No. 22-10

IN THE

Supreme Court of the United States

DAVID FOX DUBIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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

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INTEREST OF THE *AMICUS CURIAE*[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 criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and fair 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

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[1] Per Supreme Court Rules 37.3(a) and 37.6, *amicus curiae* states that no counsel for a party authored this *pro bono* brief, "in whole or in part," and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for both parties have consented to this filing.

of the identity theft statute, 18 U.S.C. § 1028A, narrowly, consistent with Congressional intent and the statute's purpose, and reverse appellant's conviction. Given NACDL's expertise in criminal law, NACDL submits that its views will be of "considerable help to the Court." Sup. Ct. R. 37.1.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit's decision in *United States v. Dubin*, 27 F.4th 1021 (5th Cir. 2022) represents yet another instance in which a court failed to heed this Court's "unmistakable" and "nearly annual" warning that "[c]ourts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *Id.* at 1041 (Costa, J., dissenting) (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)). This time, the statute at issue is 18 U.S.C. § 1028A ("Section 1028A"), which criminalizes aggravated identity theft and imposes an additional, consecutive two years of incarceration if defendants "use" a means of identification of another person "during and in relation to" the commission of a number of predicate felonies. Several other federal circuit courts have recently considered the scope of Section 1028A and the majority of those have adopted narrower constructions of the statute as compared to the Fifth Circuit. In doing so, they have rejected the government's broad theories that a person violates the statute any time he mentions or otherwise recites another person's name or identifying information while committing a predicate offense.

Despite these repeated rebukes in other courts, federal prosecutors charged and convicted David Dubin, a healthcare worker who allegedly overbilled for Medicaid services provided to a patient, under

Section 1028A, even though "[t]he only identity theft . . . [was] simple healthcare fraud impersonating aggravated identity theft." *Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting). The identity theft allegations were not distinct from the execution of the fraud itself and at no point did Dubin or his associates assume the patient's identity or seek to impersonate her. The patient provided Dubin with her identification and never complained that she had been victimized by *identity theft*, suffered damages, incurred losses, or otherwise had her identity stolen.

Ignoring the Supreme Court's guidance, the reasoning of the majority of its sister circuits that have considered the issue, and Section 1028A's title and unmistakable purpose, the Fifth Circuit upheld Dubin's conviction and adopted the broadest possible reading of Section 1028A that brought his conduct within the statute, simply because he "used" the patient's Medicaid identification number when submitting fraudulent bills. This approach defies common sense and sanctions the type of ill-advised prosecutorial abuse of discretion that this Court has continually rejected.

Dubin's Petition and Brief explain why the Fifth Circuit's maximalist interpretation contradicts the reading of the aggravated identity theft statute by the U.S. Courts of Appeals for the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. Dubin's conduct would not have violated Section 1028A in these circuits because Dubin simply recited another person's identifying information while committing healthcare fraud. He did not steal that person's identity nor make a misrepresentation about her identity, yet he now faces a mandatory and consecutive two-year prison sentence, in addition to the sentence for

his healthcare fraud conviction, because of the Fifth Circuit's erroneous holding.

In further support of Dubin, this *amicus* brief illustrates that this sweeping application of Section 1028A is a symptom of the federal overcriminalization epidemic, enabling unelected prosecutors to consolidate even more charging and plea-bargaining power. Endorsing the Fifth Circuit's expansive reading of Section 1028A would add yet another powerful weapon to federal prosecutors' already stacked arsenal.

This brief also demonstrates that the statutory purpose of Section 1028A is wholly at odds with the Fifth Circuit's rationale. Simply put, Congress did not intend to criminalize Dubin's conduct under Section 1028A, a law enacted in 2004 to address the "growing problem of identity theft," targeting those who "use false identities to commit much more serious crimes." Identity Theft Penalty Enhancement Act, H.R. Rep. No. 108-528, at 3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779 ("House Report"). Congress identified numerous examples of criminal acts 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. In other words, the statute was intended to punish *theft* of an *identity*, something that did not happen here.

