No. 08-___

IN THE
Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ignacio Flores-Figueroa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-3a), is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

In relevant part, 18 U.S.C. § 1028A 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

18 U.S.C. § 1028A(a)(1) imposes a mandatory consecutive two-year sentence enhancement on anyone who, during and in relation to certain enumerated offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person. . . ."[1] In this case,

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[1] The enumerated offenses are listed in 18 U.S.C. § 1028A(c) and include violations of:

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

petitioner acknowledged using, without lawful authority, false Social Security and Alien Registration numbers in order to obtain employment. However, he denied (without contradiction by the Government) knowing that the false identification numbers in fact belonged to some other actual person, as opposed to simply being fabricated numbers never issued by the Government to a real person.

The question presented by this petition, upon which the courts of appeals are extensively divided, is whether a defendant "*knowingly* . . . uses, without lawful authority, a means of identification of another person" within the meaning of Section 1028A(a)(1) when he does not know that the identification he is using in fact belongs to another person.

1. On April 17, 2000, petitioner, a citizen of Mexico, used a false Social Security number and Resident Alien card to obtain employment at a steel company. U.S. C.A. Br. 3. At the time, petitioner used the name Horatio Ramirez, but neither the

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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).

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

Social Security number nor the Resident Alien card had been issued to anyone of that name. *Id*. at 1, 5. In fact, the Social Security number was invalid. *Id*. at 5.[2]

In 2006, petitioner desired to begin working under his real name. He presented his employer with a new Social Security number, purportedly issued under petitioner's name, and a Permanent Resident card with his name and a registration number. U.S. C.A. Br. 3. Both documents were forgeries purchased by petitioner from an individual in Chicago. *Id*. at 5-6. Suspicious, the company's owner reported the request to U.S. Immigrations and Customs Enforcement (ICE).

The ICE investigation revealed that none of the documents were issued to either petitioner or to his former alias, Horatio Ramirez. Instead, the Social Security card bearing petitioner's name used a number issued to a minor. U.S. C.A. Br. 5. The Permanent Resident card likewise bore a number that was issued to someone else. *Id*.[3]

3. In early 2006, a federal grand jury indicted petitioner on two counts of Misuse of an Immigration Document, in violation of 18 U.S.C. § 1546, and one count of Illegal Entry, in violation of 8 U.S.C. § 1325. The grand jury also indicted petitioner on two counts of Aggravated Identity Theft, in violation of 18 U.S.C.

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[2] The record does not disclose whether the Resident Alien card number was valid or not.

[3] The record does not disclose any further details about the persons whose Social Security and Permanent Resident numbers were used on the cards bearing petitioner's name.

§ 1028A, arising from his use of the Social Security and Permanent Resident cards purportedly issued in his own name.[4] Pet. App. 2a; U.S. C.A. Br. 1. Petitioner pled guilty to both counts of Misuse of an Immigration Document and the sole count of Illegal Entry. Petitioner pled not guilty to the two counts of Aggravated Identity Theft and consented to a bench trial. U.S. C.A. Br. 1.

At trial, petitioner admitted that the documents were never issued to him, but testified that he purchased the identification documents without any knowledge that the numbers they bore belonged to real people. U.S. C.A. Br. 5.

At the close of evidence, petitioner argued that the Government had failed to prove aggravated identity theft because it had not presented any evidence to contradict his testimony that he did not know that the means of identification he had used belonged to "another person," as required by Section 1028A(a)(1). Pet. App. 2a. The district court rejected petitioner's construction of the statute, agreeing with the Government that no such proof was required. Accordingly, the court found petitioner guilty and sentenced him to seventy-five months imprisonment, twenty-four of which were the result of the Section 1028A enhancement. *Id*. at 2a-3a.

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[4] Because the original Social Security card bearing the name Horatio Ramirez did not, in fact, belong to "another person," as required by Section 1028A(a)(1), petitioner was not charged with Aggravated Identity Theft with respect to that document. Likewise, petitioner was not charged with Aggravated Identity Theft with respect to the original false Resident Alien card.

