some sort of state misdemeanor or  
9 maybe even felony, but does he know that he's  
10 committed a federal offense too?

11 MR. SURI: The way he would know is by  
12 reading that statute and by looking at the  
13 elements and finding that his conduct fits  
14 within the most natural reading of those  
15 elements.

16 JUSTICE GORSUCH: Thank you.

17 JUSTICE JACKSON: Mr. Suri, can I --  
18 can I ask you to do almost the opposite of what  
19 Justice Gorsuch was just asking you, and that is  
20 to assume that the statute (a)(7) and 1028A are  
21 distinct.

22 MR. SURI: Yes.

23 JUSTICE JACKSON: All right. So can  
24 you just help me to understand how your --  
25 first, how your "facilitates" view of 1028A is

1 different than "use in connection with"?

2 MR. SURI: Yeah, I'm not taking a  
3 definitive position on what exactly "in  
4 connection with" would mean because that's not  
5 presented in this case. I'm suggesting the  
6 Court could interpret it differently.

7 JUSTICE KAGAN: It means "in relation  
8 to."

9 JUSTICE JACKSON: But -- but what I'm  
10 asking is, you know, this is kind of like, I  
11 think, creating another constitutional problem  
12 that I hope we can focus on, which is, to the  
13 extent they are the same --

14 MR. SURI: Yes.

15 JUSTICE JACKSON: -- then I don't  
16 understand why we don't have a serious due  
17 process problem because we have a mandatory  
18 minimum with respect to the second one. So,  
19 unlike Mr. Fisher's suggestion that the second  
20 one is a lesser included offense, it is, in  
21 fact, an aggravated offense. It is more serious  
22 because you get two years tacked onto your  
23 underlying offense as a result of it.

24 So is -- is -- is it the government's  
25 position that you do not have to have more

1 egregious conduct or behavior to -- to trigger  
2 the two-year man min?

3 MR. SURI: It is more egregious  
4 because the predicate offense has to be more  
5 egregious. And I appreciate --

6 JUSTICE JACKSON: I don't think that's  
7 how it works. It doesn't. Mr. -- Mr. Fisher  
8 says look at the list of predicate offenses.  
9 It's like every fraud in the world. And you  
10 just admitted in response to Justice Thomas that  
11 it could be a teeny, teeny fraud.

12 So it's not more serious just because  
13 of the predicate offense. It would seem to me  
14 it would have to be more serious because of the  
15 way in which you're using the name.

16 MR. SURI: No, I respectfully disagree  
17 with that.

18 JUSTICE JACKSON: Okay.

19 MR. SURI: It is a subset of crimes  
20 that triggers 1028A. And --

21 JUSTICE JACKSON: But, if those crimes  
22 are broader and less serious than other crimes  
23 you can put into the other -- into (a)(7),  
24 you're still believing that it's a lesser  
25 included offense? The attached --

1           MR. SURI: But they're not -- but  
2 they're not broader. They're a narrower set of  
3 crimes. They're a more serious set of crimes  
4 than all crimes whatsoever.

5           You can violate 1028A if the predicate  
6 crime is a felony. You can violate 1028(a)(7)  
7 if the predicate crime is a misdemeanor. So,  
8 yes, 1028A is going to be more serious than  
9 1028. And there's no due process problem.

10          CHIEF JUSTICE ROBERTS: Does it make  
11 any difference to your position if the predicate  
12 crime always requires a misuse of identifying  
13 information? In other words, my -- my  
14 conception of the identity theft crime is that  
15 it is -- it provides additional punishment. But  
16 what if the underlying offense always requires  
17 misuse of identity?

18          MR. SURI: That can happen under the  
19 statute with respect to other predicate  
20 offenses, though not this one. For example, one  
21 of the other predicate offenses is Section -- I  
22 think it's 1424 if I -- I might be  
23 misremembering the number, but it's  
24 impersonating another person in an immigration  
25 proceeding. Now that's always going to involve

1 using another person's identity even on Mr.  
2 Fisher's definition, so --

3 CHIEF JUSTICE ROBERTS: Well, doesn't  
4 that suggest that you ought to have a narrower  
5 definition of the aggravated identity theft  
6 provision?

