Case No. 19-50912

United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID FOX DUBIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, NO. 1:17-CR-227-1

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT AND REVERSAL

Cynthia Eva Hujar Orr
Co-Chair, NACDL Fifth Circuit
Amicus Curiae Committee
310 S. St. Mary's Street
29th Floor Tower Life Building
San Antonio, TX 78205
(210) 226-1463
whitecollarlaw@gmail.com

Nicole DeBorde Hochglaube
Co-Chair, NACDL Fifth Circuit
Amicus Curiae Committee
3515 Fannin St.
Houston, Texas 77004
(713) 526-6300
Nicole@HoustonCriminalDefense.com

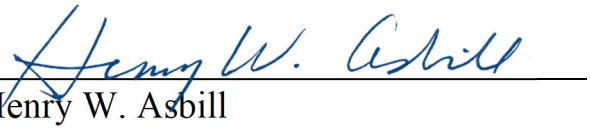
Henry W. Asbill
Bradley A. Marcus
BUCKLEY LLP
2001 M Street, NW, Suite 500
Washington, DC 20036
(202) 349-8000
hasbill@buckleyfirm.com
bmarcus@buckleyfirm.com

Daniel R. Alonso
BUCKLEY LLP
1133 Avenue of the Americas
Suite 3100
New York, NY 10036
(212) 600-2400
dalonso@buckleyfirm.com
Counsel for Amicus Curiae NACDL

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that the National Association of Criminal Defense Lawyers does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

DATED: April 16, 2021



Henry W. Asbill
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate potential disqualification or recusal.

Parties

1. Mr. David Fox Dubin, Appellant
2. Mr. William Joseph Dubin, Co-Defendant

Amicus Curiae

1. National Association of Criminal Defense Lawyers

Counsel

1. Counsel for Defendants:

   Mr. Michael C. Gross, San Antonio, Texas

   Mr. Anton Metlitsky, New York, New York

   Mr. Jason Zarrow, Los Angeles, California

   Ms. Biola E. Macaulay, Newport Beach, California

   Mr. E.G. Morris, Austin, Texas

   Mr. Michael McCrum, San Antonio, Texas

   Mr. Scott McCrum, San Antonio, Texas

2. Counsel for the United States:

   Mr. Mark R. Stelmach, AUSA, Austin, Texas

   Ms. Elizabeth Berenguer, AUSA, San Antonio, Texas

Mr. Joseph H. Gay, Jr., AUSA, San Antonio, Texas

Mr. Rex G. Beasley, AUSA, San Antonio, Texas

Mr. Justin Chung, AUSA, Del Rio, Texas

3. Counsel for *Amicus Curiae* National Association of Criminal Defense Lawyers:

Cynthia Eva Hujar Orr

Nicole DeBorde Hochglaube

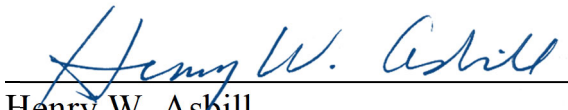
Henry W. Asbill

Daniel R. Alonso

Bradley A. Marcus

Judges

The Honorable Xavier Rodriguez, United States District Court for the Western District of Texas, San Antonio Division



Henry W. Asbill
Counsel for Amicus Curiae

STATEMENT REGARDING ORAL ARGUMENT

This case has been scheduled to be reheard *en banc* during the week of May 24, 2021. Under Fed. R. App. P. 29(a)(8), the National Association of Criminal Defense Lawyers requests this Court's permission to present oral argument as *amicus*. All parties consent to this request.

As detailed in the *amicus* brief, this case presents issues regarding overcriminalization, prosecutorial overreach, and the proper construction of criminal laws. We believe it would be important for the Court, in properly resolving these issues, to have the opportunity to hear argument from, and pose appropriate questions to, counsel for *amicus*, who will provide a national perspective on an issue that has recurred around the country.

