WHAT KIND OF LIAR ARE YOU? THE FIFTH CIRCUIT'S BROAD INTERPRETATION OF AGGRAVATED IDENTITY THEFT

Abstract: On March 3, 2022, in *United States v. Dubin*, the United States Court of Appeals for the Fifth Circuit interpreted 18 U.S.C. § 1028A(a)(1) of the aggravated identity theft statute broadly to apply to a defendant who employed a patient's accurate identifying information to overcharge Medicaid for services provided. In doing so, the court exacerbated the circuit split over the meaning of "use" in § 1028A(a)(1), siding with the Fourth, Eighth, Eleventh, and D.C. Circuits that have interpreted use to mean any involvement of another person's identifying information in committing certain federal offenses. By contrast, the First, Sixth, Seventh, and Ninth Circuits have confined the statutory meaning of use to describe only cases of identity falsification in the commission of federal offenses. This Comment argues that the *Dubin* court erred in failing to consider the statutory ambiguity and, consequently, legislative history of § 1028A(a)(1), which indicates a more limited application of the sentencing enhancement. Unless Congress clarifies that the aggravated identity theft statute applies to cases in which no identity has been falsified, the Supreme Court should construe § 1028A(a)(1) narrowly, balancing the plain meaning of use with Congress's intent to target acts of identity misrepresentation, and avoiding the over-penalization of criminal defendants for want of clarity.

INTRODUCTION

Throughout the COVID-19 pandemic, identity theft has threatened the financial security of many Americans and the federal government.[1] Falsifying

[1] *See Identity Theft by Age*, FED. TRADE COMM'N, https://public.tableau.com/app/profile/federal.trade.commission/viz/IdentityTheftReports/TheftTypesOverTime [https://perma.cc/FK23-J795] (July 20, 2022) (indicating a dramatic spike of 272,848 reports of government benefits fraud in early 2021, among bank fraud, credit card fraud, and employment or tax fraud); *see also* David A. Fahrenthold, *Prosecutors Struggle to Catch Up to a Tidal Wave of Pandemic Fraud*, N.Y. TIMES, https://www.nytimes.com/2022/08/16/business/economy/covid-pandemic-fraud.html [https://perma.cc/B6WA-UTWS] (Aug. 18, 2022) (discussing the surge of identity theft related to pandemic-relief programs). In 2020, the Federal Trade Commission received more than 2.1 million reports of consumer fraud, resulting in over $3.3 billion lost. Press Release, Fed. Trade Comm'n, New Data Shows FTC Received 2.2 Million Fraud Reports from Consumers in 2020 (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/new-data-shows-ftc-received-22-million-fraud-reports-consumers-2020 [https://perma.cc/UZ7G-BSV6]. The Department of Justice defines identity theft and identity fraud as any crime involving the unlawful obtainment and use of another person's identity, typically for financial gain and through means of deception. *Identity Theft*, U.S. DEP'T OF JUST., https://www.

identifying information for profit or deceit, however, is not new: since the 1980s, the United States Department of Justice (DOJ) has prosecuted a host of identity crimes under a general identity fraud statute.[2] In 2004, the DOJ began charging defendants with aggravated identity theft to enhance the punishment for the unlawful use of another person's identifying information in connection with certain federal offenses.[3] Despite these efforts, the exchange of personal information in online and offline contexts continues, perpetuating privacy concerns and the potential for abuse.[4] In 2018, David Dubin, a billing manager for a mental health services company, was charged with health-care fraud after overcharging Medicaid for testing provided to a patient.[5] Because Dubin included the patient's identifying information in the inflated claim, he was also charged with aggravated identity theft.[6]

Part I of this Comment discusses the history of the aggravated identity theft statute, the circuit split over its interpretation, and the factual and procedural background of the United States Court of Appeals for the Fifth Circuit's 2022 decision in *United States v. Dubin*.[7] Part II details the broad and narrow constructions of 18 U.S.C. § 1028A(a)(1) that constitute the basis of the circuit

---

justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud [https://perma.cc/33NZ-37Q2] (Nov. 16, 2020).

[2] 18 U.S.C. § 1028. The statute prohibits fraud in the form of a knowing production, possession, or transfer of identification documents, authentication features, means of identification, and document-making implements. *Id.*

[3] *See id.* § 1028A (defining aggravated identity theft as the knowing and unlawful transfer, possession, or use of another person's identifying information in relation to enumerated federal offenses); Press Release, U.S. Dep't of Just., Fact Sheet: The Department of Justice's Efforts to Combat Identity Theft (Apr. 23, 2007), https://www.justice.gov/archive/opa/pr/2007/April/07_opa_278.html [https://perma.cc/267S-6ZUS] (describing the DOJ's efforts to enhance the penalty for identity theft in connection to a felony offense under § 1028A(a)(1)); *see also* Philip F. DiSanto, Note, *Blurred Lines of Identity Crimes: Intersection of the First Amendment and Federal Identity Fraud*, 115 COLUM. L. REV. 941, 948–49 (2015) (explaining that Congress enacted identity fraud and theft statutes to address concerns regarding the security of both physical and digital means of identifying information). Section 1028A(c) provides the felony violations, commonly referred to as predicate offenses, to which § 1028A(a)(1) applies. *See* H.R. REP. NO. 108-528, at 51, 53 (2004) (statement of Adam Schiff) (explaining that a predicate offense is the underlying crime committed in relation to aggravated identity theft).

[4] *See* IDENTITY THEFT TASK FORCE, COMBATING IDENTITY THEFT: A STRATEGIC PLAN (2008), https://www.ftc.gov/sites/default/files/documents/reports/presidents-identity-theft-task-force-report/081021taskforcereport.pdf [https://perma.cc/TP9M-EQKL] (recommending strategies to address the ongoing threat of identity theft, including protecting personal data, deterring data misuse, assisting victims of identity theft, and deterring identity thieves through enhanced prosecution and punishment); Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1745, 1749 (2020) (discussing the increasing vulnerability of consumers in the modern age who share personal information with major companies, given the near-weekly occurrence of data breaches).

[5] United States v. Dubin, 27 F.4th 1021, 1022 (5th Cir.) (en banc) (Owen, C.J., concurring), *cert. granted*, 143 S. Ct. 416 (2022) (mem.). The request to Medicaid inaccurately claimed that the service was eligible for reimbursement and warranted a larger reimbursement. *Id.* at 1026.

[6] *Id.* at 1022.

