No. 08-108

IN THE
Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PROFESSORS OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae, listed by name in the Appendix, are professors of criminal law at law schools in the United States, who teach, research, write and speak about criminal law and criminal justice. As such, *amici curiae* have an interest in ensuring that the criminal law is interpreted consistently with fundamental principles of criminal justice. Specifically, *amici curiae* submit this brief to highlight the guiding principle that criminal punishment should be, and typically is, calibrated to the culpability of the offender. Accordingly, 18 U.S.C. § 1028A(a)(1), with its enhanced mandatory minimum sentence, is best interpreted as applicable only to those individuals who intentionally steal another's identity, and not to those who use a false means of identification without knowing that it belongs to another person. Adopting the Eighth Circuit's contrary interpretation, however, undermines this basic principle by punishing individuals irrespective of culpability.

SUMMARY OF ARGUMENT

A fundamental principle of criminal justice is that criminal punishment is typically calibrated to culpability. That is to say, punishment generally increases to reflect increasingly wrongful states of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and, pursuant to Rule 37.3(a), letters of consent have been filed with the Clerk of the Court.

mind. This principle strongly supports an interpretation of 18 U.S.C. § 1028A(a)(1) requiring an individual to know that a means of identification used belongs to another person.

Congress's intent to respect this principle is also reflected in the structure of the statutory scheme in which section 1028A resides. Against a backdrop of numerous statutory provisions proscribing various identity-fraud-related conduct, section 1028A provides for an additional two-year mandatory punishment for the more culpable conduct of identity theft. As such, in order to trigger the inflexible mandatory minimum, an individual must intend to steal another's identity.

Moreover, the legislative history, together with background common law conceptions of "theft," demonstrates that Congress sought to do precisely what the statutory structure suggests: single out more culpable offenders for increased punishment.

The government's interpretation, which was accepted by the Eighth Circuit, would disregard this foundational principle of criminal justice and punish irrespective of culpability. Individuals with the sole intent to use a fraudulent document would be punished differently based on mere chance – namely, whether the means of identification turns out to belong to another person. Moreover, individuals with different degrees of wrongful intent – those who intend to steal another's identity as compared with those who intend only to use a fictitious means of identification – would be punished equally should the latter inadvertently use another person's means

of identification. There is no indication that Congress sought such arbitrary results. Accordingly, the Eighth Circuit's decision in this matter should be reversed.

ARGUMENT

I. The Aggravated Identity Theft Statute's Imposition of an Increased Punishment, in Addition to the Punishment for the Underlying Identity Fraud Crimes, Shows That Aggravated Identity Theft Concerns More Culpable Individuals Who Knowingly Intend to Use Another's Identity.

A. The Criminal Law Typically Calibrates Punishment to Culpability

A fundamental principle of our criminal justice system is that punishment should be calibrated to criminal culpability. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *17 ("It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity."); *id.* at *18 (arguing that "a scale of crimes should be formed, with a corresponding scale of punishments"); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5, at 42-43 n.43 (2d ed. 2003) ("'[T]he severity of the sanctions visited on the offender should be proportioned to the degree of his culpability." (quoting FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 66 (1981))); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 850 (1980) (tracing the historical evolution of criminal culpability distinctions and concluding that "[t]he most significant general observation is

that the process of recognizing additional distinctions [as to culpability] has been through the recognition of additional bases for mitigation. The new distinction creates a new category that will receive less harsh punishment, or limits a more harsh punishment to the old category"); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1437-38 (1968) ("[I]n determining the gravity of crimes for purposes of sentence, it is often useful to lay stress on purpose. This is frequently the case under the older law as well as in the [Model Penal] Code."); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1403 (2002) ("At [the Model Penal Code's] center is the idea of blameworthiness or culpability, which is used both to determine criminality itself and to assess its degree . . . . The legislative assignment of degrees of culpability to . . . different elements [of a crime] is to be the product of a reasoned judgment based upon the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness.").