4. Petitioner appealed his conviction to the Eighth Circuit, renewing his argument that § 1028A requires proof that the defendant knew that the identification he used belongs to another person. Pet. App. 3a. The court of appeals summarily affirmed, explaining that it had recently "resolved this issue and determined that under the plain language of the statute, 'knowingly' modified only the verbs 'transfers, possesses, or uses,' and not the phrase 'of another person.'" *Id*. (citing *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316)).

In that prior decision, the Eighth Circuit acknowledged that its construction of the statute, while consistent with the law of the Fourth and Eleventh Circuits, conflicts with a decision of the D.C. Circuit. *Mendoza-Gonzalez*, 520 F.3d at 915-16 (citing *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006)).

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law. Indeed, in the five days prior to the filing of this petition, the division over the mens rea requirement of 18 U.S.C. § 1028A(a)(1), has grown from the 3-1 split acknowledged by the Eighth Circuit at the time of petitioner's appeal to a 3-3 conflict that shows no sign of abating.

Three courts of appeals now hold that "aggravated identity theft" under Section 1028A(a)(1) occurs only when the defendant knows that the means of identification he is using in fact belongs to another person. Three other circuits hold the opposite. This division of authority is considered, entrenched, and untenable. The question presented arises frequently, particularly in the context of immigration prosecutions when, as in this case, a defendant seeking employment obtains a false Social Security number without knowing whether the number is simply made up and belongs to no one, or in fact matches the number assigned by the Government to another person. The continued disparate application of the severe penalties of Section 1028A(a)(1) to similarly situated defendants should not endure. Accordingly, this Court should grant certiorari in this case to resolve the conflict and restore uniformity to this important area of federal law.

I. Six Courts Of Appeals Are Evenly Divided Over The Scope Of The Mens Rea Requirement Of 18 U.S.C. § 1028A(a)(1).

1. In the past two years, six courts of appeals have considered the mens rea requirement of Section 1028A(a)(1), dividing evenly into two diametrically opposed camps.

First, Ninth, and D.C. Circuits. The First, Ninth, and D.C. Circuits have each held that the knowledge requirement of Section 1028A(a)(1) extends to the "of another person" element of the offense, requiring the Government to prove that the defendant did not simply invent a false identification number in cases such as this, but knew that he was using the means of identification belonging to another actual person. *See United States v. Godin*, No. 07-2332, 2008 WL 2780646, at *1 (1st Cir. July 18, 2008) ("[W]e hold that the 'knowingly' *mens rea* requirement extends to 'of another person.' In other words, to obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person."); *United States v. Miranda-Lopez*, No. 07-50123, 2008 WL 2762392, at *5 (9th Cir. July 17, 2008) ("[W]e thus hold that the government was required to prove that Miranda-Lopez knew that the identification belonged to another person."); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1235 (D.C. Cir. 2008) ("[W]e hold that section 1028A(a)(1)'s mens rea requirement extends to the phrase 'of another person,' meaning that the government must prove the defendant actually knew

the identification in question belonged to someone else.").

These courts have rejected the assertion that the word "knowingly" should be read as modifying only the verbs that follow it. The D.C. Circuit, for example, has pointed out that "the Model Penal Code adopts as a general principle of construction a rule under which, absent evidence to the contrary, the mens rea requirement encompasses all material elements of an offense." *Villanueva-Sotelo*, 515 F.3d at 1239 (citing *Model Penal Code* § 2.02(4) (1985)). *See also Godin*, 2008 WL 2780646, at *4 ("In criminal statutes, adverbs that are also *mens rea* requirements frequently extend to non-verbs.") (collecting examples). In fact, the D.C. Circuit observed that even the Government admitted that the knowledge requirement of Section 1028A(a)(1) extends beyond the verbs in the provision, requiring proof at the very least that the defendant knew that what he was using was a "means of identification." *Villanueva-Sotelo*, 515 F.3d at 1238.