7 MR. SURI: No, Mr. Chief Justice.  
8 What it suggests is that Congress picked out a  
9 specific set of predicate crimes, and it picked  
10 those out where the aggravated identity theft  
11 elements are more likely to arise than with  
12 respect to other crimes. So it shouldn't be a  
13 surprise that with respect to this particular  
14 set of crimes, there are going to be some where  
15 the elements of the statute are met more  
16 frequently.

17 But, of course, we don't run into that  
18 problem here because there are a lot of  
19 different ways you can commit healthcare fraud  
20 without using a means of identification of  
21 another person without lawful authority in  
22 relation to that crime.

23 JUSTICE KAGAN: Well, what are those  
24 ways? Because it strikes me that the delta here  
25 is very slim, that in your brief, you had, you

1 know, some hypotheticals which were more or less  
2 outlandish but that when you really get down to  
3 it, all healthcare fraud is done using people's  
4 names.

5 MR. SURI: I'll give some of the less  
6 outlandish hypotheticals then.

7 First, frauds committed by patients.  
8 For example, if someone lies about his income in  
9 order to become eligible for Medicaid or lies  
10 about whether he smokes in order to get a lower  
11 health insurance premium.

12 Second, healthcare frauds committed by  
13 pharmaceutical companies. Let's say a vaccine  
14 manufacturer commits fraud in connection with a  
15 contract to provide vaccine doses, or a  
16 prescription drug manufacturer commits fraud  
17 when negotiating with Medicare about  
18 prescription drug prices. That doesn't involve  
19 individual patients.

20 Third set of examples: Frauds by  
21 providers that don't involve specific patients.  
22 Let's say the provider here lied when he was  
23 enrolling for Medicaid in the first place, or he  
24 -- the Court had a case last year about the  
25 disproportionate share fraction reimbursements

1 under Medicare and Medicaid. Let's say there's  
2 a fraud in connection with that. That's not  
3 connected with any specific patient.

4 Fourth set of examples is honest  
5 services healthcare fraud. Let's say an  
6 insurance executive accepts a bribe or a  
7 kickback. Again, that doesn't involve a  
8 specific patient.

9 I grant that --

10 JUSTICE KAGAN: So that's very  
11 helpful. Are you saying that anytime that  
12 there's a provider that bills Medicaid for  
13 services, it's covered?

14 MR. SURI: Almost.

15 JUSTICE KAGAN: I guess this just goes  
16 --

17 MR. SURI: Almost. I mean, you could  
18 imagine the fictitious patient or other  
19 hypotheticals like that, but, yes, almost all of  
20 those cases would be covered, I -- I grant that.

21 And, Mr. Chief Justice, you had --

22 JUSTICE SOTOMAYOR: But what do we do  
23 about the incongruity that under Flores-Figueroa  
24 we said fictitious people are not covered by  
25 this?

1                   MR. SURI: That's right. I'm  
2                   conceding that fictitious people aren't covered.

3                   JUSTICE SOTOMAYOR: So we're not going  
4                   to cover fictitious people under our case law,  
5                   but we're going to cover the stretcher case,  
6                   Justice Sutton's stretcher case?

7                   MR. SURI: Yes, but there's a reason  
8                   that Congress drew that distinction. When  
9                   you're billing to a fictitious patient, you're  
10                  not causing a harm to a real person. You're  
11                  just harming --

12                  JUSTICE SOTOMAYOR: Well, I don't -- I  
13                  actually don't think that the patient thinks  
14                  that he's been -- his identity has been stolen.  
15                  He may think that -- rightly, that you cheated  
16                  the government or your healthcare provider,  
17                  insurance, but I doubt very much he thinks that  
18                  you misused his name or -- or transferred his  
19                  name or that you committed identity theft with  
20                  his name.

21                  MR. SURI: I -- I have already  
22                  accepted that you could say this doesn't feel  
23                  like identity theft, but that's not the test,  
24                  whether the patient feels like his identity has  
25                  been stolen. The test is the elements set forth



1 in the statute, and the conduct here meets that.

2 JUSTICE KAVANAUGH: But the elements  
3 in the statute are -- are vague, "in relation  
4 to," "uses authority." And why doesn't the  
5 title then give us a helpful clue about how  
6 broadly to read those somewhat elastic terms?