Moreover, the Fifth Circuit's analysis of Section 1028A deviates from a settled principle of construing criminal statutes: common sense. This Court need look no further than the statute's narrow title—Aggravated identity theft—to cast the Fifth Circuit's boundless interpretation into doubt. This interpretation also drastically expands Section 1028A's scope to transform run-of-the-mill fraudsters into identity thieves if they happen to utter the name of another person in the

commission of their fraud, "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). Not all healthcare fraud is, or should be, synonymous with aggravated identity theft. And now, this Court has the opportunity to ensure the government can no longer conflate the two.

Because the Fifth Circuit ignored the Supreme Court's recurring directive by adopting a boundless reading of Section 1028A and rejected the practical, common-sense reasoning of the majority of its sister circuits, we ask this Court to overturn the Fifth Circuit's decision in *Dubin* and define the scope of Section 1028A narrowly.

ARGUMENT

I. The United States Suffers from an Overcriminalization Epidemic

It is impossible to list all the federal criminal statutes and regulations currently in existence. Brian Walsh & Tiffany Joslyn, The Heritage Foundation and NACDL, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 2–4, 6 (2010).[2] Federal crimes have proliferated, most often at the urging of the DOJ, to such an extent that more than twenty 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*

[2] Available at https://www.nacdl.org/getattachment/8d5312e0-70f8-4007-8435-0ab703dabda9/without-intent-how-congress-is-eroding-the-criminal-intent-requirement-in-federal-law.pdf.

Federalization of Criminal Law 9 (1998).[3] 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 "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).

The most recent study that attempted to estimate the number of federal crimes located in the U.S. Code tried to do so via algorithm rather than a manual effort because "Congress has spread crimes throughout the Code, resulting in what scholars have described as an incomprehensible, random and incoherent, duplicative, ambiguous, incomplete, and organizationally nonsensical mass of federal legislation that carries criminal penalties." GianCarlo Canaparo et al., The Heritage Foundation, *Count the Code: Quantifying Federalization of Criminal Statutes* 5 (2022) (citations and quotations omitted).[4] The study estimated that "from 1994 to 2019, the number of sections that create a federal crime has increased by 36 percent," from over 1,110 to over 1,500. *Id*. at 12.

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[3] Available at https://www.nacdl.org/getattachment/b94337b3-b808-4d34-ad58-77d498669169/fedcrimlaw2.pdf.

[4] Available at https://www.heritage.org/sites/default/files/2022-01/SR251.pdf.

Alarmingly, this trend has only worsened and overcriminalization now includes instances where, as here, the executive branch uses criminal provisions in specific laws in ways that Congress never intended. Thus, an improper use of prosecutorial discretion can result in the expansion of federal criminal law beyond legislative predictions if ultimately given judicial imprimatur. *See* Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 51, 58–60 (2015) (proposing an "overcriminalization canon" of construction). The threat of prosecutorial overreach is particularly acute where, as here, the scope of the statute at issue is subject to multiple interpretations that prosecutors can exploit. *See* Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. Chi. L. Rev. 1, 26 (forthcoming 2023) ("An excessively indefinite federal penal statute threatens that longstanding separation-of-powers principle by effectively delegating the task of defining crimes to another body, whether that be police officers, prosecutors, or ultimately judges and jurors.").[5]

This Court has repeatedly seized opportunities to express concern with federal overcriminalization and prosecutorial overreach, including recently in *Van Buren v. United States*, 141 S. Ct. 1648 (2021). Echoing the concerns of its preceding opinions, this Court again struck down the government's expansive reading of a statute that gave it unfettered discretion to prosecute individuals for acts unrelated to the statute's context and purpose. In reversing Van Buren's conviction under the Computer Fraud and Abuse Act ("CFAA"), this Court refused to ignore the "far-reaching" consequences of a broader interpretation of the CFAA,

[5] Available at https://ssrn.com/abstract=4178731.

which "would attach criminal penalties to a breathtaking amount of commonplace computer activity." *Id*. at 1661 (stating that this "fallout underscores the implausibility of the Government's interpretation").