Whether the knowledge requirement extends all the way to the phrase "of another person," these three circuits have found, is a question upon which the statutory text is ambiguous. *See Godin*, 2008 WL 2780646, at *5; *Miranda-Lopez*, 2008 WL 2762392, at *4; *Villanueva-Sotelo*, 515 F.3d at 1243. That conclusion, these courts believe, is supported by this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), which found that a similar formulation was "ambiguous" "[a]s a matter of grammar" because "it is not at all clear how far down the sentence the word 'knowingly' is intended to travel." *Liparota*, 471 U.S. at 424-25 n.7; *see*

Villanueva-Sotelo, 515 F.3d at 1241; *Godin*, 2008 WL 2780646, at *5; *Miranda-Lopez*, 2008 WL 2762392, at *3-*4.

Turning to other indicia of legislative intent, these circuits have noted that the structure, title ("Aggravated identity theft"), and basic purposes of the provision (as illustrated in the legislative history) either undermine the Government's reading or do not resolve the textual ambiguity. The D.C. Circuit has concluded that these sources show that the essence of the crime defined in Section 1028A(a)(1) is intentional theft and that when a defendant simply acquires an identification number (like a made-up Social Security number) that fortuitously belongs to someone else, "it is odd – and borders on the absurd – to call what [the defendant] did 'theft.'" 515 F.3d at 1246 (citation omitted). The First and Ninth Circuits have agreed that the legislative history tends to support this view, but ultimately concluded that the history as a whole was inconclusive. *Godin*, 2008 WL 2780646, at *7-*8; *Miranda-Lopez*, 2008 WL 2762392, at *4.

Because they found the text of the statute ambiguous – and concluded that the structure, history, and purposes of the provision failed to resolve the ambiguity – the First and Ninth Circuits applied the rule of lenity to decide the statutory question in favor of the defendant. *Godin*, 2008 WL 2780646, at *8; *Miranda-Lopez*, 2008 WL 2762392 at *5. Although the D.C. Circuit reached the same conclusion based on its reading of the text in light of the statute's structure, purposes, and legislative history, *Villanueva-Sotelo*, 515 F.3d at 1246, it also stated that "if we harbored any doubt about this . . .

we would turn to the rule of lenity to resolve the dispute," *id.* (citation and internal quotation marks omitted).

Fourth, Eighth, and Eleventh Circuits. Three other circuits have considered the same essential arguments and reached the opposite conclusion. *See United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008) (holding that "the Government was not required to prove that Mendoza-Gonzalez knew that [the person whose name and social security number he used] was a real person to prove he violated § 1028A(a)(1)"), *petition for cert. filed*, (U.S. July 15, 2008) (No. 08-5316); *United States v. Hurtado*, 508 F.3d 603, 610 (11th Cir. 2007) (per curiam) (holding that that "§ 1028A(a)(1) [does] not require the government to prove that [a defendant] knew that the means of identification he possessed and used belonged to another actual person"), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir. 2006) (holding that "the defendant need not be aware of the actual assignment of the [identification] numbers to an individual to have violated the statute").

These courts have reasoned that the adverb "knowingly" is most sensibly read as modifying solely the verbs that follow – "transfers, possesses, or uses" – and not the broader object of those verbs (*i.e.*, "means of identification of another person"). *See Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 609; *Montejo*, 442 F.3d at 215. The courts have acknowledged that this Court has given a broader reach to the knowingness requirement of similarly structured statutory provisions in cases like *Liparota*. But they distinguish such cases as resting

on a concern, absent here, about criminalizing otherwise innocent conduct. *See Mendoza-Gonzalez*, 520 F.3d at 917; *Hurtado*, 508 F.3d at 609-10; *Montejo*, 442 F.3d at 216.