Not surprisingly, this Court, along with numerous state courts, has recognized the long history and great importance of the correlation of punishment to culpability. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 264 (1952) ("Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind . . . will make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment.") (footnote

omitted); *State v. Green*, 647 S.E.2d 736, 746 (W. Va. 2007) (noting "'the important principle that a person's criminal liability for an act should be proportioned to his or her moral culpability for that act'" (quoting *State v. Pray*, 378 A.2d 1322, 1324 (Me. 1977))); *Commonwealth v. Vizcarrondo*, 693 N.E.2d 677, 681 (Mass. 1998) ("A conviction of murder founded on a state of mind sufficient only to support a manslaughter conviction . . . . is . . . inconsistent with the principle that criminal liability and punishment for an act should be proportionate to the actor's moral culpability for that act."); *State v. Beayon*, 605 A.2d 527, 529 (Vt. 1992) ("[A] person's criminal liability for an act should be proportioned to his or her moral culpability for that act.").

In *People v. Ryan*, 626 N.E.2d 51 (1993), *superseded by statute*, 1995 N.Y. Laws 75, N.Y. Penal Law § 15.20(4), the New York Court of Appeals faced a question analogous to the one presented here. The question in *Ryan* was whether the knowledge requirement of the State's controlled substances statute applied to each element of the offense, including drug weight. The statute recognized six degrees of criminal possession, with corresponding maximum sentences of imprisonment ranging from one-year to life. In many instances, drug weight alone determined the offense degree and accompanying severity of punishment. The Court's decision was supported by the principle that culpability and punishment should be calibrated to each other. The Court held that the legislature did not intend to treat an individual as "deserving of enhanced punishment unless he or she is aware that

the amount possessed is greater." *Id.* at 56. In so holding, the Court of Appeals declined in the absence of indications to the contrary to "ascribe to the Legislature an intent to mete out drastic differences in punishment without a basis in culpability" as that "would be inconsistent with notions of individual responsibility and proportionality prevailing in Penal Law." *Id.* at 55; *see also State v. Blanton*, 588 P.2d 28, 29 (Or. 1978) (extending knowledge requirement in drug distribution statute to the age of the recipient in order to trigger the increased punishment for furnishing narcotics to persons under 18 years of age).

In accordance with these same principles, federal criminal law generally seeks to calibrate punishment to culpability. Graded offenses, for example, are typically distinguished based on the degree of culpability, with increased culpability warranting more severe punishment. The distinction between manslaughter and murder is a classic example. *See Morissette*, 342 U.S. at 264 n.24 ("Manslaughter, '. . . the unlawful killing of a human being without malice', if voluntary, carries a maximum penalty of imprisonment not to exceed ten years. If the killing is 'with malice aforethought', the crime is murder, and, if of the first degree, punishable by death or life imprisonment, or, if of the second degree, punishable by imprisonment for any term of years or life." (alteration in original) (citation omitted) (quoting 18 U.S.C. §§ 1112, 1111)).

The federal drug laws provide another example of increased sentences for offenders with heightened culpability. The maximum punishment for simple

possession of most controlled substances is one year. *See* 21 U.S.C. § 844(a). However, Congress provided that possession of the same controlled substances with intent to distribute will result in much more severe sentences. *See id.* § 841.

18 U.S.C. § 1030, which prohibits a number of computer crimes, provides additional examples of culpability calibration. A person who knowingly transmits a computer program and "intentionally causes damage" to a protected computer can receive a sentence of up to 10 years. 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B). Intentional unauthorized access of a protected computer that "recklessly causes damage" is punishable by up to 5 years. *Id.* §§ 1030(a)(5)(B), (c)(4)(A). When the same conduct simply "causes damage and loss" – without any showing that such loss was purposefully or recklessly caused – the offense carries a maximum sentence of one year. *Id.* §§ 1030(a)(5)(C), (c)(4)(G); *see United States v. Phillips*, 477 F.3d 215, 223 n.9 (5th Cir. 2007) ("The differing degrees of culpability envisioned by Congress for the [three] subsections are reflected in the punishments Congress allotted to their violation.").[2]

