

No. 08-108

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IN THE  
**Supreme Court of the United States**

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IGNACIO FLORES-FIGUEROA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS  
AMICUS CURIAE IN SUPPORT OF  
PETITIONER**

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## INTERESTS OF *AMICUS CURIAE*<sup>1</sup>

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association (“ABA”) recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL’s mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

This case presents the question whether a statute’s specified *mens rea* requirement extends to all elements of the offense. *Amicus* has a substantial interest in the resolution of that question, which will affect a significant number of defendants in the federal courts.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.



## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a statutorily specified *mens rea* requirement extends to all elements of the offense or only to a subset of the elements. This Court should adopt the approach of the Model Penal Code to resolve that issue. Under the Model Penal Code, a specified *mens rea* requirement extends to all material elements of an offense unless a contrary purpose plainly appears.

The Court's adoption of that approach would provide much needed guidance to Congress; it would give courts a standard they can easily administer; it would promote uniformity in the interpretation of federal statutes; it would help to ensure that Congress, rather than the courts, defines the outer boundaries of the criminal law; and it would help to ensure fair notice of what the law requires. And while this Court's cases have not expressly adopted the Model Penal Code rule, they provide a firm foundation for its adoption.

Under the Model Penal Code rule, this case is easy to resolve. As petitioner's brief demonstrates there is affirmative evidence that Congress intended to extend the knowledge requirement in the identity theft statute to all elements of the offense. At the very least, however, no contrary purpose plainly appears.

The rule of lenity also requires interpreting the knowledge requirement in the identify theft statute to extend to all elements of the offense. This Court has repeatedly applied the rule of lenity to incorporate *mens rea* requirements into federal

statutes and to extend specified *mens rea* requirements to all elements of the offense. The rule of lenity has added force in this case because the identity theft statute imposes a mandatory minimum sentence, depriving courts of their usual discretion to tailor a defendant's sentence to the defendant's particular circumstances.

At the very least, this statute is ambiguous on the question whether the knowledge requirement extends to all elements of the offense. The rule of lenity requires that ambiguity to be resolved in the defendant's favor.

### ARGUMENT

#### **I. THIS COURT SHOULD ADOPT THE MODEL PENAL CODE RULE THAT A SPECIFIED *MENS REA* REQUIREMENT EXTENDS TO ALL MATERIAL ELEMENTS OF A STATUTE UNLESS A CONTRARY PURPOSE PLAINLY APPEARS.**

1. The statute at issue in this case imposes a mandatory two-year sentence on any person who, during and in relation to certain predicate offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The question presented is whether "knowingly" modifies the phrase "of another person." If so, the government must prove that a defendant knew that the means of identification he used belonged to "another person." If not, a defendant is subject to conviction if the means of identification in fact belonged to another person, but the defendant did not know that it did.

This Court has on several occasions addressed the question of “how far down the sentence the word ‘knowingly’ is intended to travel,” without expressly adopting a uniform rule for resolving that question. *See, e.g., Liparota v. United States*, 471 U.S. 419, 424-25 (1985). The Model Penal Code, however, has adopted such a rule. The Model Penal Code rule specifies that:

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 material elements of the offense, unless a contrary purpose plainly appears.

ALI, Model Penal Code § 2.02(4) (1985). That rule responds to “the pervasive ambiguity” in statutes that specify a *mens rea* requirement, “namely” the “difficulty” in determining “how many of the elements of the offense the requirement is meant to modify.” *Id.* § 2.02(4), Explanatory Note.

Under the Model Penal Code rule, a specified *mens rea* requirement extends to all elements of an offense, subject only to three built-in limitations. First, the rule does not apply when Congress “expressly distinguish[es]” among the elements. For example, if Congress places a “knowingly” requirement next to one element, and a “recklessly” requirement next to another, the rule would not apply. *See id.* (rule does not apply when “legislature prescribes “different kinds of culpability for different elements”).