[7] *See infra* notes 10–39 and accompanying text.

split, and fits *Dubin*'s plurality and dissenting opinions within this framework.[8] Finally, Part III argues that the *Dubin* court erred in failing to consider the statutory ambiguity and legislative history of § 1028A(a)(1), and that the Supreme Court should construe the aggravated identity theft statute narrowly in line with its own principles of statutory interpretation and Congress's intent.[9]

I. A Long Time Coming: The Legal, Factual, and Procedural Background of *United States v. Dubin*

In 2022, in *United States v. Dubin*, the United States Court of Appeals for the Fifth Circuit construed the aggravated identity theft statute broadly to apply to circumstances where a defendant uses another person's identifying information in committing a federal offense without falsifying that person's identity.[10] Section A of this Part traces the development of 18 U.S.C. § 1028A(a)(1) of the aggravated identity theft statute.[11] Section B summarizes the opposing interpretations of the statute—particularly, of the term "use"—among the circuit courts.[12] Section C discusses the factual and procedural history of *Dubin*.[13]

A. The History and Purpose of the Aggravated Identity Theft Statute

In 1982, Congress attempted to address identity fraud for the first time through the False Identification Crime Control Act.[14] Given the rise in technology enabling the theft or reproduction of identifying information, 18 U.S.C. § 1028 prohibited the knowing and unlawful production or transfer of another person's identification documents.[15] In 1998, Congress amended § 1028 to

---

[8] *See infra* notes 40–61and accompanying text.

[9] *See infra* notes 62–71 and accompanying text. The Supreme Court granted certiorari in *Dubin* in late 2022 and so may clarify the meaning of aggravated identity theft in its 2022–2023 term. *See* 143 S. Ct. 416 (2022) (mem.).

[10] 27 F.4th at 1025. Only the Fourth Circuit has reached the same conclusion based on similar facts. *See* United States v. Abdelshafi, 592 F.3d 602, 609–10 (4th Cir. 2010) (holding that a defendant who involved patients' accurate identifying information to overcharge Medicaid for services provided committed aggravated identity theft).

[11] *See infra* notes 14–19 and accompanying text.

[12] *See infra* notes 20–26 and accompanying text.

[13] *See infra* notes 27–39 and accompanying text.

[14] False Identification Crime Control Act of 1982, Pub L. No. 97-398, 96 Stat. 2009 (codified as amended at 18 U.S.C. § 1028). For more on the development of § 1028, see generally U.S. Dep't of Just., Crim. Res. Manual § 1501 (2020), https://www.justice.gov/archives/jm/criminal-resource-manual-1501-false-identification-18-usc-1028-overview [https://perma.cc/4DVC-JCPW], which describes the law as the result of a ten-year legislative endeavor to improve federal criminal statutes prohibiting false identification.

[15] 18 U.S.C. § 1028; *see* H.R. Rep. No. 97-975, at 1–3 (1982) (Conf. Rep.) (indicating that § 1028 aimed to prevent the production and use of false identification in government documents offenses); DiSanto, *supra* note 3, at 948 (explaining that rapid technological advancements heightened security concerns over personal information, motivating Congress to enact preventive and punitive legislation regarding identity theft).

criminalize identity theft explicitly: § 1028(a)(7) applied to anyone who knowingly and unlawfully transferred, possessed, or used another person's means of identification to commit, to aid or abet, or in connection with, a federal law violation or a state or local felony.[16]

National concerns about identity theft flared following the September 11th attacks in 2001, as some of the hijackers used false identities to board the airplanes and carry out the attacks.[17] Consequently, in 2004, Congress passed the Identity Theft Penalty Enhancement Act to proscribe aggravated identity theft.[18] To alleviate concerns that identity thieves received insufficient punishment under § 1028(a)(7), § 1028A mandated an additional term for defendants

---

[16] Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 3(a)(4), 112 Stat. 3007, 3007 (codified at 18 U.S.C. § 1028(a)(7)). This amendment arose from concerns regarding the increasing amount of financial information accessible online. *See* Statement on Signing the Identity Theft and Assumption Deterrence Act of 1998, 2 PUB. PAPERS 1930–31 (Oct. 30, 1998) (explaining that § 1028(a)(7) intended to punish the theft of personally sensitive information used to commit illegal acts in an increasingly technological era); Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 CORNELL J.L. & PUB. POL'Y 661, 670–74 (1999) (explaining the development of § 1028(a)(7) from preexisting identity fraud statutes and its intended impacts). Historically, the term "identity fraud" has been used more generally to describe a broad spectrum of fraudulent acts, whereas "identity theft" has been used to address discrete instances of personal victimization. *See* KRISTIN FINKLEA, CONG. RSCH. SERV., R40599, IDENTITY THEFT: TRENDS AND ISSUES 2–3 (2014), http://fas.org/sgp/crs/misc/R40599.pdf [https://perma.cc/C7H3-8YSG] (differentiating identity fraud from identity theft, based on the severity of concerns for victims and mens rea requirement in aggravated identity theft); *see also* Flores-Figueroa v. United States, 556 U.S. 646, 655 (2009) (associating identity fraud with using any form of false identification and identity theft with using another person's identification). Congress has used both terms to refer to any crime that involves the wrongful possession or use of another person's identifying information, typically through fraud and for financial gain. H.R. REP. NO. 108-528, at 4 (2004).

[17] *See Preventing Identity Theft by Terrorists and Criminals: Joint Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs. and the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 107th Cong. 47 (2001) (statement of Sue W. Kelly, Chair, H. Comm. on Oversight and Investigations) (describing Congress's goal to defend against identity theft in light of the Inspector General's testimony that the hijackers used false Social Security information to commit the attacks); *see also* Bob Sullivan, *9/11 Report Light on ID Theft Issues*, NBC NEWS (Aug. 4, 2004), https://www.nbcnews.com/id/wbna5594385 [https://perma.cc/P4WM-EQGC] (discussing the 9/11 commission report's findings that the hijackers committed credit card and document fraud before the attacks, and that impersonation was an essential tool for terrorism-related identity theft).

[18] Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) (codified at 18 U.S.C. §§ 641, 1028, 1028A). Section 1028A(a)(1) provides that "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1). Congress described the aggravated identity theft statute as enhancing the punishment for individuals who steal another person's identity to engage in acts of terrorism, immigration violations, firearms offenses, and other serious crimes. H.R. REP. NO. 108-528, at 3. In effect, § 1028A(a)(1) serves as a sentencing enhancement for § 1028(a)(7) violations. *Id.* at 4.

who knowingly and unlawfully transmitted, possessed, or used another person's identity during and related to predicate offenses.[19]

B. The Conflicting Interpretations of § 1028A(a)(1)

Courts generally agreed that the purpose of § 1028A(a)(1) is to enhance the punishment for defendants who unlawfully transmit, possess, or use another person's identity in the commission of certain federal offenses.[20] In 2009, in *Flores-Figueroa v. United States*, the United States Supreme Court clarified that § 1028A(a)(1) required a defendant to know that the identifying information at issue belonged to another person.[21] Within these parameters, courts have disputed the scope of § 1028A(a)(1), as the complexity of crimes involving others' identities has evolved.[22]

---

[19] *See* H.R. REP. NO. 108-528, at 3, 5–6 (noting that many identity thieves obtain short sentences, and highlighting cases where defendants were sentenced for a maximum of fifteen months and/or five years' probation); Press Release, Off. of Press Sec'y, Identity Theft Penalty Enhancement Act of 2004 (July 15, 2004) (noting that § 1028A imposes a minimum two-year sentence to compensate for previous identity theft sentences thought to be inadequate in redressing victims' harm). Section 1028A imposes a five-year consecutive prison term for terrorism-related crimes and a two-year term for all other offenses. *Compare* § 1028A(a)(1) (applying to general offenses), *with* § 1028A(a)(2) (applying to terrorism offenses). In 2018, the United States Sentencing Commission stated that prosecutions under § 1028A(a)(2) were rare after the events of 9/11. U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR IDENTITY OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 n.5 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf [https://perma.cc/LC53-B8KL].