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[2] Also relevant is the determination of offender culpability in sentencing proceedings. This Court has recognized that sentencing regimes are often motivated by the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). Similarly, this Court has observed that the United States Sentencing Guidelines aim to respect "the principle that criminal conduct of greater severity should be punished more harshly than less serious conduct." *United States v. LaBonte*, 520 U.S. 751, 764 (1997); *see also* ALI Model

Because correlation of punishment to culpability is a notion so deeply ingrained in the criminal law, this Court has respected the principle in interpreting the scope of criminal statutes. Indeed, the premise gives rise to the deeply-rooted notion that wrongful intent is generally required to turn harmful conduct into criminal conduct – even where a statute does not plainly require as much. *See, e.g.*, *Morissette*, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (noting the "presumption[] that some form of scienter is to be implied in a criminal statute even if not expressed"). Underscoring the importance of a culpability-punishment correlation, this Court has looked to the severity of a punishment in determining whether a statute requires criminal intent. *See* 513 U.S. at 71 ("[H]arsh penalties attaching to violations of the statute [are] a 'significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.'" (quoting *Staples v. United States*, 511 U.S. 600, 616 (1994))).

Penal Code: Sentencing § 1.02(2) (Draft No. 1, Apr. 9, 2007) (providing that the first of the "general purposes of the provisions on sentencing" is "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). These sentencing considerations are all the more relevant here because the mandatory minimum penalty imposed by section 1028A constrains the sentencing discretion of the trial judge.

In construing the mens rea requirement of ambiguous statutes, this Court's reliance on culpability considerations has not been limited to situations where otherwise innocent conduct might be criminalized. Rather, such reasoning has been applied with equal force in cases, such as this, where Congress has subjected already criminalized conduct to increased punishment. In *Busic v. United States*, 446 U.S. 398 (1980), *superseded by statute*, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-39, for example, this Court dealt with an ambiguity in the firearms enhancement contained in then 18 U.S.C. § 924(c) – specifically whether the sentencing enhancement could be applied to defendants convicted of a felony under a separate statute that itself authorizes an enhancement when a dangerous weapon is used. In holding that the additional enhancement at section 924(c) did not apply, the Court relied in substantial part on considerations of relative culpability.[3] *See Busic*, 446 U.S. at 411 (refusing to "impute to Congress the unlikely intention to . . . create a situation in which aiders and abettors would often be more culpable and more severely punished than those whom they aid and abet").

Ladner v. United States, 358 U.S. 169 (1958), is another example. There, the Court was reluctant to read a statute as requiring "incongruous results" that did not reflect a relationship between relative degrees of culpability and punishment. *Id.* at 177.

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[3] The Court also relied in part on the rule of lenity. *See Busic*, 446 U.S. at 406.

The petitioner in *Ladner* had been convicted of two separate counts of assault on a federal officer after firing one shot that wounded two officers; he was sentenced to serve two consecutive ten-year terms. The Court had to decide whether, under then 18 U.S.C. § 254, one or two offenses had been committed. The Court, relying on principles of culpability and lenity in vacating Ladner's consecutive sentences, stressed that the number of officers affected would often have little connection to "the seriousness of the criminal act," and therefore that relying on that fact to determine the number of offenses committed would produce arbitrary results with respect to punishment. *Id.* at 178 ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.").

Thus, where there is a question as to Congress's intent, this Court has traditionally given effect to the longstanding principle that criminal punishment typically is calibrated to culpability.

B. Interpreting the Aggravated Identity Theft Statute to Impose Additional Punishment for More Culpable Conduct Is Consistent With the Statute's Structure and Legislative History.

As the title to section 1028A makes clear, the statute criminalizes "[a]ggravated identity theft." Specifically, section 1028A states: "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). Thus, section 1028A provides a consecutive two-year mandatory minimum sentence for anyone who commits an enumerated crime while knowingly transferring, possessing, or using another person's means of identification. In stark contrast, the underlying identity fraud crimes upon which section 1028A liability is based do not include the additional element that the means of identification belong to another person. For those crimes it is sufficient that the means of identification be fraudulent.