Second, the rule does not apply to elements that are not "material." A "material" element encompasses any element that relates to "the harm or evil sought to be prevented by the law defining an offense," but does not encompass other matters, such as "jurisdiction," or "venue." *Id.* § 2.02, Explanatory Note. Thus, when Congress specifies as an element of an offense that the defendant's conduct must occur in the "territorial jurisdiction of the United States," a specified *mens rea* requirement would not automatically extend to that jurisdictional element. *See, e.g.*, 18 U.S.C. § 2241.

Third, the rule does not apply when "a contrary purpose plainly appears." Model Penal Code § 2.02(4). For instance, when Congress sets forth one element first, then sets forth the *mens rea* requirement, and then sets forth the rest of the elements, a purpose not to apply the *mens rea* requirement to the first element "plainly appears." The false statement statute is a good example. It subjects to criminal punishment "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. § 1001. By placing the "knowingly and willfully" requirement after the first element, Congress plainly expressed its purpose not to apply the requirement to that element. *United States v. Yermian*, 468 U.S. 63, 68 (1984).

Under the Model Penal Code's rule, the presumption that a specified *mens rea* requirement extends to all elements is not rebutted by a showing that applying the *mens rea* requirement to a particular element is not the "most natural

grammatical reading.” *United States v. X-Citement Video*, 513 U.S. 64, 68 (1994). When two readings are both possible, and the one that does not extend the *mens rea* requirement to all elements is simply the “most grammatical,” a purpose to negate the *mens rea* requirement does not “plainly appear.” Moreover, in general, the presumption that *mens rea* extends to all elements could not ordinarily be overcome by legislative history, comparisons to common law analogues, comparisons to related statutes, or the difficulty of prosecution. All of these sources may provide some basis for an *inference* that Congress may not have intended to extend a specified *mens rea* requirement to a particular element. But only rarely would they lead to the conclusion that a contrary purpose “*plainly appears*.”

2. This Court has sometimes looked to the Model Penal Guide for guidance in interpreting federal criminal statutes. *See, e.g., United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (interpreting 8 U.S.C. § 1326(a)); *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 408-10 (2003) (interpreting 18 U.S.C. § 1964); *United States v. Bailey*, 444 U.S. 394, 404-05, 408 (1980) (interpreting 18 U.S.C. § 751(a)). Most significantly, the Court has frequently cited the Code’s culpability provisions—purpose, knowledge, recklessness, and negligence—in interpreting *mens rea* requirements. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 n.18 (2007); *Holloway v. United States*, 526 U.S. 1, 11 n.11 (1999); *Ratzlaf v. United States*, 510 U.S. 135, 151 (1994); *Liparota*, 471 U.S. at 423 n.5; *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-78 (1978).

This Court should once again follow the Model Penal Code's guidance. Specifically, this Court should adopt for all federal criminal statutes the Model Penal Code rule that a specified *mens rea* requirement extends to all material elements of an offense, unless a contrary purpose plainly appears.

A number of important considerations support the adoption of that rule. First, "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." *Riegel v. Medtronic, Inc.*, 552 U.S. \_\_\_, 128 S. Ct. 999, 1008 (2008). Congress regularly specifies in its criminal statutes a single *mens rea* requirement, such as "knowingly." The Court should therefore give Congress as much guidance as it can on how this Court will determine the scope of the *mens rea* requirement. An approach that relies on a wide ranging indeterminate inquiry into rules of grammar, common law analogues, legislative history, related statutes, and other factors provides very little in the way of concrete guidance. By contrast, the rule that a specified *mens rea* requirement will extend to all material elements of the offense unless a contrary intent plainly appears affords Congress "a predictable background rule against which to legislate." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994).

Second, the Model Penal Code rule supplies courts with an easily administrable standard to determine the scope of a *mens rea* requirement. In fact, the application of that rule should eliminate legitimate debate about the issue in many cases. The experience of the states applying that rule provides hard evidence supporting that conclusion.