7 MR. SURI: Yeah, I -- I certainly  
8 accept, Justice Kavanaugh, that if you thought  
9 the statute were ambiguous, then the title is a  
10 useful clue in resolving that ambiguity. But I  
11 don't think the title --

12 JUSTICE KAVANAUGH: Well, isn't "in  
13 relation to," for example, an inherently, I  
14 guess, vague term in the sense that everything  
15 can relate to everything else? You have to have  
16 -- make a judgment call about the unit of or the  
17 level of generality you're going to read it, and  
18 to help guide us where to draw the line there,  
19 the title can help pinpoint a place where to do  
20 that.

21 MR. SURI: Yeah, I agree with that in  
22 principle, but there's a better source of  
23 guidance to look to than the title, namely, this  
24 Court's interpretation of 924(c). 924(c) was  
25 the model for this statute. It used the same

1 language. It used "during and in relation to."  
2 And, in that context, the Court has interpreted  
3 "in relation to" to mean have some purpose or  
4 effect with respect to the predicate crime.

5 And since Congress adopted this  
6 statute modeled on that other statute, the most  
7 sensible thing to do, I would submit, is to  
8 interpret "in relation to" the same way.

9 Now, Mr. Chief Justice, you had said  
10 that you wanted to address a question to me  
11 about the three hours of harm and whether there  
12 really were three hours of harm. I'd like to  
13 address that. Yes, there were. There's a  
14 factual dispute between the defendant and us  
15 about whether Medicaid billed on a rolling  
16 12-month basis or a calendar year basis.

17 The evidence supporting our view is  
18 set forth at Joint Appendix pages 19, 20, and  
19 27. And, since this is a sufficiency of the  
20 evidence challenge, you should look at the  
21 evidence in the light most favorable to us.

22 In addition to that, even if you  
23 resolve that factual dispute the way they  
24 propose, it would make no difference, because it  
25 would mean that instead of saying three hours of

1 testing are taken out of the rolling 12-month  
2 period, Patient L would have lost three hours of  
3 testing out of the calendar year period.

4 Now, Justice Gorsuch, I -- I must get  
5 back to this question of "in connection with"  
6 and the federalism problems.

7 JUSTICE GORSUCH: Well, let's -- let's  
8 -- let's skip that.

9 (Laughter.)

10 JUSTICE GORSUCH: I think we've beaten  
11 that horse, but I do have another question for  
12 you since you -- you looked over here. Maybe  
13 you -- maybe you regret that.

14 (Laughter.)

15 MR. SURI: I regret it already.

16 (Laughter.)

17 JUSTICE GORSUCH: If we were to reject  
18 the government's view, so, yes, you are going to  
19 regret it, is there a reduceable core? Is there  
20 an alternative? Is there a backup? If we  
21 reject the idea that every time a real patient's  
22 name is used in an overbilling, that that is  
23 automatically identity theft, which is your  
24 position --

25 MR. SURI: Yes.

1 JUSTICE GORSUCH: -- is there  
2 something else that the government wishes to  
3 purvey today?

4 MR. SURI: Yes. If the Court is to  
5 rule against us, then I would urge the Court to  
6 adopt the Sixth Circuit's interpretation that  
7 has been attributed to Judge Sutton, even though  
8 he was bound by circuit precedent in adopting  
9 that. And the reason --

10 JUSTICE GORSUCH: Let's not diminish  
11 our colleagues, okay? But you -- you -- you  
12 then are where Mr. Fisher is as an alternative?

13 MR. SURI: All I'm suggesting is we  
14 shouldn't be blaming Judge Sutton for that test  
15 --

16 JUSTICE GORSUCH: Oh.

17 MR. SURI: -- which we think is  
18 incorrect. But the reason we suggest that that  
19 test would be better than the "with law" --  
20 "without lawful authority" alternative that Mr.  
21 Fisher has suggested is that the "without lawful  
22 authority" test raises all sorts of -- that he's  
23 proposed raises all sorts of complications about  
24 where to draw the line in terms of the level of  
25 generality at which authority is being assessed.

1 And the Judge Sutton test avoids those concerns.

2 JUSTICE ALITO: Well, how does the --  
3 what's the justification for that? What -- what  
4 exactly is the Sixth Circuit Sutton test?

5 MR. SURI: The Sixth Circuit test is a  
6 distinction between lies about who received a  
7 service --

8 JUSTICE ALITO: Yeah.

9 MR. SURI: -- and lies about how and  
10 when the service was provided. We don't think  
11 it's justified, which is why we think we prevail  
12 in this particular case, but it's the least  
13 unjustified approach if you were to rule against  
14 us.