For example, the identity fraud statute that formed the predicate of Flores-Figueroa's section 1028A conviction was 18 U.S.C. § 1546(a) (enumerated in 18 U.S.C. § 1028A(c)(7)). Although both section 1546(a)[4] and 1546(b)[5] prohibit various

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[4] The conduct falling under 18 U.S.C. § 1546(a) includes:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means

immigration-related activities involving fraudulent means of identification, neither requires that the offender have used a means of identification of another person. Similarly, 42 U.S.C. § 408(a) (enumerated in 18 U.S.C. § 1028A(c)(11)), which

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of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

. . .

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; . . . .

[5] 18 U.S.C. § 1546(b) makes it a crime to use:

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

proscribes a range of social security-related frauds,[6] only requires use of a fraudulent social security

[6] Section 408(a) proscribes, in relevant part:

> Whoever—
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> . . .
>
> (7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized hereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose—
>
> (A) willfully, knowingly, and with intent to deceive, uses a social security account number, assigned by the Commissioner of Social Security (in the exercise of the Commissioner's authority under section 405(c)(2) of this title to establish and maintain records) on the basis of false information furnished to the Commissioner of Social Security by him or by any other person; or
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person; or
>
> (C) knowingly alters a social security card issued by the Commissioner of Social Security, buys or sells a card that is, or purports to be, a card so issued, counterfeits a social security card, or possesses a social security card or

number, not the fraudulent use of another's social security number.

Indeed, none of the identity fraud crimes involving false representation of citizenship, naturalization, or alien registration status that are enumerated in section 1028A(c) require use of another person's identity information.[7] Nor is use of

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> counterfeit social security card with intent to sell or alter it; or
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> . . .
>
> shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.

[7] *See* 18 U.S.C. § 911 (enumerated in 18 U.S.C. § 1028A(c)(2), prohibiting any false representation of U.S. citizenship); 18 U.S.C. § 1015(c) (enumerated in 18 U.S.C. § 1028A(c)(4) and proscribing the "use[] or attempt[ed] . . . use [of] any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or of citizenship, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained"); 18 U.S.C. §§ 1423, 1424, 1426 (enumerated in 18 U.S.C. § 1028A(c)(6) and prohibiting various uses of fraudulent citizenship documentation); 18 U.S.C § 1543 (enumerated in 18 U.S.C. § 1028A(c)(7), prohibiting use of fraudulent passports); 8 U.S.C. § 1306(d) (enumerated in 18 U.S.C. § 1028A(c)(9) and providing that "[a]ny person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be

another person's identity an element of the enumerated offenses which involve use of false papers to acquire a firearm or in connection with defrauding the United States.[8]

Thus, within the identity fraud scheme, the sole distinguishing characteristic triggering section 1028A's additional two-year mandatory minimum sentence is that the means of identification belong to

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prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both."); 8 U.S.C. § 1324c(a)(2) (enumerated in 18 U.S.C. § 1028A(c)(10), making it unlawful for any person "knowingly . . . to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter [Immigration and Nationality]").

18 U.S.C. § 1544, titled "Misuse of passport," and enumerated in 18 U.S.C. § 1028A(c)(7), proscribes the knowing use or attempted use of another's passport but not the use of an otherwise fraudulent passport. The provision does criminalize non-identity-theft-related conduct, however – specifically the knowing use or attempted use of "any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports." 18 U.S.C. § 1544. Thus, section 1028A ensures that the identity theft-related conduct covered by section 1544 is singled out for additional punishment.

