

**In the Supreme Court of the United States**

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IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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### QUESTION PRESENTED

The federal aggravated identity theft statute prescribes a two-year term of imprisonment for any person who, “during and in relation to” certain other specified crimes, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” 18 U.S.C. 1028A(a)(1). The question presented is whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the means of identification in question was that “of another person.”

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# In the Supreme Court of the United States

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No. 08-108

IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

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*ON WRIT OF CERTIORARI  
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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 274 Fed. Appx. 501.

## **JURISDICTION**

The judgment of the court of appeals was entered on April 23, 2008. The petition for a writ of certiorari was filed on July 22, 2008, and was granted on October 20, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

## STATEMENT

Petitioner pleaded guilty to two counts of misuse of immigration documents, in violation of 18 U.S.C. 1546(a), and one count of entering the United States without inspection, in violation of 8 U.S.C. 1325(a). Following a bench trial, petitioner was also convicted of two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). He was sentenced to 75 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a, 6a, 8a. The court of appeals affirmed. *Id.* at 1a-3a.

1. Section 1028A(a)(1) prescribes a two-year term of imprisonment for any person who

during and in relation to any felony violation enumerated in [18 U.S.C. 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.

18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028(d)(7) (defining “means of identification” as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual” and listing examples). Section 1028A(c) enumerates a variety of predicate offenses, including violations of 18 U.S.C. 641 (theft of federal property), “any provision contained in chapter 63 (relating to mail, bank or wire fraud),” and “any provision contained in chapter 75 (relating to passports and visas).” 18 U.S.C. 1028A(c)(1), (5) and (7).

2. Petitioner is a citizen of Mexico. In 2000, petitioner began working for a steel company under an assumed name. At that time, petitioner gave a false date of birth and a social security number that had never been assigned to a real person. He also presented a counterfeit alien registration card, but the record con-

tains no evidence that the number on that card had been assigned to a real person. 5/10/07 Tr. 10-11, 28, 33; Presentencing Report para. 4 (PSR).<sup>1</sup>

In 2006, petitioner told his employer that he wanted to be known by his true name and to change the social security and alien registration numbers on file for him. In connection with that request, petitioner presented counterfeit social security and alien registration cards that contained numbers that had, in fact, been assigned to other people. His employer was suspicious and contacted federal authorities. Petitioner was in possession of the counterfeit documents when he was arrested. Pet. App. 2a; 5/10/07 Tr. 10-11, 13-18, 27; PSR para. 4.

3. Petitioner was charged with one count of entering the United States without inspection, two counts of misuse of immigration documents, and two counts of aggravated identity theft. Indictment 1-3. At a bench trial on the aggravated-identity-theft counts, petitioner moved for a judgment of acquittal on the ground that the government had not established that he knew that the numbers on the counterfeit documents had been assigned to other people. Pet. App. 2a; 5/10/07 Tr. 30. The district court denied that motion and found petitioner guilty on both counts. *Id.* at 32, 50.

4. The court of appeals affirmed. Pet. App. 1a-3a. The court stated that its decision in *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), petition for cert. pending, No. 08-5316 (filed July 15, 2008), had “resolved th[e] issue” raised by petitioner. Pet. App. 3a.

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<sup>1</sup> Because Section 1028A(a)(1) applies only when the means of identification was that “of another person,” petitioner’s conduct in 2000 would not have subjected him to liability under that statute, even had it been in effect at that time.

### SUMMARY OF ARGUMENT

The court of appeals correctly held that 18 U.S.C. 1028A(a)(1) does not require the government to prove that the defendant knew that the means of identification in question was that “of another person.”

A. Section 1028A(a)(1) prescribes a 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). Petitioner’s carefully chosen examples notwithstanding, the most natural grammatical reading of the provision Congress enacted is that the adverb “knowingly” applies only to the verbs that immediately follow it: “transfers, possesses, or uses.” There is no structural barrier to interpreting Section 1028A(a)(1) in that manner; to the contrary, the presence of a comma after the final verb (“uses”), and Congress’s insertion of the clause “without lawful authority,” further undermines petitioner’s contention that the effect of the word “knowingly” extends all the way to “of another person.”

Statutory context likewise indicates that Section 1028A(a)(1)’s “knowingly” requirement does not reach the words “of another person.” If that were the case, the same would have to be true in the almost identically worded Subsection (a)(2). But any such interpretation would create a serious surplusage problem with respect to Subsection (a)(2). In contrast, there would be no comparable surplusage problem even if the Court were to conclude that the “knowingly” requirement also applies to the words “without lawful authority” or “means of identification.”

B. The overriding purpose of Section 1028A(a)(1) supports interpreting it to impose liability without requiring proof that the defendant knew that he used a means of identification of an actual victim. The statute's purpose is to provide enhanced protection for individuals whose identifying information is used to facilitate the commission of crimes. The harm a victim suffers when her identity is so misused bears no necessary relationship to the perpetrator's awareness of her existence. The court of appeals' interpretation appropriately places on the wrongdoer the burden of inquiry and the risk of misjudgment about the presence of a real victim.

Petitioner and his amici focus heavily on the words "theft" and "thieves" in Section 1028A's title and legislative history. But Section 1028A(a)(1) is a victim-focused statute, and it is perfectly natural to refer to a person whose identifying information is used to facilitate the commission of another crime as having been a victim of identity theft. Petitioner has also failed to demonstrate that "theft" had any settled common-law meaning. In any event, that term appears nowhere in the operative statutory text, and consideration of both the statutory text and legislative history makes clear that the offense created by 18 U.S.C. 1028A departs from common-law larceny in a number of other respects.

C. Section 1028A(a)(1) will not criminalize any apparently innocent conduct regardless of how the Court resolves the question before it. Section 1028A(a)(1) is not even potentially applicable unless the means of identification is used "during" the commission of an enumerated felony. The statute's "in relation to" requirement further ensures that a defendant does not violate Section 1028A(a)(1) unless his transfer, possession, or use of something that is, in fact, a means of identification of



another person facilitates or has the potential of facilitating the predicate felony. And any lingering concerns about criminalizing unwitting or apparently innocent conduct would be fully addressed if Section 1028A(a)(1)’s “knowingly” requirement were construed as applicable to the “without lawful authority” and “means of identification” requirements.

D. No legal presumption exists that a defendant must be aware of all of the facts necessary to make his conduct unlawful or trigger enhanced punishment. “The presumption in favor of scienter” recognized in this Court’s cases “requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269 (2000) (emphasis added; citation omitted). Congress has not directed federal courts to presume that any statutorily prescribed *mens rea* requirement applies to all elements of a criminal offense, nor did Congress have any reason to believe that this Court would apply such a presumption when it enacted Section 1028A(a)(1).

E. The rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. In addition, Congress’s decision to prescribe a specific punishment for a violation of Section 1028A(a)(1) is entitled to no special weight in the rule-of-lenity analysis.

## ARGUMENT

**SECTION 1028A(a)(1) DOES NOT REQUIRE THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW THAT THE MEANS OF IDENTIFICATION IN QUESTION WAS THAT “OF ANOTHER PERSON”**

The question presented is whether 18 U.S.C. 1028A(a)(1) requires the government to prove that the defendant knew that the particular means of identification in question was that “of another person.” The answer is no.