[20] *See, e.g.*, United States v. Abdelshafi, 592 F.3d 602, 607 (4th Cir. 2010) (providing the elements of § 1028A(a)(1) that the Government must prove before imposing "[t]his mandatory two-year sentence"); United States v. Stephens, 571 F.3d 401, 404–05 (5th Cir. 2009) (similar); *see also* H.R. REP. NO. 108-528, at 4 (explaining that § 1028A(a)(1) targeted criminals who, in committing predicate offenses, wrongfully took and used someone's identity to some extent that was fraudulent or deceitful); § 1028A(c)(1)–(11) (listing mail fraud, credit card fraud, government benefits fraud, and health-care fraud as some predicate offenses); Press Release, Off. of Press Sec'y, *supra* note 19 (noting that § 1028A ensures that those with work-related access to personal or financial data do not abuse or steal identifying information). In 2002, the Federal Trade Commission found that, of 161,819 complaints received, forty-two percent involved credit card fraud, twenty-two percent involved activating utilities in another person's name, seventeen percent involved bank accounts opened in another person's name, and sixteen percent involved medical, bankruptcy, and securities fraud. H.R. REP. NO. 108-528, at 4.

[21] 556 U.S. at 657. The Supreme Court has provided no further guidance regarding § 1028A(a)(1), *see id.* at 654 (discussing one possible use of identity, in reporting a false Social Security number, without defining "use" or other terms of § 1028A), and the statute does not define its own terms, aside from the phrase "felony violation enumerated in subsection (c)," *see* § 1028A(c) (providing examples of predicate offenses).

[22] *See* United States v. Dubin, 27 F.4th 1021, 1023 (5th Cir.) (en banc) (Owen, C.J., concurring) (noting the circuit split over interpreting § 1028A(a)(1)), *cert. granted*, 143 S. Ct. 416 (2022) (mem.). For instance, circuit courts have generally recognized health-care fraud as a cognizable predicate offense for § 1028A(a)(1), although defendants have argued that health-care fraud is not a predicate offense following Congress's enactment of § 1028A(a)(1). *See, e.g.*, United States v. Abdur-Rahman, 708 F.3d 98, 100–01 & n.1 (2d Cir. 2013) (rejecting the argument that health-care fraud is not a predi-

Most courts agree that a defendant need not steal another person's identity to use it unlawfully.[23] Nonetheless, in 2013, the circuit courts began to dispute the precise meaning of "use" within § 1028A(a)(1).[24] The First, Sixth, Seventh, and Ninth Circuits have interpreted the statutory definition of "use" narrowly to proscribe only the act of misrepresenting another person's identity in committing a predicate offense.[25] Conversely, the Fourth, Eighth, Eleventh, and D.C. Circuits have construed the statute broadly to penalize any involvement of another person's identifying information in a predicate offense, regardless of whether the identity was falsified.[26]

---

cate offense under § 1028A(c)(5), and citing other circuits that upheld § 1028A convictions in the health-care fraud context).

[23] *See, e.g.*, United States v. Kasenge, 660 F.3d 537, 541 (1st Cir. 2011) (holding that § 1028A(a)(1) does not require stealing another person's identity); *Abdelshafi*, 592 F.3d at 607 (4th Cir. 2010) (agreeing with the Eleventh Circuit that § 1028A(a)(1) does not require actual theft of another person's identity); United States v. Hurtado, 508 F.3d 603, 607 (11th Cir. 2007) (rejecting that § 1028A(a)(1) requires that a defendant stole the identifying information), *abrogated in part on other grounds by* Flores-Figueroa v. United States, 556 U.S. 646 (2009).

[24] *Compare Abdelshafi*, 592 F.3d at 609 (interpreting § 1028A(a)(1) to proscribe any involvement of another person's identity in committing a predicate offense, despite initial lawful authorization to use the identifying information), *with* United States v. Miller, 734 F.3d 530, 541 (6th Cir. 2013) (agreeing with the defendant that § 1028A(a)(1) could require the stealing, possessing, impersonating, or obtaining anything of value from another person's identity).

[25] *See* United States v. Hong, 938 F.3d 1040, 1051 (9th Cir. 2019) (concluding that a defendant who provided massage services to patients and misrepresented the treatment as Medicare-eligible did not commit aggravated identity theft because the identifying information was accurate); United States v. Berroa, 856 F.3d 141, 156–57 (1st Cir. 2017) (deciding that the defendants who issued prescriptions to patients using false licenses did not commit aggravated identity theft because they did not use patients' identities to impersonate them or act on their behalf); United States v. Medlock, 792 F.3d 700, 708 (6th Cir. 2015) (holding that the defendants who overcharged Medicare for transportation provided to patients did not commit aggravated identity theft because they did not misrepresent patients' identities); *Miller*, 734 F.3d at 541–42 (explaining that the defendant who signed a document containing false information did not commit aggravated identity theft because he did not use others' identities to impersonate them, act on their behalf, or obtain anything of value); *cf.* United States v. Spears, 729 F.3d 753, 758 (7th Cir. 2013) (en banc) (reasoning that a defendant who made a fake handgun permit for another person using her actual information committed fraud, but not aggravated identity theft).

[26] *See* United States v. Munksgard, 913 F.3d 1327, 1336 (11th Cir. 2019) (reasoning that the defendant committed aggravated identity theft when he forged another person's signature to commit bank fraud); United States v. Gatwas, 910 F.3d 362, 368 (8th Cir. 2018) (determining that the defendant committed aggravated identity theft when he used his children's accurate identifying information to submit fraudulent benefits claims for his clients); United States v. Mahmood, 820 F.3d 177, 189 (5th Cir. 2016) (explaining that the defendant's use of patients' identifying information to manipulate diagnostic criteria and upcharge Medicare constituted aggravated identity theft); United States v. Reynolds, 710 F.3d 434, 436 (D.C. Cir. 2013) (concluding that the defendant committed aggravated identity theft when he accessed others' identifying information lawfully, but used it illegitimately to commit bank and wire fraud); *Abdelshafi*, 592 F.3d at 609 (holding that the defendant committed aggravated identity theft when he included patients' identifying information in claims to defraud Medicaid).