[8] *See* 18 U.S.C. § 922(a)(6) (enumerated in 18 U.S.C. § 1028A(c)(3) and making it unlawful "to furnish or exhibit any false, fictitious, or misrepresented identification," "in connection with the acquisition or attempted acquisition of any firearm or ammunition"); 18 U.S.C. § 1002 (enumerated in 18 U.S.C. § 1028A(c)(4) and prohibiting anyone "knowingly and with intent to defraud the United States, or any agency thereof, [from] possess[ing] any false, altered, forged, or counterfeited writing or document").

another person. In targeting this conduct, it is clear that Congress intended that the two-year mandatory minimum be an *additional* punishment. Not only does section 1028A(b) mandate that the two-year sentence run consecutively to the sentence for the underlying crime, but it also prohibits a sentencing court from reducing the sentence for the underlying crime to take into account the mandatory 1028A sentence. 18 U.S.C. § 1028A(b)(2), (3). Congress's imposition of an inflexible and consecutive additional punishment highlights the severity of the punishment. *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192 (1993) (noting that the purpose of congressionally enacted mandatory minimum sentences "was to deter – through the prospect of certain and lengthy prison terms"); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 67 (2005) (criticizing mandatory minimum sentences as "heavy-handed" punishment that do not take into account an "offender's personal background, the facts of his case, and all other details"); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 208 (1993) ("When [mandatory minimum sentences] are actually applied to all fact situations falling within their scope, predictable and severe sentences are achieved.").

As previously explained, the only textual addition made by section 1028A as compared with the underlying enumerated crimes is that section 1028A requires that the means of identification be of another person. In order for the mandatory additional two years of incarceration imposed by the statute to have any relationship to culpability, the statute is best construed as directed towards those individuals who intentionally steal another's identity. There is a marked distinction in culpability between the "transfer[ ], possess[ion], or use[ ]" of a means of identification that one knows to belong to another person, as opposed to a means of identification that one only knows to be fraudulent. The knowing use of another's identity quintessentially constitutes theft. Indeed, one can infer a greater likelihood of malice or intent to benefit at the expense of the person to whom the identification rightfully belongs. It is this more culpable conduct that is the target of section 1028A's increased punishment. As the D.C. Circuit observed,

> there is a salient difference between theft and accidental misappropriation. . . . But "theft" is precisely what Congress targeted when it passed section 1028A(a)(1). Because Congress intended to express "the moral condemnation of the community," by enhancing penalties for thieves who steal identities, we hold that section 1028A(a)(1)'s mens rea requirement extends to the "[a]ggravated identity theft" statute's defining element – that

> the means of identification used belongs to another person.

United States v. Villanueva-Sotelo, 515 F.3d 1234, 1246 (D.C. Cir. 2008) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)), *petition for cert. filed*, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622); *see also United States v. Hairup*, 565 F. Supp. 2d 1309, 1313 (D. Utah 2008) ("Given the legislative history's repeated references to the concern for the growing number of intentional identity thefts caused in large part by modern technology, this kind of mandatory additional punishment is understandable. And in those cases of actual intended theft of another's identity, the punishment seems to fit the concern. A criminal receives an extra two years in prison if when committing a crime he steals someone else's identity.").

Indeed, the notion that "theft" involves a heightened degree of wrongful intent is well accepted. Historically, "theft" or "larceny" has been a specific-intent crime: "The actor who takes and carries away the personal property of another must do so with the specific intent to deprive the other of the property on a permanent basis. Sometimes this *mens rea* is described . . . as 'the intent to steal,' 'felonious intent' or by the Latin words, '*animus furandi*.'" JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.02 [A], at 593 (4th ed. 2006). As this Court has noted, "[s]tate courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses." *Morissette*, 342 U.S. at 260-61; *see also* 50

Am. Jur. 2d *Larceny* § 37 (2008) ("The animus furandi, or intent to steal, is an essential element of the crime of larceny at common law, and under many larceny and theft statutes . . . . More is required than the intent to do an unlawful act; there must be an intent to steal." (footnotes omitted)); Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 15 (2001) ("[T]he mental state necessary to almost all simple theft-type crimes is some variant of an intent to steal, defraud, or otherwise deprive the owner of the use or benefit of his property."); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 428 (1993) ("[I]ntent to steal . . . is the traditional mens rea of theft."). It is this additional culpability – the intent to steal – that separates identity theft from identity fraud and warrants the additional punishment set forth in section 1028A.