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I. NACDL Statement of Interest[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL has a nationwide membership, with many thousands of direct members and up to 40,000 members with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

In furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL often appears as *amicus curiae* in cases involving overcriminalization, prosecutorial overreach, and the proper construction of criminal laws. This case squarely presents all three of these issues, as we demonstrate in this brief. NACDL therefore urges the Court to define the scope of the identity theft statute, 18 U.S.C.

[1] All parties consent to the filing of the *amicus* brief. *See* Fed. R. App. P. 29(a)(2).

§ 1028A, narrowly, which is consistent with Congressional intent, and reverse appellant's conviction.[2]

II. Introduction and Summary of Argument

The real identity theft here is a simple health care fraud prosecution impersonating an aggravated identity theft case. As the district court correctly observed at sentencing, Appellant David Dubin's fraudulent billing scheme ran afoul of other laws, but "it wasn't aggravated identity theft." ROA.4999. Notwithstanding the rather obvious fact that the identity theft allegations neither involved impersonation nor were distinct from the execution of the fraud itself, the government pushed forward, and in so doing, expanded the aggravated identity theft statute, 18 U.S.C. § 1028A ("Section 1028A"), beyond the limits of what Congress contemplated. The panel's decision, if upheld, threatens to cement that ill-advised use of prosecutorial discretion and transform garden-variety fraud into aggravated identity theft. The unfortunate impact on Dubin is that the statute carries a mandatory two-year prison sentence—on top of the sentence for the underlying crime. The unfortunate impact on our country is that it reflects a continuing pattern of overcriminalization and prosecutorial overreach by the government.

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[2] In accordance with Fifth Circuit Rule 29(a)(4)(E) and Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief, "in whole or in part," and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae,* its members, and its counsel made any monetary contribution to its preparation and submission.

In affirming Dubin's conviction under Section 1028A, the panel held that a healthcare provider manager committed aggravated identity theft because he "used" *one* patient's identification information—voluntarily provided to the psychology office where Dubin worked—to bill Medicare for services that were provided to that patient but misrepresented during the billing process. Contrary to the common understanding of "identity theft," however, at no point did Dubin or any of his associates assume the identity of this patient or seek to impersonate him. The use of the patient's Medicaid identification number, while indisputably a part of the scheme, was incidental and did not involve *stealing* anyone's *identity*. The patient at issue provided Dubin with his identification voluntarily and never complained that he had been victimized, suffered damages, incurred losses, or had his identity stolen. Indeed, the lack of a real, individual *victim* defeats the government's case.

Dubin's Brief explains in detail why these actions did not amount to "use" that took place "without lawful authority" under Section 1028A and cites authoritative decisions from the U.S. Courts of Appeals for the First, Sixth, Seventh, and Ninth Circuits in support. In further support of Dubin's position, this *amicus* brief demonstrates that the statutory purpose of Section 1028A is wholly at odds with the panel's expansive interpretation of the statute. Simply put, Congress did not intend to criminalize Dubin's conduct under Section 1028A, a law enacted in 2004 to ad-

dress the "growing problem of identity theft[,]" targeting those who "use false identities to commit much more serious crimes." H.R. REP. 108-528, 2004 WL 5685676, at *779 (June 8, 2004) ("House Report"). Congress identified numerous examples of criminal conduct covered under the statute—none of which remotely resembles Dubin's conduct and all of which involve the use of personal information to impersonate another (*i.e.*, to pass someone off as someone else). In other words, the statute was intended to punish *theft* of an *identity*, something that did not happen here. The approach embraced by the panel thus undermines legislative intent and drastically expands the scope of Section 1028A to include run-of-the-mill fraudsters, "stray[ing] far afield from the conduct targeted by Congress" under the statute. *United States. v. Berroa*, 856 F.3d 141, 156 (1st Cir. 2017). Such a result would have far-reaching consequences in an already overburdened criminal justice system because it "could encompass every instance of specified criminal misconduct in which the defendant speaks or writes a third party's name[.]" *Id.*

Finally, the panel's interpretation of Section 1028A deviates from a settled principle for construing criminal statutes—common sense. This court need look no further than the statute's narrow title—Aggravated Identity Theft—to cast the panel's boundless interpretation of Section 1028A into doubt.