This Court has cautioned against construing statutes as “criminaliz[ing] a broad range of apparently innocent conduct,” *Liparota v. United States*, 471 U.S. 419, 426 (1985), or authorizing convictions where the defendant has “knowledge only of traditionally lawful conduct,” *Staples v. United States*, 511 U.S. 600, 618 (1994). No such risk exists under Section 1028A(a)(1), which applies only when a person commits a qualifying predicate felony. In addition, Section 1028A(a)(1)’s “in relation to” requirement ensures that a defendant does not violate the statute unless his unlawful transfer, possession, or use of a means of identification that is, in fact, that of other person “facilitat[es] or ha[s] the potential of facilitating” the predicate felony. *Smith v. United States*, 508 U.S. 223, 238 (1993) (citation omitted). Even if some conceivable concerns about criminalizing unwitting or innocent conduct were to remain, they would be fully addressed if Section 1028A(a)(1)’s “knowingly” requirement were construed as applicable to the “without lawful authority” and “means of identification” requirements. And because “[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from

‘otherwise innocent conduct,’” *Carter*, 530 U.S. at 269 (emphasis added; citation omitted), it provides no basis for construing Section 1028A(a)(1)’s “knowingly” requirement as extending all the way to the words “of another person.”

Because Section 1028A(a)(1) will pose no trap for the innocent or unwary regardless of the Court’s resolution of this case, the statute should be construed in a straightforward manner in light of its text and apparent purpose. Considered as a whole, the statutory text is most naturally read as prohibiting the transfer, possession, or use of a means of identification “of another person,” without requiring the government to show that the defendant knew of that other person. That reading is confirmed by Congress’s overriding aim of providing enhanced protections for real-world victims whose identifying information is used to commit other crimes, and by the lack of any necessary connection between the harms those victims suffer and the government’s ability to prove a particular defendant’s subjective awareness of their existence.

**A. The Statutory Text And Context Indicate That Section 1028A(a)(1) Does Not Require Proof That The Defendant Knew That The Means Of Identification In Question Was That Of Another Person**

1. Section 1028A(a)(1) mandates a 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). The most natural grammatical reading of this provision is that the “knowingly” requirement applies only to the *nature* of the defen-

dant's conduct—that is, a “transfer[], possess[ion], or use[]” of an item that is, in fact, a means of identification of another person.

Petitioner invokes “common usage” purportedly to show that an adverb like “knowingly” is ordinarily taken “to apply not only to adjacent verbs, but also to any direct object that may follow.” Pet. Br. 9. The examples he gives, however, load the dice on that point; they do not prove the general proposition for which they are offered.

For example, petitioner offers the statements “John knowingly discarded his sister’s homework,” and “John knowingly ate the last slice of pizza.” Pet. Br. 9. The first example’s use of the possessive (“sister’s”) suggests that John *knew* that the item he discarded belonged to his sister. A formulation that put the modifier afterwards—*i.e.*, “John knowingly discarded the homework of his sister”—does not necessarily convey that implication. The second example’s meaning is overtaken by the reader’s assumption that one normally knows what he is eating, which raises the inference that “knowingly” must refer to something else.

In the end, supposed common usage (based on a handful of carefully selected examples) cannot generate rules of construction that supplant grammar. The word “knowingly” is an adverb, and “[a]n adverb, in standard English, modifies almost anything *except* a noun,” Robert Funk et al., *The Elements of Grammar for Writers* 62 (1991), including the noun phrase “a means of identification of another person.” That is a basic feature of “the language as we normally speak it.” *Watson v. United States*, 128 S. Ct. 579, 583 (2007). Even courts of appeals that have ultimately adopted petitioner’s proposed interpretation have acknowledged that “[i]n a

purely grammatical sense, ‘knowingly,’ as an adverb, modifies only the verbs ‘transfers, possesses, or uses.’” *United States v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008); accord *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008), petition for cert. pending, No. 08-622 (filed Nov. 7, 2008).

This Court has made the same grammatical point in other contexts. In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), for example, the Court considered a statute that referred, in pertinent part, to a person who “knowingly transports or ships in interstate commerce by any means including by computer or mails, any visual depiction, if” certain other requirements were met. *Id.* at 68 (quoting 18 U.S.C. 2252(a)(1) and (2)). The Court stated that “[t]he most natural grammatical reading” of that statute “suggest[ed] that the term ‘knowingly’ modifie[d] *only* the surrounding verbs: transports, ships, receives, distributes, or reproduces.” *Ibid.* (emphasis added). Thus, as a matter of grammar, the word “knowingly” would not have applied to the words “any visual depiction,” whose placement in the statute at issue in *X-Citement Video* parallels the placement of the words “a means of identification of another person” in Section 1028A(a)(1).<sup>2</sup>

In *United States v. Williams*, 128 S. Ct. 1830 (2008), in contrast, the Court considered a statute where struc-

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<sup>2</sup> In *X-Citement Video*, the Court ultimately concluded that the statute’s “knowingly” requirement extended to two other requirements set forth later in the statute. 513 U.S. at 78. In reaching that conclusion, the Court cited “anomalies which [would] result from [a contrary] construction,” the presumption of scienter, and the constitutional-avoidance canon. *Id.* at 68-69. No similar reasons justify departing from “[t]he most natural grammatical reading” of the statutory text (*id.* at 68) in this case. See pp. 33-52, *infra*.

tural clues indicated that the word “knowingly” modified an entire statutory section. That case involved a statute where the solitary word “knowingly” was set off by a dash from and “introduce[d]” two distinct subsections. *Id.* at 1839; see 18 U.S.C. 2252A(a)(3). The Court determined that the statute’s structure made clear that the word knowingly “applie[d] to” the two subsections “in [their] entirety,” and it stated that “there [was] no grammatical barrier to reading [the statute] in that way.” *Williams*, 128 S. Ct. at 1839. Indeed, because the single word “knowingly” clearly extended through the dash and past an “(A),” because that same introductory adverb clearly applied to the verbs immediately following the “(B)” as well, and because the verbs in both subsections were not set off in any way from the words that followed them, there would have been a structural barrier in *Williams* to construing the “knowingly” requirement as applying *only* to the verbs that began each subsection. See 18 U.S.C. 2252A(a)(3).

There are no structural barriers to giving Section 1028A(a)(1) its “most natural grammatical reading.” *X-Citement Video*, 513 U.S. at 68. In Section 1028A(a)(1), “knowingly” immediately precedes the only verbs that it could plausibly modify, and there are no intervening punctuation marks or other words that separate “knowingly” from those verbs.

Nor is there any other textual reason to believe that the effect of the word “knowingly” in Section 1028A(a)(1) extends past the three verbs that immediately follow it. An “adverb should generally be placed as near as possible to the word it is intended to modify,” *The Chicago Manual of Style* ¶ 5.155, at 185 (15th ed. 2003) (*Chicago Manual*), and “common usage” indicates that the word “knowingly” in Section 1028A(a)(1) “does

not modify the entirely lengthy predicate that follows it.” *United States v. Montejo*, 442 F.3d 213, 215 (4th Cir.), cert. denied, 549 U.S. 879 (2006). “Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil.” *United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006).