In fact, the legislative history surrounding section 1028A demonstrates that Congress was focused on the more culpable conduct of intentional theft of others' identities and not on accidental misappropriation. Passed as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) ("ITPEA"), the accompanying House Judiciary Committee Report makes clear that it was Congress's intent to "punish 'identity *thieves*' who '*steal* identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes.'" *Villanueva-Sotelo*, 515 F.3d at 1244 (emphasis in original)

(quoting H.R. Rep. No. 108-528 at 3 (2004), as reprinted in 2004 U.S.C.C.A.N. 779, 780). The Report's description of identity theft focuses on intentional stealing, explaining that "identity thieves":

> obtain[] individuals['] personal information for misuse not only through "dumpster diving," but also through accessing information that was originally collected for an authorized purpose. The information is accessed either by employees of the company or of a third party that is authorized to access the accounts in the normal course of business, or by outside individuals who hack into computers or steal paperwork likely to contain personal information.

H.R. Rep. No. 108-528, at 4-5 (2004) as reprinted in 2004 U.S.C.C.A.N. 779, 780-81. As the Report makes clear, Congress's aim was to punish and deter more effectively the most culpable offenders – those who knowingly steal others' identities in order to commit serious crimes. *Id.* at 3, 2004 U.S.C.C.A.N. at 779 ("Currently under 18 U.S.C. § 1028 many identity thieves receive short terms of imprisonment or probation; after their release, many of these thieves will go on to use false identities to commit much more serious crimes."); *id.* at 5, 2004 U.S.C.C.A.N. at 781 ("Under current law, many perpetrators of identity theft receive little or no prison time. That has become a tacit encouragement to those arrested to continue to pursue such crimes."). The report goes

on to list a number of cases in which identity thieves received relatively light sentences. In each of these cases, the defendants knew that the identity information used actually belonged to someone else. *Id.* at 5-6, 2004 U.S.C.C.A.N. at 781-82.

Statements made during floor debate were similarly focused on knowing theft. Representative Sensenbrenner, the chair of the House Judiciary Committee, stated that "[t]his legislation will allow prosecutors to identify thieves who steal an identity, sometimes hundreds or even thousands of identities, for purposes of committing one or more crimes." 150 CONG. REC. H4809 (daily ed. June 23, 2004). Even in the immigration context, Congress's sole focus remained the same. For example, Representative Carter, the lead sponsor of the Act, explained that it would "facilitate the prosecution of criminals who steal identities in order to commit felonies" and gave as an example a case where a "Texas driver's license bureau clerk pleaded guilty to selling ID cards to illegal immigrants using stolen information from immigration papers." *Id.* at H4810; *see also Villaneueva-Sotelo*, 515 F.3d at 1244 ("Focusing on the immigration context, the [House] report mentions a case in which a Mexican resident obtained federal benefits by using 'the name and Social Security number of his former brother-in-law, a U.S. citizen.'" (quoting H.R. Rep. 108-528 at 6, 2004 U.S.C.C.A.N. at 781)). In reviewing the legislative record of the Act, the D.C. Circuit noted that at no point did any member of Congress "so much as allude to a situation in which a defendant wrongfully obtain[ed] another person's personal information

unknowingly, unwittingly, and without intent." *Villanueva-Sotelo*, 515 F.3d at 1245 (internal quotation marks omitted) (alteration in original).

Thus, both the structure of the statutory scheme and the statute's legislative history reveal that Congress, by targeting "aggravated identity theft," singled out for additional punishment those defendants who knew they were using not only a means of identification that did not belong to them but indeed that it belonged to someone else.[9] These are the more serious offenders who are subject to greater punishment. Rather than reflecting an intention to depart from the established principle that punishment should be calibrated to culpability, section 1028A is best interpreted as embracing it.

II. The Government's Reading of the Aggravated Identity Theft Provision Contravenes the Principle That the Degree of Punishment Generally Should Reflect the Level of Culpability and Leads to Disparate Sentencing Results.