In most cases, application of the rule is routine and leads to the conclusion that the *mens rea* requirement applies to all elements. See, e.g., *State v. Hopkins*, 873 S.W.2d 911, 912 (Mo. Ct. App. 1994) (holding that “knowingly” applies to the age of the child element for a statute criminalizing whoever “knowingly encourages, aids or causes a child less than seventeen years old” to engage in conduct tending to injure his welfare); *State v. Gaylord*, 890 P.2d 1167, 1177 (Haw. 1995) (applying the specified “intent” requirement to “each of the elements set forth” in a theft statute, because “no contrary purpose ‘plainly appears’ on the face of the statute”); *Gibson v. State*, 643 N.E.2d 885, 887 & n.7 (Ind. 1994) (holding that *mens rea* requirement applies to all elements in statute that criminalized whoever “knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft”); *Commonwealth v. Scolieri*, 813 A.2d 672, 678 (Pa. 2002) (holding that specified *mens rea* requirement applied “to all elements”); *State v. Worthy*, 746 A.2d 1063, 1067 (N.J. Super. Ct. App. Div. 2000) (concluding that “any ambiguity as to whether ‘knowingly’ was intended to apply to each element of the offense is clarified by” rule extending *mens rea* to all elements of the offense) (citation omitted).

That does not mean that the state courts always conclude that the specified *mens rea* requirement extends to all elements. In some cases, the legislature plainly expresses a contrary intent. And when it does, the state courts readily conclude that the *mens rea* requirement does not apply to that particular element. See, e.g., *People v. Benzor*, 100

P.3d 542, 544 (Colo. App. 2004) (observing that “the mental state ‘knowingly’ appears after the ‘following a conviction of a felony’ element and before the ‘escapes from said custody or confinement’ element” in a statute, and concluding that “[s]uch placement is indicative of the General Assembly’s intent that the mental state ‘knowingly’ apply only to the conduct element of the crime of escape following conviction”); *State v. Cabans-Salgado*, 92 P.3d 421, 423 (Ariz. Ct. App. 2004) (declining to apply the presumption and extend a *mens rea* term to an element because “a contrary legislative purpose plainly appears” in the text of a felony murder statute explicitly stating that it “requires no specific mental state other than what is required for the commission of any of the enumerated felonies”); *Louallen v. State*, 778 N.E.2d 794, 798 (Ind. 2002) (construing a statute penalizing whoever fondles or touches a child “with intent to arouse” and declining to extend this “intent” requirement back to the fondling or touching elements specified earlier in the text).<sup>2</sup>

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<sup>2</sup> At least eighteen American states have codified this interpretive canon by statute, and courts have applied it in others as well. See Ala. Code § 13A-2-4(a); Ariz. Rev. Stat. Ann. § 13-202(A); Ark. Code Ann. § 5-2-203(a); Colo. Rev. Stat. § 18-1-503(4); Conn. Gen. Stat. § 53a-5; Del. Code Ann. tit. 11, § 252; Haw. Rev. Stat. § 702-207; 720 Ill. Comp. Stat. 5/4-3(b); Ind. Code § 35-41-2-2(d); Me. Rev. Stat. Ann. tit. 17-A, § 34(2); Mo. Rev. Stat. § 562.021(1); Mont. Code Ann. § 45-2-103(4); N.H. Rev. Stat. Ann. § 626:2(I); N.J. Stat. Ann. § 2C:2-2(c)(1); N.Y. Penal Law § 15.15(1); N.D. Cent. Code § 12.1-02-02(3)(a), (b); Or. Rev. Stat. § 161.115(1); 18 Pa. Con. Stat. § 302(d); see also *People v. Tombs*, 697 N.W.2d 494, 499 (Mich. 2005); *State v. Lundgren*, 1994 WL 171657, at \*7-8 (Ohio Ct. App. Apr. 22, 1994).



While the Model Penal Code rule can be easily administered by the courts, an unguided totality-of-the-circumstances approach places needless strain on the judicial system. The litigation over the meaning of this particular statute exposes the weaknesses of that approach. Courts all over the country have struggled with this issue. They have diagrammed sentences, applied grammatical rules, poured over the legislative history, compared the statute to related statutes, compared the statute to common law analogues, attempted to divine the purpose of the statute, and considered the practical problems of enforcement. Yet because of the indeterminacy of the inquiry, they have reached diametrically opposed conclusions about the meaning of a simple sentence. This Court's review will, of course, resolve the issue. But meanwhile countless participants in the judicial system have expended scarce resources on a question that ideally should be capable of easy resolution.