To the contrary, there is a structural barrier to construing Section 1028A(a)(1)’s “knowingly” requirement as extending all the way to the words “of another person.” Although petitioner omits it when paraphrasing the statute (see Pet. Br. 9), Section 1028A(a)(1) contains a clause that is set off by commas after the final verb that follows “knowingly” and before the words “a means of identification of another person.” See 18 U.S.C. 1028A(a)(1) (“knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person”). A comma directs a reader to make “a slight pause,” *Chicago Manual* ¶ 6.18, at 244, which further reinforces the inference that the effect of the adverb “knowingly” does not extend past the verbs that follow it, much less past the entire additional element “without lawful authority,” which ends with another comma.

2. Interpreting Section 1028A(a)(1)’s “knowingly” requirement as applying to the words “of another person” would also create a serious surplusage problem with respect to the almost identically worded Section 1028A(a)(2). In contrast, there would be no comparable surplusage problem even if the Court were to conclude that the effect of “knowingly” extends past the verbs that follow it and reaches the words “without lawful authority” or “a means of identification.”

a. Like Subsection (a)(1), the provision at issue here, Subsection (a)(2) was enacted as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 2(a), 118 Stat. 831. The two provisions are worded almost identically: in fact, there are only three differences between them. First, the predicate offenses specified by Subsection (a)(2) are all terrorism-related. 18 U.S.C. 1028A(a)(2) (incorporating list in 18 U.S.C. 2332b(g)(5)(B)). Second, Subsection (a)(2) prescribes a five-year term of imprisonment rather than Subsection (a)(1)’s two-year term of imprisonment. 18 U.S.C. 1028A(a)(1) and (2).

The third difference between Subsections (a)(1) and (a)(2) is the critical one here. Section 1028A(a)(1) applies to one who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” 18 U.S.C. 1028A(a)(1). Section 1028A(a)(2), in contrast, adds the words “or a false identification document,” so that the provision applies to one who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document.” 18 U.S.C. 1028A(a)(2); see 18 U.S.C. 1028(d)(4) (definition of “false identification document”).

b. Petitioner’s argument is that Subsection (a)(1)’s “knowingly” requirement extends to the words “of another person” in that provision. If that were correct, the same conclusion would apply to Subsection (a)(2), because the critical language of the two provisions is identical up to that point. *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (stating that the need to read a statute “as a whole” has particular force where the provisions in question “are adjacent” and have “similar structures”).



In addition, the words “transfers, possesses, or uses” are the only verbs in Subsection (a)(2), and Subsection (a)(2) contains no punctuation marks between “of another person” and “or a false identification document.” 18 U.S.C. 1028A(a)(2). As a result, a conclusion that the effect of the adverb “knowingly” in Subsection (a)(2) extends beyond the three verbs that immediately follow it and also reaches the first object of those verbs (that is, “a means of identification of another person”) would require the same conclusion with respect to the second object as well (that is, “a false identification document”).

The problem with such an interpretation, however, is that it would render superfluous the words “of another person” in Subsection (a)(2). See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotation marks and citation omitted). It would be “at the least unnecessary, and perhaps absurd” to interpret Section 1028A(a)(2) as if it applied to one who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification *knowing that it belongs to* another person or is a false identification document.” *United States v. Miranda-Lopez*, 532 F.3d 1034, 1042 (9th Cir. 2008) (Bybee, J., concurring in part and dissenting in part). “A person who knowingly transfers a means of identification without lawful authority must necessarily know that the identification *either* belongs to another person *or* that it is false; there are no other choices.” *Ibid.* (Bybee, J., concurring in part and dissenting in part) (emphases added).<sup>3</sup> The

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<sup>3</sup> Judge Bybee implicitly assumed that Section 1028A(a)(1)’s “knowingly” requirement applies through the words “without lawful author-

fact that a “second ‘knowingly’ requirement \* \* \* cannot peaceably be read into” Subsection (a)(2) cuts against reading one into “the nearly identical” Subsection (a)(1). *Id.* at 1043 (Bybee, J., concurring in part and dissenting in part).<sup>4</sup>

In contrast, there would be no superfluous language at all if the Court were to give Subsections (a)(1) and (a)(2) their “most natural grammatical reading,” *X-Citement Video*, 513 U.S. at 68, and hold that, in both subsections, the adverb “knowingly” applies only to the verbs that immediately follow it. The same would be true for both provisions if the Court were to conclude that the effect of “knowingly” terminates with the comma following the words “without lawful authority.”

Even if Subsection (a)(2)’s “knowingly” requirement were understood to apply to “a means of identification,” the words “of another person” in that provision would still not be “mere surplusage.” *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 98 (2006). Although it could be argued that such a construction would render unnecessary

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ity.” In addition to eliminating the surplusage problem, such a construction would also further reduce any potential concerns about criminalizing unwitting or apparently innocent conduct. See pp. 33-36, *infra*.

<sup>4</sup> In *Villanueva-Sotelo*, the D.C. Circuit stated that the government had “concede[d]” at oral argument that Subsection (a)(2)’s “knowledge requirement must apply to the whole phrase ‘false identification document.’” 515 F.3d at 1239 (citation omitted). Petitioner does not assert that the government made any such concession in this case, and it does not so concede here. Accord *Miranda-Lopez*, 532 F.3d at 1043 (Bybee, J., concurring in part and dissenting in part); *United States v. Estrada-Sanchez*, 558 F. Supp. 2d 129, 136 n.7 (D. Me. 2008). Petitioner likewise makes no attempt to respond to the argument that such a reading would render superfluous the words “of another person” in Section 1028A(a)(2).

“[t]he *entire phrase* ‘of another person or a false identification document,’” the separate listing of “a means of identification *or* a false identification document” in Subsection (a)(2) could plausibly be understood to underscore the difference between Subsections (a)(1) and (a)(2), the former of “which applies *only* to the use of another’s identification.” *Miranda-Lopez*, 532 F.3d at 1039, 1040 n.5.

3. a. For the reasons explained above, the most natural reading of Section 1028A(a)(1) is that a defendant need not know that the particular means of identification in question was that “of another person.” “If Congress had wished to extend the knowledge requirement [in Section 1028A(a)(1)] to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification ‘known to belong to another actual person.’” *United States v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008).

b. This point is underscored by 18 U.S.C. 1546(a), the provision whose violation formed the predicate for petitioner’s convictions under Section 1028A(a)(1). In Section 1546(a), Congress made it unlawful to “*knowingly* \* \* \* use[] \* \* \* [any] document prescribed by statute or regulation for entry into or evidence of authorized stay or employment in the United States, *knowing* it to be forged, counterfeited, altered, or falsely made.” 18 U.S.C. 1546(a) (emphases added). Cf. 18 U.S.C. 922(q)(2)(A) (making it unlawful “for any individual *knowingly* to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual *knows, or has reasonable cause to believe, is a school zone*”) (emphases added);

Emergency and Disaster Assistance Fraud Penalty Act of 2007, Pub. L. No. 110-179, § 2(a), 121 Stat. 2556 (to be codified at 18 U.S.C. 1040(a)(2) (Supp. II 2008)) (making it unlawful to “*knowingly* \* \* \* make[] any materially false, fictitious, or fraudulent statement or representation, or make[] or use[] any false writing or document *knowing* the same to contain any materially false, fictitious, or fraudulent statement or representation”) (emphases added).