The interpretation of 18 U.S.C. § 1028A(a)(1) offered by the Government and adopted by the Eighth Circuit, ignores the basic precept of criminal justice discussed herein. According to the Government, the additional two-year mandatory minimum applies regardless of whether an

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[9] The Department of Justice has also viewed intentional misappropriation of another's identity as the touchstone of identity theft. *See* http://www.usdoj.gov/criminal/fraud/websites/idtheft.html (providing examples of identity theft, all of which involve an intention to steal another person's identifying information).

individual knows that a means of identification belongs to another person. Rather than calibrating punishment to the degree of culpability, under this reading, punishment is decoupled from culpability; offenders with similar degrees of culpability are to be punished differently while offenders with different degrees of culpability are to be punished similarly. This reading leads to unwarranted and unreasonable results.

The facts of this and other cases demonstrate the anomalies that the government's interpretation creates. On the one hand, the crime of identity theft targeted by Congress is typified by *United States v. White*, No. 06-4141, 2008 U.S. App. LEXIS 21654 (6th Cir. Oct. 10, 2008). In *White*, the defendant worked with an employee of Capital One to steal the names, addresses, account and social security numbers of more than 50 people holding Capital One credit cards, causing losses over $212,000 to those accounts. For this knowing identity theft, White was convicted and sentenced to 85 months for access device fraud, in violation of 18 U.S.C. § 1029(a)(2), to be followed by section 1028A's two-year consecutive mandatory minimum. *See also, e.g.*, *United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008) (affirming section 1028A conviction of a bank employee who forged her supervisor's signature on hundreds of checks totaling more than $150,000).

Unlike the type of individuals just described, who were plainly targeted by Congress in enacting section 1028A, Petitioner's case typifies the cases of individuals who had no intention to steal someone else's identity. It is undisputed that Flores-Figueroa

used false alien registration and social security numbers in connection with his employment. *See United States v. Flores-Figueroa*, 274 F. App'x. 501 (8th Cir. 2008). Lacking, however, was knowledge that the numbers belonged to someone else. There is no implication therefore of any intent to steal another's identity or indeed to prey on others by so doing as is typically associated with identity theft.

The case *United States v. Bobby Hammond*, pending in the United States Court of Appeals for the Fifth Circuit (No. 08-20320), provides another example of misapplication of aggravated identity theft charges to a defendant who had no intention to steal another person's identity. Hammond was an evacuee of New Orleans after it was devastated by Hurricane Katrina, and was entitled to disaster unemployment assistance funded by the Federal Emergency Management Agency. In order to apply for this assistance, Hammond called one of the centers established by the Louisiana Department of Labor to process such claims. Trial Tr. vol. 1, 178, Oct. 15, 2007, United States v. Hammond, 07-CR-116 (S.D. Tex.). Hammond provided the call center employee with requested information about himself – including his social security number – so that an application could be filled out on his behalf. *Id.* at 148.

Hammond called the assistance call center again when he had not yet received a debit card to collect his benefits. This time, the application created on his behalf misstated the last digit of his social security number: Hammond's social security number ends in 4726; the number on the second application

ends in 4725. *Id.* at 152. The Louisiana Department of Labor erroneously sent Hammond two debit cards – one for each social security number. Over the course of the next six months, Hammond used both cards, receiving 38 payments that totaled $3724 for each card. *Id.* at 161. As it turned out, the social security number ending in 4725 belonged to another New Orleans resident, albeit one who did not apply for assistance. *Id.* at 197-98.

Hammond was subsequently charged with mail fraud, wire fraud, and aggravated identity theft. Trial Tr. vol. 2, 288-300, Oct. 16, 2007. Hammond's defense to the aggravated identity theft charges was that he did not know that the social security number ending in 4725 belonged to someone else. The government conceded that it had no evidence that Hammond knew that he was using another person's social security number. Trial Tr. vol. 1, 126-27. The District Court refused to instruct the jury that the government was required to prove such knowledge. Trial Tr. vol. 2, 274-75.

