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 FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE UNITED STATES HISPANIC CHAMBER OF COMMERCE AS *AMICI CURIAE* ON BEHALF OF PETITIONER

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This *amicus curiae* brief is submitted on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") and the United States Hispanic Chamber of Commerce ("USHCC") in support of Petitioner.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")

MALDEF is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair, predictable, and even-handed interpretation and enforcement of the nation's criminal laws.

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[1] Pursuant to Supreme Court Rule 37.3(a), the *Amici Curiae* state that the parties have consented to the filing of this brief and that letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici Curiae* further state that no one other than MALDEF, USHCC, and their counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE UNITED STATES HISPANIC CHAMBER OF COMMERCE ("USHCC")

USHCC is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. Founded in 1979, the USHCC actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of more than 2.5 million Hispanic-owned businesses in the United States and Puerto Rico that generate in excess of $388 billion annually to the American economy. It also serves as the umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The USHCC has a direct interest in this case for several reasons. First, Hispanic employers and Hispanic employees play a significant role in the American economy. Hispanics are the largest minority group in the United States with an estimated population of over 41.3 million. Hispanics are the largest minority group in over 26 states, and they are estimated to grow by more than 1.7 million per year. (U.S. Census Bureau Data of 1970, 1990, 2000, 2004; Pew Hispanic Center, March 2004; Tomas Rivera Policy Institute.) Among minority groups, Hispanics continue to own the most companies, and by 2010, Hispanics will own 3.2 million companies and generate in excess of $465 million in revenues. (United States Small Business

Administration; HispanTelligence.) Hispanics also account for over 13 percent of the documented U.S. labor force and are expected to increase to 20 percent by 2030. (HispanTelligence.)

If the decision below is affirmed, Hispanic employers will face an unstable workforce. Most employers do not knowingly employ illegal aliens. All employers, including Hispanic employers, are potentially subject to investigations and possibly raids that can significantly impact their operations and create a drastic impact on the economy if employees caught up in those investigations and raids are prosecuted for aggravated identity theft in circumstances like that at issue here.

SUMMARY OF ARGUMENT

When Justice Oliver Wendell Holmes applied the rule of lenity in *McBoyle v. United States*, 283 U.S. 25, 27 (1931), he wrote:

> [a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that 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 far as possible the line should be clear.

Only if 18 U.S.C. § 1028A(a)(1) is read to require that a defendant actually know that the means of identification transferred, possessed or used is that of another person will the line drawn by the law be clear, and its warning fair.

If 18 U.S.C. § 1028A(a)(1) instead is read to permit conviction for aggravated identity theft regardless of whether a defendant knows that the means of identification at issue belongs to another real person, the law will have radically different applications to persons engaging in essentially the same activity.

Should this Court conclude that 18 U.S.C. § 1028A(a)(1) is ambiguous, it should apply the rule of lenity. Application of the rule is particularly appropriate in this case because the criminal statute at issue creates a category of aggravated offense based on the commission of a predicate felony, and then imposes a mandatory two-year consecutive sentence for that aggravated offense that in many instances far exceeds the sentence imposed for commission of the predicate crime. As is demonstrated in the brief of *Amici* Advocates for Human Rights, *et al.*, the weight of 18 U.S.C. § 1028A(a)(1) frequently falls on undocumented aliens. Yet, such a result is at odds with the far more flexible and nuanced scheme to address the use of false documents that Congress created within the framework of the body of law relating to citizenship and legal resident status.

ARGUMENT

POINT I

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL AVOID ANOMALOUS RESULTS IN THE SENTENCING OF SIMILARLY SITUATED DEFENDANTS

The Eighth Circuit's reading of 18 U.S.C. § 1028A(a)(1) results in very different punishments being meted out to people who have engaged in essentially the same activity. For example, twin brothers could purchase forged Permanent Resident cards from an individual in Chicago, as Petitioner did in this case, go to work at a steel plant, as Petitioner did in this case, and become the subject of a U.S. Immigration and Customs Enforcement ("ICE") investigation, as Petitioner was in this case. If brother #1 happened to have purchased and used a Permanent Resident card that bore a number that had never been issued to someone else, he would not be charged with aggravated identity theft. But if brother #2, who purchased his forged card on the same day and from the same person as brother # 1, and who worked alongside brother #1 in the steel plant, happened to have purchased a card that bore a number that had been issued to some other real person, under the reading of 18 U.S.C. § 1028A(a)(1) adopted by the Eighth Circuit, he would be charged with aggravated identity theft and, if convicted, would be sentenced to a term of imprisonment two years longer than that imposed on his twin.