Third, the Model Penal Code promotes the goal of uniformity in the interpretation of federal statutes. See Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1437 (1968) (stating that the purpose of the provision "to promote uniformity upon the issue"). Under the unguided approach, there is a risk that courts will interpret the scope of *mens rea* requirements in similarly drafted statutes differently even when there is very little reason to believe that Congress intended such a variance. Under the Model Penal Code rule, interpretations of the scope of the *mens rea* requirement will not vary

from statute to statute, unless Congress plainly so intended.

Fourth, the Model Penal Code rule is faithful to the principle that only Congress has the power to define criminal activity. This Court long ago held that “it is the legislature, not the Court, which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Since then, the Court has consistently reaffirmed that principle, explaining that “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *United States v. Bass*, 404 U.S. 336, 348 (1971).

Under the unguided approach to determining the scope of a *mens rea* requirement, there is a substantial risk that a court will determine that a *mens rea* requirement does not apply to an element of the offense even when Congress intended otherwise. In that event, the court would effectively be defining activity as criminal that Congress has chosen not to criminalize. A rule that extends the *mens rea* requirement to all elements unless a contrary purpose plainly appears eliminates that risk and ensures that an activity will not be criminalized unless Congress so intended.

Finally, the Model Penal Code rule helps to ensure that persons receive fair notice of what the law makes illegal. Fair notice is a basic element of due process. *Lambert v. California*, 355 U.S. 225, 228 (1957). The Court has therefore long required that criminal statutes give “fair warning . . . of what

the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Under the unguided totality-of-the-circumstances approach to determining the scope of a *mens rea* requirement, however, it may be difficult, if not impossible, to know in advance of a decision by this Court what a criminal statute actually makes illegal. By contrast, the rule that *mens rea* extends to all elements unless a contrary purpose plainly appears will ensure fair warning on the scope of any specified *mens rea* requirement.

3. This Court’s cases have not expressly adopted the Model Penal Code approach. They have, however, provided a firm grounding for its adoption. In *X-Citement Video*, a case involving the scope of a specified *mens rea* requirement, the Court viewed the Court’s cases have having established a tradition of interpreting “criminal statutes to include broadly applicable scienter requirements.” 513 U.S. at 70.

In *Bryan v. United States*, 524 U.S. 184, 193 (1998), the Court stated that “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” Similarly, in *Staples v. United States*, 511 U.S. 600, 605 (1994), the Court observed that “a conventional *mens rea* element . . . require[s] that the defendant know the facts that make his conduct illegal.” While neither of these cases involved the question of the scope of a specified *mens rea* requirement, their formulations are both supportive of a general rule that a specified requirement extends to all elements.

Moreover, the Court's key cases that have interpreted the scope of a *mens rea* requirement are consistent in result with the Model Penal Code rule. A number of cases have involved statutes in which a knowledge requirement preceded all elements of the offense. In *Liparota*, 471 U.S. at 420, the statute subjected to criminal punishment anyone who "knowingly" used food stamps in an unauthorized manner. In *X-Citement Video*, the statute subjected to criminal punishment anyone who knowingly transported or received depictions of minors engaged in sexually explicit conduct. 513 U.S. at 68. And in *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008), the statute subjected to punishment anyone who knowingly distributed material reflecting the belief or intending to cause another to believe that the material depicted a minor engaging in sexually explicit conduct. In all three case, the Court held that the knowledge requirement extended to all elements of the offense. *Liparota*, 471 U.S. at 433; *X-Citement Video*, 513 U.S. at 78; *Williams*, 128 S. Ct. at 1839.<sup>3</sup>

The two key cases in which a specified *mens rea* requirement has not been extended to all elements have both involved exceptions to the Model Penal Code's presumptive rule. One of the statutes has already been discussed: the statute that subjects to criminal punishment anyone who, within the jurisdiction of a federal agency, knowingly makes a false statement. The Court's holding in *Yermian*, 468 U.S. 63, that the defendant does not have to

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<sup>3</sup> The description of the statutes in *Liporota*, *X-Citement Video*, and *William* are paraphrases, but capture their essence.

know that the false statement is within the jurisdiction of the United States fits within two of the Model Penal Code exceptions. First, it fits within the exception for jurisdictional facts. *Id.* at 68. And second, because Congress placed the knowledge requirement after that jurisdictional element, a purpose not to extend the knowledge requirement to that element plainly appeared. *Id.* at 69.

