No. 15-370

In the Supreme Court of the United States

CLIFFORD D. BERCOVICH AND HOWARD WEBBER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 1028A(a)(1), which makes it unlawful to "use[], without lawful authority, a means of identification of another person," requires proof that the defendant used another person's identification without that person's consent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted at 615 Fed. Appx. 416. The order of the district court granting petitioners' motion to dismiss the aggravated identity theft charges (Pet. App. 3-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2015. The petition for a writ of certiorari was filed on September 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the Northern District of California returned an indictment charging petitioners with one count of con-

spiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1349; 12 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2(b); 12 counts of aggravated identity theft against petitioner Bercovich, in violation of 18 U.S.C. 1028A; and six counts of aggravated identity theft against petitioner Webber, in violation of 18 U.S.C. 1028A. Indictment 2-7. Before trial, the district court dismissed the aggravated identity theft charges because the indictment failed to allege that petitioners used the means of identification of another person without that person's consent. Pet. App. 3-19. The court of appeals reversed and remanded the case for further proceedings. *Id.* at 1-2.

1. Between June 2010 and January 2012, petitioners participated in a scheme to use prison "inmates' personal information to prepare and file false federal income tax returns." Indictment 2. Webber, who was incarcerated, would gather other inmates' personal identifying information, transcribe the information onto forms Bercovich had created, and then mail the forms to Bercovich. *Id.* at 3. Bercovich used the information Webber collected to prepare and file federal income tax returns that falsely claimed refunds under the Earned Income Tax Credit and the Making Work Pay Credit. *Id.* at 2-3. The U.S. Department of the Treasury would mail refund checks to a post-office box that petitioners controlled, and Bercovich would then deposit the checks into a bank account that he controlled. *Id.* at 3. Petitioners each received a share of the refunds. *Ibid.*

2. On October 3, 2014, a federal grand jury in the United States District Court for the Northern District of California returned an indictment charging peti-

tioners with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1349; 12 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2(b); and 18 combined counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Indictment 2-7.

With respect to the aggravated identity theft charges, the indictment alleged that, during and in relation to a felony violation of 18 U.S.C. 1341 (mail fraud), petitioners "knowingly transferred, possessed, and used without lawful authority a means of identification of another person." Indictment 5-6. The indictment was silent as to whether petitioners used those means of identification without the owners' consent. Petitioners moved to dismiss the aggravated identity theft charges on the grounds that an indictment under 18 U.S.C. 1028A is invalid if it does not allege that the defendant used another person's means of identification without that person's consent. Pet. App. 5.

3. The district court granted petitioners' motion and dismissed the aggravated identity theft charges. Pet. App. 3-19. The court recognized that "a steady chorus of federal circuit courts interpreting [Section] 1028A [have] concluded that," in determining whether a defendant transferred, possessed, or used another person's means of identification "without lawful authority," it is immaterial whether the defendant had the other person's consent to use his identifying information. *Id.* at 6-7. The district court found persuasive, however, the Seventh Circuit's decision in *United States* v. *Spears*, 729 F.3d 753 (2013) (en banc), which held that a defendant did not violate Section 1028A when he created a counterfeit handgun per-

mit for a third party and transferred it to her. Pet. App. 9.

The district court explained that in *Spears*, the Seventh Circuit had focused on the statutory phrase "of another person." Pet. App. 9-10. In a case where the defendant had been charged with transferring another person's means of identification without lawful authority, the Seventh Circuit found it ambiguous whether "another" means a person other than the defendant, or a person who did not consent to the information's use. *Id.* at 10 (citing *Spears*, 729 F.3d at 756). The *Spears* court looked to the statute's caption—"[a]ggravated identity theft"—to support its conclusion that "another" refers to someone who did not consent to the use of his personal information, *id.* at 10-11 (citing *Spears*, 729 F.3d at 756), and it concluded that the rule of lenity resolved the question if the caption did not, *id.* at 12 (citing *Spears*, 729 F.3d at 757).

The district court concluded that "*Spears* offers a persuasive interpretation of the aggravated identity fraud statute." Pet. App. 13. The court stated that the courts of appeals that had previously concluded that a violation of Section 1028A did not require proof that the defendant lacked the other person's consent to use his identifying information had "largely overlooked the meaning of 'another person'" in the statute. *Ibid.* The district court dismissed the aggravated identity theft charges against petitioners. *Id.* at 18.