The anomalous and inconsistent results that flow from the Eighth Circuit's reading of 18 U.S.C. § 1028A(a)(1)

are further illustrated by the case at bar. Mr. Flores-Figueroa worked at L & M Steel Services, Inc. for six years using a false Social Security number that had never been issued to anyone (and a name that was not his own). *Brief for Petitioner ("Pet. Br.")* at 3 – 4. In 2006, when he decided that he would like to work under his own name, he purchased a second forged Social Security card bearing his own name and a new number. *Pet. Br.* at 4. Unfortunately for Mr. Flores-Figueroa, unknown to him, the number on this new Social Security card had been assigned to another real person. *Id.* Therefore, after ICE conducted its investigation, Mr. Flores-Figueroa was charged with having violated 18 U.S.C. § 1028A(a)(1), and was ultimately convicted and sentenced for that offense. Had Mr. Flores-Figueroa continued to use the false Social Security number with which he had commenced his employment, he could not have been charged with aggravated identity theft since that Social Security number had never been assigned to another real person. His sentence, had he been arrested while still using his first Social Security number, would have been two years shorter.[2] Ironically, then, the attempt by Mr. Flores-Figueroa to work under his own name, rather than a name that was not his own, led to his being charged with aggravated identity theft.[3]

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[2] The record does not disclose whether the Resident Alien number Mr. Flores-Figueroa used when he was first employed ever had been issued to a real person, but the Government did not allege that it had. *Pet. Br.* at 3, n. 1

[3] The other irony here is that, unlike the typical identity thief, a defendant like Mr. Flores-Figueroa has an interest in using false identification that has never been assigned to any real person, rather than the reverse.

It has long been recognized that there is an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks, 196, 209 (1967), quoted approvingly in *United States v Bass*, 404 U.S. 336, 348 (1971). Surely, if Congress had intended the harsh anomaly that results from the Eighth Circuit's reading of § 1028A(a)(1) it would have declared its intention in "language that is clear and definite." *United States v. Universal C.I.T. Credit Corp*., 344 U. S. 218, 222 (1952). Since it did not, all ambiguity in the statute must be resolved in favor of Petitioner. *Id.*

POINT II

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL BE CONSISTENT WITH THE APPROACH ADOPTED BY CONGRESS TO ADDRESS VARYING DEGREES OF CULPABILITY RELATING TO THE USE OF FALSE DOCUMENTS

The reading of § 1028A(a)(1) adopted by the Eighth Circuit not only leads to the anomalous results discussed above. It also has profound impact on the terms of imprisonment imposed on defendants. This is perhaps best illustrated by the Fourth, Eighth, and Eleventh Circuit decisions now familiar to this Court because they are the decisions that present the conflict with the First, Ninth, and D. C. Circuits on the question before the Court: *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006); *United States v. Mendoza-Gonzalez*, 520 F.3d 912

(8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008). In each of these three cases, the total sentence imposed was six months for the predicate felonies and two years for aggravated identity theft, premised on commission of those predicate felonies.

In *Montejo*, 442 F.3d 213, the defendant pleaded guilty to one count of possession of a false immigration document (in violation of 18 U.S.C. § 1546(a)) and one count of false representation of a social security number (in violation of 42 U.S.C. § 408(a)(7)(B)). He moved to quash the count of the indictment that charged him with violation of 18 U.S.C. § 1028A(a)(1), asserting that while he knew that the numbers on the cards he had obtained were false and did not belong to him, he did not know that the numbers in fact had been assigned to other real people. The motion was denied.