III. Argument

None other than the trial judge below is of the view that this case does not "seem" like aggravated identity theft. In fact, on the day he sentenced Dubin, he pointedly said, "I hope I get reversed on the aggravated identity theft count." ROA.4998-4999, 5012. As Judge Xavier Rodriguez accurately summarized: "[T]he whole crux of this case is how they were billing, and it turns out that's criminal the way they were doing their business, but it wasn't aggravated identity theft." ROA.4999. Similarly, when the case reached a panel of this Court, Judge Elrod was "reluctant[]" to join in the panel's majority opinion because she did not view Dubin's actions as constituting "real identity theft[.]" *United States v. Dubin*, 982 F.3d 318, 331 (5th Cir. 2020) (Elrod, J., concurring). The question for this *en banc* Court, therefore, is whether Section 1028A should be limited to what Judge Elrod called "real" identity theft, or whether it should additionally include the kind of conduct that, we submit, the ordinary person on the street would not consider "real." We urge this Court to limit the statute to "real identity theft," as ordinarily understood and as Congress intended; the alternative would further contribute to the rampant overcriminalization of recent years.

A. The United States Suffers From an Overcriminalization Epidemic

It sounds hard to believe, but it is impossible to list all the federal criminal statutes and regulations currently in existence. Brian Walsh and Tiffany Joslyn,

Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law, The Heritage Foundation and National Association of Criminal Defense Lawyers (Apr. 2010), at 2-4, 6. Federal crimes have proliferated to such an extent that more than 20 years ago, the American Bar Association's Task Force on the Federalization of Criminal Law found that "the present body of federal criminal law" had grown "[s]o large" that there was "no conveniently accessible, complete list of federal crimes." ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law (1998), at 9. Not even the federal government can determine the exact number of federal crimes in existence: when Congressman Jim Sensenbrenner, Chairman of the House Judiciary Committee's 2013 Over-criminalization Task Force, asked the Congressional Research Service ("CRS") to compile such a list, the CRS responded that it "lack[ed] the manpower and resources to" do so. That response alone, as noted by the Congressman, "demonstrates the breadth of over-criminalization." *See Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary,* 113th Cong. 65 (2013).

Alarmingly, this trend has only worsened, and overcriminalization now includes instances where, as here, the executive branch uses criminal provisions in specific laws and regulations in ways Congress never intended. An improper use of prosecutorial discretion can result in the expansion of federal criminal law beyond

legislative predictions if ultimately given judicial imprimatur. Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 51, 61 (2015) (proposing "overcriminalization canon" of construction).

Unsurprisingly, the Supreme Court in recent years has cited overcriminalization with increasing frequency when reversing criminal convictions, typically on statutory construction grounds but occasionally on constitutional ones. *See, e.g., Kelly v. United States,* 140 S. Ct. 1565, 1568 (2020) (reversing defendant's wire fraud and program fraud convictions even though "[t]he evidence the jury heard no doubt shows wrongdoing," because the federal fraud statutes at issue do not criminalize all such conduct); *McDonnell v. United States*, 136 S. Ct. 2355, 2372-3 (2016) (rejecting government's "boundless interpretation" of the "official act" element of federal bribery statute, in part because it would raise constitutional questions about representative government); *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (holding, based on Congressional intent, that a fish is not a "tangible object" for purposes of records tampering statute). In doing so, the Court has refused to "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell*, 136 S Ct. at 2372-73 (quoting *United States v. Stevens,* 559 U.S. 460, 480 (2010)). An example of this reluctance to trust the government's exercise of discretion is *Bond v. United States*, 572 U.S. 844, 863 (2014), in which the Court expressed "surpris[e]" that the government charged the defendant at all, and rejected

an interpretation of a chemical weapons statute that threatened to "transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults." *See also Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013) ("Adopting the Government's theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress's choice to penalize one but not the other[]"); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (in mail fraud case, rejecting "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.").