All three circuits thus have found the statute unambiguous. *See Mendoza-Gonzalez*, 520 F.3d 916; *Hurtado*, 508 F.3d at 610 n.8; *Montejo*, 442 F.3d at 217. Thus, none relies on legislative history, although the Eighth Circuit has indicated that it would view that history as supporting its reading of the text. *See Mendoza-Gonzalez*, 520 F.3d at 916-17. And because they found the text of the statute clear, the Fourth and Eighth Circuits have declined to apply the rule of lenity to construe the statute in a manner more favorable to defendants. *Hurtado*, 508 F.3d at 610 n.8; *Montejo*, 442 F.3d at 217.

2. Writing separately in *Godin*, Judge Lynch persuasively argued that the time has come for this Court to resolve the circuit conflict:

> It would be beneficial if the Supreme Court resolved the mens rea issue. The circuit conflict is certainly ripe. And there are a large number of district court opinions on the issue. The issue is important and affects a large number of cases and a large number of defendants. For each of those defendants, an additional mandatory two-year sentence makes a great deal of difference.

2008 WL 2780646, at * 10 (Lynch, C.J., concurring).

This Court should heed Judge Lynch's call. The circuit conflict is considered, mature, and ripe for resolution. Each of the six circuits has given the question presented extensive, thoughtful consideration. The courts have acknowledged each

other's holdings and reasoning, but have been unable to agree on the meaning of the statute.[5] As a result, there is no reasonable prospect that the division will be resolved without this Court's intervention. Indeed, two of the circuits have denied petitions for rehearing en banc, one on each side of the split. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), *reh'g en banc denied*, (June 13, 2008); *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *reh'g en banc denied*, (May 1, 2008).

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[5] *See Godin*, 2008 WL 2780646, at * 3 (First Circuit noting that the "circuits are divided on the issue" and citing the decisions of the Fourth, Eighth, Eleventh, and D.C. Circuits); *id.* at *4 (explaining basis for its disagreement with the Fourth, Eighth, and Eleventh Circuits); *id.* at *6-*8 (disagreeing with the D.C. Circuit's conclusion that the provision's structure, title, and legislative history resolve the ambiguity); *Miranda-Lopez*, 2008 WL 2762392, at *4 (Ninth Circuit acknowledging split between D.C. Circuit and the Fourth, Eighth, and Eleventh Circuits, and declaring that "we follow the D.C. Circuit's reasoning"); *Mendoza-Gonzalez*, 520 F.3d at 915-16 (Eighth Circuit noting decisions of the Fourth, Eleventh, and D.C. Circuits); *id.* at 916 ("We acknowledge that we have reached a different conclusion than the D.C. Circuit" and explaining why); *Villanueva-Sotelo*, 515 F.3d at 1242 (D.C. Circuit acknowledging "that the Fourth Circuit reached the opposite conclusion in [*Montejo*]" and that "the Eleventh Circuit, along with several district courts, has adopted this interpretation," but concluding that "[w]e respectfully disagree with *Montejo"* and explaining why); *Hurtado*, 508 F.3d at 609 (finding support in the Fourth Circuit's resolution of the question). Moreover, two of the decisions have generated dissents, further airing the arguments in favor of the conflicting readings of the statutes. *See Miranda-Lopez*, 2008 WL 2762392, at *7-*10 (Bybee, J., dissenting); *Villanueva-Sotelo*, 515 F.3d at 1250-61 (Henderson, J., dissenting).

Moreover, no purpose would be served by further percolation. By and large, the decisions have addressed the same set of arguments regarding the text, purposes and legislative history of the Act, as well as the meaning of this Court's decisions in cases like *Liparota*. Given the thoroughness of the opinions already issued, it is unlikely that future decisions in other circuits will shed significant light on the debate.