This Court has stated that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Although “[t]he *Russello* presumption \* \* \* grows weaker with each difference in the formulation of the provisions under inspection,” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436 (2002), the Court has applied a similar analysis when a relevant comparison of different statutes suggests that the presence of certain language in one indicates that its absence in another reflects a deliberate congressional choice. In *United States v. Shabani*, 513 U.S. 10 (1994), for example, the Court unanimously rejected the argument that courts should read into the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act. In so holding, the Court cited the fact that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt-act requirement. *Shabani*, 513 U.S. at 14.

The same general point applies here. Like Section 1028A, Section 1546(a) governs unlawful use of identity documents. And in the latter provision, but not the for-

mer, Congress has expressly provided that the defendant must have knowledge not only of the nature of his conduct (for example, “use” of an item) but also the nature of the item in question. That contrast between Section 1028A(a)(1) and Section 1546(a) “speaks volumes.” *Shabani*, 513 U.S. at 14.<sup>5</sup>

4. Petitioner errs in asserting (Pet. Br. 27-28) that this Court’s decision in *Liparota* establishes the sweeping proposition that all “statutes with knowledge requirements” are “inherently ambiguous.” To the contrary, “*Liparota*’s discussion of the scope of ‘knowingly’ should not be understood apart from the Court’s primary stated concern [of] avoiding criminalization of otherwise non-culpable conduct.” *Montejo*, 442 F.3d at 216. As explained below, there is no such danger here. See pp. 33-36, *infra*.

The statute at issue in *Liparota* was also structurally different from the one at issue in this case. Unlike Section 1028A(a)(1), see p. 12, *supra*, the statute at issue in *Liparota* did not contain an intervening clause after the verbs that immediately followed the word “knowingly.” See 471 U.S. at 420 n.1 (quoting 7 U.S.C. 2024(b)(1) (1982), which provided, in pertinent part, “whoever knowingly uses, transfers, acquires, alters, or possesses

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<sup>5</sup> In *Liparota*, the Court concluded that Congress’s different placement of the word “knowingly” in adjacent statutory provisions was “too slender a reed” to support a conclusion that the “knowingly” requirement in the former applied only to the verbs that immediately followed it. 471 U.S. at 429. But the basis for this conclusion was that acceptance of the government’s argument “would lead to the demise of the very distinction that Congress is said to have desired” because it would have meant that any person who violated the latter statute would also, *a fortiori*, have violated the former. *Ibid*. No such anomaly exists here because there is no violation of Section 1028A(a)(1) unless the means of identification in question is that “of another person.”

coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall” be guilty of a crime). Nor did the Court’s holding in *Liparota* create a serious superfluity problem with respect to a closely related, and nearly identically worded, provision. See pp. 12-16, *supra*. For those reasons as well, *Liparota*’s extremely brief discussion of the statutory text at issue in that case, see 471 U.S. at 424, and its block quotation in a footnote of a passage from a treatise that the Court stated “aptly summed up the ambiguity in an analogous situation,” *id.* at 424 n.7, cannot bear the heavy weight petitioner seeks to place upon it.

**B. Statutory Purpose Counsels Against Requiring The Government To Prove That The Defendant Knew That The Means Of Identification Was That “Of Another Person”**

The unmistakable purpose of Section 1028A(a)(1) is to provide enhanced protections for victims. Extending the statute’s “knowingly” requirement to the words “of another person” would frustrate that purpose. The harm a victim suffers when her identifying information is used to facilitate the commission of another crime does not depend on whether the wrongdoer was consciously aware that she existed. The courts that have adopted petitioner’s proposed construction have erred in focusing on whether someone like petitioner would have been labeled a “thief” at common law. Instead, the appropriate inquiry is whether a person whose means of identification is used in a way proscribed by Section 1028A(a)(1) has suffered the sort of harm Congress meant to address. The answer is clearly yes.

***1. The purpose of Section 1028A(a)(1) is to provide enhanced protections for victims***

The statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim. Congress has enacted other statutes that make it unlawful to create, transfer, or use forged or otherwise falsified identification documents that do not depend on whether the document itself or a means of identification contained therein belongs to or is that of an actual person. See, *e.g.*, 18 U.S.C. 499, 701, 1028(a), 1423, 1424, 1425(b), 1426(b), 1543, 1546(a), 1546(b). Like those statutes, Section 1028A(a)(1) requires that the defendant’s knowing transfer, possession, or use of the means of identification must itself be improper (that is, “without lawful authority”) and must serve a particular function (that is, be “in relation to” one of the felonies specified in Subsection (c)). 18 U.S.C. 1028A(a)(1). Unlike those statutes, however, Section 1028A(a)(1) also requires that the means of identification in question must, in fact, be that “of another person.” *Ibid.*

Section 1028A(a)(1)’s legislative history underscores Congress’s emphasis on the victim. The first sentence under the heading “Background and Need for the Legislation” in the House Judiciary Committee’s report on the bill that enacted Section 1028A(a)(1) states 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* in some way that involves fraud or deception.” H.R. Rep. No. 528, 108th Cong., 2d Sess. 4 (2004) (*House Report*) (emphases added).<sup>6</sup>

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<sup>6</sup> Because the *House Report*’s definition expressly equates “identity theft” and “identity fraud,” it is fatal to the repeated claims by peti-

The statistics recounted in the *House Report* about the prevalence of “types of identity theft” (*House Report* 4) also focus on the harms suffered by those whose identities are misappropriated, and they draw no distinction based on whether the perpetrators knew their victims existed. The *House Report* states that “[t]he Federal Trade Commission (‘FTC’) received 161,819 victim complaints of someone *using another’s information* in 2002” and that a 2003 study found that “[a] total of 4.6% of survey participants indicated that they had discovered that they were victims of *some* type of identity theft in the past year.” *Ibid.* (emphases added). The *House Report* further explains that “[t]he FTC estimates the loss to businesses and financial institutions from identity theft to be \$47.6 billion” and “[t]he costs to individual consumers \* \* \* to be approximately \$5.0 billion.” *Ibid.*

Member statements in the *House Report* likewise underscore that Section 1028A(a)(1)’s overriding purpose is, in the words of one of its sponsors, “protect[ing] the good credit and reputation of hardworking Americans.” *House Report* 51 (statement of Rep. Schiff). Members emphasized that “victims [of identity theft] have a difficult [and] time consuming \* \* \* task of repairing a damaged credit history.” *Id.* at 25 (statement

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tioner and his amici (see, *e.g.*, Pet. Br. 8, 21; EPIC Amicus Br. 8-19) that Congress perceived any fundamental distinction between the two. See pp. 27-33, *infra* (identifying other reasons why use of the term “theft” in the statutory title and legislative history do not warrant a different result). Nor do the words “wrongfully obtains” in the definition quoted above aid petitioner. There is a right way to obtain a social security or other identifying number; making up a string of numbers, or using numbers purchased from someone else, is not it.



of Rep. Coble). In particular, they noted that “[a] victim of identity theft usually spends a year and a half working to restore his or her identity and good name,” *id.* at 50 (statement of Rep. Schiff); accord *id.* at 44 (statement of Rep. Jackson Lee) (“an average of 600 hours”), and that “[b]eing a victim costs an average of \$1,400 in out-of-pocket expenses,” *ibid.* (statement of Rep. Jackson Lee). One of Section 1028A(a)(1)’s sponsors also stated that previous sentencing practices had failed to “reflect the impact on the victims.” *Id.* at 51 (statement of Rep. Schiff); accord *Remarks on Signing the Identity Theft Penalty Enhancement Act*, 40 Weekly Comp. Pres. Doc. 1305, 1306 (July 19, 2004) (stating that current “sentences for these crimes do not reflect the damage done to the victim”).<sup>7</sup>