One pattern in these cases—which represent only a fraction of federal cases filed around the country each year—is the government's prosecution "for a single act (or course of conduct) under a criminal statute whose main purpose has nothing to do with the defendant's conduct, yet which contains broadly worded provisions with words that, read literally, encompass it." Pierce, *supra* at 51. As one scholar aptly summarizes the Supreme Court's pattern in the above cases:

> The Court begins by identifying two disconnects: that between a statute's narrow-sounding title and extremely broad language in specific provisions, and that between the common, man-on-the-street meaning of a phrase and the government's proposed reading of it. The Court then uses these disconnects to find ambiguity in a key term.

Id. The common thread in the Court's jurisprudence, then, is its rejection, in cases like *Kelly*, *Yates*, *McDonnell*, *Cleveland*, and others, of arguments rooted strictly in

the text that, if adopted, would have done violence to the goals that led to crafting that text in the first place. This is precisely what happened here, as shown in the next section.

B. Applying Section 1028A to Dubin's Conduct is Another Example of Overcriminalization and Prosecutorial Overreach

This case presents a classic example of this type of overcriminalization. Prosecutors used the narrow-sounding title of Section 1028A ("Aggravated Identity Theft") but squeezed their theory into the word "uses," all while failing to consider whether Dubin actually committed *real, classic identity theft – i.e.*, by stealing, taking, impersonating, or misrepresenting someone else's identity, personal identifying information, or both, for nefarious purposes. The danger of this approach is even more severe here because Section 1028A carries a mandatory two-year consecutive sentence—which means that ill-considered charging decisions can translate directly into punishment that judges are unable to avoid imposing. 18 U.S.C. § 1028A(a)(1). In other words, as Judge Jed Rakoff has written, the "net result is that prosecutors, rather than judges, now effectively determine the sentences to be imposed in most cases," and "hold most of the cards." Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. Rev. 1429, 1432 (2017).

Thus, in circumstances like Dubin's, where classic identity theft has not occurred, and where there is no identity theft victim who needs to repair his credit or

reputation, Section 1028A "give[s] prosecutors too much leverage" and is "an emblem of a deeper pathology in the federal criminal code." *Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting); Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, The New York Times (Dec. 5, 2013) ("Using their discretionary power to apply lengthy 'enhancements' on top of required terms ... federal prosecutors are strong-arming defendants into pleading guilty and over-punishing those who do not—undermining the fairness and credibility of the justice system.").[3]

This heavy-handed use of prosecutorial discretion feeds into the well-recognized problems caused by mandatory minimum sentencing laws, which at times "cause innocent people to plead guilty." Rakoff, *supra* at 1432 (observing that innocent individuals plead guilty "in order to avoid the risk that, if they go to trial and are convicted on the heavy and multiple charges that prosecutors now typically include in indictments (in part to promote plea bargaining), they will face huge sentences that most judges will have little power or incentive to mitigate."); *see also The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction*

[3] Available at: https://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html

and How to Save It, National Association of Criminal Defense Lawyers (July 10, 2018).[4]

This considerable problem shows no signs of stopping, either in general or specifically with respect to aggravated identity theft. Just last month, Chief Judge John Dowdell of the Northern District of Oklahoma lamented the overcriminalization of Section 1028A where, as here (albeit regarding Medicaid), there was "no evidence that [defendant] attempted to pass himself off as his patients by billing their treatments to Medicare." The court criticized the government's aggravated identity theft case, describing it as "counter intuitive[,]" "weak[]," and "rest[ing] on a tenuously broad reading of the statute." *United States v. Connor,* No. 19-CR-58-JED, 2021 WL 864556, at *2, *7 n. 2 (N.D. Okla. Mar. 8, 2021). These criticisms apply equally to the government's case here.