Hammond was ultimately convicted of both wire fraud and aggravated identity theft in connection with wire fraud. He was sentenced to six months for wire fraud plus the two-year consecutive mandatory minimum for aggravated identity theft. Minute Entry 85, United States v. Bobby Hammond, 07-CR116 (S.D. Tex. May 16, 2008).

Certainly, Hammond knowingly accepted benefits to which he was not entitled. For that offense he was sentenced to serve only six months in prison. He is to serve an additional two years, however, based on

mere happenstance rather than upon the increased culpability that would result from knowingly using another person's identity.

The recent prosecution of undocumented workers at the Agriprocessors Inc., meat packing plant in Postville, Iowa is another stark example of the misapplication of aggravated identity theft charges to defendants who had no knowledge that they were using someone else's identity. On May 12, 2008, immigration enforcement officers arrested more than 300 immigrant workers at Agriprocessors. The majority of these workers were then charged with using Social Security or alien registration numbers that did not belong to them. As it turned out, most of the numbers being used belonged to other persons. Pursuant to Eighth Circuit precedent, however, in order to bring charges under section 1028A prosecutors were not required to – and they did not – allege that the workers using such numbers knew that the numbers belonged to other persons. *See United States v. Mendoza-Gonzalez*, 520 F.3d 912, 916 (8th Cir. 2008). This fact dramatically altered the stakes for those workers who had been using such numbers as compared with the workers using numbers that were simply fake. Facing a credible threat of a mandatory two-year minimum sentence under section 1028A, almost all of the workers who happened to have been using numbers belonging to other persons quickly accepted plea offers to serve five months in prison. By contrast, workers using false numbers that did not belong to anyone else were offered probation. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the*

Misinterpretation of Federal Law, 32 SEATTLE L. R. (forthcoming 2009), *available at* http://papers.ssrn.com. Yet there was no allegation of any difference in the mental state as between one group of workers and another. Happenstance, rather than increased culpability, led to greater punishment for some rather than others.

Individuals such as Flores-Figueroa, Hammond, and the immigration status violators at the Agriprocessors plant undoubtedly committed a crime. Such individuals, however, exhibited less criminal culpability than the "identity thieves" Congress targeted in passing the ITPEA. Yet the government's interpretation treats both categories of offenders identically. As such, defendants with sometimes vastly differing degrees of culpability are punished with equal severity. As the D.C. Circuit observed:

> common sense tells us that a defendant ought not receive two additional years of incarceration for picking one random number rather than another – unless, of course, Congress has made clear that he should. Put another way, it's only common sense to conclude that conviction under an identity theft statute requires actual theft.

Villanueva-Sotelo, 515 F.3d at 1249; *see also United States v. Sanchez*, No. 08-CR-0017 (CPS), 2008 U.S. Dist. LEXIS 35460, at *15 (E.D.N.Y. Apr. 30, 2008) (concluding that it does not "seem entirely just or effective to subject a defendant to two years

additional imprisonment for a circumstance (the fact that the false name chosen happened to belong to an actual person) over which the defendant has little control"); *Hairup*, 565 F. Supp. 2d at 1313 ("It is one thing to send a person to prison for an extra two years for intentionally using another person's identity while passing a fraudulent check and another to subject a person to the same punishment where there was no such intent."). Here, there is no indication that Congress sought to punish or reward mere chance. Rather, every indication is that Congress – in accordance with firmly established criminal justice principles – sought to impose additional punishment for increased culpability.

Finally, it is important to note that adopting the interpretation urged here will not indemnify the conduct at issue. Even without the additional sentence for aggravated identity theft, Flores-Figueroa must still serve a 51-month sentence. Other defendants who "transfer[ ], possess[ ], or use[ ]" fraudulent means of identification, not knowing them to belong to another person, will continue to be punished under the appropriate document fraud provision applicable to their conduct. Correctly read, however, the aggravated felony provision with its "knowing" element and the correspondingly greater punishment imposed by the statute, should only be applied where the increased level of evil intent is present to justify the additional mandatory minimum sentence enhancement.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit that 18 U.S.C. § 1028A(a)(1) does not require proof of knowledge that a means of identification belongs to another person, should be reversed.

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