C. The Factual and Procedural Backdrop of United States v. Dubin

David Dubin worked as a billing manager for a mental health-care company (PARTS) located in Texas, which offered psychological services at a youth shelter.[27] As a Medicaid provider, PARTS submitted claims to Medicaid with patients' identification numbers and descriptions of the services provided to determine eligibility for and amount of reimbursement.[28] In 2017, Texas's Medicaid Fraud unit discovered that Dubin had engaged in fraudulent billing practices since 2011.[29] Specifically, in 2013, a PARTS associate evaluated Patient L, whom PARTS had already tested within the past year.[30] Before the associate conducted further services, the shelter discharged Patient L.[31] Because Medicaid reimbursed only one examination per patient each year, Dubin directed the associate to push forward the service date to establish Patient L's eligibility.[32] Furthermore, Dubin instructed the associate to overreport the time spent with the patient and claim that a licensed psychologist, rather than the licensed psychological associate, evaluated the patient.[33]

---

[27] United States v. Dubin, 982 F.3d 318, 321 (5th Cir. 2020), *aff'd*, 27 F.4th 1021 (5th Cir.) (en banc) (per curiam), *cert. granted*, 143 S. Ct. 416 (2022) (mem.). Children with behavioral or mental health challenges lived at the shelter, and PARTS employees traveled there to perform psychological examinations, conduct clinical interviews, and recommend treatment for patients. *Id.*

[28] *Id.* Medicaid reimbursed PARTS for one psychological evaluation per patient each year, for up to eight hours' worth of services each day, and at a higher rate for licensed psychologists than for non-licensed clinicians. United States v. Dubin, 27 F.4th 1021, 1026 (5th Cir.) (en banc) (Owen, C.J., concurring), *cert. granted*, 143 S. Ct. 416 (2022) (mem.).

[29] *Dubin*, 982 F.3d at 321–22. After talks in 2011 between Dubin's father, who worked as a licensed psychologist for PARTS, and the president of the shelter's board of directors, PARTS began sending employees to the shelter and billing Medicaid for services provided. *Id.* at 321. PARTS paid ten percent of its income to the shelter's president. *Id.* Following the investigation, Dubin, his father, and the shelter's president were charged under 18 U.S.C. §§ 2 (aiding and abetting), 1349 (conspiracy to commit health-care fraud), 1347 (health-care fraud), and 1028A (aggravated identity theft). *Dubin*, 982 F.3d at 322.

[30] Brief for Petitioner at 6, Dubin v. United States, No. 22-10 (filed Dec. 23, 2022). PARTS employees evaluated several patients at the shelter during this time, but Patient L was the sole patient at issue in this case. *Id.*

[31] *Id.* at 7.

[32] *Dubin*, 27 F.4th at 1026 (Owen, C.J., concurring). Dubin initially instructed the associate to wait until the one-year mark (May 29) had passed before proceeding with services. *Id.* Upon learning that Patient L would be discharged before then, Dubin told the associate to report that the test had occurred on May 30. *Id.*

[33] *Id.*; *see* Brief for Petitioner, *supra* note 30, at 7 (noting that the ultimate gain that PARTS received through the licensed-psychologist enhancement was $101.43). The exact number of hours overreported is not consistent across court documents: Chief Judge Richman (then known as Chief Judge Owen), writing for the plurality of judges who joined the per curiam affirmance, stated that Dubin had billed for the maximum eight-hour period—if not for Patient L, then at least as a general practice. *Dubin*, 27 F.4th at 1026 (Owen, C.J., concurring). Judge Elrod wrote, however, that Dubin had instructed the associate to charge for three hours' worth of testing. *Id.* at 1037 (Elrod, J., dissenting). Regardless, the court's split interpretations of § 1028A(a)(1) did not turn on the specific number of hours that Dubin overbilled. *See id.* at 1030–31 (Owen, C.J., concurring) (discussing the issue of overcharging without referring to the exact number of hours).

In 2018, Dubin was convicted in the United States District Court for the West District of Texas of, among other offenses, health-care fraud and aggravated identity theft.[34] The court imposed a year-and-a-day sentence for health-care fraud and an additional two-year term for aggravated identity theft.[35] Dubin appealed the aggravated identity theft count, arguing that he did not use a means of identification within the meaning of § 1028A(a)(1) because he did not misrepresent his or the patient's identity in submitting the fraudulent claim.[36] A panel of the United States Court of Appeals for the Fifth Circuit affirmed the conviction, reasoning that Dubin plainly used Patient L's identity for unlawful purposes.[37] In light of the circuit split, the Fifth Circuit granted en banc review in March 2022 to reconsider the meaning of "use" in § 1028A(a)(1).[38] In November 2022, the Supreme Court granted certiorari to determine whether § 1028A(a)(1) considers the mere inclusion of another person's accurate identifying information in a predicate offense to be aggravated identity theft.[39]

---

[34] *See Dubin*, 27 F.4th at 1022 (Owen, C.J., concurring) (explaining that Dubin's charge under § 1347 was for aiding and abetting, and his charge under § 1349 was for conspiracy to commit health-care fraud); 18 U.S.C. §§ 1347(a) (health-care fraud), 1349 (attempt and conspiracy), 1028A (aggravated identity theft). The health-care fraud and conspiracy offenses are felony violations enumerated in subsection (c)(5) of § 1028A. *See* § 1028A(c)(5) (including any provision in chapter 63 as a predicate offense); §§ 1347, 1349 (appearing in chapter 63 of Title 18). A jury found Dubin guilty of these counts. Brief for Petitioner, *supra* note 30, at 8.

[35] United States v. Dubin, 982 F.3d 318, 323 (5th Cir. 2020), *aff'd*, 27 F.4th 1021 (5th Cir.) (en banc) (per curiam), *cert. granted*, 143 S. Ct. 416 (2022) (mem.). The court concluded that the falsified date and licensed-psychologist enhancement were sufficient to support the jury's verdict, and did not address the issue of inflated hours. Brief for Petitioner, *supra* note 30, at 8.

[36] Brief for Appellant at 14, United States v. Dubin, 982 F.3d 318 (5th Cir. 2020) (No. 19-50912). Dubin argued for a narrow construction of § 1028A(a)(1), following the First, Sixth, Seventh, and Ninth Circuits. *See, e.g.*, United States v. Medlock, 792 F.3d 700, 708 (6th Cir. 2015) (narrowing the meaning of "use" under § 1028A(a)(1) to cases where some aspect of identity has been misrepresented, as opposed to the nature of services provided).

[37] *See Dubin*, 982 F.3d at 325–26 (defining the plain meaning of "use" as deploying something for another purpose). As a matter of first impression, the panel defined "use" in connection with the phrase "without lawful authority," setting forth a two-part test for aggravated identity theft: first, whether the defendant used a means of identification, and second, whether that use was unlawful or outside the scope of authority. *Id.* at 326. The panel held that Dubin's conduct constituted aggravated identity theft because he used Patient L's identifying information to commit Medicaid fraud. *Id.* Concurring in the judgment, Judge Elrod noted that she would have followed the Sixth Circuit's rationale in *Medlock* if she were not bound by the Fifth Circuit's precedent. *Id.* at 332 (Elrod, J., concurring); *see Medlock*, 792 F.3d at 707–08 (holding that the defendants' misrepresentation of "how and why" their company transported patients did not constitute aggravated identity theft because the patients actually received services).

[38] *See Dubin*, 27 F.4th at 1022, 1023 (Owen, C.J., concurring) (noting the disagreement over the proper interpretation of "use" under § 1028A(a)(1) within the court and among circuits).

[39] Dubin v. United States, 143 S. Ct. 416 (2022) (mem.).