**2. *Requiring the government to prove that the defendant was aware of the victim’s existence would undermine the statutory purpose***

As just explained, Section 1028A(a)(1) is a victim-focused statute whose overriding purpose is to provide enhanced protection for those whose personal identifying information is used to facilitate the commission of another crime. Requiring the government to demonstrate that a defendant was specifically aware that the

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<sup>7</sup> It is true (Pet. Br. 20) that the *House Report* describes the bill as “address[ing] the most serious criminals,” but the remainder of that sentence—which petitioner fails to quote—makes clear that the *Report*’s authors viewed that class as consisting of those who commit identity crimes “in furtherance of other more serious crimes.” *House Report* 9; see *ibid.* (stating that the bill “is intended to reduce the incidence of identity theft and fraud and address the most serious criminals by providing stronger penalties for those who would commit such crimes in furtherance of other more serious crimes”).

particular means of identification in question was that “of another person” would undermine that purpose.

a. In *United States v. Feola*, 420 U.S. 671 (1975), this Court held that a statute that made it unlawful to forcibly assault a federal officer required only that the government demonstrate “an intent to assault, not an intent to assault a federal officer.” *Id.* at 684. The Court explained that at least one of the statute’s purposes was to “accord[] maximum protection to federal officers,” and it determined that a contrary construction would offer no protection “to the agent acting under cover.” *Ibid.* As a result, the Court concluded that Congress’s purpose “could well be frustrated by the imposition of a strict scienter requirement.” *Id.* at 678.<sup>8</sup>

The same is true here. The degree of harm suffered by a victim whose identifying information has been used in a way that facilitates the commission of another crime does not vary depending on how the perpetrator acquired that information or whether he has a specific awareness that a tangible victim exists. For example, “the effect on a victim’s credit rating is the same whether someone (1) makes up a social security number, procures credit with that number, and does not repay or (2) steals a social security number from a database, procures credit with that number, and does not repay.”

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<sup>8</sup> The only mention of *Feola* in petitioner’s brief is in a footnote that briefly asserts that the case involved a “‘jurisdictional’ elements” exception to a “presumption” that any *mens rea* requirement set forth in the text of a criminal statute applies to all facts that make the defendant’s conduct unlawful. Pet. Br. 18 & n.4. No such presumption exists. See pp. 39-49, *infra*. Even if it did, moreover, petitioner acknowledges that it would have to yield where “a contrary purpose plainly appears,” Pet. Br. 19 (quoting Model Penal Code § 2.02(4) (1985)), and the Court’s analysis in *Feola* demonstrates why this would be such a case.

*Godin*, 534 F.3d at 59. Petitioner’s proposed construction, however, would mean that Section 1028A(a)(1) would provide no protection at all in the former situation, notwithstanding the presence of the sort of real victim for whom Congress intended to provide enhanced protection.

Petitioner may be correct (Pet. Br. 31) that a victim is particularly likely to suffer tangible financial harm where the perpetrator misuses a means of identification in order to gain access to already existing accounts. But the same document upon which petitioner relies states that, “[a]mong Identity Theft victims, 17% said the thief used the victim’s personal information to *open* at least one new account,” Synovate, *Federal Trade Commission—Identity Theft Survey Report* 34 (2003) (emphasis added), and a perpetrator need not know that a victim exists in order to do so. In addition, regardless of whether a particular victim suffers tangible economic harm, a defendant does not violate Section 1028A(a)(1) unless he misappropriates a means of identification “of another person” in a manner that facilitates his commission of *another* crime. And having one’s identifying information used in connection with criminal activity poses an obvious risk of harm to the victim. See *House Report* 25 (statement of Rep. Coble) (“Identity theft and identity fraud are terms used to refer to all types of crimes in which an individual’s personal or financial data is misused, typically for economic gain *or* to facilitate another criminal activity.”) (emphasis added).

b. Petitioner also ignores the perverse incentives that his proposed construction would create. A holding that petitioner was entitled to a judgment of acquittal on the Section 1028A(a)(1) counts would “allow a defendant to use the identification of another person fraudulently

in the commission of an enumerated felony so long as the defendant remains ignorant of whether that other person is real.” *Hurtado*, 508 F.3d at 609. Such a rule could encourage wrongdoers to take steps to avoid learning whether a particular means of identification was that “of another person,” and to argue when caught that they were unaware of that fact. It is true (Pet. Br. 33) that the manner in which the defendant obtained or used a particular means of identification may, in some cases, provide strong circumstantial evidence that he knew that it was, in fact, that “of another person.” But that does not change the reality that requiring the government to establish such knowledge beyond a reasonable doubt would in a class of cases impose an “impossible burden.” *Villanueva-Sotelo*, 515 F.3d at 1255 (Henderson, J., dissenting) (citation omitted).

In contrast, the construction adopted by the court of appeals would require those who commit one of the specified predicate crimes to “bear the burden of ascertaining” whether a means of identification they use to facilitate the commission of that crime is that of another person by subjecting them to “enhanced penalties” if that is the case. *United States v. Falu*, 776 F.2d 46, 50 (2d Cir. 1985). “[I]mpos[ing] on the [wrongdoer] the burden of inquiry and the risk of misjudgment,” *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992) (R.B. Ginsburg, J.), cert. denied, 508 U.S. 923 (1993), is far more consistent with Congress’s aim of providing enhanced protection for victims than the construction advocated by petitioner.

c. Petitioner errs in asserting (Pet. Br. 22) that, “under the court of appeals’ interpretation, the law draws *no* distinction between defendants with significantly *different* levels of culpability.” A defendant “who

intentionally steals thousands of credit card numbers and bilks their owners out of hundreds of thousands of dollars” (*ibid.*) will commit as many Section 1028A(a)(1) violations as people he bilks. In addition, the hypothetical defendant posited by petitioner would also be subject to punishment for the underlying predicate crimes, and his infliction of six digits worth of financial harm would probably be taken into account in imposing sentence. Cf. Sentencing Guidelines § 2B1.1(b)(1).

Petitioner also asserts (Pet. Br. 23 n.9) that, under his proposed construction, the fact that a defendant unknowingly used the means of identification of another person “presumably can be taken into account in setting the punishment for the identity fraud.” The history recounted above, however, shows that one of the motivating factors for Section 1028A(a)(1) was the belief that precisely that sort of discretionary sentencing regime had failed to “reflect the impact on the victims.” *House Report* 51 (statement of Rep. Schiff). Cf. Advocates for Human Rights (AHR) Amicus Br. 19-20 (asserting that a first offense under 18 U.S.C. 1546(a), the crime that formed the predicate for petitioner’s convictions under Section 1028A(a)(1), would generally result in an advisory Guidelines range of 0 to 6 months of imprisonment); MALDEF Amicus Br. 11-12 (same). It is Congress that “has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme,” and courts “do not sit as a ‘superlegislature’ to second-guess these policy choices.” *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion); see *Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility,

these are peculiarly questions of legislative policy.”) (citation omitted).