15 JUSTICE ALITO: Well, isn't the "who"  
16 question answered by the statutory term, another  
17 person?

18 MR. SURI: No, I took the test that  
19 the Sixth Circuit was putting forward to be that  
20 the false statement has to be a falsity as to  
21 who received a particular service. So they're  
22 not interpreting the term "another person."  
23 They're interpreting the term "in relation to"  
24 in that context.

25 JUSTICE JACKSON: Do you dispute that

1 this 1028A is an aggravated nature of the  
2 commission of this crime?

3 MR. SURI: No, I don't dispute that.

4 JUSTICE JACKSON: All right. And you  
5 suggested in response to me earlier that the  
6 aggravation comes from the list of offenses?

7 MR. SURI: Yes.

8 JUSTICE JACKSON: Do you agree, as I'm  
9 looking at the list of offenses, that it  
10 includes things like mail, bank, and wire fraud?

11 MR. SURI: Yes.

12 JUSTICE JACKSON: And so you're  
13 suggesting that -- that the aggravation alone  
14 has nothing to do with the use -- the way in  
15 which you use? You can use it --

16 MR. SURI: Yeah.

17 JUSTICE JACKSON: -- in the same way  
18 as triggering (a)(7) in connection to, but it's  
19 just the fact that you're committing mail and  
20 wire or bank fraud that subjects you to the  
21 two-year man min?

22 MR. SURI: Yes. Let me summarize the  
23 point in the following way. If you use  
24 someone's identity with respect to a federal  
25 misdemeanor, that could be covered by

1 1028(a)(7).

2 If you use it with respect to a  
3 federal felony that's on that list, such as mail  
4 fraud, then that's aggravated identity theft.

5 JUSTICE JACKSON: Yes, but (a)(7) also  
6 covers felonies.

7 MR. SURI: State felonies.

8 JUSTICE JACKSON: Yes, unlawful  
9 activity that constitutes a violation of federal  
10 law. And I appreciate that that sweeps in  
11 misdemeanors, but --

12 MR. SURI: Yes.

13 JUSTICE JACKSON: -- you're suggesting  
14 that the two-year mandatory minimum penalty in  
15 this area of fraud is only distinguishable on  
16 the basis of the fact that you could do -- you  
17 could be charged with a misdemeanor under  
18 (a)(7), that that's the difference, that's the  
19 delta between the two?

20 MR. SURI: That is the difference  
21 between the two. And, remember, (a)(7) in one  
22 respect is harsher than 1028A because it has a  
23 five-year maximum penalty.

24 So, under 1028A, you -- you're getting  
25 --

1 JUSTICE JACKSON: Of course, that's  
2 not the function of mandatory minimums. I mean,  
3 they're not really -- I appreciate that it has a  
4 higher top level, but Congress, when it -- when  
5 it enacts a mandatory minimum, is constraining  
6 judicial discretion with respect to what you can  
7 impose as a penalty. And usually Congress does  
8 that in situations in which it has identified  
9 substantially more serious or more egregious  
10 conduct on the part of the person who is subject  
11 to the mandatory minimum.

12 And what's strange to me about your  
13 argument is that you're saying, in this  
14 situation, unlike many others, we don't care  
15 about that. We're not focused on the fact that  
16 it's necessarily more egregious. We're just  
17 looking at the list of offenses, and, to the  
18 extent a misdemeanor could be charged in the  
19 other world, that -- that justifies a two-year  
20 mandatory minimum in this one?

21 MR. SURI: Let me take the worst  
22 version of that hypothetical for us and say  
23 Congress has enacted two identical statutes and  
24 one has a mandatory minimum and one doesn't, and  
25 it's entirely up to the prosecutor which of



1 those charges is -- is brought.

2 This Court has held specifically that  
3 that is not a violation of the Constitution. I  
4 believe the case is United States against  
5 Batchelder if I'm remembering correctly.

6 JUSTICE JACKSON: All right. I  
7 appreciate that. But, here, we don't have two  
8 entirely identical statutes. We have ones that,  
9 in fact, use different terms.

10 So why would we interpret them to be  
11 identical? I mean, even if we've said that's  
12 okay to do, we have "in connection with" in one  
13 and we have "during and in relation to" in  
14 another.