II. *DUBIN* HIGHLIGHTS THE DIVIDE OVER THE MEANING OF "USE" IN § 1028A(A)(1)

In 2022, in *United States v. Dubin*, the United States Court of Appeals for the Fifth Circuit deepened the circuit split over the meaning of "use" in § 1028A(a)(1), revealing the conflicting interpretations among the First, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits.[40] Section A of this Part examines the broad, textual approach employed by the Fourth, Eighth, Eleventh, and D.C. Circuits.[41] Section B summarizes the narrow interpretation articulated by the First, Sixth, Seventh, and Ninth Circuits.[42] Section C discusses the Fifth Circuit's plurality in *Dubin*, which took the broad approach, and its dissents, which advocated a constrained reading of the statute.[43]

A. The Broad Construction of § 1028A(a)(1) Based on Plain Meaning

In 2010, in *United States v. Abdelshafi*, the Fourth Circuit defined the meaning of "use" under § 1028A(a)(1) broadly in determining that a defendant who owned a medical transportation services company committed aggravated identify theft when he employed patients' identifying information to overcharge Medicaid for mileage driven.[44] The court interpreted the use of identifying information to include any involvement of another person's identity in a predicate offense.[45] Deeming the statutory text broad and clear, the court declined to consider its scheme or legislative history, holding that § 1028A(a)(1) applies whenever a defendant employed a person's identity, to some degree, unlawfully.[46]

---

[40] *Compare* 27 F.4th at 1023 (Owen, C.J., concurring) (construing § 1028A(a)(1) broadly to affirm the conviction), United States v. Munksgard, 913 F.3d 1327, 1336 (11th Cir. 2019) (same), United States v. Gatwas, 910 F.3d 362, 368 (8th Cir. 2018) (same), United States v. Reynolds, 710 F.3d 434, 436 (D.C. Cir. 2013) (same), *and* United States v. Abdelshafi, 592 F.3d 602, 609 (4th Cir. 2010) (same), *with Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting) (construing § 1028A(a)(1) narrowly), United States v. Hong, 938 F.3d 1040, 1051 (9th Cir. 2019) (same), United States v. Berroa, 856 F.3d 141, 156–57 (1st Cir. 2017) (same), *Medlock*, 792 F.3d at 708 (same), *and* United States v. Spears, 729 F.3d 753, 758 (7th Cir. 2013) (en banc) (similar).

[41] *See infra* notes 44–49 and accompanying text.

[42] *See infra* notes 50–55 and accompanying text.

[43] *See infra* notes 56–61 and accompanying text.

[44] 592 F.3d at 609–10. The claims included patients' names, birthdates, and Medicaid identification numbers, along with dates of service, pick-up and drop-off locations, and miles travelled. *Id.* at 605. The company responsible for reviewing the claims used the mileage, among other factors, to calculate Medicaid's reimbursement. *Id.*

[45] *Id.* at 609. The court defined "use" in connection with the phrase "without lawful authority," reasoning that some uses of another person's identity could be lawful, but any unlawful use constitutes aggravated identity theft. *Id.* at 608.

[46] *See id.* at 608 & n.4 (noting that the defendant did not argue that the statute was ambiguous and thus refusing to consider the statute's title or context). The court cited *Flores-Figueroa v. United States* to support a textual reading of § 1028A(a)(1). *Id.* at 607. In *Flores-Figueroa*, the Supreme Court stated that a textual statutory interpretation still considers context, but found no special circum-

In 2018, the Eighth Circuit similarly construed § 1028A(a)(1) broadly in *United States v. Gatwas*, holding that a defendant committed aggravated identity theft when he filed fraudulent dependent-based benefits claims for his clients using his children's identifying information.[47] Focusing on the text of § 1028A(a)(1), the court reasoned that any involvement of another person's identity to commit a predicate offense constitutes aggravated identity theft, so long as the identifying information played an integral role in the offense.[48] The Eleventh Circuit followed suit in 2019, in *United States v. Munksgard*, reasoning that a defendant committed aggravated identity theft when he forged another person's signature on a loan application because the use of identifying information facilitated the underlying offense of bank fraud.[49]

B. The Narrow Construction of § 1028A(a)(1) Based on Ambiguity

In 2015, in *United States v. Medlock*, the Sixth Circuit diverged from the Fourth Circuit's broad and clear view of § 1028A(a)(1) in holding that the de-

---

stances present in the case to alter the statute's plain meaning. 556 U.S. 646, 652 (2009). Nonetheless, the Supreme Court proceeded to consider the legislative history of § 1028A. *Id.* at 654–55. The *Abdelshafi* court rejected the defendant's argument that his initial authorization to use patients' identifying information to bill Medicaid precluded him from committing aggravated identity theft. *See* 592 F.3d at 609 n.5 (explaining that the statute does not differentiate basic from "excessive[]" uses of another person's identity, but rather applies to all knowing and unlawful uses of the information). In 2016, in *United States v. Mahmood*, the Fifth Circuit similarly held that a defendant who manipulated patients' medical information to increase reimbursement without altering their identifying information committed aggravated identity theft. 820 F.3d 177, 189 (5th Cir. 2016).

[47] 910 F.3d 362, 368 (8th Cir. 2018). The defendant argued that the text and context of § 1028A(a)(1) required the theft or assumption of another person's identity in committing the underlying offense. *Id.* at 364. Like the *Abdelshafi* court, the *Gatwas* court rejected this argument, noting the limiting function of the phrase "without lawful authority" on the meaning of "use." *See id.* (referring to "use[], without lawful authority" as one statutory term).

[48] *See id.* at 368 (explaining that the defendant's use of someone else's identity "must be more than incidental" to the underlying offense to invoke § 1028A(a)(1)). The court offered that it would reverse the conviction of aggravated identity theft had the defendant used a client's identifying information in submitting a tax return that either under-reported income or claimed false deductions because such uses would be incidental, rather than integral, to the fraud. *Id.* Rejecting that the statute was ambiguous, the court declined to consider the rule of lenity in favor of the defendant. *Id.* at 368 n.2.

[49] *See* 913 F.3d 1327, 1334, 1336 (11th Cir. 2019) (citing United States v. Michael, 882 F.3d 624, 628 (6th Cir. 2018)) (explaining that the defendant must have used the identifying information to facilitate or advance the predicate offense to commit aggravated identity theft). The court rejected the argument that § 1028A(a)(1) required an attempt at impersonation, reasoning that the defendant plainly converted another person's name to his own service and thus fell within the statutory scope. *Id.* at 1334. Although claiming to adhere to a plain-meaning approach, the *Munksgard* court considered both the text and context of § 1028A(a)(1) to reach its conclusion. *Id.* at 1336. In 2013, in *United States v. Reynolds*, the D.C. Circuit similarly held that a defendant who forged colleagues' digital signatures to procure a bank loan committed aggravated identity theft. *See* 710 F.3d 434, 436 (D.C. Cir. 2013) (reasoning, based on the text of § 1028A(a)(1), that a defendant's use of identifying information constitutes aggravated identity theft when the use is for illegitimate purposes or exceeds the scope of initial authority).

