No. 08-108

IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the Government must show that the defendant knew that the means of identification he used belonged to another person.

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BRIEF FOR THE PETITIONER

Petitioner Ignacio Flores-Figueroa respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 1a-3a, and the district court, Pet. App. 4a-15a, are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. Petitioner filed a timely petition for a writ of certiorari on July 22, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1028A is reproduced in full in the statutory appendix to this brief. In most relevant part, it provides:

§ 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.

STATEMENT OF THE CASE

Section 1028A(a)(1) of Title 18 imposes a mandatory two-year sentence upon anyone who, during and in relation to certain predicate offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Petitioner Flores-Figueroa used, without lawful authority, false social security and alien registration numbers in order to secure a job. Originally, petitioner used numbers that were simply fabricated and had never been assigned to an actual person. Subsequently, petitioner obtained a new set of identification numbers which, unbeknownst to him, had been assigned to real people. With respect to those false documents, the Government charged petitioner with "aggravated identity theft" under Section 1028A(a)(1). The question presented is whether a defendant "*knowingly* . . . uses, without lawful authority, a means of identification of another person," *id*. (emphasis added), within the meaning of that provision when he does not know that the means of identification he is using belongs to another person.

1. The facts of this case are undisputed. In 2000, petitioner Flores-Figueroa, a citizen of Mexico, used a false social security number and resident alien card to secure employment at L & M Steel Services, Inc., in East Moline, Illinois. U.S. C.A. Br. 3. The cards were in the name Horatio Ramirez, but neither number was actually issued to anyone of that name,

and the social security number had never been issued to anyone. *Id.* at 1, 5.[1]

After working at the company for six years, petitioner decided that he would like to work under his real name. He traveled to Chicago and purchased forged social security and permanent resident cards bearing his name. U.S. C.A. Br. 3-6. Although petitioner knew that the numbers on the cards did not belong to him, he did not know whether they belonged to another person or were — like his original false social security number — simply fabricated and belonged to no one. U.S. C.A. Br. 6.

Petitioner then presented the new documents to his employer and asked that it change his employment records accordingly. Petitioner's employer reported the request to U.S. Immigrations and Customs Enforcement, which determined that the numbers on the documents had been issued to other actual persons. U.S. C.A. Br. 5. There is no evidence that petitioner's use of those numbers caused any injury to the persons to whom the numbers actually belonged.

3. After being indicted by a federal grand jury, petitioner pled guilty to two counts of misuse of immigration documents (18 U.S.C. § 1546) for his use of the social security and permanent resident numbers, and one count of illegal entry into the United States (8 U.S.C. § 1325). However, petitioner

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[1] Although the record does not disclose whether the resident alien number had been issued to a real person, the Government never alleged that it had.

pled not guilty to two additional charges of aggravated identity theft (18 U.S.C. § 1028A). Pet. App. 2a; U.S. C.A. Br. 1.

During the bench trial that followed, petitioner testified that he purchased the documents without knowing that the numbers belonged to real people. U.S. C.A. Br. 6. The Government did not challenge that testimony or present any evidence to the contrary.

At the close of evidence petitioner moved for judgment of acquittal on the aggravated identity theft charges, arguing that the Government had not established that he knew that the social security and permanent resident numbers he used had been assigned to other people. Pet. App. 2a. The district court denied the motion, agreeing with the Government that such proof was not required under the statute. *Id.*

The district court sentenced petitioner to 51 months' imprisonment for the misuse of immigration documents and his illegal entry into the United States. Pet. App. 6a. In addition, as required by Section 1028A, the court imposed an additional mandatory two-year sentence for the aggravated identity theft counts, to be served consecutive to the other sentences. *See* Pet. App. 6a; 18 U.S.C. § 1028A(b). Accordingly, petitioner was sentenced to a total of 75 months' imprisonment. Pet. App. 2a-3a.

On appeal, petitioner renewed his objection to the sufficiency of the evidence to support his aggravated identity theft conviction. Relying on its recent decision in *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *petition for*

cert. filed (U.S. July 15, 2008) (No. 08-5316) — which had rejected the same challenge to the Government's interpretation of Section 1028A(a)(1) — the court of appeals affirmed the judgment. Pet. App. 3a. That decision had concluded that

> [T]he plain language of § 1028A(a)(1) limits "knowingly" to modifying "transfers, possess, or uses" and not "of another person." Thus, we conclude that § 1028A(a)(1) is unambiguous and that the Government was not required to prove that [the defendant] knew that [the person's whose means of identification he used] was a real person to prove he violated § 1028A(a)(1).

520 F.3d at 915.

SUMMARY OF ARGUMENT

As its name suggests, the "Aggravated identity theft" statute punishes an especially serious form of stealing. By common understanding and legal tradition, there is an important difference between accidental misappropriation and intentional theft. Taking another person's property without knowing that it belongs to someone else — as might happen, for example, when taking in a neighborhood cat, wrongly thinking it is a stray — may be a civil tort (you have to give the cat back), but it is not criminal "theft." The statutory definition of "Aggravated identity theft" tracks that distinction, punishing only those who "*knowingly* . . . use[], without lawful authority, the means of identification of another person." 28 U.S.C. § 1028A(a)(1) (emphasis added).