Thereafter, Mr. Montejo was tried on the count of aggravated identity theft based on stipulated facts. It was agreed that Mr. Montejo had walked into the United States from Mexico and that he had purchased a Resident Alien card and a Social Security card in Phoenix, Arizona for $60.00. The Resident Alien card bore his photo and a fabricated number. The Social Security card bore his name along with a fabricated number. As stated by the Court of Appeals,

> [i]t turned out that, unknown to Montejo, the Alien Registration number that Montejo provided [to his employer] had been assigned to a Tanzanian man . . . who by that time had

> become a naturalized U.S. citizen. Likewise, the Social Security number used by Montejo had actually been assigned to another person, though the rightful owner is not named.

442 F.3d at 214. The trial court convicted Mr. Montejo of violating 18 U.S.C. § 1028A(a)(1), concluding, in a judgment affirmed by the Fourth Circuit, that it was not necessary for the Government to prove that Mr. Montejo knew that the means of identification at issue belonged to another real person. Mr. Montejo was sentenced to six months' imprisonment on each of the two predicate felonies and two years' imprisonment for aggravated identity theft (as well as supervised release and special assessments). *Id.* at 215.

The defendant in *Mendoza-Gonzalez*, 520 F.3d 912, was sentenced to a total of 30 months in prison: six months' imprisonment on four separate counts of using false documents and making false statements, with all four sentences to run concurrently, followed by a consecutive twenty-four month sentence for aggravated identity theft. In July 2006, Mr. Mendoza-Gonzalez had applied for work in a pork processing plant in Iowa using an identification card in the name of Dinicio Gurrola. Late in 2006, ICE conducted a raid at the plant. Mr. Mendoza-Gonzalez was interviewed and arrested. He was charged with making a false claim of citizenship in violation of 18 U.S.C. § 1015(e), using false identification documents in violation of 18 U.S.C. § 1546(b)(1), using fraudulently obtained immigration documents in violation of 18 U.S.C. § 1546(a), and making a false representation of a social security number in violation of 42 U.S.C.§ 408(a)(7)(B), as well as aggravated identity theft.

A jury convicted Mr. Mendoza-Gonzalez of all counts. After he was sentenced, he appealed only the conviction for aggravated identity theft, arguing, *inter alia*, that 18 U.S.C. § 1028A(a)(1) required the Government to prove beyond a reasonable doubt that he had had actual knowledge that the identification he had used belonged to an actual person, and that the Government had failed to meet its burden. The Eighth Circuit affirmed the conviction, resulting in Mr. Mendoza-Gonzalez being sentenced to an additional 24 months in prison beyond the six months that he was to serve concurrently for the four separate predicate offenses.

In *Hurtado*, 508 F.3d 603, the defendant was found guilty of four counts of making false statements and falsely representing himself as a United States citizen and two counts of aggravated identity theft. He was sentenced to a total of 30 months in prison: six months' imprisonment on the first four counts, to be served concurrently, and 24 months of imprisonment for aggravated identity theft, to be served consecutively to the sentences on the first four counts. Mr. Hurtado had applied for a passport using as supporting identification a birth certificate and a driver's license in the name of Marcos Colon. He had paid $1500 to an individual in Boston for the birth certificate and social security card. On appeal, Mr. Hurtado challenged only the convictions for identity theft. The Eleventh Circuit held that 18 U.S.C. § 1028A(a)(1) does not require that the Government prove that a defendant knew that the means of identification he possessed and used belonged

to another actual person. It therefore affirmed the conviction.[4]

The fact that the sentences for the predicate felonies were six months long in each of the three cases discussed above presumably reflects consistent application of the Sentencing Guidelines to those felonies when the defendant is a first-time offender. Under the Guidelines, these predicate felonies generally are characterized as base level 6 or base level 8 felonies.[5] The applicable

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[4] While the relationship between the sentences for the predicate felonies and for the crime of aggravated identity theft are not so disparate as those discussed above in the other cases that create the circuit conflict with respect to the question before this Court, the sentence for aggravated identity theft, particularly because the statute mandates that the sentence be both of 24 months' duration and consecutive, does add substantially to the total sentence imposed. In the case at bar, almost 1/3 of the total sentence is attributable to the conviction for aggravated identity theft: Mr. Flores-Figueroa received a sentence of 75 months' imprisonment: 24 months for aggravated identity theft, and 51 months for misuse of immigration documents and entry without inspection. In *United States v. Miranda-Lopez*, No. 07-50123, 2008 W. L. 2762392 (9th Cir. July 17, 2008), defendant was sentenced to 39 months for unlawful entry and an additional 24 months for aggravated identity theft. The length of the sentences is not referenced in the circuit court opinions in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), and *United States v. Godin*, No. 07-2332, 2008 WL 2780646 (1st Cir. July 18, 2008).