**3. *Neither the statute’s title nor the references to “theft” and “thieves” in the legislative history warrants a different conclusion***

Petitioner and his amici rely heavily on the existence of the word “theft” in both the statutory short title and in Section 1028A’s heading and on the numerous references to “thieves” and “theft” in the legislative history. In essence, petitioner’s argument is that “the traditional understanding of theft” (Pet. Br. 13) required “knowledge that the property misappropriated in fact belongs to another” (*id.* at 15), and that Section 1028A(a)(1) should be interpreted to preserve “this defining aspect of the traditional understanding of theft. *Id.* at 16; see *Villanueva-Sotelo*, 515 F.3d at 1243-1246.<sup>9</sup> That argument lacks merit.

a. This Court has stated that “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice,” it is generally appropriate to presume that Congress “kn[ew] and adopt[ed] the cluster of ideas that were attached to each borrowed word.” *Morrisette v. United States*, 342 U.S. 246, 263 (1952). That “canon on imputing common-law meaning,” however, is subject to two important limi-

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<sup>9</sup> Amicus EPIC asserts that “[i]dentity theft goes *beyond* the theft of one of the victim’s attributes to the misappropriation of a person’s very identity.” Br. 11 (emphasis added; internal quotation marks and citation omitted). That contention underscores the dangers of giving controlling weight to an undefined term that appears only in a statute’s title and legislative history. The statutory text makes clear that in order to violate Section 1028A(a)(1), a defendant need only transfer, use, or possess a single “means of identification” of another person, as that term is defined in 18 U.S.C. 1028(d)(7).

tations. *Carter*, 530 U.S. at 264. First, it is insufficient that the crime in question “bear[s] a close resemblance to” some common-law crime; Congress must make use of a “*term* with established meaning at common law.” *Ibid.*; see *id.* at 265. Second, it is not enough for such a term to be contained in the statute’s title or some extrinsic source; the term with an established common-law meaning must be contained “in the text of the statute.” *Id.* at 264.

The limitations set forth in *Carter* preclude resort to the canon here. Petitioner contends that the term “theft” has a “traditional understanding” (Pet. Br. 13), but his reliance on that word is doubly flawed. For one thing, the authorities that petitioner cites fail to demonstrate that “theft”—as opposed to “larceny,” which is the actual term used in all of the pre-1990 authorities upon which petitioner relies<sup>10</sup>—had an “established meaning at common law.” *Carter*, 530 U.S. at 266. Cf. *United States v. Turley*, 352 U.S. 407, 411-412 (1957)

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<sup>10</sup> See *Morissette*, 342 U.S. at 261 n.19 (Pet. Br. 16) (observing that “to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property”) (citing *Johnson v. State*, 36 Tex. 375 (1872)); *Regina v. Riley*, 169 Eng. Rep. 674 (1853) (Pet. Br. 16) (sustaining larceny conviction); *Regina v. Thurborn*, 169 Eng. Rep. 293, 293-294 (1848) (Pet. Br. 16) (“[T]he crime of larceny cannot be committed, unless the goods taken appear to have an owner, and the party taking them must know or believe that the taking is against the will of the owner.”); Oliver Wendell Holmes, Jr., *The Common Law* 71 (1881) (Pet. Br. 15 n.3) (discussing the term “larceny”); 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 98 (2d ed. 1828) (Pet. Br. 16) (chapter title: “Of Larceny”). The statute at issue in *Morissette* (Pet. Br. 15) likewise did not use the word “theft.” Instead, it proscribed “embezzl[ing], steal[ing], purloin[ing], or knowingly convert[ing]” government property. 342 U.S. at 248 n.2 (quoting 18 U.S.C. 641 (Supp. V 1951)).

(refusing to apply canon with respect to Congress’s use of the term “stolen” because the words “‘stolen’ (or ‘stealing’) ha[d] no accepted common-law meaning” and were not necessarily “coterminous with larceny and exclusive of other theft crimes”). And to the extent that “theft” has emerged as the name for a particular crime in the modern era, it has generally been used as a catch-all term that is designed to incorporate a number of common-law forebearers, of which larceny was simply one. 3 Wayne R. LaFare, *Substantive Criminal Law* § 19.8(c), at 145 (2d ed. 2003) (*LaFare*). Cf. *Bell v. United States*, 462 U.S. 356, 360 (1983) (stating that the phrase “intent to steal or purloin” in 18 U.S.C. 2113(b) “ha[d] no established meaning at common law” and construing that statute, whose language does not mirror or adopt the common-law elements of larceny, “to go beyond the common-law definition”).

In addition, even the term “theft” appears only in the statute’s short title and in the heading of Section 1028A as a whole. Such references are insufficient to trigger the canon’s application. See *Carter*, 530 U.S. at 267 (concluding that canon “ha[d] no bearing” where the term “robbery”—which had an established common-law meaning—was contained solely in the statute’s title).

b. Petitioner’s reliance on the use of “theft” and “thieves” in locations other than the operative text of Section 1028A(a)(1) is flawed for another reason as well. Section 1028A(a)(1) is fundamentally a victim-focused statute. See pp. 20-27, *supra*. As a result, asking whether a person who engages in the conduct for which petitioner was convicted would typically be labeled a “thief,” see, e.g., Pet. Br. 5, 8; *Villanueva-Sotelo*, 515 F.3d at 1243, is to pose the wrong question. Petitioner used the social security and alien registration numbers



of innocent people in a manner that facilitated his commission of a federal felony. And it is perfectly natural to describe those people as having been “victim[s] of identity theft, whether [petitioner] knew that [he] was stealing [those people’s] identit[ies] or not.” *United States v. Godin*, 489 F. Supp. 2d 118, 121 (D. Me. 2007), rev’d, 534 F.3d 51 (1st Cir. 2008).

c. Petitioner’s focus on the term “theft” is flawed for yet another reason. Regardless of how the Court resolves the specific question before it, it is clear that both the statute as a whole and Section 1028A(a)(1) in particular criminalize a great deal of conduct that would not have constituted common-law larceny. As a result, the premise of petitioner’s argument—that the term “theft” as used in the statute’s title and the heading of Section 1028A should be understood to be synonymous with common-law larceny—fails on its own terms.

The “[a]ggravated identity theft” heading on which petitioner relies does not introduce Section 1028A(a)(1), the provision under which petitioner was convicted. Rather, it introduces Section 1028A in its entirety, including Subsection (a)(2), the terrorism-related provision. And in that subsection, Congress has clearly created an offense that would not constitute common-law larceny, because it has no requirement that the “false identification document” in question be that of an actual person. See 18 U.S.C. 1028A(a)(2); see also 18 U.S.C. 1028(d)(4) (definition of “false identification document”). Common-law larceny, in contrast, required that the property in question have an “owner,” *Morissette*, 342 U.S. at 261 n.19; Oliver Wendell Holmes, Jr., *The Common Law* 70-71 (1881) (*The Common Law*), as did the statute the Court construed in *Morissette*, see 342 U.S. at 248 n.2.

It is also clear that—regardless of how the Court resolves this case—many people who violate Section 1028A(a)(1) would not be “a thief in the traditional sense of the word.” *United States v. Montejo*, 353 F. Supp. 2d 643, 654 (E.D. Va. 2005), *aff’d*, 442 F.3d 213 (4th Cir.), *cert. denied*, 549 U.S. 879 (2006). As the very authorities upon which petitioner relies demonstrate (see Pet. Br. 15-16 & n.3), common-law larceny also required a “taking and removing, by trespass, of personal property \* \* \* with intent to deprive such owner of his ownership therein.” *The Common Law* 71 (citation omitted).