The court of appeals' construction of this provision — reading the word "knowingly" as

modifying only the provision's verbs and not the direct object ("means of identification of another person") — is inconsistent not only with traditional conceptions of theft, but also with the most natural understanding of the provision's language. In common usage, a state-of-mind adverb that modifies a transitive verb is understood to reach its direct object as well. To say "Jane knowingly took that cat of Mr. Smith's" is to convey that Jane not only knew that she took *something* (which turned out to be a cat belonging to Mr. Smith) but also that she knew that what was she was taking was a cat and that it belonged to Mr. Smith. That would be particularly clear if the speaker prefaced the statement by calling Jane a thief.

So, too, a statutory provision labeled "Aggravated identity theft," and prohibiting knowingly "us[ing] . . . the means of identification of another person" strongly conveys the requirement that the defendant knew that the means of identification he was using belonged to another person. Without such knowledge, the defendant is simply committing identity fraud, which is a separate offense punished elsewhere (a fact of which Congress was obviously aware, as it made some forms of identity fraud predicate offenses for aggravated identity theft).

Petitioner's reading also is consistent with the principal purpose of the Act, which was to provide a harsh penalty for the most severe forms of identity theft. Rather than targeting the most culpable identity thieves, the court of appeals' construction casts an indiscriminate net, drawing in both the serious identity thieves Congress had in mind (like a person who seeks out social security numbers of real

people in order to empty their bank accounts) and a random selection of identity fraud defendants who unknowingly pick identification numbers that belong to real people. Indeed, the court of appeals' interpretation would even ensnare someone who, during the course of an enumerated felony (like mail fraud), accidentally garbles the digits in his own identification number and has the misfortune of landing upon a number that was assigned to someone else. While such individuals are surely deserving of punishment for their underlying felonies, they are hardly the people one would expect Congress to intend to punish additionally, and severely, as aggravated identity thieves.

To be sure, requiring the Government to prove that a defendant knew that the means of identification he was using belonged to another person makes aggravated identity theft prosecutions somewhat more difficult. But that is no reason to read even an ambiguous statute in favor of the Government — the rule of lenity requires the opposite — and here the statutory language, structure, backdrop, and purposes all support the requirement. If Congress thinks that it would be better to dispense with that knowledge element of the offense, it is of course free to do so. But until it does, this Court should give the text of Section 1028A(a)(1) its ordinary meaning.

ARGUMENT

Petitioner does not contest that in using false identification documents to obtain employment in the United States, he committed acts of identification *fraud*, for which he pled guilty and was sentenced to more than four years' imprisonment. Pet. App. 6a. The question before the Court is whether he also committed "Aggravated identity *theft*" within the meaning of 18 U.S.C. § 1028A(a)(1) (emphasis added), even though he had no intention of stealing anyone's identity and did not, in fact, know that the identification numbers he was using actually belonged to other people. The answer to that question is "no."

I. The "Aggravated Identity Theft" Statute Requires Proof That The Defendant Knew That The Means Of Identification He Used Belonged To Another Person.

A. The Text and Structure Indicate Congress's Intent To Extend The Provision's Knowledge Requirement To "Of Another Person."

The Court's inquiry begins, of course, with the text. *Staples v. United States*, 511 U.S. 600, 605 (1994). And because federal crimes "'are solely creatures of statute,' . . . [d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area." *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citations omitted). Indeed, the "rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18

U.S. 76, 95 (1820). Thus, in construing criminal statutes, the Court "typically find[s] a 'narrow interpretation' appropriate." *Dowling*, 473 U.S. at 213 (citation omitted).

1. In Section 1028A(a)(1), the adverb "knowingly" is followed by a series of transitive verbs ("transfers, possesses, or uses") which are then followed by a direct object phrase ("means of identification of another person"). In common usage, a state-of-mind adverb like "knowingly" is ordinarily understood to apply not only to adjacent verbs, but also to any direct object that may follow. *See generally* Brief of Professors of Linguistics §§ A-B.

Consider, for example, the following statements:

(1) John knowingly discarded his sister's homework.

(2) Jane knowingly ate the last slice of pizza.

Under the Eighth Circuit's rule of grammar, the first sentence would be true so long as John knew he was discarding something, even if he thought it was waste paper or his own homework. Although that reading might be grammatically possible, in common usage the sentence is understood to convey that John knew that he was discarding something, that he knew that the something was homework, and that he knew that the homework belonged to his sister. That is, the knowledge requirement extends to the direct object and, indeed, to the entirety of the direct object phrase.

Likewise, in the second example, if the word "knowingly" modifies only the verb "eat," the sentence is true even if Jane thought she was eating a piece of pita bread or believed that there was more

pizza in the refrigerator. But no speaker of English would think that this was the intended meaning of the sentence.

It is thus unsurprising that the Government has conceded elsewhere that the knowledge requirement of Section 1028A(a)(1) is not limited to the provision's verbs but extends, at least in part, to the verbs' direct object phrase. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008) ("As the government concedes, the mens rea requirement must extend at least to the direct object's principal modifier, 'of identification.'").

Having made that reasonable concession, it is hard to see how the Government can maintain that, as a linguistic matter, the knowledge requirement can only be read to extend to "means of identification" but not to the qualifying phrase "of another person." Once the word "knowingly" is "emancipated from merely modifying the verbs," and is conceded to extend to the verbs' direct object, then "as a matter of grammar it is difficult to conclude that the word 'knowingly' modifies one of the elements in [the subsection,] but not the other." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994). The direct object of the provision's verbs, after all, is the entirety of the phrase "means of identification of another person." *See* Linguists' Br. § B.

Consider, for instance, these examples:

(3) John knowingly ate a bushel of his neighbor's apples.

(4) John knowingly ate a bushel of apples of his neighbor's.