As Judge Costa observed in his dissenting opinion in *Dubin*, "the Supreme Court has not . . . [adopted the government's proposed broad reading] ***once*** this century for a white collar/regulatory criminal statute." *Dubin*, 27 F.4th at 1041–42 (emphasis added). Indeed, this 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 show[ed] wrongdoing," because the "statutes at issue do not criminalize all such conduct"); *McDonnell v. United States*, 579 U.S. 550, 576–81 (2016) (rejecting the government's "boundless interpretation" of the "official act" element of the federal bribery statute, in part because it would raise constitutional questions about representative government); *Yates v. United States*, 574 U.S. 528, 547–48 (2015) (holding, based on Congressional intent, that a fish is not a "tangible object" for purposes of a records tampering statute); *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (in a mail fraud case, rejecting a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

In reversing these convictions and rejecting the theories brought by federal prosecutors, this Court has refused to "construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 579 U.S. at 576 (quotations omitted);

see also Marinello v. United States, 138 S. Ct. 1101, 1108–09 (2018) (striking down the government's broad reading of the statute's omnibus clause in part because "rely[ing] upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor" and "[d]oing so risks allowing 'policemen, prosecutors, and juries to pursue their personal predilections,' . . . which could result in the nonuniform execution of that power across time and geographic location"). Another example of this Court's appropriate reluctance to trust the government's exercise of discretion is *Bond v. United States*, 572 U.S. 844 (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." *Id*. at 852, 863. And just a year earlier, this Court overturned another conviction that resulted from federal prosecutors pursuing a "weak[] . . . case" because "[a]dopting the Government's theory . . . 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." *Sekhar v. United States*, 570 U.S. 729, 737–38 (2013).

One pattern in many of these cases is the government's prosecution "for a single act . . . 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. And the common thread is this Court's continual rejection of

the government's arguments rooted strictly in the text that, if adopted, would have undermined the goals of that text in the first place.

As the next section demonstrates, federal prosecutors continued their pattern of exploiting broad statutes by charging Dubin with aggravated identity theft, and the Fifth Circuit erroneously condoned this overreach. The Court can now correct the Fifth Circuit and again remind the government and courts that they "should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *Dubin*, 27 F.4th at 1041 (Costa, J., dissenting) (quoting *Van Buren*, 141 S. Ct. at 1661 (2021)).

II. 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. The prosecutors disregarded the purpose of Section 1028A to squeeze their theory into its text, 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 ("PII"), 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 overly aggressive and poorly considered charging decisions can translate directly into punishments that judges cannot avoid imposing. 18 U.S.C. § 1028A(a)(1). Judge Rodriguez, the trial judge who sentenced Dubin, felt that tension here, observing that this does not "seem" like aggravated identity theft while pointedly stating: "I hope I get reversed on the aggravated identity theft count." J.A. 37, 39. As Judge 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." *Id*. at 38. The "net result [of such overreach] 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 her credit or reputation, Section 1028A, broadly construed, "give[s] prosecutors too much leverage" and is "an emblem of a deeper pathology in the federal criminal code." *Yates*, 574 U.S. at 570 (Kagan, J., dissenting); *see* Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, The New York Times (Dec. 5, 2013)[6] ("Using their discretionary power to apply lengthy 'enhancements' on top of required terms . . . prosecutors are strong-arming defendants into pleading guilty and overpunishing those who do not—undermining the fairness and credibility of the justice system."); *see also* John D. Cline, *Reforming the Federal Criminal Code Will Restore Fairness to the American Criminal Justice System*, *in* The Enforcement Maze: Over-Criminalizing American Enterprise 15 (2018)[7] (explaining that a practical effect of the proliferation of federal criminal statutes is that multiple statutes address the same

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

[7] Available at https://www.nacdl.org/getattachment/490ae3e0-583b-4905-a792-01776759338d/the-enforcement-maze-overcriminalizing-american-enterprise-compendium.pdf.

conduct, which prosecutors then use to overcharge defendants). This concern is all the more acute in cases like Dubin's, whose sentence was effectively tripled by the imposition of an inapplicable Section 1028A penalty.