The other key case refusing to extend a specified *mens rea* requirement to an element of the offense also falls within the Model Penal Code exception. In *United States v. Feola*, 420 U.S. 671 (1975), the Court held that the knowledge requirement in a statute that criminalized knowingly assaulting a federal officer while the officer was engaged in official duties did not require the government to prove that the defendant knew that his victim was a federal officer. The Court explained that the officer's status as a federal officer was a jurisdictional fact and that *mens rea* requirements do not ordinarily extend to jurisdictional facts. *Id.* at 676-77 & n.9. Because the Court viewed the victim's status as a federal officer as jurisdictional, that case also falls within the Model Penal Code's exception for jurisdictional facts.

Thus, while the Court has not expressly adopted the Model Penal Code's presumption that a prescribed *mens rea* requirement applies to all elements of the offense, its decisions provide a firm grounding for that rule. Because there are powerful reasons to adopt the rule, and because the Court's

cases provide a firm grounding for the rule, the Court should embrace that rule.<sup>4</sup>

4. In this case, the application of the Model Penal Code rule leads to an easy answer to the question presented. Petitioner's brief demonstrates that Congress affirmatively intended to require the government to prove that defendant knew that the means of identification he used identification belonged to another person. Under the Model Penal Code rule, the result is the same, but the analysis is simpler. There is a presumption that the *mens rea* requirement applies to that element, and, for the reasons discussed in petitioner's brief, no contrary purpose "plainly appears."

## **II. THE RULE OF LENITY REQUIRES READING THE STATUTE TO REQUIRE KNOWLEDGE OF ALL ELEMENTS OF THE CRIME.**

The rule of lenity also leads to the conclusion that the identity theft statute requires proof that the defendant knew that he used the means of identification of another person. The identity theft statute is, at the very least, ambiguous on whether it

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<sup>4</sup> Amicus has not done a complete search for all of this Court's *mens rea* cases. To the extent that there are any cases that refuse to extend a *mens rea* requirement to all the elements of a particular statute, and that refusal does not fall within one of the Code's exceptions, the Court may preserve the interpretation of that statute as a matter of stare decisis. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008) (preserving § 10(b) private cause of action, but refusing to extend it).

requires proof that the defendant had knowledge that he was using the identification of another person. Under the rule of lenity, that ambiguity must be resolved in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”) (citation omitted).

This Court has recognized the strong link between the rule of lenity and the presumption in favor of *mens rea*. In *Gypsum*, the Court noted that its precedents had relied on the rule of lenity as a basis for “read[ing] a state of mind component into an offense even when the statutory definition did not in terms so provide.” 438 U.S. at 437 (citing *Rewis*, 401 U.S. at 812).

The Court has also applied the rule of lenity to resolve ambiguity on the scope of a specified *mens rea* requirement. In *Liparota*, for example, the Court relied on the rule of lenity to extend the specified “knowingly” *mens rea* requirement to all material elements of the statute. It reasoned that “requiring *mens rea*” for the final “not authorized” element of the statute “is in keeping with our longstanding recognition of the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” 471 U.S. at 427 (citations omitted). The Court added that the rule of lenity “provides a time-honored interpretive guideline when the congressional purpose is unclear” on whether “knowingly” applies to a particular element of the statute. *Id.*

The rule of lenity rests on two core principles—that the public have fair notice before

being punished for an offense, and that courts should not penalize conduct that Congress did not intend to reach. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). As this Court has recognized, those core principles are fully applicable in determining the scope of a specified *mens rea* requirement. In *Liparota*, the Court expressly relied on those principles in extending the specified *mens rea* to all the elements of the offense. 471 U.S. at 427. Similarly, in *Arthur Andersen LLP v. United States*, this Court cited these core lenity principles in broadly applying a “knowingly” requirement to various elements of the offense. 544 U.S. 696, 703 (2005).