4. The government filed an interlocutory appeal. See 18 U.S.C. 3731. While the government's appeal was pending, the Ninth Circuit held in *United States* v. *Osuna-Alvarez*, 788 F.3d 1183 (per curiam), cert. denied, 136 S. Ct. 283 (2015), that "regardless of

whether the means of identification was stolen or obtained with the knowledge and consent of its owner, the illegal use of the means of identification alone violates [Section] 1028A." *Id.* at 1185-1186. In light of *Osuna-Alvarez*, the court of appeals reversed the district court's order dismissing the Section 1028A charges against petitioners and remanded for further proceedings. Pet. App. 2.

ARGUMENT

Petitioners contend (Pet. 3-13) that the indictment fails to allege any violation of Section 1028A because it does not allege that petitioners used inmates' identifying information without the inmates' consent. Review of petitioners' claims is not warranted. Quite apart from the fact that this case is in an interlocutory posture, the court of appeals correctly rejected petitioners' argument, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has recently denied petitions for writs of certiorari presenting the same question. See *Osuna-Alvarez* v. *United States*, 136 S. Ct. 283 (2015) (No. 15-5812); *Otuya* v. *United States*, 134 S. Ct. 1279 (2014) (No. 13-6874). The same result is warranted here.

1. The court of appeals reversed the district court's decision dismissing the aggravated identity theft charges against petitioners and remanded for further proceedings. Pet. App. 2. The court of appeals' decision is therefore interlocutory, which by itself "furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); *Brotherhood of*

Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283 & n.72 (10th ed. 2013).

That practice promotes judicial efficiency. The case has been returned to the district court for trial on the aggravated identity theft charges. If petitioners are acquitted, their claims will become moot. If they are convicted, petitioners can present their challenge to the Section 1028A charges, along with any other challenges to other convictions, in a single petition for a writ of certiorari following final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment). Petitioners offer no reason to depart from this Court's usual practice of declining to review interlocutory petitions.

2. Review would be unwarranted even if this case were not interlocutory, because the court of appeals correctly held that Section 1028A(a)(1) does not require proof that petitioners used another person's identifying information without that person's consent.

a. Section 1028A(a)(1) mandates a consecutive two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1) and (b). As the court of appeals explained in *United States* v. *Osuna-Alvarez*, 788 F.3d 1183 (per curiam), cert. denied, 136 S. Ct. 283 (2015), the statute "explicitly covers a defendant who 'uses' a means of identification

'without lawful authority.'" *Id.* at 1185 (citation omitted). Congress often provides that an action constitutes a crime only if it is done without "consent" or without "permission." See, *e.g.*, 18 U.S.C. 290, 1165, 1365(f)(1), 1793, 1863, 1951(b)(2), 1992(a), 2113(e), 2199, 2319A(a). Congress did not include such a limitation in Section 1028A(a)(1). By its terms, the statute covers anyone who knowingly "uses, without lawful authority" another person's identifying information—whether or not the other person consents.

This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997); see, *e.g.*, *Brogan* v. *United States*, 522 U.S. 398, 406, 412 (1998); *United States* v. *Wells*, 519 U.S. 482, 490-493 (1997). Consistent with that precedent, the courts of appeals to have considered the question have "universally" held that a defendant violates Section 1028A(a)(1) even where "the defendant used another person's means of identification with the other person's consent or permission." *Osuna-Alvarez*, 788 F.3d at 1185.[1]

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[1] See *United States* v. *Otuya*, 720 F.3d 183, 189 (4th Cir. 2013) (Section 1028A(a)(1) applies whether the means of identification is used "with or without permission from its rightful owner."), cert. denied, 134 S. Ct. 1279 (2014); *United States* v. *Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013) (Section 1028A(a)(1) "includes cases where the defendant obtained the permission of the person whose information the defendant misused."); *United States* v. *Ozuna-Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011) (Section 1028A(a)(1) "does not require theft, or any other illicit method of procurement, of the means of identification."), cert. denied, 132 S. Ct. 1936 (2012); *United States* v. *Retana*, 641 F.3d 272, 275 (8th Cir. 2011) (the use of another person's identification violates Section 1028A(a)(1) "regardless of whether that use occurred with or without the other person's permission"); *United States* v. *Carrion-Brito*, 362 Fed.