C. The Panel's Expansive Interpretation of Section 1028A is Wholly Inconsistent With the Statute's Purpose and Structure

In attempting to discern the meaning of Section 1028A, both the panel in this case and an earlier panel in *United States v. Mahmood*, 820 F.3d 177, 188 (5th Cir. 2016), restricted their analyses to the plain language of the statute and concluded that they had no choice but to uphold the convictions. *Dubin*, 982 F.3d at 325-26; *Mahmood*, 820 F.3d at 188. This *en banc* Court, unconstrained by previous panels,

[4] Available at: https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrial-NearExtinct.

has an opportunity to interpret the statute in a manner consistent with its own precedent and the purpose and context of the law. In this Circuit:

> The definition[s] of words in isolation however, [are] not necessarily controlling in statutory construction…. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Cascabel Cattle Company, L.L.C. v. U.S., 955 F.3d 445, 451 (5th Cir. 2020) (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). Although the Supreme Court has not always been unanimous in its approach to statutory interpretation, its decisions tend to agree with this Court that words should not be interpreted in a vacuum, and that context and legislative purpose matter. *See Marinello v. United States*, 138 S. Ct. 1101, 1107-8 (2018) (assessing meaning of statute's omnibus clause by viewing it in light of "statutory context" and "legislative history"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (observing the "cardinal rule that statutory language must be read in context[.]"); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."). An analysis of Section 1028A's legislative history shows that Congress never intended the statute to apply to incidentally employing another's identity in situations that show no sign of theft or impersonation. This Court, therefore, should reverse the panel.

1. Congress did not intend the statute to apply to incidental use of means of identification.

When drafting Section 1028A, "Congress borrowed and modified the language of § 1028(a)(7)." *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013) (rehearing *en banc*). Section 1028(a)(7) made identity theft a federal crime, prohibiting anyone who "knowingly transfers, possesses, or *uses, without lawful authority*, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7) (emphasis added). This prohibition was added to law in 1998 as the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105–318, 112 Stat 3007 (1998) on the heels of the Internet's "[i]nformation Age" to combat identity thieves who "financially devastate [] victims." Statement by President William Clinton Upon Signing H.R. 4151, 1998 WL 971795.

> Tens of thousands of Americans have been victims of identity theft. Imposters often run up huge debts, file for bankruptcy, and commit serious crimes. It can take years for victims of identity theft to restore their credit ratings and their reputations. This legislation will enable the United States Secret Service, the Federal Bureau of Investigation, and other law enforcement agencies to combat this type of crime[.]

Id. Although the terms "use" and "without lawful authority" were not defined, the 1998 act was intended to punish those who engage in classic identity theft, *i.e.*, "theft

of personal identification information that results in harm to the person whose identification is stolen and then used for false credit cards, fraudulent loans or for other illegal purposes." 144 Cong. Rec. S12604-02, at *S12604, 1998 WL 716313 (Oct. 14, 1998) (statement of Sen. Leahy). Dubin did not engage in any such conduct here, and simply put, when there has not been theft of an individual victim's personal information, someone like Dubin cannot be convicted of identity theft under Section 1028(a)(7).

Congress's passage of Section 1028A in 2004 and the accompanying House Report reinforces the notion that punishing classic identity theft was the purpose of the aggravated identity theft statute. Whereas the backdrop of the 1998 law was the proliferation of the Internet, the 2004 law became partially necessary in the aftermath of the September 11, 2001 terrorist attacks because terrorists "'have long utilized identity theft[.]'" House Report, H.R. REP. 108-528, 2004 WL 5685676, at *780 (quoting an unnamed FBI agent). Section 1028A was not intended to replace 18 U.S.C. § 1028, change the definition of "identity theft[,]" change the conduct targeted by the statutory scheme, or otherwise require something other than *theft of an identity and the presence of a real, individual victim*. It was a means to enhance penalties related to identity theft when two separate crimes were committed together (*i.e.*, identity theft in the commission of a separate, underlying crime). *Id.* at 779-80 (noting that 18 U.S.C. § 1028 had proved insufficient to deter identity thieves, who

were receiving short imprisonment or probation terms and, after releases, were engaging in identity theft of a more serious nature); United States Sentencing Commission, *Mandatory Minimum Penalties For Identity Theft Offenses in the Federal Criminal Justice System*, at 8 (Sept. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf (ussc.gov) ("The statute directs the court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony").