In addition, as Judge Lynch observed, the question is recurring and important:

> A large number of cases are involved. The range of underlying felonies that can trigger this offense is broad. To give but a few examples of the scope of the issue, this offense can be charged when an unlawful means of identification is used in the course of Social Security fraud, 18 U.S.C. § 1028A(c)(11), passport fraud, *id*. § 1028A(c)(7), theft of public property, *id*. § 1028A(c)(1), fraud in the acquisition of a firearm, *id*. § 1028A(c)(3) , citizenship fraud, *id*. § 1028A(c)(2), and other crimes.

Godin, 2008 WL 2780646, at *10 (Lynch, C.J., concurring). In 2005, an FBI official testified before Congress that the Bureau had over 1600 open investigations into identity theft and expected the number of grow.[6] Thus, it is perhaps unsurprising

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[6] *See Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use*, *Before the Subcomm. on Corrections and Rehabilitation of the S. Comm on the Judiciary*, 109th Cong. (2005) (Statement of Chris Swecker, Assistant Director, Criminal Investigative Division,

that six circuits have addressed the meaning of Section 1028A(a)(1)'s mens rea requirement in the past two years alone.

Finally, the present division of authority is unfair and untenable. Individuals committing precisely the same acts are subject to significantly different sentences depending on accidents of geography. The disparity is exacerbated by the fact that Congress took pains to ensure that defendants subject to Section 1028A(a)(1) would serve the entirety of the two-year additional sentence on top of the sentence received for their predicate offense. *See* 18 U.S.C. § 1028A(b) (requiring sentence be served consecutively to any other sentence and prohibiting courts from placing defendants convicted under this provision on probation). If the Government's construction of the statute is wrong, defendants in three circuits are serving sentences substantially harsher than Congress intended. On the other hand, if the Government's view is correct, Congress's intent to harshly punish aggravated identity theft often will be thwarted, including in the Ninth Circuit, the most populous circuit in the country.

3. This case presents an ideal vehicle for resolving the circuit conflict. The statutory question was the principal basis for dispute in the district court and the sole question presented on appeal. Pet. App. 3a. Moreover, the question is dispositive of petitioner's conviction. Petitioner does not dispute that his conviction was lawful unless the Government

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Federal Bureau of Investigation), *available at* http://judiciary.senate.gov/testimony.cfm?id=1437&wit_id=4162.

was required to prove that he knew that the Social Security or Permanent Resident registration number he used belonged to another actual person. At the same time, the Government acknowledged on appeal that petitioner "testified that he purchased the means of identification in Chicago and did not know that they were issued to real people." U.S. CA Br. 6. And the Government did not claim to have presented any evidence to contradict that testimony at trial.

II. A Defendant Does Not Knowingly Commit Aggravated Identity Theft Unless He Knows That The Means Of Identification He Is Using Belongs To Another Person.

Certiorari is also warranted because the decision below is wrong, conflicting with both the best reading of Section 1028A(a)(1) and the rule of lenity.

1. The text of Section 1028A(a)(1) is ambiguous as to the scope of its knowledge requirement. The word "knowingly" could apply to one or more of four aspects of the offense, as the provision applies to anyone who "knowingly **[1]** transfers, posseses, or uses, **[2]** without lawful authority, **[3]** a means of identification **[4]** of another person." 28 U.S.C. § 1028A(a)(1).

It is at least grammatically possible that the provision requires only that the defendant knew that his actions constituted "transferring, possessing, or using" something, and that Congress did not care whether the defendant knew that the thing was a means of identification, or that he lacked lawful authority for his action, or that the identification belonged to someone else. But this Court's

precedents demonstrate that this is surely not the only, or even the most plausible, reading.