This heavy-handed 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* NACDL Trial Penalty Recommendation Task Force, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 6–7 (2018)[8] (describing how "the discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial . . . . becomes an overwhelming influence in a defendant's consideration of a plea deal"). With 98.3% of federal indictments resulting in a guilty plea in 2021—and 99% in the Fifth Circuit—federal prosecutors have become the judge, jury, and executioner. U.S. Sent'g Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* 56–58 (2021).[9]

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[8] Available at https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

[9] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

This considerable problem shows no signs of stopping, either in general or specifically with respect to aggravated identity theft. As the past several years have demonstrated, prosecutors across the country persist in liberally bringing Section 1028A charges under expansive theories that appellate courts have subsequently rejected. *See United States v. Hong*, 938 F.3d 1040 (9th Cir. 2019); *United States v. Berroa*, 856 F.3d 141 (1st Cir. 2017); *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015); *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc) (all overturning Section 1028A convictions). Notably, Chief Judge Easterbrook described the prosecution's theory in *Spears* as one that gave Section 1028A "a surprising scope" and was contrary to the position that the Solicitor General had presented to the Supreme Court in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) when the Court was considering a different part of Section 1028A. *Spears*, 729 F.3d at 756–57 (en banc).

Other district judges, like Judge Rodriguez, have also lamented the government's attempted application of Section 1028A: for example, Chief Judge Dowdell of the Northern District of Oklahoma criticized the government's aggravated identity theft case as "counter intuitive," "weak[]," and "rest[ing] on a tenuously broad reading of the statute" where, as here (albeit regarding Medicaid), there was "no evidence that [the defendant] attempted to pass himself off as his patients by billing their treatments to Medicare." *United States v. Connor,* No. 19-CR-58-JED, 2021 WL 864556, at *2, *7 n.2 (N.D. Okla. Mar. 8, 2021). More recently, when considering whether to dismiss a Section 1028A charge in an indictment, District of Maryland Chief Judge Bredar "harbor[ed] grave doubts" as to whether the statute was "intended to criminalize the forging of corporate documents that

coincidentally contain auto-generated signatures [as the government charged] or that 'uses'—in context—can be read broadly enough to unambiguously do so," but ultimately denied the motion as premature. *United States v. Sanders,* No. CR JKB-20-0168, 2022 WL 1771734, at *5 (D. Md. May 31, 2022). These practical criticisms apply equally to the government's case here.

Most damning, federal prosecutors have demonstrated that they will bring charges under Section 1028A even when they openly consider the gravamen of the offense to be something other than *real* identity theft. In Dubin's case, "[t]he government . . . recognized the true nature of the case when it said at oral argument: 'The fraud here is that the hours that were charged were billed as being performed as a licensed psychologist, when it was performed by a licensed psychological associate." *Dubin*, 27 F.4th at 1040 (Elrod, J., dissenting) (citing Panel Oral Argument at 17:43–17:55). But the prosecutors overreached and brought the aggravated identity theft charge anyway.

III. The Fifth Circuit's Expansive Interpretation of Section 1028A Is Wholly Inconsistent with the Statute's Purpose and Structure, Which Inform the Proper Reading of the Statute's Text

In endorsing the government's expansive theory of Section 1028A, the Fifth Circuit purportedly focused its analysis on the statute's text. *Dubin,* 27 F.4th at 1027 ("Though the caption of 18 U.S.C. § 1028A is indeed 'Aggravated identity theft,' the text of § 1028A(a)(1) does not require 'theft' . . . ."). But this overly rigid approach ignores that this Court generally recognizes that individual words should not be interpreted in a vacuum, and that context and legislative

purpose matter. *See Marinello*, 138 S. Ct. at 1107–08 (assessing the meaning of a statute's omnibus clause by viewing it in light of the "statutory context" and "legislative history"); *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (applying a narrower reading to a phrase at issue after noting that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction" and "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, [and] considering the purpose and context of the statute . . ."). Section 1028A's legislative history proves that Congress never intended the statute to apply to incidentally employing another's identity in situations that show no sign of theft or impersonation.