A normal English speaker would understand either sentence to mean that John knew not only that he had eaten something, or even that he had eaten a bushel of appels. One would understand the sentences to assert as well that John knew that the bushel of apples belonged to his neighbor. That is, the reader would think that the word "knowingly" extends not only to the verb "ate" and to the direct object noun "bushel," but also to the rest of the direct object phrase, however expressed.

Indeed, the focus of the adverb in both sentences (and in many others like them) is on the words modifying the direct object noun. One normally would not think that "knowingly" was inserted in the sentences, for example, to make clear that John didn't *accidentally* eat the apples when he really meant just to smell them, or was meant to make clear that John knew that what he was eating was a bushel of apples, not oranges. The focus instead is on John's knowledge that the bushel of apples belonged to his neighbor; that is, on the words at the very end of the direct object phrase.

The same is true of similarly constructed statutes. The "normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection." *X-Citement Video, Inc.*, 513 U.S. at 79 (Stevens, J., concurring). Of course, Congress can demonstrate a different intent through grammatical or structural cues. *See, e.g.*, *id*. at 67-68. But there is nothing in the language of Section 1028A(a)(1) to signal to the reader that the knowledge requirement unexpectedly stops half-way

through the phrase "means of identification of another person."

2. The most natural reading of the language of Section 1028A(a)(1) is confirmed by the structure and accepted meaning of its immediate neighbor, Section 1028A(a)(2). That subsection provides:

> **(2) Terrorism offense**.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, **[1]** a means of identification of another person or **[2]** *a false identification document* shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

18 U.S.C. § 1028A(a)(2) (emphasis added).

The Government conceded in the D.C. Circuit that this provision requires it to prove that a defendant charged with using a "false identification document" knew that the identification document was, in fact, false. *Villanueva-Sotelo*, 515 F.3d at 1239. That is, the Government agreed that the knowledge requirement extends to the entire direct object phrase "false identification document," including the word "false" which qualifies the direct object noun phrase ("identification document"), just as the words "of another person" qualifies the direct object noun phrase "means of identification" in the prior clause. The Government's position thus requires the Court to accept one of two implausible propositions: (a) that the knowledge requirement in Section 1028A(a)(2) hopscotches among the

provision's various elements, landing on the verbs and the words "means of identification" before leaping over "of another person" to alight on "false identification document"; or (b) that the knowledge requirement applies to the "of another person" element in the terrorism offense provision but not in its immediate predecessor provision, Section 1028A(a)(1).

The more sensible reading is that Congress intended the knowledge requirement to extend to the entirety of the direct object phrase in every instance, consistent with ordinary usage.

B. The Natural Reading Of The Text Is Consistent With The Traditional Conception Of "Theft" And The Treatment Of Mens Rea Requirements In Criminal Statutes.

Petitioner's construction of the statute also draws support from the legal backdrop against which it was enacted, including the traditional understanding of theft and longstanding presumptions about the scope of mens rea requirements in criminal statutes.

1. Traditional Understanding Of "Theft"

This is not the first time this Court has been required to construe the mens rea element of a federal statute criminalizing a form of theft.

In *United States v. Morissette*, 342 U.S. 246 (1952), a defendant was accused of "knowingly . . . convert[ing] property of the United States," 18 U.S.C. § 641, after he gathered and sold seemingly abandoned scrap metal that, unbeknownst to him,

belonged to the U.S. Air Force. *Morissette,* 342 U.S. at 247. The question in this Court was whether the Government was required to prove that the defendant knew that that the property was not abandoned but instead belonged to someone else. In reversing the conviction, this Court explained that

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Id. at 263. In light of that principle, this Court assumed that in proscribing "knowing conversion" — a "larceny-type offense," *id*. at 271 — Congress incorporated the traditional requirement that the defendant know that the property he took belonged to another. *Id*. at 270-71. And because the trial court had not required the prosecution to prove that element, the Court reversed his conviction. *Id*. at 276.

The same principles should lead to the same result in this case.

In enacting Section 1028A(a)(1), Congress criminalized a form of theft. Indeed, the provision is expressly entitled "Aggravated identity *theft*," 18 U.S.C. § 1028A (emphasis added), and was enacted as part of the "Identity *Theft* Penalty Enhancement Act," Pub. L. 108-275, § 1, 118 Stat. 831 (2004) (emphasis added). The legislative history likewise

demonstrates that Congress viewed Section 1028A as punishing a type of theft, albeit in a new and modern context.[2]

And as the decision in *Morissette* illustrates, an essential element of theft is the knowledge that the property misappropriated in fact belongs to another. *See* 342 U.S. at 270-73.[3] Thus, theft "cannot be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner."

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[2] *See, e.g.*, H.R. Rep. 108-528, at 3 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 779 (explaining that that the object of the provision was to address the "the growing problem of identity *theft*," and target "persons who *steal* identities," *i.e.*, "identity thieves") (emphases added); *Hearing on H.R. 1731 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Timothy Coleman, Counsel to Assistant Att'y Gen., Crim. Div., Dep't of Justice) (testimony explaining that "a person commits aggravated identity theft by *stealing* someone's identity in order to commit a serious federal predicate offense") (emphasis added).

[3] *See also e.g.*, O.W. HOLMES, JR., THE COMMON LAW 71 (1881) (explaining that larceny is "'the taking and removing, by trespass, of personal property *which the trespasser knows to belong either generally or specially to another*, with *intent* to deprive such owner of his ownership therein'") (emphasis added) (citation omitted); BLACK'S LAW DICTIONARY 1516 (8th ed. 2004) (defining "theft" as the "felonious taking and removing of another's personal property *with the intent of depriving the true owner of it*") (emphasis added); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) ("[T]he act of stealing; *specif*: the felonious taking and removing of personal property *with intent to deprive the rightful owner of it.*") (emphasis added).