Confronted with a similarly constructed provision in *Liparota v. United States*, 471 U.S. 419 (1985), this Court recognized the inherent textual ambiguity in such formulations. There, the Court construed a statute criminally punishing anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by" law. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1) (1982)). The Government argued that the prosecution was required to prove only that the defendant knowingly "use[d], transfer[ed], acquire[d], alter[ed], or possesse[d]" the food stamps in a manner that – known to the defendant or not – happened to violate federal law. *Id.* at 423. The defendant argued that the knowledge requirement extended through the entire clause, requiring the Government to show that he also knew that the manner in which he using the food stamps was not authorized by law. *Id.* Importantly for the present discussion, the Court found the language of the statute – which took the same form as Section 1028A(a)(1), using "knowingly" before a series of verbs followed by a direct object and a further limiting phrase – to be grammatically ambiguous:

> 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.

471 U.S. at 424 (emphasis in original). The Court then noted that one "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)).

The Fourth, Eighth, and Eleventh Circuits nonetheless have insisted that the text of Section 1028A(a)(1) is unambiguous, but their reasons are unpersuasive. These courts have asserted that because "knowingly" is an adverb, and located proximate to the words "transfers, possesses, or uses," it must be understood to apply only to those verbs. *See Mendoza-Gonzalez*, 520 F.3d at 915;

Hurtado, 508 F.3d at 309; *Montejo*, 442 F.3d at 215. But this Court recognized in *Liparota* that this is not true. 471 U.S. at 424 (noting of similarly constructed provision, "the words themselves provide little guidance" as to the reach of the knowingness requirement).[7] As the First Circuit rightly observed, "[c]ases holding that 'knowingly' extends to words and phrases other than verbs are legion." *Godin*, 2008 WL 2780646, at * 4 (collecting cases). To take but one example, no one could reasonably think that the federal statute criminalizing "knowingly . . . possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1), would apply to a delivery truck driver who knew he was transporting for distribution *some* kind of substance, but did not know that the sealed packaged in his vehicle contained cocaine. Yet that would be the consequence of a rule applying the

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[7] The Fourth, Eighth, and Eleventh Circuits insist that *Liparota* is inapposite because its construction of the knowledge requirement in 7 U.S.C. § 2024(b)(1) was intended to avoid criminalizing innocent conduct. *Mendoza-Gonzalez*, 520 F.3d at 917; *Hurtado*, 508 F.3d at 609; *Montejo*, 442 F.3d at 213. That description of the basis of the Court's decisions is incorrect; the Court made clear that the concern about innocent conduct was simply one of several factors, including the rule of lenity, supporting its holding. *Liparota*, 471 U.S. at 426-27. But more importantly for present purposes, it was only because the Court found the text of the statute ambiguous that it was required to turn to other considerations like lenity and avoiding the criminalization of seemingly innocent conduct. *Id.* at 424. That textual conclusion was driven by the Court's recognition of the inherent ambiguity of the formulation used in the statute before it – a formulation repeated in Section 1028A(a)(1) – rather than by any policy concern. *Id.* at 424-25, 430.

adverb "knowingly" only to the verbs in Section 841(a)(1).

Equally absurd results would follow from applying the knowledge requirement of Section 1028A(a)(1) only to the provision's verbs. Take, for example, a person who knowingly transfers an envelope from one person to another, having been told, and in fact reasonably believing, that it contains a birthday card when it really contains a stolen Social Security card. *See United States v. Godin*, 476 F. Supp. 2d 1, 2 (D. Me. 2007). If the knowledge requirement in Section 1028A(a)(1) extends only to the provision's verbs, criminal liability would attach. But not even the Government believes that this is a sensible reading of the statute. In the D.C. Circuit the Government acknowledged that "the mens rea requirement must extend at least to the direct object's principal modifier, 'of identification.'" *Villanueva-Sotelo*, 515 F.3d at 1238.

Having made that reasonable concession, it is difficult 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." That is, once the word "knowingly" is "emancipated from merely modifying the verbs," 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). At the very least, the reach of the knowledge requirement is textually ambiguous.