A modern identity thief could certainly obtain a particular means of identification by stealing a tangible item such as a driver’s license or credit card. But it is equally (if not more) likely that he will obtain it from a piece of tangible personal property that the victim has deliberately abandoned (such as discarded mail) or use the means of identification in a manner that does not deprive the victim of its use (as with a defendant who uses someone else’s social security number on an employment form). And “[n]othing in the plain language of the statute requires that the means of identification have been stolen for a § 1028A(a)(1) violation to occur.” *Hurtado*, 508 F.3d at 607; see *Godin*, 534 F.3d at 60 (observing that “several of the anecdotal examples of identity theft [given in the *House Report*] describe crimes that did not involve stealing a means of identification *from another*”) (emphasis added). It is likewise far from clear that a “name or number that may be used, alone or in conjunction with any other information, to identify a specific individual” (18 U.S.C. 1028(d)(7)) would have been considered “personal property” for purposes of common-law larceny. Cf. 3 *LaFave* § 19.4(a), at 78 (“At common law one could not steal intangible personal

property, including such substantial choses in action as stocks, bonds, checks or promissory notes, all of which are in the form of documents.”).

d. Petitioner is correct that most of the examples given in Section 1028A(a)(1)’s legislative history involve situations where “the defendant clearly knew that the identification he or she was using belonged to another person.” Pet. Br. 16. But see *id.* at 17 (acknowledging that “the state of the defendant’s knowledge in [some] examples [given in the legislative history] might be subject to debate”). Like a statute’s title, however, legislative history has “a role in statutory interpretation *only* to the extent [it] shed[s] a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (emphasis added). Here, there is no “ambiguous term[.]” (*ibid.*) whose meaning could be illuminated by the examples the drafters of the *House Report* chose to highlight.

At any rate, if legislative history is to be considered in assessing Section 1028A(a)(1)’s meaning, the most significant legislative history is the *House Report*’s flat statement 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 in some way that involves fraud or deception.” *House Report* 4 (emphasis added). That definition makes clear that petitioner is indeed an “identity th[ief]” as the rest of the *House Report* uses that term.

The fact that crimes like petitioner’s “did not make the ‘worst case’ list [recited in the *House Report*] does not mean that” it is not covered by Section 1028A(a)(1). *Villanueva-Sotelo*, 515 F.3d at 1254 (Henderson, J., dissenting). It is understandable that the *House Report*’s

drafters would have focused on “the most notorious cases in which defendants had received ‘light’ punishment under the then-existing law.” *Ibid.* (Henderson, J., dissenting). And even if the prototypical cases envisioned by the drafters generally involved wrongdoers who knew that the means of identification in question was that of an actual person, “statutory prohibitions often go beyond the principal evil [contemplated by their drafters] to cover reasonably comparable evils,” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).<sup>11</sup>

**C. Petitioner’s Proposed Construction Is Not Necessary To Avoid Criminalizing Apparently Innocent Or Otherwise Lawful Conduct**

This Court has stated on several occasions that there is a presumption against construing statutes in a way that would “criminalize a broad range of apparently innocent conduct,” *Liparota*, 471 U.S. at 426, or authorize liability in the absence of an “evil-meaning mind,” *Morrisette*, 342 U.S. at 251. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005); *X-Citement*

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<sup>11</sup> Amicus AHR asserts (at 21) that the Court should resolve this case by reference to Congress’s “overarching approach to false document offenses in the immigration law.” The relevant question here is Congress’s intent with respect to Section 1028A(a)(1), and amicus AHR identifies no reason for believing that Congress viewed that statute as incorporating a series of broader principles supposedly derived from immigration law. That omission is unsurprising, because Section 1028A(a)(1) is applicable with respect to a variety of predicate crimes outside the immigration context. See, *e.g.*, 18 U.S.C. 1028A(c)(1) (referencing certain offenses “relating to theft, embezzlement, or misappropriation by bank officer or employee” or “theft from employee benefit plans”), (5) (“any provision contained in chapter 63 (relating to mail, bank, and wire fraud)”), and (11) (certain violations of the Social Security Act, 42 U.S.C. 301 *et seq.*).

*Video*, 513 U.S. at 70-73; *Staples*, 511 U.S. at 610, 612. That principle does not control here. The conduct proscribed by Section 1028A(a)(1) would not be innocent or appear lawful regardless of whether the defendant knew that the means of identification in question was that “of another person.”

1. A conclusion that Section 1028A(a)(1)’s “knowingly” requirement does not apply to the words “of another person” would not result in the criminalization of any “apparently innocent conduct.” *Liparota*, 471 U.S. at 426. That is because Section 1028A(a)(1) does not demarcate a line between legally innocent and criminally culpable conduct. Instead, like the statute at issue in *United States v. Ressaam*, 128 S. Ct. 1858 (2008)—a decision in which the Court did not even mention the interpretive principle upon which petitioner relies—Section 1028A(a)(1) creates an offense that specifically requires, as an element, the commission of another federal felony. For that reason alone, a person who does no more than unwittingly transfer a stolen social security card (see Pet. Br. 24-25) clearly has not violated Section 1028A(a)(1).

The risk of sweeping in any “apparently innocent conduct” (*Liparota*, 471 U.S. at 426) is further neutralized by the fact that the predicate felonies “during” which a Section 1028A(a)(1) violation must occur will generally have their own *mens rea* requirement. As a result, Section 1028A(a)(1) only “applies to persons who should be well aware that their conduct is subject to public regulation.” *United States v. Cook*, 76 F.3d 596, 601 (4th Cir.), cert. denied, 519 U.S. 939 (1996).

This case provides an apt illustration. By pleading guilty to the Section 1546(a) counts that formed the predicate for his Section 1028A(a)(1) convictions, peti-

tioner conceded that he “use[d] \* \* \* document[s] prescribed \* \* \* for entry into or evidence of authorized stay or employment in the United States” and that he did so “knowing [them] to be forged \* \* \* or to have been \* \* \* unlawfully obtained.” 18 U.S.C. 1546(a). There is nothing “innocent” about that conduct regardless of whether petitioner also knew that the documents themselves, or the identifying information contained within them, were those “of another person.” 18 U.S.C. 1028A(a)(1).

Petitioner and the courts that have adopted his proposed construction have also ignored the significance of Section 1028A(a)(1)’s “in relation to” requirement. See, e.g., *Villanueva-Sotelo*, 515 F.3d at 1237 (“[r]educing” the statutory language “to its essence” in a way that eliminated the “during and in relation to” requirement). But the “in relation to” requirement is critical, because it makes clear that the defendant’s transfer, possession, or use of the means of identification of another “cannot be the result of accident or coincidence.” *Smith*, 508 U.S. at 238. Instead, it “must have some *purpose or effect* with respect to the” underlying felony and “must ‘*facilitat[e], or ha[ve] the potential of facilitating,*’” the predicate crime. *Ibid.* (emphases added; citation omitted).