Those courts have reasoned that consent does not confer "lawful authority" to use another person's identifying information, and thus, "regardless of how the means of identification is actually obtained, if its subsequent use breaks the law * * * it is violative of [Section] 1028A(a)(1)." *United States* v. *Ozuna-Cabrera*, 663 F.3d 496, 499 (1st Cir. 2011), cert. denied, 132 S. Ct. 1936 (2012); see, *e.g.*, *United States* v. *Lumbard*, 706 F.3d 716, 721-722 (6th Cir. 2013); *United States* v. *Retana*, 641 F.3d 272, 274-275 (8th Cir. 2011).

b. Petitioners contend (Pet. 11-12) that the court of appeals erred because it "examined only the 'without lawful authority' language" in Section 1028A, but "did not address the phrase 'of another person.'" But petitioners do not explain how their use of inmates' identifying information to obtain fraudulent tax refunds did not constitute use of the means of identification "of another person." Rather, petitioners rely entirely (Pet. 7-12) on the Seventh Circuit's decision in *United States* v. *Spears*, 729 F.3d 753 (2013) (en banc). That case addressed a different question than is presented here.

In *Spears*, the defendant had produced a counterfeit handgun permit for a woman who could not lawfully obtain such a permit, using the woman's own identifying information. 729 F.3d at 754. The defendant did

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Appx. 267, 273 (3d Cir. 2010) (permission or payment to use another's identity does not constitute lawful authority); *United States* v. *Hurtado*, 508 F.3d 603, 607 (11th Cir. 2007) (per curiam) ("Nothing in the plain language of the statute requires that the means of identification must have been stolen for a [Section] 1028A(a)(1) violation to occur."), cert. denied, 553 U.S. 1094 (2008), abrogated on other grounds by *Flores-Figueroa* v. *United States*, 556 U.S. 646 (2009).

not use the counterfeit permit himself and was charged only with "transfer[ring]" the permit to the woman. *Id.* at 755. The Seventh Circuit held that the defendant had not violated Section 1028A(a)(1) because he did not "transfer" to the woman the means of identification "of another person"—he transferred to her a counterfeit permit that contained her own identifying information. *Id.* at 755-756, 758.

In so holding, the court of appeals in *Spears* stated that the term "another person" in Section 1028A(a)(1) "refer[s] to a person who did not consent to the use of the 'means of identification.'" 729 F.3d at 758. But that statement was made in the context of the facts of *Spears*, where the court was analyzing whether the means of identification had been *transferred* to a person other than the person the information identified. In contrast, petitioners' case, and every other court of appeals case addressing the question presented, involves a defendant who *used* another person's identifying information without lawful authority. The Seventh Circuit's reasoning does not speak to the lawfulness of that conduct.

The Seventh Circuit noted that the offense conduct in *Spears*, transferring to a client a "bogus credential containing the client's *own* information," 729 F.3d at 756 (emphasis added), fit more comfortably within 18 U.S.C. 1028 (which criminalizes fraud in connection with identification documents) than Section 1028A, 729 F.3d at 756-757. The same cannot be said here. Petitioners did not transfer to someone a counterfeit credential with that person's own identifying information, as prohibited by Section 1028. Instead, petitioners used another person's identifying information

in the commission of a felony, which is prohibited by Section 1028A.

As petitioners note (Pet. 8), the Seventh Circuit in *Spears* relied in part on Section 1028A's caption ("Aggravated identity theft"). But the Seventh Circuit did so only to "clear up ambiguities" with respect to a different question: whether the statute prohibits transferring to someone a counterfeit credential with that person's own identifying information. 729 F.3d at 756 (citing *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008)). Whatever the merits of the Seventh Circuit's reasoning in that context, it does not apply here. "A caption cannot override a statute's text." *Ibid.* And the text of Section 1028A unambiguously prohibits petitioners' conduct—using another person's identifying information without lawful authority. In any event, Section 1028A's reach is not limited to "theft," as another portion of Section 1028A unquestionably encompasses conduct that cannot be described as such. See 18 U.S.C. 1028A(a)(2) (providing increased penalties for persons who use "a false identification document," whether or not that document reflects the identity of another person). The reference to identity "theft" in Section 1028A's title is therefore "but a short-hand reference to the general subject matter of the provision," rather than a limitation on the statute's scope. *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169 (2014) (citation and internal quotation marks omitted).