Of course, *amicus* recognizes that identity theft laws do not themselves constitute overcriminalization, and even a narrowly drawn aggravated identity theft law with a two-year consecutive sentence enhancement would be within Congress's prerogative. But, in situations like Dubin's, where he has not engaged in classic identity theft, the expansively worded statute gives the government virtually unfettered discretion to bring "counter intuitive" prosecutions. *Connor,* 2021 WL 864556, at *7 n.2. This discretion becomes toxic when combined with Section 1028A's two-year consecutive sentence enhancement, which incentivizes prosecutors to charge the underlying felony and label the incidental use of a means of identification as identity theft to leverage a favorable resolution for the government. *See, e.g.*, Robert Weisberg, *Crime and Law: An American Tragedy*, 125 Harv. L. Rev. 1425, 1445 (2012)

(employing prosecutorial discretion has evolved "from an exercise of wisdom to a selection of weaponry").

This result is just not what Congress intended. The House Report from the Committee on the Judiciary attached to H.R. 1731—the Identity Theft Penalty Enhancement Act, H.R. 1731—demonstrates that Congress understood aggravated identity theft to be separate and apart from the underlying crimes that trigger enhanced punishment. Congress viewed the bill as one that addressed "the growing problem of identity theft," which it defined as "all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits." House Report, H.R. REP. 108-528, 2004 WL 5685676, at *779-80 (June 8, 2004), *reprinted* in 2004 U.S.C.C.A.N. 779. The examples of "identity theft" in the House Report that would be subject to enhanced penalties include criminal conduct far afield from Dubin's, such as:

- Using a skimmer to obtain credit card data from individuals and providing stolen names, Social Security numbers, and credit card data to third parties;
- Accessing the information of potential customers in a financial institution's computer system and sharing such information with a third party; and
- Stealing the identity of individuals (including using their Social Security number) to establish credit, obtain loans or lines of credit, submit "bogus"

federal income tax returns, and receive Social Security, employment, disability, or Title XVI benefits. *Id*.

All the foregoing examples contemplate criminals procuring the identities and means of identification of other individuals to pass themselves off as other people or access benefits available to other people without those individuals' knowledge. By contrast, none of the examples remotely contemplates cases like Dubin's, where true identities are used to submit billing information related to actual patients, who received actual services, and who gave their identification voluntarily. Even outside the medical context, the examples—and by extension, the statute itself—are far afield of any situation where employing identification numbers that are incident to an ordinarily lawful activity would be considered identity theft. This would apply, for example, to fraudulent tax deductions by employers who use the 1099 or W-2 information of contractors or employees to take inflated tax deductions. No one stole the contractor's identity, as much as they put it to a use that *otherwise* constituted a crime. Taking an expansive reading of the types of activity that could be considered "identity theft" will broaden the scope of the conduct contemplated by Section 1028A to include those instances when a person's identity is used to commit any type of fraud, even when the person's identity was not misused by someone seeking to pass themselves off as that person. Such a result was never anticipated by Congress and is at odds with the statute's purpose.

2. Interpreting Section 1028A in context—using common sense and the statute's title—confirms that Dubin's conduct is not covered by the statute.