15 MR. SURI: I --

16 JUSTICE JACKSON: And you're asking us  
17 to interpret "during and in relation to" as if  
18 it is the same.

19 MR. SURI: I'm not asking you to  
20 interpret them as if they're the same. I think  
21 that was the point of my colloquy with Justice  
22 Gorsuch. They're different.

23 JUSTICE JACKSON: But you can't tell  
24 me what difference "facilitates" makes. Your --  
25 your definition is facilitates, and so all I

1 want to know is, why is that any different than  
2 "in connection with"?

3 MR. SURI: "In connection with" is  
4 used alongside with "intent to aid" -- "commit  
5 or to aid or abet." And you could read that  
6 ejusdem generis to be similar to "with intent to  
7 commit or to aid or abet." And you don't have  
8 that contextual limitation with respect to  
9 "during and in relation to."

10 In the phrase "during and in relation  
11 to," the word "during" is what is doing most of  
12 the limiting work. The word "during" is saying  
13 that the use of the identity must be  
14 contemporaneous with the crime. So that's  
15 already limiting the universe quite a bit.

16 Now, within that context, "relation  
17 to" simply serves to exclude fortuities, cases  
18 in which it's a coincidence that the name was  
19 used at the same time as the commission of that  
20 particular crime.

21 JUSTICE ALITO: Speaking of ejusdem  
22 generis, could you address the argument  
23 regarding the application of that canon to the  
24 statutory terms use, possess, transfer?

25 MR. SURI: Yes, Justice Alito. I

1 think that the presence of the term "possess"  
2 strongly supports our interpretation, and the  
3 reason is that it would be quite odd for this  
4 statute to prohibit the passive possession of  
5 another person's name, to prohibit a  
6 particularly egregious type of use, namely, use  
7 for the purpose of impersonation, but to cover  
8 nothing in between the active uses that fall  
9 short of impersonation. There's no reason to  
10 think Congress would have included that  
11 discontinuity in the statute.

12 In addition, I think Justice Barrett  
13 raised the question that "transfer and possess"  
14 could be read to refer to circumstances in which  
15 the information is stolen. And I agree with  
16 that.

17 But "use" has to be doing some  
18 independent work. If you've stolen the  
19 information, you've already possessed it without  
20 lawful authority. And in order to give "use"  
21 some independent work to do, you have to make  
22 sure that there isn't a stealing element built  
23 into that.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas, anything further?

2 Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

5 JUSTICE KAGAN: Mr. Suri, you -- just  
6 on this question of "without lawful authority,"  
7 different kind of issue, in your brief, you say  
8 that means if he uses it with permission -- no,  
9 sorry, if he uses it without permission or --  
10 here's what I want to ask you about -- if he  
11 uses it with permission but the conferral of  
12 that permission contravened some other law.

13 So suppose somebody had said to this  
14 doctor -- that Patient L had said to this  
15 doctor, you know, you gave me five hours of  
16 service X, but you've been a great doctor; I'm  
17 happy for you to bill 20 hours of some more  
18 expensive service.

19 Would that count as without lawful  
20 authority or not?

21 MR. SURI: We would say that we could  
22 prosecute that case, but that's a more difficult  
23 case and would raise issues that are not present  
24 here. In that hypothetical, unlike this case,  
25 there would be authority, and the question would

1 be whether the authority was lawful.

2 The argument on the other side would  
3 be that "lawful" should be interpreted to apply  
4 only to procedural unlawfulness. You've held a  
5 gun to the person's head in order to extract the  
6 consent. But you could also interpret "lawful"  
7 to include substantive unlawfulness.

8 JUSTICE KAGAN: So you think it goes  
9 that far, but you're saying, you know, don't  
10 worry about it, we can do that next case?

11 MR. SURI: Correct.

12 JUSTICE KAGAN: And last question is,  
13 just coming back to the Judge Sutton test, which  
14 may or may not be the Judge Sutton test, how do  
15 you understand the Judge Sutton test to work  
16 with respect to hypotheticals which I take the  
17 Petitioner to have conceded, which is like  
18 billing cancer services, billing some other  
19 product entirely, not psychological services now  
20 but something else entirely.

21 How does the Judge Sutton test work  
22 with relationship to those hypotheticals --

23 MR. SURI: I think --

24 JUSTICE KAGAN: -- which also means with  
25 connection to those hypotheticals.

1 (Laughter.)