Application of the rule of lenity in determining the reach of a *mens rea* term avoids the uncertainty and unfairness that may result from reliance on particular grammatical theories, purported broader statutory purposes, or legislative history. In *Ratzlaf*, after reading a statute’s designated *mens rea* requirement to apply broadly to elements of the offense, the Court explained that its reading of the text precluded a resort to legislative history. It observed, though, that even if it had found the *mens rea* “requirement ambiguous as applied . . . we would resolve any doubt in favor of the defendant” through the rule of lenity rather than turn to legislative history. 510 U.S. at 148; *see also Crandon v. United States*, 494 U.S. 152, 160 (1990) (“Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.”). This Court’s cases thus



firmly support application of the rule of lenity to resolve any ambiguity in the scope of a specified *mens rea* requirement.

The rule of lenity has added force in this case because a violation of the identity theft statute results in the imposition of a mandatory minimum sentence over and above the sentence for the predicate offense. The construction of a mandatory minimum sentencing offense squarely implicates the history and policies underlying the rule of lenity.

This Court has repeatedly held that the rule of lenity “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that the rule applies to any question of statutory interpretation that would “increase the penalty that [the statute] places on an individual”). These holdings follow from the rule’s core principles. Because the rule of lenity does not rest on an “assum[ption] that offenders against the law carefully read the penal code,” *Bell v. United States*, 349 U.S. 81, 83-84 (1955), but instead on broader imperatives that the criminal laws be clear and punishments decided by Congress, the rule has the same force in determining the meaning of a statute that increases penalties as it does in determining the meaning of a statute that makes conduct criminal.

The rule of lenity plays a special role in interpreting statutes that impose a mandatory minimum sentence because mandatory minimum sentences constitute an exception to Congress’s

general sentencing requirements. In the Sentencing Reform Act of 1984, Congress has required a court to impose a sentence that is “not greater than necessary,” 18 U.S.C. § 3553(a)—unless “otherwise specifically provided.” *Id.* § 3551(a). Congress has also required that judges take into account all circumstances in imposing a sentence in order to match a defendant’s sentence to the circumstances of the case. *Id.* § 3553(a). These requirements accord with the longstanding federal sentencing tradition of considering “every convicted person as an individual and every case as . . . unique.” *Gall v. United States*, 552 U.S. \_\_\_, 128 S. Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums constitute an exception to these more general statutory requirements. Thus, the broader the reading of a mandatory minimum statute the greater the danger that it will undermine Congress’s general policy in favor of individualized sentencing. Application of the rule of lenity can play a critical role in preventing that from occurring. By requiring that ambiguities in statutes that impose mandatory minimum sentences be resolved in the defendant’s favor, the rule of lenity helps to ensure that the mandatory minimum exceptions do not swallow the general rule of individualized sentencing.

Applying the rule of lenity to mandatory sentences can also foster uniformity, certainty, and precision in the criminal law. The uncertainty in the interpretation of mandatory statutes can impede the plea negotiations that today help resolve a large majority of the federal criminal caseload. These negotiations will proceed more quickly and smoothly

if the law that governs criminal punishment is clear. See *Holloway v. United States*, 526 U.S. 1, 22 (1999) (Scalia, J., dissenting) (citing the “*in terrorem* effect” of expanded liability on “a modern federal criminal-law system characterized by plea bargaining” as support for the rule of lenity).

Finally, the rule of lenity embodies an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.” *Bass*, 404 U.S. at 348 (quoting Henry J. Friendly, “Mr. Justice Frankfurter and the Reading of Statutes,” in *Benchmarks* 196, 209 (1967)). Mandatory sentences directly implicate that concern because they remove the discretion of judges to take into account the factors that call for a reduced sentence. See *Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (“Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum.”). Accordingly, when there is any ambiguity in the reach of a statute that imposes a mandatory minimum sentence, that ambiguity should be resolved in favor of the defendant.

In this case, petitioner has shown that, at the very least, this statute is ambiguous on the question whether the government must prove that the defendant knew that the identification he used belonged to another person. The rule of lenity requires that ambiguity to be resolved in the defendant’s favor.

**CONCLUSION**

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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