As Judge Costa aptly observed in dissent, "a textual case can be made for . . . an expansive reading of [Section 1028A]. But strong textual support existed for the government's broad interpretations of other criminal laws [including those in *Marinello* and *Yates*]—interpretations the Supreme Court did not buy." *Dubin*, 27 F.4th at 1042 (Costa, J. dissenting). "Because those sweeping interpretations were not the only plausible reading of the statute, the Supreme Court adopted also-plausible narrower interpretations." *Id.* The Court should do the same here.

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

The legislative history of Section 1028A informs how its text should be properly read. When drafting Section 1028A, "Congress borrowed and modified the language of § 1028(a)(7)." *Spears*, 729 F.3d at 756. 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 in connection with, any unlawful activity that constitutes a violation of Federal law." 18 U.S.C. § 1028(a)(7) (emphasis added). This prohibition was added to law as the Identity Theft and Assumption Deterrence Act of 1998 on the heels of the Internet's "Information Age" to combat identity thieves who "financially devastate . . . victims." Statement by President William Clinton Upon Signing H.R. 4151 (1998), *reprinted in* 1998 U.S.C.C.A.N. 703. As President Clinton recognized,

> 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 "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 (daily ed. Oct. 14, 1998) (statement of Sen. Leahy). Dubin did not engage in any such conduct here, and thus, cannot be convicted of identity theft under Section 1028(a)(7).

Congress's passage of Section 1028A in 2004 and the accompanying House Report reinforce 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 followed the September 11, 2001 attacks because terrorists "have long utilized identity theft." House Report at 4 (quoting an unnamed FBI agent). Section 1028A was not intended to replace Section 1028, change the definition of "identity theft" or 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 4–5 (noting that Section 1028 insufficiently deterred identity thieves, who were receiving short imprisonment or probation terms and, after releases, were engaging in further, more serious identity theft); *see* U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Identity Theft Offenses in the Federal Criminal Justice System* 8 (2018) (noting that "[t]he statute directs the court not to reduce any sentence for the underlying felony, assuming the defendant is convicted separately of the underlying felony").[10]

The House Report demonstrates that Congress understood aggravated identity theft to be separate from the underlying crimes that trigger enhanced punishment. Congress viewed the bill, entitled the Identity Theft Penalty Enhancement Act, as addressing "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." House Report at 3–4. The examples of

[10] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf.

"identity theft" in the House Report 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 it with third parties; and
- Stealing an individual's identity to establish credit, obtain loans, submit "bogus" federal income tax returns, and receive Social Security and other federal benefits.

Id. at 5–6. All of the foregoing examples contemplate criminals procuring the identities and means of identification of others to pass themselves off as those people or access their benefits without their knowledge or consent. By contrast, no examples remotely contemplate cases like Dubin's, where true identities were used to submit billing information for actual patients, who received actual services, and who gave their identification voluntarily. Such a result was never anticipated by Congress and is at odds with the statute's purpose.

An examination of the U.S. government's identity theft protection website, run by the FTC, underscores this point.[11] 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 involve so-called "identity thieves"

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[11] *Identity Theft Recovery Steps*, FTC, https://www.identitytheft.gov/steps.

who have "[s]tolen [y]our [i]nformation" to "drain your bank account, run up charges on your credit cards, open new utility accounts, . . . get medical treatment on your health insurance . . . . get your [tax] refund . . . . [and] even give your name to the police during an arrest."[12] The same is true for the DOJ's identity theft website, which describes "identity theft and identity fraud" as "terms used to refer to all types of crime in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception."[13] And none of these descriptions of impersonation remotely resemble Dubin's circumstance, yet he is now a convicted aggravated identity thief.