2 MR. SURI: I think the fairest answer  
3 to that question is that the opinion doesn't  
4 address that, and, therefore, I'm not sure how  
5 the Sixth Circuit would resolve that issue.

6 We would suggest that if the Court  
7 adopt that test, it'd say that those  
8 hypotheticals are covered, because it seems  
9 pretty clear that the fraud in that case is in  
10 relation to the use of the name and also that  
11 it's without lawful authority.

12 JUSTICE KAGAN: Right. But, if I  
13 understood the Judge Sutton test to be asking,  
14 well, was there a misrepresentation with respect  
15 to identity, it would seem as though in those  
16 hypotheticals there is no misrepresentation with  
17 respect to identity. So I would think -- I  
18 guess I was a little bit surprised that you came  
19 out in favor of the Judge Sutton test as your  
20 preferred way of losing because I would think  
21 then that you lose those set of cases.

22 MR. SURI: Judge Sutton suggested that  
23 if no one received a particular service and you  
24 say that someone did, that is a  
25 misrepresentation as to identity. So, in the

1 cancer services example, the clinic is providing  
2 cancer services to no one and you're still  
3 saying you provided it to Patient L, that is a  
4 misrepresentation as to identity as he conceived  
5 of the test.

6 JUSTICE KAGAN: I see. And then how  
7 would he separate or the -- somebody received  
8 psychological services from a certain level of  
9 psychologist but not from a psychiatrist, let's  
10 say?

11 MR. SURI: I don't think those should  
12 be separated, Justice Kagan. That's precisely  
13 why we think we should prevail in this case.  
14 There is no principal distinction between those.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: In the court of  
19 appeals, Judge Costa's opinion said that this  
20 Court's precedents had sent an unmistakable  
21 message that courts should not assign federal  
22 criminal statutes a breath-taking scope when a  
23 narrower reading is reasonable.

24 And the Petitioner also cites a long  
25 line of cases you're familiar with, Marinello,

1 Van Buren, Kelly, the list goes on, where we  
2 have rejected, I would say, the broadest  
3 interpretation of criminal statutes, the literal  
4 reading as compared to the ordinary reading of  
5 criminal statutes, based on fair notice concerns  
6 and not trapping the unwary or increasing the  
7 sentence on an unwary person.

8           So why does this case not fall within  
9 that concern and with that body of precedent  
10 about reading it as broadly as you possibly  
11 could and thereby raising fair notice concerns  
12 of the kinds that Judge Costa raised?

13           MR. SURI: Because this statute,  
14 unlike the statutes in all of those other cases,  
15 comes into play only if someone has committed a  
16 predicate crime. In all of the cases that  
17 you've just mentioned, there was a concern that  
18 law-abiding individuals would be prosecuted by  
19 the federal government for routine conduct.

20           For example, in Marinello, you could  
21 be prosecuted under the interpretation that was  
22 advanced there for paying someone in cash rather  
23 than paying by check. And in Van Buren, there  
24 was a concern that you could prosecute people  
25 who used their computers at work to check sports



1 scores.

2           There's no concern like that in this  
3 case. In this case, the statute at issue here  
4 comes into play only if a predicate federal  
5 offense has already been committed.

6           JUSTICE KAVANAUGH: Well, that's  
7 similar to an argument I heard years ago from  
8 the government about mens rea: Don't worry  
9 about mens rea requirements for sentence  
10 enhancements as opposed to the crime itself.  
11 And I didn't find that persuasive then because  
12 the concern about sentence enhancements is -- is  
13 still, as Justice Gorsuch said earlier, you  
14 know, the -- the ordinary citizen may know,  
15 okay, well, this is going to trigger a certain  
16 amount of punishment, but you're on no notice  
17 that it could trigger a mandatory minimum or a  
18 significantly increased amount of punishment.

19           So don't the same concerns about fair  
20 notice still kick in in that situation, where  
21 you're talking about an enhancement as to the  
22 underlying crime?

23           MR. SURI: I don't think the same  
24 concerns kick in. I think -- I -- I appreciate  
25 that the concerns do arise, but they're

1 mitigated by the fact that the person has to  
2 have committed a predicate crime in the first  
3 place.

4 And there is no danger of giving  
5 federal prosecutors the power to turn otherwise  
6 law-abiding citizens into criminals. That  
7 simply doesn't arise with respect to this  
8 statute.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12 Justice Jackson?