Regina v. Thurborn, 169 Eng. Rep. 293, 293-94 (1848). For example, "to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property." *Morissette*, 342 U.S. at 261 n.19 (citing *Johnson v. State*, 36 Tex. 375 (1871)); *see also, e.g.*, 2 RUSSELL ON CRIMES 98 (1828) (same for accidental misappropriation of neighbor's sheep); *Regina v. Riley*, 169 Eng. Rep. 674 (1853) (same).

Certainly nothing in the text or legislative history of Section 1028A suggests that Congress intended to abandon this defining aspect of the traditional understanding of theft. The House Report accompanying the Act includes a list of cases illustrating the type of conduct Congress intended to cover. H.R. Rep. No. 108-528, at 5-6, 2004 U.S.C.C.A.N. at 781-82. In most (if not all) of the examples, the defendant clearly knew that the identification he or she was using belonged to another person. *See Villanueva-Sotelo*, 515 F.3d at 1244. For example, the Report discusses a customer service representative using his position to access personal consumer credit information from three credit reporting agencies — a scheme that allowed him to access the personal information of 30,000 victims. H.R. Rep. No. 108-528, at 5, 2004 U.S.C.C.A.N. at 781. Another case involved a health club employee who stole credit card data from members, and provided the stolen identity information to an associate convicted of conspiracy to bomb the Los Angeles International Airport in 1999. *Id.* The one example relating to immigration likewise fits squarely within the traditional notions of theft: a Mexican citizen obtained federal benefits by using

the name and social security number of his former brother-in-law, a U.S. citizen. *Id*. at 6, 2004 U.S.C.C.A.N. at 782.

And although the state of the defendants' knowledge in other examples might be subject to debate, *see United States v. Godin*, 534 F.3d 51, 59-61 (1st Cir. 2008), at the very least none plainly encompasses an instance in which a defendant simply used an identification number that, unbeknownst to him, turned out to have been assigned to another person. *See Villanueva-Sotelo*, 515 F.3d at 1245.

The same is true of the examples raised in the floor discussion of the Act. Representative Carter, the author of the Act, stated that the Act would "facilitate the prosecution of criminals who *steal* identities," such as a student at the University of Texas who stole 55,000 Social Security numbers from a university database. 150 Cong. Rec. H4808, H4810 (2004) (emphasis added). He also gave the example of a former motor vehicles clerk who pleaded guilty to stealing information from immigration papers to sell identification cards to undocumented immigrants. *Id.* Notably, although his statement made clear that he viewed the clerk as an identity thief, Representative Carter did not suggest that the immigrants who received the false identification cards were subject to the Act. *Id*.

2. *Presumption That Mens Rea Requirements Apply To All Facts That Make The Defendant's Conduct Unlawful*

Congress also enacted Section 1028A(a)(1) against the backdrop of this Court's tradition of construing "criminal statutes to include *broadly applicable* scienter requirements." *X-Citement Video, Inc.*, 513 U.S. at 70 (emphasis added). Thus, absent significant reason to believe that Congress intended otherwise, "a conventional *mens rea* element . . . require[s] that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605; *see also Dixon v. United States*, 548 U.S. 1, 5 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.") (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998) (footnote omitted)); *Rogers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion) (applying presumption to federal firearms statute). Thus, for example, in *Morissette*, the Court explained that in light of tradition, "knowing conversion requires . . . . [that the defendant] must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." 342 U.S. at 270-71.[4]

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[4] There are exceptions to the presumption, including with respect to "jurisdictional" elements that go to the forum for prosecuting the crime rather than the criminality of the act. *See, e.g.*, *United States v. Feola*, 420 U.S. 671, 683-85 (1975). But no such exceptions applies here.

By the time Congress enacted Section 1028A, this presumption was widely recognized[5] and, in fact, had been codified as a principle of construction in the Model Penal Code for more than 40 years. Section 2.02(4) of the Code, adopted in 1962, provides:

> When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

MODEL PENAL CODE § 2.02(4) (1985).

When considering the proper interpretation of federal statutes, this Court has often looked to the Model Penal Code.[6] Here, the general interpretive

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[5] *See, e.g.*, John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1113 (1999) ("Where Congress has expressly prescribed a definite culpability requirement somewhere in the statute, the Court . . . appl[ies] this express kind of culpability to all material elements of the statute.").

[6] *See, e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (citing the Code definition of attempt when construing 8 U.S.C. § 1326(a)); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-410 (2003) (relying on the Code when interpreting 18 U.S.C. § 1951); *United States v. Bailey*, 444 U.S. 394, 404-05, 408 (1980 (citing the Code when discerning the *mens rea* requirement of 18 U.S.C. § 751(a)); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (noting the Code's influence in defining *mens rea*, and as support for the "generally disfavored status" of strict-liability offenses).

principle suggested by the Code accords with this Court's own tradition and performs a valuable function in "giving legislators a predictable background rule against which to legislate." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). It is also consistent with the rule of lenity, requiring a clear indication that Congress has intended to abandon tradition in favor of a more expansive definition of the crime. *See, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *infra* at 34-38.

Of course, "[p]rinciples derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates," when a statute indicates a contrary congressional intent. *United States v. Bailey*, 444 U.S. 394, 406 (1980). But in this case, the background principle applied by this Court and suggested by the Model Penal Code aligns with the most natural reading of the text and, as discussed next, the underlying purposes of the legislation.