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

The context and structure of Section 1028A further support that it was not intended to encompass conduct like Dubin's. Narrower interpretations of "use" are available to cabin the scope of Section 1028A, and as Dubin explains in Section I.A. of his Brief, such interpretations are textually sound and consistent with the surrounding phrases in the statute. *See* Br. 18–23.

"Use" is undoubtedly open to multiple interpretations. *See Bailey v. United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable

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[12] *Warning Signs of Identity Theft*, FTC, https://www.identitytheft.gov/Warning-Signs-of-Identity-Theft.

[13] *Identity Theft*, U.S. Dep't of Just., https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud.

to it. . . . 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended."). The government even recognized the flexibility of "use" in its *Van Buren* briefing. Resp. Br. 38, *Van Buren v. United States*, 141 S. Ct. 1648 (2021) (No. 19-783) (arguing that "[a]lthough 'use' often has a broader definition, it may also be limited to circumstances where the mechanism employed is particularly efficacious" to advance its reading of the CFAA to only criminalize circumstances where a defendant's authorized access is *instrumental* in acquiring information from a computer, as opposed to *incidental*). Yet in *Dubin*, the government advanced, and the Fifth Circuit endorsed, the broadest application of "use" to stretch Section 1028A as far as its text could go by ignoring the statute's title and context. *See Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting) ("[T]he panel majority's reasoning was based entirely on dictionary definitions of the word 'use.' . . . Yet, this is not the way that we are to interpret that chameleon-like word, 'use.'").

Moreover, as Dubin explains in his Brief, the government's reading fails to assign proper meaning to the neighboring phrase "without lawful authority," which is better understood to direct the critical inquiry of Section 1028A to whether a defendant had permission to act on someone else's behalf, and not whether he happened to state another person's name while committing a predicate offense. Br. 23–27; *Dubin*, 27 F.4th at 1043 (Costa, J., dissenting) ("The statute's 'without lawful authority' language may provide additional support for reading the statute to apply only when 'another person's' identity was used without permission.").

Here, this Court has an opportunity to clarify the scope of Section 1028A relying on common sense—a uniformly recognized principle in statutory interpretation—by endorsing the narrower interpretation of the text adopted by the majority of circuits that have considered the issue. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 364 (5th Cir. 2005); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1016–17 (9th Cir. 2004); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997); *Salt Lake City v. W. Area Power Admin.*, 926 F.2d 974, 984 (10th Cir. 1991) (all observing the importance of common sense in statutory interpretation). The 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 logical approach. 543 U.S. 1, 11 (2004). Here, that term is not just "uses," but crucially, "identity theft." And Dubin's conduct was "simple healthcare fraud" and not "identity theft." *Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting).

Another common-sense principle requires the review of the statute's title. Section 1028A's is "Aggravated identity theft," which, reviewed alongside the statute's legislative history, suggests that Dubin's interpretation is the right one. *Flores-Figueroa*, 556 U.S. at 655 (citing Section 1028A's title in construing another aspect of the statute); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (observing that "statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotations and citations omitted).

Ignoring common sense and endorsing the government's limitless theory also violates "the ancient rule that the law must afford ordinary people fair notice of

its demands." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring). Such notice must come in advance, not in the form of an indictment after the defendant has already acted, and must be set forth "in language that the common world will understand." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). In its Opposition to Dubin's Petition for a Writ of Certiorari, the government did not refute Dubin's argument regarding "what ordinary people understand identity theft to be" and simply dismissed the role of a statute's title in statutory interpretation. Opp. 10 (quoting Pet. 31). But the government cannot assert in good faith that ordinary people—including Dubin—are afforded proper notice that a statute entitled "Aggravated identity theft" applies to situations in which there was no theft or impersonation of anyone's identity.