13 JUSTICE JACKSON: Can I just quickly  
14 get your understanding of the Fifth Circuit's  
15 view of "without lawful authority" and whether  
16 or not the government endorses it?

17 MR. SURI: I don't take the Fifth  
18 Circuit to have taken a view on "without lawful  
19 authority." It wasn't raised at the panel  
20 stage, and at the en banc stage, all the Fifth  
21 Circuit did was say we affirm for the reasons  
22 given in the panel opinion.

23 JUSTICE JACKSON: Oh, so you don't  
24 think they held that "without lawful authority"  
25 means to use it to commit a crime?

1 MR. SURI: No, I don't think they did.

2 JUSTICE JACKSON: What -- is that the  
3 government's position or no?

4 MR. SURI: No, that's not the  
5 government's position.

6 JUSTICE JACKSON: What is the  
7 government's position?

8 MR. SURI: The government's position  
9 is that a person acts without lawful authority  
10 only if he uses the means of identification in a  
11 manner that requires prior authorization, but he  
12 either didn't get that authorization or the  
13 authorization was conferred in an invalid way.

14 And I think that limitation eliminates  
15 a lot of the parade of horrors that arises on  
16 the other side. So circumstances in which  
17 you're simply addressing someone by his name or  
18 mentioning his name or talking about him or  
19 making a statement about him wouldn't be covered  
20 by this phrase because those don't require prior  
21 authorization in the first place. Neither --

22 JUSTICE JACKSON: So -- you can end  
23 where you started, which is with the waiter  
24 hypothetical. The government's view is that all  
25 of those would be without lawful authority?

1                   MR. SURI: Those would be without  
2 lawful authority because you do need someone's  
3 permission to charge his credit card in the same  
4 way you do need someone's permission to bill  
5 something to his Medicaid number.

6                   JUSTICE JACKSON: Thank you.

7                   CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9                   JUSTICE SOTOMAYOR: A couple  
10 follow-ups. In the Bond case, clearly, the  
11 woman who poisoned the mistress or the person  
12 she suspected of being a mistress wasn't a  
13 law-abiding citizen, and we still narrowed that  
14 statute, correct?

15                  MR. SURI: Correct.

16                  JUSTICE SOTOMAYOR: Number two,  
17 following up on what Justice Jackson just said,  
18 if I disagree with you, reading the record,  
19 because I have, it was very clear that the Fifth  
20 Circuit said "without lawful authority" exists  
21 whenever someone uses the name -- the means of  
22 identification of another person to commit a  
23 crime.

24                  You argued the same thing. That's the  
25 jury instruction that was given to the jury. If

1 this is my view of the evidence, where does that  
2 leave us on this case? Do we vacate and remand  
3 and say that's too broad, now pay attention to  
4 what the scope of "without lawful authority"  
5 might mean? It's unsatisfying, by the way, but  
6 is that what we do?

7 MR. SURI: No. You would still rule  
8 for us, and the reason is that they haven't  
9 challenged the jury instructions here. In fact,  
10 they agreed to the jury instructions that were  
11 given.

12 This is a sufficiency of the evidence  
13 challenge. The issue is whether the evidence  
14 supports findings on each of the elements of the  
15 crimes, not whether the jury was instructed  
16 properly.

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Fisher.

21 REBUTTAL ARGUMENT OF JEFFREY L. FISHER  
22 ON BEHALF OF THE PETITIONER

23 MR. FISHER: Thank you. I'd like to  
24 first -- first address a couple things about the  
25 two different components of the statutory text

1 that we've been discussing today and then turn  
2 to consequences.

3           So, first, on the statutory text,  
4 we've talked about the "in relation to" element  
5 and the "without lawful authority" element. On  
6 "in relation to," forgive me, but I'll turn back  
7 to just Judge Sutton's opinion and point out at  
8 page 628 of that opinion, in describing the  
9 Sixth Circuit's prior case, he said the Sixth  
10 Circuit held quite correctly that this -- that  
11 the claim of the stretchers did not fall within  
12 the statute. So he not only discussed the prior  
13 case, he endorsed it.

14           And that paragraph says, if the lie  
15 just goes to about the nature of the services  
16 provided, not who received them, it does not --  
17 it is not falling within the "in relation to"  
18 element of the statute.