Further, by considering the context and structure of Section 1028A, it is clear that the statute was not intended to encompass conduct like Dubin's. Dubin's brief demonstrates at length why the narrower view of Section 1028A's "use" requirement is the more appropriate one. We add here that the Court should also look at the statute using "a fundamental principle of statutory construction—common sense." *Burlington Northern & Santa Fe Ry. Co. v. Poole Chemical Co.*, 419 F.3d 355, 364 (5th Cir. 2005) (citing cases). The Supreme Court's reminder in *Leocal v. Ashcroft* that a court "cannot forget" the ordinary meaning of the term that it is "ultimately" defining demonstrates this practical, common-sense approach. 543 U.S. 1, 11 (2004). Here, that term is not just "uses," but crucially, "identity theft"—which Dubin's conduct—as Judge Elrod noted in this case, did not amount to "real identity theft." *Dubin*, 982 F.3d at 331 (Elrod, J., concurring). Another common-sense principle requires the review of the statute's title. Section 1028A is entitled "Aggravated Identity Theft" and, reviewed alongside the statute's legislative history recited above, suggests Judge Elrod's interpretation of the statute is the right one. *Flores-Figueroa v. United States*, 556 U.S. 646, 655 (2009) (citing Section 1028A's title in construing another aspect of the statute); *INS v. National Center for Immigrants' Rights*, 502 U.S. 183,

189-90 (1991) (looking to title of statute to "aid in resolving an ambiguity in the legislation's text.").

An examination of the U.S. government's identity theft protection website, run by the Federal Trade Commission, bears this out.[5] The website is a resource for victims to report and recover from identity theft—providing checklists, letters, and other sample documents to guide victims through the recovery process. All of the scenarios described on that website involve what the government calls "identity thieves" who have "[s]tolen [y]our [i]nformation,"[6] and none resemble Dubin's circumstances. The same is true for the U.S. Department of Justice's identity theft website.[7] *Amicus* urges the Court to apply these common-sense principles here. The patient at issue suffered no harm and provided his identification voluntarily, and this simply was not a case of identity theft, aggravated or not.

3. Other Circuit Courts agree that Dubin's conduct is not covered by the statute.

The position we advance here is not controversial in half of the circuits that have considered similar questions, including the U.S. Courts of Appeals for the First, Sixth, Seventh, and Ninth Circuits, because no victim had his identity stolen and

[5] *Identity Theft Recovery Steps*, Federal Trade Commission, https://www.identitytheft.gov/steps.

[6] *Warning Signs of Identity Theft*, Federal Trade Commission, https://www.identitytheft.gov/Warning-Signs-of-Identity-Theft.

[7] *Identity Theft*, United States Department of Justice, https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud.

suffered damages. In *United States v. Berroa*, the First Circuit examined whether defendants, who gained their medical licenses by fraud, committed aggravated identity theft by writing "prescriptions that their patients would then fill at various pharmacies." 856 F.3d 141, 155 (1st Cir. 2017). The court relied on the legislative history of Section 1028A to strike down the government's "alternative construction," which was "limitless[.]" *Id.* at 156.

The First Circuit analyzed the above-described House Report and the "several examples of identity theft" detailed in the report to reach its conclusion that Section 1028A requires *classic identity theft*. *Id.* ("Notably, each of these examples involved the defendant's use of personal information to pass him or herself off as another person, or the transfer of such information to a third party for use in a similar manner"). Drawing on these examples, the Court concluded:

> By contrast, the purported "use" of patient information alleged here *strays far afield from the conduct targeted by Congress*. While, in a colloquial sense, Berroa and Castro could be said to have "used" their patients' names in writing prescriptions, they certainly did not attempt to pass themselves off as the patients. The government's reading of the statute is virtually unlimited in scope. Indeed, if, as the government implies, "use" of a "means of identification" is to be given its broadest possible meaning, *it could encompass every instance of specified criminal misconduct in which the defendant speaks or writes a third party's name*.

Id. (emphasis added). The Court was thus concerned with the "purported" use of patient identifications because that could stretch the statute to its breaking point.[8]

Following the First Circuit's decision, the Ninth Circuit relied upon *Berroa's* legislative history analysis in reversing defendant's conviction under Section 1028A in a case that presented an analogous situation. *United States v. Hong*, 938 F.3d 1040, 1050-51 (9th Cir. 2019). In *Hong,* the defendant provided massage services to patients but then misrepresented those treatments as Medicare-eligible physical therapy services. Even though the provider used the patients' identifications to carry out the fraud, the Court held that he did not commit aggravated identity theft.