Likewise, although the Seventh Circuit in *Spears* relied on the history of Section 1028A (Pet. 9-10), legislative history "need not be consulted when * * * the statutory text is unambiguous," as it is here. *United States* v. *Woods*, 134 S. Ct. 557, 567 n.5 (2013).

And in any event, the relevant legislative history does not suggest that Congress intended Section 1028A(a)(1) to apply only when a defendant uses another person's means of identification without permission.

It is true that the relevant House Report "is replete with references to 'theft' and 'thieves,' and that one stated purpose of the statute is to increase sentences for 'identity thieves.'" *Ozuna-Cabrera*, 663 F.3d at 500 (quoting H.R. Rep. No. 528, 108th Cong., 2d Sess. 3 (2004) (House Report)). Although examples of theft in the legislative history "reflect Congress's heightened concern for the ignorant victim," *Lumbard*, 706 F.3d at 724, the House Report also explains that "[t]he terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data." House Report 4. And the House Report further describes examples of fraudulent use of another person's identity that did not involve theft; for example, a man who used his former brother-in-law's name and social security number to obtain social security benefits and a woman who worked under her husband's social security number while collecting disability benefits. *Ozuna-Cabrera*, 663 F.3d at 500 (citing House Report 6).[2] The legislative history thus confirms what

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[2] As petitioners note (Pet. 9-10), *Spears* relied in part on this Court's observation that "the examples in the legislative history of [Section] 1028A involve people injured when a third party used their names or financial information * * * without their consent." 729 F.3d at 757 (citing *Flores-Figueroa* v. *United States*, 556 U.S. 646, 655 (2009)). But this Court also observed that the legislative history was "inconclusive." *Flores-Figueroa*, 556 U.S. at 655. More importantly, *Flores-Figueroa* involved a different question. In that case, this Court held that Section 1028A(a)(1) "requires the

the text demonstrates: "Congress intended [Section] 1028A to address a wide array of identity crimes, and not only those iterations involving conventional theft." *Ibid.*; see *Lumbard*, 706 F.3d at 724.

The Seventh Circuit in *Spears* also cautioned against reading Section 1028A to apply "every time a tax-return preparer claims an improper deduction." 729 F.3d at 756. But the Seventh Circuit's evident concern was tax-preparers who are simply conduits, transferring false tax returns to the Internal Revenue Service (IRS). *Ibid.* Contrary to petitioners' claims (Pet. 4), there is no reason to believe the Seventh Circuit would find that Section 1028A does not prohibit petitioners from collecting other people's identifying information and using it to obtain fraudulently inflated tax refunds from the IRS, which they then keep in part for themselves. Regardless, the Seventh Circuit's dicta did not broaden its ruling or create a circuit conflict warranting this Court's review.

Indeed, subsequent decisions of the Seventh Circuit undermine petitioners' broad reading of *Spears*. The court of appeals has described *Spears* narrowly, explaining that it held "that manufacturing a false means of identification for a customer using the customer's *own* identifying information does not violate [Section] 1028A." *United States* v. *Zheng*, 762 F.3d 605, 609 (7th Cir. 2014). The court has never applied *Spears*'s "consent" language in a case like this one, where the defendant is charged with *using* another person's identifying information. To the contrary, the

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[g]overnment to show that the defendant knew that the means of identification at issue belonged to another person." *Id.* at 657. The Court did not suggest that the government must prove that the defendant acted without that person's consent.

Seventh Circuit has listed the elements of Section 1028A(a)(1) in such a case without any reference to a lack-of-consent requirement. See *United States* v. *Thomas*, 763 F.3d 689, 692 (2014). Accordingly, *Spears* does not reflect the existence of any circuit conflict warranting this Court's intervention.

3. Petitioners contend (Pet. 12-13) that Section 1028A is unconstitutionally vague. A statute is only void for vagueness if "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). Every court of appeals to have considered the question presented—whether Section 1028A prohibits using another person's identity with that person's permission but without lawful authority—has ruled the same way as the court of appeals did here. Section 1028A unambiguously covers petitioners' conduct, and no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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