[5] For ease of reference, all citations to the United States Sentencing Commission, Guidelines Manual ("USSG") referenced in this paragraph are grouped in this footnote. The portions of the Guidelines Manual applicable to the predicate

(Cont'd)

sentence for a first conviction at such levels is zero to six months. Significantly, the Sentencing Guidelines provide for increases of offense levels and concomitantly increased sentences if certain additional characteristics exist. For example, the level is increased by two, and the sentence potentially doubled to 12 months, if a defendant is an unlawful alien who previously had been deported or if he previously was convicted for a felony immigration offense. Additionally, the offense level and sentence will be further increased if, for example, a defendant fraudulently obtained a United States passport. In the cases of Messrs. Montejo, Mendoza-Gonzalez, and Hurtado, it appears that none of these or any other additional characteristics existed. The sentences imposed for the predicate felonies therefore did not exceed six months. Notwithstanding the absence of any of the additional characteristics enumerated in the Sentencing Guidelines, each was sentenced to an additional 24 months' imprisonment because the means of identification used in connection with the commission of the predicate felony happened to bear a number that had been assigned to another real person — and the defendant therefore was held to have committed aggravated identity theft.

The impact of a conviction for aggravated identity theft does not fall solely on a defendant and his family,

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felonies in issue are set forth in USSG, App. A. The sentences are discussed in USSG §§ 2B1.1 and 2L2.2. The additional offense characteristics giving rise to increased levels and sentences are set forth at § 2L2.2(b). The Sentencing Table appears at USSG p. 396 (Nov. 1, 2008).

significant as that may be. It also has ramifications for employers. Employers have an interest in a stable workforce. As the federal government itself has recognized, "Given the vulnerabilities in the 1-9 system, many employers that do not knowingly employ illegal aliens nevertheless have unauthorized workers, undetected in their workforce." FAR Case 2007-13, Employment Eligibility Verification, 73 Fed. Reg., at 33, 379. In the event of an ICE investigation or raid, the effect on the stability of a workforce can be dramatic if undocumented workers are prosecuted for aggravated identity theft as well as document fraud. The Postville, Iowa prosecutions described in the brief of *Amici* Advocates for Human Rights, *et al*. offer compelling evidence on this point. In that case, prosecutors typically offered defendants who had used fraudulent documents that did not bear the names or identification numbers of other actual people probation but they insisted on prison terms in plea bargains with those defendants who had used documents that bore the names or identification numbers of other actual people – regardless of whether the defendants knew they had used a means of identification of another real person.[6] Brief of *Amici* Advocates for Human Rights, *et al.* at 15.

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[6] In fashioning the nation's immigration laws, Congress has made paths to relief from removal (and continued participation as part of a stable workforce) available to people convicted of false document offenses so long as those offenses are not aggravated felonies and do not involve moral turpitude. See Brief of *Amici* Advocates for Human Rights, *et al.* at Point II B. Conviction for aggravated identity theft would bar such relief.

Such disparate outcomes, which bear little or no relationship to an individual defendant's degree of culpability, will be avoided if this Court applies the rule of lenity to any ambiguity it finds in 18 U.S.C. § 1028A(a)(1). Resolution in favor of Petitioner also will be consistent with the overall scheme adopted by Congress to address different degrees of culpability relating to the use of false documents.

CONCLUSION

The Government's reading of 18 U.S.C. § 1028A(a)(1) turns that statute into the equivalent of a game of chance: if a person purchases and uses a Social Security number or other means of identification that was never issued to another real person, he cannot be prosecuted for aggravated identity theft, but if the number he receives happens to have been issued to another real person, he will be. As stated by the District Court in *Villanueva-Sotelo*, 515 F.3d at 1249:

> [C]ommon 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.

The rule of lenity supports this common sense result.

For the foregoing reasons, *Amici* urge the court to answer the question presented, "yes," and to reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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