C. Petitioner's Reading Is Consistent With The Statute's Purposes.

In enacting the aggravated identity theft provision, Congress focused on serious misconduct warranting extraordinary punishment above and beyond the penalties provided for the predicate offense. *See, e.g.*, H.R. Rep. No. 108-528, at 9, 2004 U.S.C.C.A.N. at 785 (noting that purpose of the Act was to "address the *most serious criminals*") (emphasis added); *Hearing on H.R. 1731 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th

Cong. (2004) (statement of Timothy Coleman, Counsel to the Assistant Att'y Gen., Crim. Div., Dep't of Justice) (testifying that the Act "would greatly help to ensure that the Department has the tools it needs to prosecute effectively, and punish appropriately, the *most serious forms* of identity theft") (emphasis added). Congress's focus on especially serious misconduct is illustrated by the extraordinary punishment it established for aggravated identity theft, requiring not only a mandatory two-year sentence, but also going to great lengths to ensure that the sentence would be served in prison and consecutively to the sentence for the predicate (or any other) offense. *See* 18 U.S.C. § 1028A(b).

Petitioner's construction of the statute is in keeping with these purposes. First, petitioner's reading reserves the severe punishment of Section 1028A for the most serious offenses, in which identity thieves knowingly obtain the means of identification of other persons, often for the purpose of exploiting victims and their good names.

Second, petitioner's construction sensibly distinguishes between the punishment due for the identity *fraud* — which is punished elsewhere, often severely[7] — and the additional punishment Congress intended for fraud used to commit identity *theft*. Under the Eighth Circuit's interpretation, that

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[7] *See, e.g.*, 18 U.S.C. § 1425 (unlawful attempt to procure citizenship) (up to twenty-five years); 18 U.S.C. § 1546(a) (use of false document to obtain immigration papers) (up to twenty-five years); 18 U.S.C. § 1546(b) (misuse of immigration documents) (up to five years).

additional punishment is applied even when all the defendant has done beyond the act of identity fraud is to have had the misfortune of picking identification numbers that happen to belong to another person. Indeed, someone who accidentally transposes the numbers of his own social security number in the course of committing a predicate offense — say a Ponzi scheme in violation of the mail fraud statute — would be considered an identity thief under the court of appeals' interpretation if it turns out that the garbled number happens to belong to someone else. The statue so construed would arbitrarily subject individuals with substantially identical culpability to dramatically different punishments. *See generally* BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980 (1981).

At the same time, under the court of appeals' interpretation, the law draws *no* distinction between defendants with significantly *different* levels of culpability. A defendant like petitioner is treated no differently than a defendant who intentionally steals thousands of credit card numbers and bilks their owners out of hundreds of thousands of dollars. Not only are both convicted of the same offense, but because Section 1028A imposes a mandatory two-year sentence — allowing the sentencing judge no discretion to raise or lower the sentence to reflect different levels of culpability — the two defendants get exactly the same sentence.[8]

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[8] As discussed below, the displacement of traditional sentencing discretion is a reason for vigilant application of the rule of lenity. *See infra* 37-38.

Petitioner's construction draws a more sensible line, limiting Section 1028A to individuals who engage in significantly more culpable conduct, while nonetheless ensuring that those guilty of identity fraud or immigration offenses are subject to appropriate punishment for their misconduct.[9]

II. The Court Of Appeals' Reasons For Giving Section 1028A(a)(1) An Expansive Interpretation Lack Merit.

The arguments in favor of a broader construction of Section 1028A are unconvincing, especially in view of the rule of lenity.

A. The Text Does Not Unambiguously Limit "Knowingly" To The Provision's Verbs.

The court of appeals offered two reasons for its conclusion that the text of Section 1028A(a)(1) "unambiguous[ly]" "limits 'knowingly' to modifying 'transfers, possesses, or uses' and not 'of another person.'" *Mendoza-Gonzalez*, 520 F.3d at 915. Neither is persuasive.

1. First, the court explained that "'Knowingly' is an adverb, and '[g]ood usage requires that the limiting modifier, the adverb 'knowingly,' be as close

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[9] To the extent the culpability for identity fraud is heightened by the fact that a defendant unknowingly used a means of identification belonging to another person, that fact presumably can be taken into account in setting the punishment for the identity fraud.

as possible to the words which it modifies." *Id*. at 915 (citation omitted) (alteration in original).

Whatever value this advice has as a general matter, it is of little assistance to the specific question here.[10] As shown above, words like "knowingly" commonly extend beyond neighboring verbs. And in the context of a statute establishing the mens rea element of a crime, "[c]ases holding that 'knowingly' extends to words and phrases other than verbs are legion." *Godin*, 534 F.3d at 56-57 (collecting cases).

Moreover, in this case, limiting "knowingly" to the verbs it abuts leads to a conclusion that even the Government acknowledges cannot be right. *See supra* at 10. It would, for example, allow the criminal prosecution of a person who knowingly transfers an

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[10] The advice is most aptly directed at an ambiguity — not presented in Section 1028A(a)(1) — as to which of several verbs, adjectives, or adverbs in a sentence the adverb modifies. Consider for example:

(5) The marathoners submitted their applications to compete *immediately*.

In this formulation, it is entirely unclear whether the adverb "immediately" modifies the verb "compete" or the verb "submitted." Placing the adverb closer to the verb it was intended to modify would eliminate that ambiguity. CHICAGO MANUAL OF STYLE ¶ 5.155 (15th ed. 2003). Similarly, the placement of the adverb "nearly" changes the meaning in the following sentences by making clear whether it modifies the verb "lost" or the adjective "all":

(6) We *nearly* lost all our camping equipment.