Even if there were some arguable textual merit to the Fifth Circuit's expansive reading of Section 1028A, per the rule of lenity, it is axiomatic that "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (concluding that two statutory readings were plausible, and therefore adopting the "more defendant-friendly" one). As described in the next section, the consequences of a far-reaching Section 1028A are too grave to ignore, whether this Court views them as "extra icing on a cake already frosted," or instrumental in triggering the rule of lenity. *Van Buren*, 141 S. Ct. at 1661 (citation omitted).

IV. Permitting the Fifth Circuit's Interpretation of 1028A to Stand Would Lead to Unreasonable and Unacceptable Outcomes

Under the Fifth Circuit's unlimited interpretation of Section 1028A, a defendant who is found guilty of healthcare fraud under 18 U.S.C. § 1347(a)(2) would

automatically also be found guilty of aggravated identity theft because healthcare billing inherently involves the use of patient names and other PII. Recognizing this overlap, Judge Duncan characterized the lack of daylight between the statutes as a "problem." Oral Argument at 54:30–54:50, *Dubin*, 27 F.4th 1021 (No. 19-50912).[14] Section 1028A, as a separate statute, should *add* some degree of culpability. But the government considers this to be a feature and not a bug of their interpretation, emphasizing how broad the statute is and advancing this theory both at trial and on appeal. *Id.* at 50:07–51:22 (wherein the government argued that "if you use someone's PII, and you have to, then all of those cases are going to be aggravated identity theft"); *Dubin*, 27 F.4th at 1037–38 (Elrod, J., dissenting) (noting that prosecutors had argued at Dubin's trial that committing healthcare fraud "obviously" and "automatic[ally]" meant that Dubin had also committed aggravated identity theft). The government even went so far as to posit that a defendant would commit aggravated identity theft, in addition to healthcare fraud, even if the patient *willingly cooperated* and *gave permission* to overbill using their name. Oral Argument at 52:18–52:29. This position is facially absurd—there is absolutely no patient theft in any sense—and stretches a statute entitled "Aggravated identity theft" that was enacted to protect against classic identity thieves beyond recognition.

Healthcare fraud is not the only Section 1028A predicate offense that could automatically be converted into aggravated identity theft under the Fifth Circuit's interpretation. Several other predicate fraud offenses inherently involve the use of PII, such as tax,

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[14] Available at https://www.ca5.uscourts.gov/OralArgRecordings/19/19-50912_5-25-2021.mp3.

immigration, and Social Security offenses. 18 U.S.C. §1028A(c)(1)–(11). Consider, for example, fraudulent tax deductions made by an employer who used the W-2 information of employees to take inflated tax deductions. The employer did not *steal* employee identities—at no point did he attempt to pass himself off as them, nor would his employees suffer the harm targeted by identity theft laws, such as "financial loss . . . . [u]ntold inconvenience, perpetual concern about another privacy breach, and loss of trust." *Dubin*, 27 F.4th at 1044 (Costa, J., dissenting). Rather, employee PII happened to be put to a use that *otherwise* constituted a crime. But under the Fifth Circuit's interpretation of Section 1028A, this tax fraud would become inseparable from identity theft.

This application of Section 1028A is all the more concerning because of the broad range of predicate offenses that it incorporates. They span wide-ranging fraud and false statement offenses such as mail, bank, and wire fraud (15 U.S.C. § 6823; 18 U.S.C. § 922(a)(6), chs. 47,[15] 63); immigration and citizenship offenses (8 U.S.C. §§ 1253, 1306, 1321 et seq.; 18 U.S.C. § 911, chs. 69, 75); various forms of theft and embezzlement (18 U.S.C. §§ 641, 656, 664); and certain violations of the Social Security Act (42 U.S.C. §§ 408, 1011, 1307(b), 1320a–7b(a), 1383a). 18 U.S.C. § 1028A(c)(1)–(11). According to the *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, fraud, theft, embezzlement, and immigration offenses are among the most common federal convictions, so the potential application of an illimitable Section 1028A should not be understated. U.S. Sent'g Comm'n, *supra*, at 45.