The circuits accepting the Government's construction have also noted that Congress could

have written the provision to unambiguously extend the knowledge requirement to the "of another person element." *See*, *e.g.*, *Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 609. Congress could, for example, have applied the provisions to one who "*knowingly* transfers, posses, 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." But that kind of repetition is awkward and inconsistent with common usage, as would be a provision making abundantly clear that the knowledge requirement applies only to the verbs (*e.g.*, "knowingly transfers, posses, or uses something which, whether known to him or not, is a means of identification of another person used without lawful authority"). In the end, the construction Congress did use is consistent with common usage, but inherently ambiguous.

2. This Court must resolve the statutory ambiguity in favor of lenity unless "resort to 'the language and structure, legislative history, and motivating policies' of the statute" removes all "reasonable doubt . . . about [the] statute's intended scope." *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see*, *e.g.*, *Liparota*, 471 U.S. at 427. In this case, those considerations support the interpretation lenity would otherwise require.

a. *Legal Backdrop.* Section 1028A(a)(1) must be read in light of a legal tradition that ordinarily imputes the mens rea requirement of a statute to each of its elements, unless there is some good reason to do otherwise. *See Model Penal Code* § 2.02(4) (1985) ("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."); *X-Citement Video, Inc.*, 513 U.S. at 70 (reading criminal statute in light of "our cases interpreting criminal statutes to include *broadly applicable* scienter requirements") (emphasis added). To be sure, that presumption can be overcome, but as discussed next, nothing in the structure, history, or purposes of the statute points strongly in favor of an unusual reading here.

b. *Structure*. The subsection immediately following Section 1028A(a)(1) 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, 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.

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

Two aspects of this provision render the Government's construction of Section 1028A(a)(1) untenable.

First, the italicized language makes clear that in the case of terrorism offenses, it is enough that the defendant knew that his identification document was false, regardless of whether or not he knew that the identification belonged to another person. Congress thus knew how to make irrelevant the defendant's

knowledge of whether the identification he used belonged to another, and did so in an immediately adjoining subsection of the statute.

Second, in the D.C. Circuit, the Government conceded that the knowledge requirement in the terrorism offense provision extended to the phrase "false identification document," such that the defendant would have to know that the document was false in order to commit the offense under that prong of the provision. *Villanueva-Sotelo*, 515 F.3d at 129. But that concession requires the Court to believe 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). Because identical neighboring clauses in a statute should be read in a consistent manner, neither view is plausible.

c. *Purposes and Legislative History*. The purposes and legislative history of the provision further support petitioner's reading. The title of the provision is "Aggravated identity theft," 18 U.S.C. § 1028A. The word "theft" implies the knowing acquisition of the property of another.[8] Thus, for

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[8] *Black's Law Dictionary* defines "theft" as the "felonious taking and removing of another's personal property with the intent of depriving the true owner of it." *Black's Law Dictionary* 1516 (8th ed. 2004).

example, one who takes in a cat, believing that it is a stray, does not commit "theft" as commonly understood simply because it turns out that the cat in fact belongs to someone else. It is the thief's knowledge that the taken property belongs to another that distinguishes misappropriation from thievery. *See*, *e.g.*, *United States v. Hurt*, 527 F.3d 1347, 1350 (D.C. Cir. 2008) (theft requires specific intent to take possession of the property of another); W. LaFave, *Substantive Criminal Law* § 19.5(a) (2d ed. 2003) (same). Likewise, when a person makes up a Social Security number, having no idea whether it belongs to someone else, it is hard to see how that conduct qualifies as "theft" – much less "aggravated theft" – within the ordinary meaning of those terms.