(7) We lost *nearly* all our camping equipment.

envelope from one person to another, having been told, and reasonably believing, that it contains a birthday card when it really contains a stolen Social Security card. Because there would be no question that the defendant knew that he was transferring something, the knowledge requirement of Section 1028A(a)(1) would be satisfied under the Eighth Circuit's interpretation. But that result makes no sense and Congress could not have intended it.

2. The court of appeals also sought support from the so-called "last antecedent rule." *Mendoza-Gonzalez*, 520 F.3d at 915. That rule suggests that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). For example, if a sign announces discounted movie tickets for "students, seniors, and children under the age of eight," the qualifying phrase "under the age of eight" is most likely meant to apply to children and not to seniors or students.

The rule has no application here. For one thing, this case does not involve any question about the modification of antecedents. The verbs in Section 1028A(a)(1) *succeed* rather than *antecede* the qualifying word "knowingly."[11] And as far as

[11] Apparently aware of the mismatch, the court of appeals attempted to define the "antecedent" requirement out of the "last antecedent" rule, describing the rule as holding that "qualifying words and phrases usually apply only to the words or phrases immediately preceding *or following* them, not to others that are more remote." *Mendoza-Gonzalez*, 520 F.3d at 915 (emphasis added). But that is not how this Court, or general authorities, have ever described the rule. *See, e.g.,*

petitioner can determine, this Court has never applied the "last antecedent" rule to anything other than antecedents.[12]

In addition, this Court has never applied the last antecedent rule to an adverb like "knowingly," the placement of which is far less informative in determining its reach.[13] Instead, as discussed above, such words are most naturally understood as having a broader reach and, when used to establish the mens rea element of a crime, are subject to other more specific presumptions. *See supra* at 9-12, 18-20.

3. The court of appeals' textual analysis also conflicts with this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985). In that case, the Court construed a statute criminally punishing

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Barnhart, 540 U.S. at 26; N. SINGER & J.D. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:33 (7th ed. 2007) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.").

[12] *See, e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344 (2005); *Barnhart*, 540 U.S. at 26; *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993); *United States v. Bass*, 404 U.S. 336, 339-40 & n.6 (1971); *Fed. Trade Comm'n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Scott v. Jones*, 46 U.S. (5 How.) 343, 357 (1847); *Ex parte Bollman & Ex parte Swartwout*, 8 U.S. (4 Cranch) 75, 93 (1807).

[13] Consider, for example, the following sentences:

(8) John *knowingly* discarded his sister's homework.

(9) John discarded his sister's homework *knowingly*.

The placement of the adverb does not alter the meaning of the sentence.

anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by" law. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1) (1982)). The question was whether the knowledge requirement extended to the phrase "in any manner not authorized by" law, thereby requiring proof that the defendant knew that his conduct was unlawful. *Id*. at 423. Under the Eighth Circuit's grammar rule, that question should have been easy — the adverb should have been understood as unambiguously limited to the verbs and would not extend any further. But this Court reached a contrary conclusion:

> Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.

Id. at 424 (emphasis in original). The ambiguity it confronted, the Court observed, is common in statutes with knowledge requirements. It noted that "[o]ne treatise has aptly summed up the ambiguity in an analogous situation":

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit"

> from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel — whether it modifies "sells," or "sells a security," or sells a security without a permit."

Id. at 424 n.7 (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972)).

That conclusion is starkly at odds with the Eighth Circuit's insistence that the knowledge requirement of Section 1028A is necessarily and unambiguously limited to the provision's verbs. The court of appeals attempted to distinguish *Liparota* on the ground that this Court gave the provision before it an expansive interpretation to avoid criminalizing otherwise innocent conduct. *Mendoza-Gonzalez*, 520 F.3d at 917-18. But this Court relied on that concern — "[i]n addition" to the rule of lenity, 471 U.S. at 427 — only *after* finding that the grammatical formulation in the provision was inherently ambiguous. 471 U.S. at 424 & n.7.

Even more, the Court found the statute grammatically ambiguous only with respect to a question far more difficult than the one the Court confronts in this case. In *Liparota*, the Court did not doubt that the knowledge requirement extended at least as far as the direct object of the operative verbs, requiring the Government to prove that the

defendant knew he was using "coupons or authorization cards." *See id.* 424. The harder question, upon which the Court found the statute ambiguous, was whether the knowledge requirement extended beyond that to the additional phrase "in any manner not authorized by" law. *Id.* at 423. And that question was difficult not only because it required extending the knowledge requirement beyond the direct object phrase, but also because of the traditional presumption that "ignorance of the law is no excuse." *Bryan v. United States*, 524 U.S. 184, 195 (1998).[14]

No such difficulties arise in this case. And as a result, *Liparota* not only squarely contradicts the court of appeals' conclusion that the word "knowingly is unambiguously limited to the verbs it precedes, but strongly supports petitioner's alternative reading of the statute.

4. In the end, the Eighth Circuit is reduced to relying on the fact that Congress could have written the provision to extend the knowledge requirement to

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[14] The Court thus did not advert to the risk of criminalizing otherwise innocent conduct to overcome some general grammatical rule limiting knowledge requirements to verbs. *See Liparota*, 471 U.S. at 426-27. Likewise, in *X-Citement Video*, the Court relied on concerns about innocent conduct not because it thought that the word "knowingly" ordinarily modifies only the verbs it precedes, but rather to overcome strong textual cues that the knowledge requirement did not extend as far as the defendant contended. *See* 513 U.S. at 68. (noting that knowledge requirement would not ordinarily reach elements "set forth in independent clauses separated by interruptive punctuation"). No such barriers exists in this case.

the "of another person element" in even clearer terms. *See Mendoza-Gonzalez*, 520 F.3d at 915 (citation omitted). This may be true. Congress could, for example, have applied the provisions to one who "*knowingly* transfers, possesses, or uses, what he *knows* to be a means of identification belong to another *known* person, *knowing* that he lacked lawful authority to do so." It could have said something similar in *Liparota* and *Morissette* as well. But that kind of repetition is awkward and, in fact, is never used in speech or statute. Moreover, as shown above, the formulation Congress did use is reasonably clear and consistent with ordinary usage and legal tradition.

B. The Eighth Circuit's Misreading Of The Text Is Not Justified By Any Statutory Purpose.

The court of appeals' analysis of the purposes of the statute does nothing to overcome the weakness of its textual analysis.

1. Protecting Victims

The Eighth Circuit regarded its interpretation as consistent with Congress's intent to apply Section 1028A whenever a defendant "wrongfully obtains and uses *another person's* personal data." *Mendoza-Gonzalez*, 520 F.3d at 916 (emphasis in original) (internal quotation marks and citation omitted). After all, the Government points out, "the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence." *Mendoza-Gonzales* BIO 9. This argument is unpersuasive.

As an initial matter, the premise of the argument is doubtful. It is by no means self-evident that the harm to victims is the same regardless of whether the defendant accidentally picks an identification number belonging to another person or if the defendant seeks out a number he knows belongs to another person with the intention of stealing the victim's identity. And, in fact, the Federal Trade Commission reported to Congress that the most serious cases of identity theft — that is, those instances causing the most harm — tend to involve a thief who knows his or her victim. Synovate, Fed. Trade Comm'n, IDENTITY THEFT SURVEY REPORT 28 (2003) ("Knowledge of the thief's identity is more likely when the crime involves more serious cases of Identity Theft."). Additionally, the Commission found that the vast majority of victims — eighty-five percent — report misuse of their existing accounts as the harm suffered. *Id.* at 33. In both categories of cases, the identity thief almost by definition has chosen a particular false identification precisely *because* he knows that it belongs to another actual person. Similarly, in describing its most important identity theft prosecutions, the Department of Justice has identified cases in which the defendant used stolen identities that the thief knew belonged to real people. Pres. Identity Theft Taskforce, COMBATING IDENTITY THEFT: VOLUME II, at 48-49 (2007). Such victimization presumably is less likely when the defendant does not even know that the victim exists.

At any rate, even if it were true that unknowing misappropriation of a means of identification posed the same harm to victims as intentional identity theft, that would be no reason to assume Congress

intended to elide this distinction in Section 1028A. The law commonly draws distinctions among offenses imposing the same harm or risk upon victims. The most obvious example is homicide — although the effect on the victim is the same, the punishments for negligent homicide, manslaughter, and premeditated murder vary enormously. Closer to home, the law also has long distinguished between accidental misappropriation (a civil tort) and intentional theft (a serious crime), even though the loss to the true owner is identical. *See Morissette*, 342 U.S. at 270-72.

Such distinctions persists because although the harm to victims is important, the degree of criminal punishment ordinarily hinges most importantly on the defendant's culpability, *see* Prof. of Crim. Law Br. § II, which in turn generally depends substantially on what he knew or intended. And there is no escaping the fact that there is a significant difference between the culpability of someone who uses an identification number not knowing that it belongs to someone else, and an intentional identity thief.

2. Facilitating Prosecutions

The court of appeals also objected that Congress could not have intended to require the Government to prove that the defendant knew that the means of identification he used in fact belonged to another person because such a requirement would "'place on the prosecution an often impossible burden.'" *Mendoza-Gonzalez*, 520 F.3d at 916 (quoting *Villaneuva-Sotelo*, 515 F.3d at 1255 (Henderson, J., dissenting)).

Again, the premise of the objection is unsound. Proof of what a defendant knew or believed is a

common part of many prosecutions, including every prosecution for theft. In *Morissette*, for example, this Court saw no impossible burden in requiring prosecutors to prove that the defendant knew that the property he had taken belonged to someone else. In such cases, the Government may rely on circumstantial evidence, which is often easily available and highly persuasive. *See Morissette*, 342 U.S. at 276; *see also, e.g.*, *Liparota*, 471 U.S. at 434. For example, how a defendant obtained the means of identification can be very probative. "[W]hen an individual obtains personal information by trolling through the victim's garbage or by improperly viewing files to which the perpetrator gains access, he obviously knows the information belongs to someone else." *Villanueva-Sotelo*, 515 F.3d at 1249. Also, in many cases the way the defendant used the means of identification can demonstrate the requisite knowledge. For example, using the identification to impersonate the victim, obtain credit, or conduct financial transactions, would make "little sense if the information at issue belonged to no one." *Id.* at 1250.

In short, there is no reason to believe that petitioner's construction of the statute would make it unduly difficult for prosecutors to convict the serious identity thieves Congress intended the statute to target. Nor does petitioner's interpretation leave the Government without recourse when the defendant did not know (or the Government cannot prove that he knew) that the false identification he was using belonged to another person. By definition, such defendants are subject to punishment under Section 1028A's predicate offenses, which provide for substantial punishment on their own.

Finally, any suggestion that the Court should construe ambiguity in a statute to facilitate prosecutions "turns the rule of lenity upside-down." *United States v. Santos*, 553 U.S. ___, 128 S. Ct. 2020, 2028 (2008) (plurality opinion). As discussed next, this Court "interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.*; *see also Morrisette*, 342 U.S. at 263 (refusing "by feat of construction . . . [to do] away with the requirement of a guilty intent," in order to "ease the prosecution's path to conviction").

III. The Court Of Appeals' Interpretation Is Inconsistent With The Rule Of Lenity.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025 (plurality opinion). "This principle is founded on two policies that have long been part of our tradition." *United States v. Bass*, 404 U.S. 336, 348 (1971).

> First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'

Id. (citations omitted). At the same time, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 128 S.Ct. at 2025 (plurality opinion).

1. In this case, the most the Government could hope to show is that the text of Section 1028A is ambiguous as to the scope of the Act's *mens rea* requirement. *See Liparota*, 471 U.S. at 424 & n.7. Although the rule of lenity does not preclude the use of the "traditional tools of statutory construction," to resolve a textual ambiguity, *Caron v. United States*, 524 U.S. 308, 316 (1998) (citation omitted), the ambiguity must, in fact, be resolved. That is, the rule of lenity is not reserved for unintelligible statutes or cases in which the traditional tools of construction leave the Court in absolute equipoise. Rather, it is a "canon of strict construction of criminal statutes." *United States v. Lanier*, 520 U.S. 259, 266 (1997). If a criminal defendant is to be required to seek clarity from indirect sources beyond the text of the statute itself, those sources must speak with clarity sufficient to ensure that no "reasonable doubt persists about a statute's intended scope." *Moskal v. United States*, 498 U.S. 103, 108 (1990). And "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990).[15]

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[15] The rule of lenity thus places primary emphasis on the clarity of the statutory language itself. *See, e.g.*, *Bass*, 404 U.S.

Here, the Government can point to nothing in the structure, legislative history, background legal rules, or purposes of the statute that decisively resolves any textual ambiguity in its favor. Indeed, none of the courts of appeals accepting its interpretation has done so on the strength of such evidence of legislative intent.[16] At best, the Government might argue that a broader statute would be *consistent* with Congress's general purposes in criminalizing identity theft. But that is not nearly

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at 347 ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have *spoken in language* that is clear and definite.") (internal quotation marks and citation omitted) (emphasis added); *United States v. R.L.C.*, 503 U.S. 291, 307-10 (1992) (Scalia, J., concurring in the judgment). Giving priority to the words of the statute reflects the practical reality that few lay people will have the resources or capacity to investigate the meaning of a criminal statute through a close reading of the legislative history or other indirect inferences drawn from general purposes. At the same time, it respects the basic separation of powers principles that also underlie the doctrine, recognizing that the words of the statute are by far the best indication of congressional intent. *See, e.g.*, *Morissette*, 342 U.S. at 263 (noting that the "doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that [courts] should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the *words used in the statute*") (emphasis added).

[16] Instead, all have found — incorrectly — that the statutory language was unambiguous. *See Mendoza-Gonzalez*, 520 F.3d at 915; *United States v. Hurtado*, 508 F.3d 603, 608-10 & n.8 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir. 2006).

enough. *See*, *e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990) (explaining that "longstanding principles of lenity . . . preclude our resolution of the ambiguity against [a criminal defendant] on the basis of general declarations of policy in the statute and legislative history").

2. The rule of lenity is especially appropriate in the context of provisions like Section 1028A which impose a mandatory minimum sentence.

For one thing, ambiguous mandatory sentencing provisions pose a heightened risk of leaving defendants "languishing in prison" far longer than Congress intended if erroneously construed. *Bass*, 404 U.S. at 348 (citation omitted).

At the same time, such provisions alter the tradition balance of power between the judicial and executive branch. *See, e.g.*, AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, RECOMMENDATIONS ON PUNISHMENT, INCARCERATION, AND SENTENCING 5, 27-28 (2004). "'It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Gall v. United States*, 128 S.Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums upset this "uniform and constant" role of judicial discretion and undermine the "notion of individualizing sentences." JUSTICE KENNEDY COMMISSION, *supra*, at 27. For example, the court of appeals' broad construction of Section 1028A(a)(1) would be less troubling if the statute permitted sentencing courts to distinguish between defendants

like petitioner and those who seek out others' identification for the express purpose of stealing their identities and emptying their bank accounts. Yet because the provision permits but a single, severe sentence, a broad construction of the statute risks disparities and injustices courts should be reluctant to assume Congress intended, absent clear instruction.

In addition, unduly broad interpretations of statutes with mandatory minimum sentences also risks aggrandizing the discretionary authority (and institutional power) of federal prosecutors, who can exercise substantial control over a defendant's eventual sentence through their unreviewable charging decisions. JUSTICE KENNEDY COMMISSION, *supra*, at 27-28; *see* Barbara S. Vincent & Paul J. Hofer, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (2004) ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward prosecution priorities, sometimes at the expense of other sentencing goals.").

Accordingly, this Court should not assume that Congress has altered the traditional balance of sentencing roles and authority without clear indicia of congressional intent. And because there is no such evidence here, the Court should reject the expansive interpretation given Section 1028A(a)(1) by the court of appeals in this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Section 1028A of Title 18 provides:

§ 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.

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

(b) Consecutive sentence.—Notwithstanding any other provision of law—

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

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment

imposed for the felony during which the means of identification was transferred, possessed, or used;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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