fendants who owned a medical transportation services company did not commit aggravated identity theft when submitting inaccurate claims to Medicare because they did not falsify patients' identifying information, but rather the nature of services provided.[50] Acknowledging the common yet varied meanings of "use," including the employment, conversion, or personal avail of something, the court reasoned that the scheme and context of § 1028A(a)(1) limited the statutory term to describe only instances of identity falsification.[51] The court explained that lying about the exact services provided constitutes health-care fraud, but not aggravated identity theft, because nothing about the patients' identities had been falsified.[52]

In 2017, in *United States v. Berroa*, the First Circuit similarly construed § 1028A(a)(1) narrowly, holding that the defendants, two doctors with fake licenses, did not commit aggravated identity theft when they issued prescriptions to patients because they did not misrepresent their own or the patients' identities in doing so.[53] Determining the meaning of "use" in § 1028A(a)(1) to

---

[50] 792 F.3d 700, 708 (6th Cir. 2015). The defendants' company (MAS) transported patients to kidney dialysis appointments, and Medicare reimbursed MAS only for medically necessary rides for bedridden patients. *Id.* at 703. An investigation from 2006 to 2007 revealed that MAS had billed Medicare for "single-passenger" or "stretcher required" transports that involved multiple passengers who were able to walk to and from the vehicle. *Id.* at 703–04.

[51] *Id.* at 706. The court adhered to its recent decision in *United States v. Miller*, which held that a defendant who received a purported endorsement from business partners in a fraudulent loan application did not use their identities within the meaning of § 1028A(a)(1). *Id.*; *see* United States v. Miller, 734 F.3d 530, 540, 542 (6th Cir. 2013) (considering "use" to be ambiguous based on the parties' equally compelling definitions, and invoking the rule of lenity); *see also* Bailey v. United States, 516 U.S. 137, 143 (1995) (stating that the term "use" poses interpretational challenges, given its many possible meanings), *superseded by statute on other grounds*, 18 U.S.C. § 924(c)(1).

[52] *See Medlock*, 792 F.3d at 707 (explaining that the defendants' use of patients' identities to falsify "how and why" the transports occurred did not constitute aggravated identity theft). The court analogized that billing $200 for medical services that cost $100 would not be aggravated identity theft. *Id.* Similarly, in 2013, in *United States v. Spears*, the Seventh Circuit held that making someone a fake handgun permit using their accurate identifying information would not constitute aggravated identity theft because identity theft requires falsifying an identity, whereas identity fraud encompasses any type of falsification. 729 F.3d 753, 756 (7th Cir. 2013) (en banc). In 2018, in *Michael*, the Sixth Circuit distinguished *Medlock*, concluding that a defendant's forging a doctor's signature to prescribe medication for a patient constituted aggravated identity theft, whereas inflating the quantity of drugs that the doctor actually prescribed would not. 882 F.3d at 628–29. In 2019, in *United States v. Hong*, the Ninth Circuit similarly held that a defendant did not commit aggravated identity theft when he overcharged Medicare for services provided because he included patients' accurate identifying information in the claims and only falsified eligibility for reimbursement. 938 F.3d 1040, 1051 (9th Cir. 2019). In 2020, in *United States v. Gagarin*, the Ninth Circuit distinguished *Hong*, concluding that the defendant committed aggravated identity theft because she attempted to impersonate her cousin by forging her signature on an insurance application. 950 F.3d 596, 604 (9th Cir. 2020).

[53] 856 F.3d 141, 156–57 (1st Cir. 2017). The defendants had failed their medical licensing exams and obtained fraudulent scores to gain certification with the Puerto Rico Board of Medical Examiners. *Id.* at 147. In 2010, the defendants received an indictment for, among other offenses, mail fraud and aggravated identity theft. *Id.* at 148. Mail fraud constitutes a predicate offense under § 1028A(a)(1). *Id.* at 155 (citing 18 U.S.C. § 1028A(a)(1), (c)).

be ambiguous, the court inferred from the legislative history that Congress understood identity theft to require an attempt at impersonation.[54] The court reasoned that although the defendants technically used patients' identifying information in writing prescriptions, they did not falsify that information and thus did not commit aggravated identity theft.[55]

C. The Dubin *Plurality Takes the Broad and Clear Approach*

Following the Fourth Circuit's broad and clear view of § 1028A(a)(1), a plurality of nine judges in *United States v. Dubin* determined that Dubin's employment of Patient L's identifying information in the fraudulent Medicaid claim constituted aggravated identity theft.[56] Adhering to the statutory text, the plurality reasoned that although Dubin was authorized to use the patient's identifying information to bill Medicaid, he violated that authority in committing fraud.[57] The plurality declined to limit the scope of § 1028A(a)(1) to instances of identity misrepresentation, holding that any kind of misrepresentation—be it the details of services or identities involved—warranted the enhancement.[58]

---

[54] *See id.* at 156, 157 n.8 (noting the statutory ambiguity, "fraught" nature of the meaning of "use," and House Report's examples of identity theft, including fake tax returns and Social Security applications in others' names, that all involved attempts at impersonation (citing *Bailey*, 516 U.S. at 143)). In *Flores-Figueroa v. United States*, the Supreme Court noted that Congress likely intended to distinguish identity theft from identity fraud by separating them by section within the statute. 556 U.S. 646, 655 (2009). In 2021, in *United States v. Wedd*, the Second Circuit disagreed with the First Circuit's view that aggravated identity theft required an attempt at impersonation, holding that § 1028A(a)(1) proscribed the transfer of phone numbers into an automatic subscription program to charge customers without their knowledge. 993 F.3d 104, 123 (2d Cir. 2021). Leaning on rationale from the Sixth Circuit, the *Wedd* court explained that § 1028A(a)(1) applied to any use of identifying information that "facilitate[s]" a predicate offense. *Id.* (quoting *Michael*, 882 F.3d at 628).

[55] *Berroa*, 856 F.3d at 156. The court added that the rule of lenity would resolve any lingering ambiguity in favor of the defendants. *Id.* at 157 n.8.

[56] 27 F.4th 1021, 1033 (5th Cir.) (en banc) (Owen, C.J., concurring), *cert. granted*, 143 S. Ct. 416 (2022) (mem.). Nine judges affirmed Dubin's conviction on the substantive ground. *Id.* Judge Oldham affirmed the conviction on procedural grounds, explaining that Dubin had waived the issue of the meaning of "use" on appeal. *Id.* (Oldham, J., concurring). Judge Oldham noted that the meaning of "use" should be considered in a future case and indicated support for a narrow interpretation of § 1028A(a)(1). *See id.* at 1033, 1036 (considering the dissents' view that Dubin's conduct did not constitute aggravated identity theft persuasive, but postponing the question until properly preserved). The plurality declined to consider the scheme or legislative intent behind § 1028A(a)(1), indicating that the text was unambiguous. *Id.* at 1026–27 (Owen, C.J., concurring).

[57] *See id.* at 1023–24 (citing applicable holdings from *United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010), to support a textual interpretation of § 1028A(a)(1) that requires the unlawful use of identifying information). The plurality reasoned that Dubin could not have committed health-care fraud without employing Patient L's identity, relying on the Eighth and Eleventh Circuits' rationales that the identifying information must facilitate or be integral to the predicate offense to constitute aggravated identity theft. *Id.* at 1025.