Similarly, the Seventh Circuit reversed appellant's convictions for aggravated identity theft where the purported criminal conduct did not comport with the statute's purpose. *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013) (rehearing *en banc*). Looking to the statute's title, the court drew a distinction between identity fraud and identity theft, noting that a keystone of the latter is stealing or misappropriating someone's identity, which was not present in *Spears*. *Id.* (rejecting the government's position and explaining that it "would, for example, require a mandatory

[8] The First Circuit noted that its holding "is consistent" with the Sixth Circuit's decision in *United States v. Medlock*, 792 F.3d 700, 705 (6th Cir. 2015), which is the subject of Dubin's primary brief, and upon which the concurring member of the panel would have relied. 856 F.3d at 157. *But see United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), *United States v. Wedd*, __ F.3d __, 2021 WL 1216564 (2d Cir. Apr. 1, 2021), and *United States v. Munksgard,* 913 F.3d 1327, 1334 (11th Cir. 2019).

two-year consecutive sentence every time a tax-return preparer claims an improper deduction," a result that would give Section 1028A "a surprising scope."). Further, the court noted that the government previously argued before the Supreme Court that "'[t]he statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim.'" *Id.* at 757 (quoting *Flores-Figueroa v. United States*, 2009 WL 191837, at *20-21 (2009)) ("'protect[ing] the good credit and reputation of hardworking Americans[]'" is the statute's "overriding purpose").

Here, of course, there is no "real victim[.]" No individual, including, most importantly, the patient whose information formed the basis for the aggravated identity theft conviction, ever complained or reported his identity stolen. The patient at issue did not have to take any steps to recover his stolen identity, fix his credit, or recover damages, because Dubin plainly did not commit aggravated identity theft.[9]

IV. CONCLUSION

For the foregoing reasons, as well as those expressed in Dubin's brief, *amicus curiae* NACDL urges this Court to reverse the panel's decision.

[9] As the above-discussed legislative history of Section 1028A makes clear, Congress was concerned about individual victims of identity thieves who became "financially devastate[d]" and had to restore their credit ratings and their reputations. Statement by President William Clinton Upon Signing H.R. 4151, 1998 WL 971795 (Leg. Hist.). Here, there is no such victim, and the Court in *Mahmood* fails to explain how "individuals whose identities Defendant allegedly used to submit false Medicare claims" acquire true victim status. *Mahmood*, 820 F.3d 177 at 188-89. This is especially true because the only one that suffered any losses or damages was Medicare, and the same *Mahmood* Court acknowledged as much when analyzing the defendant's restitution and loss calculations. *Id.* at 193 ("We must consider that Medicare is the victim of Mahmood's fraud[]").

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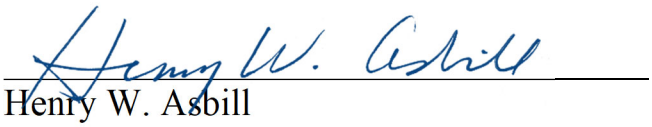
Respectfully submitted,

BUCKLEY LLP

By: 

Henry W. Asbill
Daniel R. Alonso
Bradley A. Marcus

Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

Cynthia Eva Hujar Orr
Nicole DeBorde Hochglaube
Co-Chairs, NACDL Fifth Circuit
Amicus Curiae Committee

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April 2021, a true and correct copy of the foregoing was filed electronically using the CM/ECF system.

Henry W. Asbill
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limitations of Fed. R. App. P. 29(a)(5), Fifth Circuit Rule 29.3, and Fed. R. App. P. 32(a)(7)(B) because this brief contains 5618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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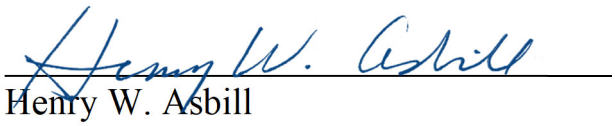

Henry W. Asbill
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers