

No. 08-108

In The
Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA

Petitioner,

v.

UNITED STATES,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit**

**BRIEF OF THE MARYLAND CRIME VICTIMS'
RESOURCE CENTER, INC., THE IDENTITY
THEFT ACTION COUNCIL OF NEBRASKA, THE
IDENTITY THEFT RESOURCE CENTER, TEXAS
LEGAL SERVICES CENTER, THE NATIONAL
CRIME VICTIM LAW INSTITUTE, AND THE
NATIONAL CENTER FOR VICTIMS OF CRIME AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

The Maryland Crime Victims' Resource Center, Inc. ("MCVRC") was originally formed as the Stephanie Roper Foundation and Committee after the kidnapping, rape, and murder of Stephanie Roper in 1982 and the treatment of her parents in the aftermath of crime.² MCVRC's mission is "To ensure that victims of crime receive justice and are treated with dignity and compassion through comprehensive victims' rights and services." 18 U.S.C. § 3771 is named in part to honor Stephanie Roper. (See Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act ("CVRA"), codified as Title I of the Justice For All Act of 2004). Since 2007, MCVRC has expanded its delivery of services and advocacy provided to include victims of identity theft and fraud through direct representation regarding their crime victims' rights in criminal cases, assistance with collateral civil consequences, as well as the training of law enforcement personnel and of pro bono attorneys.

The Identity Theft Resource Center ("ITRC") was originally formed as VOICES (Victims of Crimes

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent were notified of the intention to file this brief prior to 10 days before the due date of the brief, and both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici* filed the respondent's letter of consent with the Clerk of the Court contemporaneously with the filing of this brief. On December 12, 2008, the petitioner filed with the Court his "Consent to the filing of amicus briefs, in support of either party or neither party."

² See

http://www.mdcrimevictims.org/_pages/d_about_mcv/d1_aboutmcv_intro.htm (last visited January 21, 2009).

Extended Services) in 1999 to support victims of identity theft in resolving their cases, and to broaden public awareness and understanding of identity theft. ITRC's long-standing mission has been "To provide best-in-class victim assistance at no charge to consumers throughout the United States." In addition to victim services, it is ITRC's on-going mission to educate consumers, corporations, government agencies and other organizations on best practices for fraud and identity theft detection, reduction, and mitigation.³

Texas Legal Services Center ("TLSC") is a nonprofit corporation whose mission is to improve the quality of advocacy and to expand the availability of legal assistance for low income individuals and organizations in the Southwest. For 30 years, TLSC has been a leading provider of legal services and support to Texans. TLSC operates three programs for crime victims including the Victims Initiative for Counseling, Advocacy, and Restoration of the Southwest ("VICARS") which serves victims of identity theft and financial fraud in Texas, Oklahoma, New Mexico, and Colorado. Since its inception, VICARS has provided direct legal services to over 600 victims of identity theft and has provided specialized training to law enforcement, attorneys, and victim advocates who assist identity theft victims.

The Identity Theft Action Council Of Nebraska was founded in 2006 by Jaimee Napp, an identity theft victim, who has used her journey as a basis to help

³ See <http://www.idtheftcenter.org> (last visited January 27, 2009); http://www.idtheftcenter.org/artman2/publish/a_history/The_History_of_the_Identity_theft_Resource_Center.shtml (last visited January 27, 2009).

others and discuss systematic change.⁴ The Identity Theft Action Council of Nebraska's mission is "To educate Nebraska consumers on identity theft and prevention, provide victims assistance with their recovery and advocate for consumers and victims on identity theft and privacy issues at the state and federal level."

The National Center for Victims of Crime ("National Center"), a non-profit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families, and communities harmed by crime. Among other things, the National Center advocates laws and policies that create resources and secure rights and protections for crime victims. The National Center's programs include the National Crime Victim Helpline, which provides information and referrals to victims of crime, including victims of identity theft. The National Center has a particular interest in this brief due to its work and dedication to the interests of victims of identity theft and fraud, and to the interest of all victims in receiving restitution for the harm that results from a criminal offense.

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote

⁴ See http://www.idtheftne.org/about_us.html (last visited January 22, 2009).

balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training, technical assistance to attorneys, promotion of the National Alliance of Victims' Rights Attorneys, research and analysis of developments in crime victim law, and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case involves fundamental rights of all crime victims, including the right to access justice.

All of the *amici* have a strong interest in ensuring that the laws enacted to protect victims whose identities have been misappropriated are properly interpreted and enforced.

SUMMARY OF ARGUMENT

This country is afflicted by an epidemic of identity theft. The harm suffered by victims of identity theft can be devastating.⁵ In response to this epidemic, Congress has enacted statutes designed to increase penalties for identity theft and to ensure restitution for identity theft victims.

⁵ See, e.g., 149 Cong. Rec. S12739, S12746 (Oct. 16, 2003) (statement of Sen. Specter) (“[V]ictims spend an average of 600 hours recovering from identity theft crimes, sometimes spanning several years.... In addition to the lost time, victims spend an average of \$1,400 in their efforts to rectify the damage inflicted by identity thieves....”); Russ Krebs, *Victim works to fix mess*, Fremont Tribune, January 24 - 25, 2009, <http://www.fremonttribune.com/articles/2009/01/24/news/local/doc497a96debaeef725151811.txt>.

Congress passed the Identity Theft Penalty Enhancement Act of 2004, codified at 18 U.S.C. § 1028A, in order, among other things, to provide additional punishment and deterrence for those who use false identities in the commission of crime. Subsequently, Congress passed the Identity Theft Enforcement and Restitution Act, codified in part at 18 U.S.C. § 3663(b)(6), in order to ensure that victims of offenses under Section 1028A(a) receive restitution for time spent repairing their lives.

Under Petitioner's misreading of Section 1028A(a)(1), innocent victims of identity theft would be deprived of their right to restitution unless the government could prove that the perpetrator knew the false identity actually belonged to another, specific person. Petitioner's reading should be rejected because it ignores the plain text of Section 1028A(a)(1), the Congressional intent behind Section 1028A(a)(1), and the interests of the victims that the statute was enacted to protect.

ARGUMENT

I. THE STATUTE IS NOT AMBIGUOUS: IT DOES NOT REQUIRE THAT A VIOLATOR KNOW THAT THE FALSE IDENTITY HE IS USING BELONGS TO ANOTHER PERSON.

In any case of statutory construction, the analysis should begin with the text of the statute, and, where that statute is unambiguous, the analysis need not go further. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (U.S. 1999) (“As in any case of statutory construction, our analysis begins with ‘the

language of the statute.’ . . . And where the statutory language provides a clear answer, it ends there as well.”) (internal citation omitted).

In this case, the text of the relevant statute is not ambiguous:

§ 1028A. Aggravated identity theft

(a) Offenses.--

(1) In general.--Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1). In turn, the predicate offenses enumerated in 1028A(c) (which must be committed in order for the statute to apply) include felony violations “relating to false personation of citizenship”, “any provision contained in chapter 63 (relating to mail, bank, and wire fraud),” “any provision contained in chapter 69 (relating to nationality and citizenship),” “any provision contained in chapter 75 (relating to passports and visas),” “section 243 or 266 of the Immigration and Nationality Act,” and “any provision contained in chapter 8 of title II of the Immigration and Nationality Act.” *See* 18 U.S.C. § 1028A(c).

Thus, a person violates Section 1028A(a)(1) when, in addition to committing one of the predicate felonies specified by the statute, that person also

knowingly and unlawfully transfers, possesses, or uses a means of identification that belongs to another. The controversy at hand has arisen because the Petitioner contends that a conviction under Section 1028A(a)(1) requires proof that the offender knew that the false identity he was using belonged to another person. According to the Petitioner, this requirement is created as a result of the placement of the term “knowingly” in the statute.

However, the plain language of Section 1028A(a)(1) demonstrates that “knowingly” applies only to “transfers, possesses, or uses.” Indeed, “knowingly” is only used once in the statute and only in connection with those verbs. This analysis is consistent with the reasoning employed by the Fourth Circuit when it addressed this identical question:

We begin with grammar. The word “knowingly” in this case is an adverb that modifies the verbs “transfers, possesses, [and] uses.” “Without lawful authority” is an adverbial phrase that also modifies these verbs. The direct object of these transitive verbs is “a means of identification,” a nominal phrase that is further modified by the adjectival prepositional phrase “of another person.” Together, “transfers, possesses, or uses . . . a means of identification of another person” forms a predicate.

We think that, as a matter of common usage, “knowingly” does not modify the entire lengthy predicate that follows it. Simply placing “knowingly” at the start of this long predicate does not transform it into a modifier of all the words that follow. Good usage requires that the limiting modifier, the adverb “knowingly,” be as close as possible to the words which it modifies, here, “transfers, possesses, or uses.”

United States v. Montejo, 442 F.3d 213, 215 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006). Based on this reasoning, the Fourth Circuit arrived at the conclusion that Section 1028A(a)(1) unambiguously does not require proof that the violator knew the false identity he or she was using belonged to another person. *See Montejo*, 442 F.3d at 217.

This same result has been reached by multiple other circuits in their analysis of this statute, as well. *See United States v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008) (“The fact that the word ‘knowingly’ - an adverb - is placed before the verbs ‘transfers, possesses, or uses’ indicates that ‘knowingly’ modifies those verbs, not the later language in the statute.”); *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *petition for cert. pending*, No. 08-5316 (filed July 15, 2008) (“[T]he plain language of § 1028A(a)(1) limits ‘knowingly’ to modifying ‘transfers, possesses, or uses’ and not ‘of another person.’ Thus . . . § 1028A(a)(1) is unambiguous . . . the Government was not required to prove that Mendoza-Gonzalez knew that Gurrola was a real person”). These findings comport with

well-established principles of statutory construction. See, e.g., *United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006) (“Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil.”).

Further, restricting use of the term “knowingly” to the verbs does not lead to an absurd result, whereas extending “knowingly” to every part of Section 1028A(a)(1) would produce a nonsensical result. A defendant could avoid the law if he did not know, or the government could not prove that he knew, that his victim was an actual person, regardless of the havoc his use of the identity caused the victim.

Finally, extending the term “knowingly” to each element of the offense would require reading language into the statute that is simply not there—because Congress chose not to add such language, courts should not make such additions, either:

If Congress had intended to extend the knowledge requirement to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification “known to belong to another actual person.” An extension of the knowledge requirement to the phrase “of another person” in § 1028A(a)(1), as advocated by Hurtado, would allow a defendant to use the identification of another person fraudulently in the commission of another enumerated

felony so long as the defendant remains ignorant of whether that other person is real. The plain language of § 1028A(a)(1) does not dictate such a reading.

United States v. Hurtado, 508 F.3d at 609.

Thus, for the foregoing reasons, the plain text of the statute unambiguously does not require violators to know that the false identities they have used belong to actual persons.

II. EVEN IF THE TEXT OF THE STATUTE WERE AMBIGUOUS, ANY SUCH AMBIGUITY WOULD BE CLARIFIED BY LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT.

Even if the statute were ambiguous (which it is not), the next step would be to look to Congressional history and intent to clarify any such ambiguity. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (U.S. 1985) (“Because we find the statute ambiguous on its face, we seek guidance in the statutory structure, relevant legislative history, [and] congressional purposes”); *United States v. Hohri*, 482 U.S. 64, 71 (U.S. 1987) (“Because the statute is ambiguous, congressional intent is particularly relevant to our decision.”); *Toibb v. Radloff*, 501 U.S. 157, 162 (U.S. 1991) (“[A] court appropriately may refer to a statute’s legislative history to resolve statutory ambiguity.”). An examination of Congressional intent and history with respect to Section 1028A(a)(1) leaves no doubt that the knowledge requirement advocated by the Petitioner was never contemplated by Congress and, in fact,

would directly contravene the legislative purposes behind Section 1028A(a)(1).

A. The Accompanying Restitutionary Statute Reflects Congressional Understanding That There Is No Requirement That An Offender Under Section 1028A(a) Knows He Is Harming Another Person.

After the enactment of Section 1028A(a), Congress enacted 18 U.S.C. § 3663(b)(6), which allows the victims of offenders under Section 1028A(a) to receive restitution. It states as follows:

The [restitution] order may require that such defendant—

. . . .

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title [18 USCS §§ 1028(a)(7) or § 1028A(a)], pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the **intended or actual harm** incurred by the victim from the offense.

18 U.S.C. § 3663(b) (emphasis added).

Use of the phrase “intended **or** actual harm” (and not “intended **and** actual harm”) evidences Congressional understanding that a violation of 1028A(a) may result in **unintended harm to victims**. If Congress understood that 1028A(a)(1) could be violated only if the offender knew he was using an identity that belonged to another person, Congress

would not have written the corresponding restitutionary statute in this open-ended fashion to incorporate all types of “actual harm.”

Further, Section 3663(b)(6) and its reference to “intended or actual harm” resulting from a violation of Section 1028A(a) eviscerates the Petitioner’s purported distinction between “intentional theft” (which, according to Petitioner, Section 1028A(a)(1) is intended to punish) and “accidental misappropriation” (which, according to Petitioner, Section 1028A(a)(1) is not intended to punish). *See, e.g.*, Brief for the Petitioner, p. 5 (“As its name suggests, the ‘Aggravated identity theft’ statute punishes an especially serious form of stealing. . . . [T]here is an important difference between accidental misappropriation and intentional theft.”). If Congress intended, or understood, Section 1028A(a)(1) to operate as the Petitioner contends, Section 3663(b)(6) would not have been written to reference “intended or actual harm” resulting from violations of Section 1028A(a).

B. Petitioner’s Reading of Section 1028A(a)(1) Would Undermine Congressional Intent to Assist Victims Via Section 3663(b)(6).

The combination of Section 1028A(a) and Section 3663(b)(6) establishes a coherent statutory scheme in which innocent victims whose identities have been misappropriated can recover for the lost value of time that those victims must spend restoring their good names and reputations. *See* 18 U.S.C. § 3663(b)(6) (in the case of an offense under 1028A(a), victim can receive restitution for “an amount equal to the value of the time reasonably spent by the victim in

an attempt to remediate the intended or actual harm incurred by the victim from the offense.”). Under the Petitioner’s reading of Section 1028A(a)(1), significant numbers of victims would lose their restitutionary rights solely because the felons using their identities happened to lack the specific knowledge that the identities were assigned to real persons.

1. The Congressional Record with Respect to 1028A(a) Is Replete with References to the Harms Suffered by Victims Whose Identities Have Been Misappropriated.

It is clear from the Congressional record that section 1028A was enacted out of concern for the victims of identity theft:

The Federal Trade Commission received 161,819 complaints of someone using another’s information in 2002. In 2003 the FTC performed a random sampling of households. The results from the survey suggest that almost 10 million Americans were the victim of some form of ID theft within the last year

150 Cong. Rec. H4808, H4809 (June 23, 2004) (statement of Rep. Sensenbrenner).

The enormous costs suffered by these victims were described as follows:

Identity theft has now topped the list of consumer complaints filed with the FTC for the last 4 years in a row, impacting millions of Americans and costing consumers and businesses billions of dollars.

My home State of California ranks number three in the number of victims of identity theft per capita with over 37,000 complaints reported by consumers, costing over \$40 million just last year alone. Nationally, California cities crowd the top ten list of metropolitan areas with the highest per capita rates of identity theft reported. The Los Angeles-Long Beach metropolitan area, which includes my district, is particularly prone to such crimes and ranks number two nationally with over 13,000 victims.

A victim of identity theft usually spends a year and a half working to restore his or her identity and good name. Many of my constituents have contacted me. Many of my colleagues have heard similar urging that Congress act quickly and effectively to crack down on this growing epidemic.

150 Cong. Rec. H4808, H4810 – 11 (June 23, 2004)
(statement of Rep. Schiff) (emphasis added).

2. The Harms Referenced in the Congressional Record for Section 1028A(a) Were Targeted by the Restitutionary Provision at Section 3663(b)(6).

As noted *supra*, after the enactment of Section 1028A(a), Congress enacted Section 3663(b)(6) as a restitutionary mechanism specifically designed to compensate victims for the lost value of time spent remediating the damage caused by the misappropriation of their identities:

The [restitution] order may require that such defendant--

. . . .

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title [18 USCS §§ 1028(a)(7) or 1028A(a)], pay an amount equal to the **value of the time reasonably spent by the victim** in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

18 U.S.C. § 3663(b)(6) (emphasis added). Thus, the Congressional record for Section 1028A expressed concern with respect to the time lost by victims of identity theft in restoring their good names, and Section 3663(b)(6) directly and specifically allows restitution for the value of that time.

3. Petitioner’s Reading of Section 1028A(a)(1) Would Lead to the Arbitrary (and Absurd) Result that the Restitutionary Rights of Victims Will Be Contingent on Whether the Offender Happened to Know that the False Identity Belonged to Another Person.

If Petitioner’s reading of Section 1028A(a)(1) is accepted, then a large percentage of the very group of victims that Congress intended to protect through Section 1028A(a) and Section 3663(b)(6) will be deprived of restitutionary rights. More specifically, under Petitioner’s reading of Section 1028A(a)(1), a victim’s right to restitution under Section 3663(b)(6) would be revoked as long as the accused offender under Section 1028A(a)(1) did not know that the fake identity he was using belonged to another person. As such, Petitioner’s reading of Section 1028A(a)(1) subverts the Congressional purpose of helping the innocent victims who have spent significant amounts of time restoring their identities.⁶

Further, the absurdity of the position that a victim’s right to restitution should be contingent on whether the offender happened to know the false identity he was using belonged to another person cannot be ignored—the havoc wrecked on the victim’s life is the same either way. The absurdity of the

⁶ It should also be noted that relief would not be available under Section 3663(b)(6) via Section 1028(a)(7) either, for Petitioner’s interpretation would apply to that statute in the same way. *See* 18 U.S.C. § 1028(a)(7) (applies to an offender who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . .”).

Petitioner's position is perhaps best illustrated by an example:

Scenario 1: Offender A purchases an identity card from a third party. The identity card contains Victim B's personal information. The third party informs Offender A that Victim B is a real person. Before Offender A is apprehended, he has caused minor damage, requiring Victim B to spend 20 hours remediating the harm caused by Offender A's misappropriation of the identity. **Result Under Petitioner's Reading Of Section 1028A(a)(1):** Violation under Section 1028A(a)(1), and victim is entitled to restitution under Section 3663(b)(6).

Scenario 2: Offender A purchases an identity card from a third party. The identity card contains Victim B's personal information. The third party does **not** inform Offender A that Victim B is a real person. Before Offender A is apprehended, he has caused significant damage, requiring Victim B to spend 200 hours remediating the harm caused by Offender A's misappropriation of the identity. **Result Under Petitioner's Reading Of Section 1028A(a)(1):** No violation under Section 1028A(a)(1), and **victim is not entitled to restitution under Section 3663(b)(6).**

Thus, depending on whether a third party notifies the offender that the fake identity belongs to another, the innocent victim (who, in both cases, has done absolutely nothing wrong) could have his restitutionary rights under Section 3663(b)(6) erased. Any reading that leads to such arbitrary results subverts the Congressional intent evidenced by the legislative record for Section 1028A(a) and enactment of Section 3663(b)(6).

C. Further, It Also Cannot Be Ignored that the Congressional Record Specifically References the Very Conduct in which Petitioner Was Engaged.

The Congressional record with respect to Section 1028A(a) expressly references the use of false identification by illegal immigrants:

Mr. Speaker, unfortunately, the mentions of ID theft are becoming all too commonplace. . . . In Collin County, Texas, a former Texas driver's license bureau clerk pleaded guilty **to selling ID cards to illegal immigrants using stolen information from immigration papers.**

150 Cong. Rec. H4808, H4810 (June 23, 2004) (statement of Rep. Carter) (emphasis added). *See also* H.R. Rep. 108-528, *4 (2004), U.S.C.C.A.N. 779, 780. ("The terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for

economic or other gain, **including immigration benefits.**”) (emphasis added).

These conduct descriptions in the Congressional record plainly include scenarios in which the ultimate user of the false identification will not know whether the identity belongs to another real person. More specifically, when an illegal immigrant purchases a false ID card from a third party, that illegal immigrant has no knowledge of whether that false ID is connected to a real person. This observation was even made in one of the decisions relied on by the Petitioner:

[T]he definition of “identity theft” given in the House Report encompasses the use of false identification to receive immigration benefits. *Id.* at 4, 2004 U.S.C.C.A.N. at 780. **If an undocumented immigrant purchases a social security number from a third party and uses that number to obtain employment, he or she may not know that it is assigned to another person. The third party may know that the number is a valid number, assigned to a real person, but the immigrant may not.**

United States v. Godin, 534 F.3d 51, 60 (1st Cir. 2008) (emphasis added). Thus, even decisions that ostensibly support the Petitioner’s position acknowledge that the Congressional record reflects an intent that Section 1028A(a)(1) should apply to perpetrators who do not necessarily know they are using the identity of another person. This reflection of Congressional intent, in itself, should terminate the analysis.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully Submitted,

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