19           So we think that would resolve the  
20 case in our favor in a way that Judge Sutton has  
21 explicitly endorsed.

22           As to "without lawful authority," I  
23 think Justice Sotomayor is right, the only  
24 argument ever made below was the one you  
25 described. It's at JA 31 and 32.

1           And, Justice Jackson, at pages 66a and  
2           67a of the Petition Appendix, the Fifth Circuit  
3           panel decision, which was adopted by the en banc  
4           court, quite directly adopts that reading of the  
5           "without lawful authority" element in this case  
6           and applies it to Mr. Dubin's conduct, and then  
7           the en banc court, of course, accepts that. So  
8           the Fifth Circuit quite directly did address  
9           that issue and got it wrong.

10           Now we heard a suggestion in the brief  
11           and I just heard it a moment ago that the  
12           government maybe doesn't agree anymore with the  
13           argument it made below, that -- that any use to  
14           violate the law constitutes "without lawful  
15           authority," but, with due respect to my friend,  
16           I just don't understand what their alternative  
17           test means.

18           No court has ever adopted it. And  
19           this notion that you need to have permission --  
20           it's only something that you need to have  
21           permission for to do, I don't even understand  
22           how that works with respect to the one example  
23           we used in the briefs, which is putting a name  
24           on an envelope or making a phone call because  
25           things like the Do Not Call List and Junk Fax

1 restrictions under federal law do require  
2 permission to send those sorts of things.

3           So I don't understand, as we said in  
4 our reply brief, how that test would even work.  
5 And, at the very least, you'd just be  
6 interjecting another layer of vagueness and  
7 difficulty into the statute. So we think it's  
8 best to stick with what the government argued  
9 below and what the Fifth Circuit decided.

10           Now let me turn to the scope and the  
11 consequences of this very broad position that  
12 the government has endorsed, and I think the  
13 government stood here and said yes, every  
14 mischarge by a waiter, a cashier, et cetera,  
15 constitutes -- that -- that violates the mail or  
16 wire fraud statute would fall within our  
17 understanding. That's an incredibly broad  
18 sweep.

19           I heard some resistance about the  
20 healthcare fraud statute. So there was an  
21 admission that virtually every provider case  
22 would fall within the statute.

23           Now the government in its brief tried  
24 to give a few other examples, and we answered  
25 those in our reply brief, and this is at pages



1 18 and 19 of our reply brief. We point out that  
2 the examples the government gave would require  
3 the use of somebody's name. So, again, I heard  
4 today the notion of applying for Medicare  
5 benefits and then lying or Medicaid benefits and  
6 lying about your age or your smoking.

7 But, to do that application, you have  
8 to list your doctor, your employer, a contact at  
9 your employer. You're putting names all over  
10 that form. And the form won't be approved if  
11 those names are not there.

12 So exactly the same argument the  
13 government is making today would apply to the  
14 only hypotheticals that the government has put  
15 forth in a brief, and I -- some of these things  
16 were new today. I don't know every last detail,  
17 but I bet you, if you run down the details,  
18 you'll find names on those forms as well.

19 And I think that leads me to the  
20 consequences and the real-world consequences for  
21 this. So it's not just that a mandatory minimum  
22 comes into play where it wouldn't otherwise come  
23 into play. But what you would be doing by  
24 accepting the government's position is creating  
25 a world where every simple fraud prosecution is

1 now also chargeable as aggravated identity  
2 theft.

3 And what happens then? Well, in a  
4 world of plea bargaining, that becomes, in the  
5 words that other prosecutors have used, powerful  
6 plea bargaining leverage we can use to procure  
7 quick pleas in federal fraud cases.

8 We're not talking about an aggravated  
9 penalty for actually misusing somebody's name.  
10 We're talking about in practical terms a very  
11 strong cudgel to use against people to procure  
12 pleas in very low-level fraud cases.

13 And that's not what Congress was aimed  
14 for in this case. Congress wasn't trying to  
15 create a two-year mandatory minimum all of a  
16 sudden for ordinary fraud offenses. It was  
17 aimed at a particular new form of misconduct  
18 that's simply not present in the words  
19 "aggravated identity theft" and on the facts of  
20 this case.

21 If there are no further questions,  
22 I'll submit.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
24 Fisher, Mr. Suri. The case is submitted.

25

1                   (Whereupon, at 11:36 a.m., the case  
2 was submitted.)  
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