[58] *Id.* at 1032–33. Like the *Gatwas* court, the *Dubin* plurality interpreted the term "use" in connection with the phrase "without lawful authority" to reach its conclusion. *See id.* at 1029 (explaining that a "straightforward" interpretation of § 1028A(a)(1) revealed that Dubin "use[d], without lawful authority," Patient L's identity and thus committed aggravated identity theft). The plurality considered

Eight judges dissented, concluding that Dubin did not commit aggravated identity theft because he did not falsify anyone's identity in the inaccurate reimbursement request.[59] Calling the term "use" "chameleon-like," the dissent inferred from the title and context of § 1028A(a)(1) that Congress intended to penalize the falsification of identities in connection with predicate offenses.[60] Judge Elrod reasoned that Dubin had at most committed identity fraud because he did not misrepresent anyone's identity, but rather the details of services provided.[61]

III. USE WITH CAUTION: THE NEED FOR CLARITY AND LEGISLATIVE INTENT JUSTIFY A NARROW CONSTRUCTION OF § 1028A(a)(1)

In *Flores-Figueroa v. United States*, although the United States Supreme Court did not define the meaning of "use" in the context of aggravated identity theft, it interpreted § 1028A(a)(1) narrowly, signaling a limited application of

---

the distinction between a made-up billing case, in which a patient's identity is falsified, and an overbilling case to be unsupported by the text. *Id.* at 1030–31. The Fourth Circuit also rejected this interpretation of § 1028A(a)(1). *See Abdelshafi*, 592 F.3d at 609 & n.5 (holding that the defendant used patients' identities unlawfully to submit inflated medical bills, regardless of actual services rendered).

[59] *Dubin*, 27 F.4th at 1040–41 (Elrod, J., dissenting). Judge Elrod, joined by Judges Jones, Costa, Willett, Duncan, Engelhardt, and Wilson, and in substantial part by Judge Haynes, wrote one dissenting opinion. *Id.* at 1037 (Elrod, J., dissenting). Judge Costa, joined by Judges Jones, Elrod, Duncan, Engelhardt, and Wilson, wrote a separate dissent. *Id.* at 1041 (Costa, J., dissenting). To distinguish the case from one of aggravated identity theft, Judge Elrod reasoned that Patient L, as opposed to someone else, received some services, if not the exact array of services that PARTS reported to Medicaid. *Id.* at 1038 (Elrod, J., dissenting); *see* United States v. Medlock, 792 F.3d 700, 708 (6th Cir. 2015) (concluding that the defendants did not use patients' identification to commit health-care fraud under § 1028A(a)(1) because the patients actually received services).

[60] *Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting). Judge Elrod criticized the plurality for relying solely upon a dictionary definition of "use," despite contrary Supreme Court precedent. *See id.* (quoting Bailey v. United States, 516 U.S. 137, 143 (1995), *superseded by statute on other grounds*, 18 U.S.C. § 924(c)(1)) (explaining that the meaning of "use," as Congress intended, comes not solely from the word itself, but also the statute and sentencing scheme).

[61] *Id.*; *see* United States v. Spears, 729 F.3d 753, 756 (7th Cir. 2013) (en banc) (suggesting that identity theft requires misappropriating another person's identity, whereas identity fraud applies to any kind of fraud). Judge Elrod borrowed reasoning from the Sixth and Eighth Circuits to distinguish an integral use of identifying information, such as fabricating a patient entirely, from an incidental use, the latter of which she thought Dubin committed. *Dubin*, 27 F.4th at 1040 n.4 (Elrod, J., dissenting); *see* United States v. Gatwas, 910 F.3d 362, 368 (8th Cir. 2018) (explaining that the use of another person's identity cannot be merely incidental to the predicate offense under § 1028A(a)(1)). Separately, Judge Costa reasoned that because Dubin had Patient L's consent to use his identifying information, he did not commit aggravated identity theft. *See Dubin*, 27 F.4th at 1042–43 (Costa, J., dissenting) (explaining that the key distinction between fabricating a health-care claim and overcharging for services provided is the patient's consent to use his information for billing purposes). The *Dubin* plurality and most other circuits rejected this view, given that § 1028A(a)(1) does not require actual theft of another person's identity. *Id.* at 1028–29 (Owen, C.J., concurring); *see* United States v. Osuna-Alvarez, 788 F.3d 1183, 1185 (9th Cir. 2015) (rejecting the argument that the defendant did not commit aggravated identity theft because he had permission to use his brother's passport).

the sentencing enhancement.[62] Although the word "use" could describe the mere involvement of something, both Supreme Court precedent and the existence of the circuit split suggest that its statutory meaning is more precise, if not ambiguous.[63] Courts taking the broad and clear view of § 1028A(a)(1) dismiss this need for specificity, but in doing so, exacerbate current ambiguity by failing to provide clear or consistent definitions of "use."[64] As it did in *Flores-Figueroa*, the Supreme Court should resolve the ambiguity surrounding § 1028A(a)(1) by referring to statutory context to guide its interpretation.[65]

Though deeming the legislative history inconclusive, the *Flores-Figueroa* Court initially suggested that Congress intended to distinguish identity theft from

---

[62] *See* 556 U.S. 646, 650, 654–55 (2009) (assessing the statute's plain meaning, scheme, and Congress's intent to limit the scope of § 1028A(a)(1) to cases in which defendants know that they are using others' identities in committing predicate offenses).

[63] *See Bailey*, 516 U.S. at 143 (deeming the word "use" in 18 U.S.C. § 924(c)(1) ambiguous, given its many definitions, and discerning Congress's intent based on the statutory scheme and context); Smith v. United States, 508 U.S. 223, 228–29, 233 (1993) (noting the many definitions of "use," including the conversion to personal service, employment, or availing oneself of, and proceeding to consider the surrounding words and provisions of § 924(c)(1) to inform its interpretation); Julian W. Smith, Note, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79, 94 (2011) (arguing that circuit splits are evidence of statutory ambiguity and their existence should caution courts to interpret statutes narrowly). Whether a circuit split indicates ambiguity has created its own circuit split. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1016 n.1 (9th Cir. 2012) (M. Smith, J., dissenting) (noting the circuit split over whether a circuit split indicates ambiguity), *rev'd sub nom.* Scialabba v. de Osorio, 573 U.S. 41 (2014).

[64] *See, e.g.*, United States v. Abdelshafi, 592 F.3d 602, 608 (4th Cir. 2010) (reasoning that some uses of identifying information can be lawful, whereas any unlawful use constitutes aggravated identity theft); *Gatwas*, 910 F.3d at 364, 368 (considering whether the term "uses, without lawful authority" requires impersonation or misappropriation, and later describing "use" as the integral involvement of another person's identifying information to an underlying offense); *see also Dubin*, 27 F.4th at 1042 (Costa, J., dissenting) (determining that the distinction between integral and incidental uses of another person's identity is unclear). Even the United States Government, in its brief to the Supreme Court on writ of certiorari, acknowledged the ambiguity of § 1028A(a)(1), based on its many possible interpretations. *See* Brief for the United States at 21, Dubin v. United States, No. 22-10 (filed Jan. 23, 2023) (conceding that "[f]alsehoods can often be characterized in different ways," and deeming Dubin's view that § 1028A(a)(1) requires identity misrepresentation to be reasonable). Furthermore, the over-inclusive two-part test for aggravated identity theft based on a "use, without lawful authority," of identifying information contradicts recent guidance from the Supreme Court regarding statutory interpretation. *See* United States v. Taylor, 142 S. Ct. 2015, 2024 (2022) (rejecting the idea that Congress would include two separate clauses in one statute to perform one function); *see also* Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (declining to give a criminal computer fraud statute a "breathtaking" scope that would encompass impermissible uses of information to which defendants had authorized access).