The legislative history likewise demonstrates that Congress was focused on the problem of intentional identity theft, not unintentional misappropriation. Pursuant to the Identity Theft Penalty Enhancement Act, H.R. 1731, 108th Cong. (2004), in 2004 Congress modified § 1028A to "address[] the growing problem of identity *theft*. . . [including that] many identity *thieves* receive short terms of imprisonment or probation." H.R. Rep. No. 108-528, at 3 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780 (emphasis added). The practices Congress focused on all involved the intentional theft of the identification of known individuals. Thus, the House Report emphasized that because of the large number of complaints to the Federal Trade Commission from victims whose information was pilfered, "we must try to find new ways to combat" not only such unsophisticated practices as "dumpster diving," but also theft of "information that was originally collected for an

authorized purpose," including database hacking and illicit employee access to confidential information. *Id.* at 4-5. Indeed, all of the specific examples cited in the House Report "involved defendants who . . . knew the identification they used belonged to another." *Villanueva-Sotelo*, 515 F.3d at 1244 (describing that all of the specific examples cited in the House Report "involved defendants who . . . knew the identification they used belonged to another"). And although some examples may be clearer than others, *see Godin*, 2008 WL 2780646, at *7, at the very least none plainly encompasses a case 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 distinction between theft and unknowing misappropriation is not a technicality, but instead goes to the core of what Congress found to be so especially culpable as to warrant additional, and quite severe, punishment as "aggravated identity theft." The focus on intentional theft illustrates that Congress was principally concerned in this provision not with addressing *fraud*, which is punished severely elsewhere,[9] but rather with recognizing the additional level of culpability that arises when a defendant knowingly seeks to use a means of identification that belongs to another person and, therefore, intentionally risks inflicting special harms on the person whose identity the defendant steals.

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[9] For example, violations of 18 U.S.C. § 1546, punishing "Fraud and misuse of visas, permits, and other documents," are punishable by up to a ten years' imprisonment for a first offense. *Id.* § 1546(a).

Indeed, the legislative history focuses extensively on that potential harm. *See Villanueva-Sotelo*, 515 F.3d at 1243-44 (collecting examples).

Of course, an individual sometimes can be harmed by accidental misappropriation of his means of identification as well. But that does not change the fact that the degree of a defendant's culpability turns most critically on the state of his intentions.[10] Put simply, someone who intends to steal another's identity is worthy of greater punishment than one who unintentionally picks an identification number out of thin air that happens to match one already issued to someone else. To be sure, both defendants have engaged in culpable conduct in using a false identification. But the purpose of the sentencing enhancement in Section 1028A(a)(1) is to provide additional punishment when that *fraud* also amounts to identity *theft*, a concept commonly understood to encompass the intentional taking of property known to belong to another.

Applying the knowledge requirement to the "of another person" element thus tracks the distinction most relevant to culpability. The Government, on the other hand, would mete out extraordinary punishment not on the basis of anything the

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[10] Moreover, the risk of harm to the victim is more significant when the misappropriation is intentional – a defendant like petitioner, who uses false identification to secure employment with no intention of stealing anyone's identity, surely is less dangerous than is a defendant who seeks out Social Security numbers and other identification belonging to real people, often in order to facilitate absconding with their money or misusing their credit.

defendant intended, but rather based on the random happenstance that some defendants acquire Social Security numbers that happen not to have been assigned yet, while others are not so lucky.

3. Even if it is possible to hypothesize a Congress that would have intended such a result, such speculation is an insufficient basis for resolving a textual ambiguity in a criminal statute against the defendant. "When interpreting a criminal statute," this Court does not "play the part of a mind reader." *United States v. Santos*, 128 S. Ct. 2020, 2026 (2008) (plurality opinion). Instead, in choosing between plausible constructions of a criminal statute, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Accordingly, when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955).

In this case, at the very least, consideration of the structure, history and purposes of Section 1028A(a)(1) does not decisively resolve the textual ambiguity in favor of the Government.[11] The rule of lenity therefore requires rejection of the

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[11] Indeed, none of the circuits accepting the Government's view have done so on the strength of the legislative history, strcture, or purposes of the statute. Instead, all have found – incorrectly – that the statutory language was unambiguous. *See Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 608; *Montejo*, 442 F.3d at 217.

Government's interpretation and reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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