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[15] Excluding Sections 1028A and 1028(a)(7). 18 U.S.C. §1028A(c)(4).

The consequences of an expansive Section 1028A are not hypothetical: A Fifth Circuit panel recently upheld the Section 1028A conviction of a dog trainer convicted of wire fraud who submitted the names of instructors who did not actually work full time for his training business in connection with his application for VA fund eligibility because, after *Dubin*, "no matter how he acquired the names and certifications of the four individuals, he submitted them . . . (thus using the individual's names) without lawful authority in furtherance of his wire-fraud scheme." *United States v. Croft*, No. 21-50380, 2022 WL 1652742, at *4 (5th Cir. May 24, 2022), *petition for cert. filed* __ U.S. __ (U.S. Aug. 29, 2022) (No. 22-5460).

Indeed, under the Fifth Circuit's flawed reasoning, a lawyer who overbills a client's fee payor without the client's consent for work done is an identity thief, in addition to a wire and mail fraudster. The same is true for individuals who overembellish recommendations for job or school applicants. Common sense concludes that these individuals have not committed aggravated identity theft. However, an expansive reading of Section 1028A will broaden the scope of the conduct that could be considered "aggravated identity theft" to include those instances when PII is used to commit *any* type of federal fraud, even when the person's identity was not misused or misrepresented by someone seeking to impersonate them. If this Court allows Dubin's conviction to stand, then federal prosecutors will be given carte blanche to bring Section 1028A charges in any of these situations.

Tellingly, the government has done nothing to refute Dubin's dire warning that the Fifth Circuit's decision means that "a defendant violates the statute any time he mentions or otherwise recites someone

else's name while committing a predicate offense." Pet. 2. In its Opposition to Dubin's Petition, the government glibly dismissed this well-founded concern by theorizing that it is possible that "one or more of the elements of Section 1028A might not be satisfied" "if any future case were in fact to arise involving one of [Dubin's] hypothesized scenarios." Opp. 11–12. But this provides no comfort to those accused. As Section B of this brief demonstrates, it is highly unlikely that a future defendant who may have happened to recite someone's name during the commission of a Section 1028A predicate offense would go to trial to test the government's theory that it could establish all of Section 1028A's elements beyond a reasonable doubt. Defendants would be heavily incentivized to plead guilty if prosecutors threatened to bring a Section 1028A charge, even if the proposed application was unconventional and unconvincing, to avoid the possibility of the mandatory two-year sentencing enhancement. *See* Lucian E. Dervan, *The Symbiotic Relationship between Over-Criminalization and Plea Bargaining*, *in* The Enforcement Maze: Over-Criminalizing American Enterprise 13 (2018) [16] (describing how "novel legal theories . . . go untested by the courts" when federal prosecutors overcharge defendants using "overly broad statutes" in new ways and present them with "significant incentives to plead guilty").

Of course, this Court recognizes that it should not "construe a criminal statute on the assumption that the Government will use it responsibly," and by virtue of this prosecution of Dubin, federal prosecutors have established that they will not use Section 1028A

[16] Available at https://www.nacdl.org/getattachment/490ae3e0-583b-4905-a792-01776759338d/the-enforcement-maze-overcriminalizing-american-enterprise-compendium.pdf.

responsibly, bringing aggravated identity theft charges even in counter-intuitive situations. *McDonnell*, 579 U.S. at 576 (quotations omitted). As Judge Jacobs wisely observed in his dissent from the denial of rehearing en banc in *Marinello*, "at some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, 'Show me the man and I'll find you the crime.'" *United States v. Marinello*, 855 F.3d 455, 459 (2d Cir. 2017) (Jacobs, J., dissenting). This Court must again reinstate boundaries where the government has overstepped, this time, by striking down its theory of Section 1028A.

CONCLUSION

For the foregoing reasons, as well as those expressed in Dubin's brief, *amicus curiae* NACDL urges this Court to overturn the Fifth Circuit's decision in *Dubin* and define the scope of Section 1028A narrowly.

Respectfully submitted,

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