[65] *See* 556 U.S. at 655, 657 (weighing various statements from the legislative history to limit the scope of § 1028A(a)(1)); FINKLEA, *supra* note 16, at 26 (highlighting the definition of aggravated identity theft and the scope of enumerated predicate offenses as two areas for Congress to clarify); *see also* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1655 (2014) (arguing that legislative history can serve to reveal semantic meaning of statutory language).

identity fraud, based on the misrepresentation of a person's identity.[66] Even some broad interpretations of § 1028A(a)(1) point to this distinction: to facilitate or be integral to a predicate offense, some aspect of identity has usually been misrepresented.[67] Requiring identity misrepresentation under § 1028A(a)(1) thus balances the common understanding of "use" with Congress's intended meaning in the context of aggravated identity theft.[68]

Confining the scope of § 1028A(a)(1) to acts of identity falsification serves the interests of identity theft victims without over-penalizing incidental uses of identifying information in unrelated predicate offenses.[69] Moreover, in light of current ambiguity, a narrow construction of the statute holds the federal government accountable for drafting clear laws, notifying the public of all elements of criminal conduct, and proving each element beyond a reasonable doubt.[70] Until Congress clarifies whether aggravated identity theft encom-

[66] *See* 556 U.S. at 655 (explaining that Congress distinguished identity fraud and identity theft by using different titles and described identity theft as the taking of another person's information knowingly); H.R. REP. NO. 108-528, at 4 (2004) (citing a Federal Trade Commission survey of ten million reports of identity theft, many of which included misappropriation or impersonation). Part of the push behind § 1028A(a)(1) was the failure of previous statutes to differentiate identity theft from other identity crimes. *See, e.g.*, 18 U.S.C. § 1028(b) (1988) (making no distinction between penalties for identity theft and other identity crimes).

[67] *See, e.g.*, *Gatwas*, 910 F.3d at 368 (explaining that merely including identifying information in a fraudulent tax claim that underreported income would not constitute aggravated identity theft, but rather an incidental use of identity in a predicate offense). The Eleventh and D.C. Circuits' broad constructions of § 1028A(a)(1) indirectly highlighted the importance of identity misrepresentation, as forgery requires the temporary assumption of another person's identity. *See* United States v. Munksgard, 913 F.3d 1327, 1335–36 (11th Cir. 2019) (rejecting the argument that the defendant's use of identifying information was merely incidental to the underlying offense and concluding that the defendant committed aggravated identity theft when he forged another person's signature to commit bank fraud); United States v. Reynolds, 710 F.3d 434, 436 (D.C. Cir. 2013) (holding that the defendant committed aggravated identity theft when he used digital versions of colleagues' signatures without their consent to approve a fraudulent bank loan).

[68] *See* United States v. Berroa, 856 F.3d 141, 156 (1st Cir. 2017) (weighing the various definitions of "use" with the House Report's examples of identity theft, each of which involved identity falsification); Nourse, *supra* note 65, at 1644 (appealing to textualists and purposivists alike that certain types of legislative history, namely statutory history, should be considered when interpreting a statute).

[69] *See* H.R. REP. NO. 108-528, at 3 (stating that § 1028 increases the penalty for those who steal others' identities to commit serious offenses). *Compare Dubin*, 27 F.4th at 1044 (Costa, J., dissenting) (doubting that Patient L suffered from identity theft when his information was not used beyond his consent or understanding of Dubin's authority and he did not incur any substantial losses), *with id.* at 1033 (Owen, C.J., concurring) (suggesting that Congress intended to protect taxpayers and Medicaid beneficiaries when drafting § 1028A(a)(1)). Courts that interpret § 1028A(a)(1) narrowly caution that a broad construction would automatically bootstrap an aggravated identity theft count—at minimum, a two-year sentence—for every involvement of identifying information in a predicate offense. *Id.* at 1041–42 (Costa, J., dissenting).

[70] *Cf. Flores-Figueroa*, 556 U.S. at 655–56 (rejecting the argument that the difficulty of proving the knowledge element of § 1028A(a)(1) beyond a reasonable doubt means that Congress intended to dispense with the mens rea requirement); Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (explain-

passes crimes in which no identity has been misrepresented, the Supreme Court should construe § 1028A(a)(1) narrowly based on its plain meaning, purpose, and, when necessary, the rule of lenity.[71]

CONCLUSION

In 2022, in *United States v. Dubin*, the United States Court of Appeals for the Fifth Circuit interpreted § 1028A(a)(1) of the aggravated identity theft statute broadly to enhance the punishment for a defendant who included a patient's accurate identifying information to overcharge Medicaid for services provided. This decision, along with those of the Fourth, Eighth, Eleventh, and D.C. Circuits, extended the statute beyond its plain meaning and purpose to encompass any involvement of identifying information in predicate offenses, regardless of whether an identity was misrepresented. A narrow construction of § 1028A(a)(1), as articulated by the First, Sixth, Seventh, and Ninth Circuits, is appropriate because it acknowledges the statutory ambiguity and Congress's intent to target identity misrepresentation in connection with certain federal offenses. Unless Congress clarifies that § 1028A(a)(1) applies to cases in which no identity has been misrepresented, the Supreme Court should interpret the statute narrowly to penalize only acts of identity falsification, thereby effectuating its plain meaning and purpose, and ensuring that the government drafts and enforces unambiguous criminal laws.

ANNA K. HUNT

---

ing that a penal law must define criminal conduct clearly enough for citizens and law enforcement officials to understand what behaviors are prohibited).

[71] *See* United States v. Bass, 404 U.S. 336, 347 (1971) (justifying the application of the rule of lenity, given the severity of criminal penalties, and noting that legislatures should determine what behaviors constitute crimes and warrant punishment); *see, e.g.*, *Berroa*, 856 F.3d at 156–57 (confining § 1028A(a)(1) to cases of identity theft or impersonation, based on the statutory ambiguity, likely legislative intent, and rule of lenity); United States v. Miller, 734 F.3d 530, 542 (6th Cir. 2013) (resolving the case in favor of the defendant, given the opposing, albeit equally reasonable interpretations of § 1028A(a)(1) and inconclusive legislative intent); *cf.* United States v. Spears, 729 F.3d 753, 757–58 (7th Cir. 2013) (en banc) (applying the rule of lenity to resolve another ambiguous term in § 1028A(a)(1) because legislatures are responsible for defining crimes clearly, as opposed to "clever prosecutors riffing on equivocal language").