Petitioner suggests that, under the court of appeals’ construction, Section 1028A(a)(1) would apply to “someone who accidentally transposes the numbers of his own social security number in the course of committing a predicate offense \* \* \* if it turns out that the garbled number happens to belong to someone else.” Pet. Br. 22; see *id.* at 7. But petitioner does not attempt to explain how that kind of accidental and inadvertent use of a means of identification of another person would have

the effect of facilitating the commission of the underlying predicate crime.<sup>12</sup> In addition, any lingering concerns about criminalizing such conduct could be fully addressed by construing Section 1028A(a)(1)’s “knowingly” requirement as applicable to the words “without lawful authority.” See n.3, *supra*. Petitioner’s hypothetical thus provides no basis for interpreting Section 1028A(a)(1)’s “knowingly” requirement as extending to the words “of another person.” See *Carter*, 530 U.S. at 269 (“The presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”) (emphasis added; citation omitted).

2. Petitioner attempts to draw support from the government’s statement in its brief to the D.C. Circuit in *Villanueva-Sotelo* that it “seem[ed] clear that the ‘word “knowingly” [in Section 1028A(a)(1)] must modify not just the verb[s], but also at least the object that immediately follows the verb[s], namely, “a means of identification.”’” Govt C.A. Br. at 11 n.8, *Villanueva-Sotelo, supra* (No. 07-3055) (citation omitted). That “concession” (Pet. Br. 10), which was made before a different court and in a different case, does not aid petitioner here.

As the next two sentences of the same brief explain, the statement upon which petitioner relies was expressly premised on the view that a contrary “reading would criminalize innocent conduct and be inconsistent

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<sup>12</sup> Section 1028A(a)(1)’s “in relation to” requirement will do less independent work in cases, like this one, where the predicate felony involves unlawful use of documents. But Section 1028A(a)(1)’s predicates are not limited to document-related offenses, and, in other contexts, “the requirement that a defendant possess the identification during and in relation to an enumerated felony is a significant restriction.” *Estrada-Sanchez*, 558 F. Supp. 2d at 135 n.6.

with congressional intent.” Gov’t C.A. Br. at 11 n.8, *Villanueva-Sotelo*, *supra* (No. 07-3055). For the reasons explained above, that premise appears to have been incorrect in light of Section 1028A(a)(1)’s “during and in relation to” clause. See pp. 34-35, *supra*. More importantly, the government has never made any such concession with respect to whether Section 1028A(a)(1)’s “knowingly” requirement applies to the words “of another person.”

Petitioner counters that “it is hard to see how \* \* \*, as a linguistic matter, the knowledge requirement [in Section 1028A(a)(1)] can only be read to extend to ‘means of identification’ but not to the qualifying phrase ‘of another person.’” Pet. Br. 10. There would, of course, be no linguistic anomaly at all if the Court were either to: (1) give Section 1028A(a)(1) its “most natural grammatical reading” (*X-Citement Video*, 513 U.S. at 67) and hold that the “knowingly” requirement does not apply past the verbs that immediately follow it; or (2) hold that the effect of the “knowingly” requirement terminates with the comma following the words “without lawful authority.”

In any event, a conclusion that Section 1028A(a)(1)’s “knowingly” requirement extends to the words “a means of identification” would not mandate the same conclusion with respect to the later words “of another person.” Only the extension of the “knowingly” requirement to the words “of another person” would create a significant surplusage problem with respect to Subsection (a)(2). See pp. 12-16, *supra*. This Court has also made clear that “[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct,’” *Carter*, 530 U.S. at 269 (quoting



*X-Citement Video*, 513 U.S. at 72) (emphasis added), and an extension of the “knowingly” requirement through the words “a means of identification” would be more than sufficient to address any such concerns.

Contrary to petitioner’s assertion (Pet. Br. 10), this Court’s decision in *X-Citement Video* is not to the contrary. In that case, the Court concluded that once the statutory term “knowingly” was “emancipated from merely modifying the verbs” that immediately followed it and was understood to “appl[y] to the sexually explicit conduct depicted” as well, it was “difficult” to avoid the conclusion that “knowingly” also applied to the statutory requirement regarding the age of the performers. 513 U.S. at 77-78. In the statute at issue in *X-Citement Video*, however, the age-of-the-performers requirement was located *between* the word “knowingly” and the sexually-explicit-conduct requirement, which made it particularly implausible, “as a matter of grammar” (*id.* at 77), that the “knowingly” requirement applied only to the latter. See *id.* at 68 (quoting 18 U.S.C. 2252(a)(1) and (2)). Here, in contrast, the words “a means of identification” precede the words “of another person,” so there is no similar grammatical barrier to concluding that the “knowingly” requirement applies only to the former. In addition, the Court’s conclusion in *X-Citement Video* that the “knowingly” requirement also applied to the age-of-the-performers requirement was also supported by the constitutional-avoidance canon, *id.* at 72, 78, and by the fact that, under that statute, “the age of the performers [was] *the crucial element* separating legal innocence from wrongful conduct, *id.* at 73 (emphasis added).

**D. There Is No Presumption That A Defendant Must Be  
Aware Of All Facts That Are Necessary To Make His  
Conduct Unlawful Or Trigger An Enhanced Sentence**

Petitioner asserts that there is a “longstanding presumption[]” that “mens rea requirements apply to all facts that make the defendant’s conduct unlawful.” Pet. Br. 13, 18 (initial capitalization and emphasis omitted).<sup>13</sup> Amici Professors of Criminal Law advance the even broader proposition (at 5-6, 17) that this Court should presume that a defendant must have a culpable mental state with respect to any fact that subjects him to heightened punishment.<sup>14</sup>

No such broad presumptions exist. In addition, their adoption would disservice congressional intent and threaten serious disruption of a great deal of well-settled authority.

1. a. This Court has stated that “criminal offenses requiring no *mens rea* have a ‘generally disfavored status.’” *Liparota*, 471 U.S. at 426 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)). Because “the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,” *Dennis v. United States*, 341 U.S. 494, 500 (1951), the Court has determined that it is sometimes appropriate to “read a state-of-mind component into an offense even when the statutory definition

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<sup>13</sup> Petitioner unquestionably had knowledge of facts sufficient to make his conduct “unlawful.” See pp. 34-35, *supra*. Petitioner’s argument, therefore, is more accurately characterized as being that there is a presumption that a defendant must know all of the facts that are necessary to establish a violation of a particular criminal statute.

<sup>14</sup> A similar argument is before the Court in *Dean v. United States*, cert. granted, No. 08-5274 (oral argument scheduled for Mar. 4, 2009).

d[oes] not in terms so provide,” *United States Gypsum Co.*, 438 U.S. at 437 (emphasis added); accord *Staples*, 511 U.S. at 605 (construing statute that was entirely “silent concerning the *mens rea* required for a violation”). In other cases, as noted above, the Court has interpreted the scope of a statutorily prescribed *mens rea* requirement against a background presumption that statutes should not generally be read as criminalizing “apparently innocent conduct.” *Liparota*, 471 U.S. at 426.

b. At the same time, however, the Court has made clear that “[t]he presumption of scienter” recognized in its cases is not absolute. Instead, the Court has stated that it “requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter*, 530 U.S. at 269 (quoting *X-Citement Video*, 513 U.S. at 72) (emphasis added).

In *United States v. Balint*, 258 U.S. 250 (1922), for example, the Court unanimously held that a statute that made it unlawful to distribute opium or cocaine without a permit did not require proof that the defendant was aware of the permitting requirement. *Id.* at 254. To the contrary, the Court found nothing illogical about making those in “the business of dealing in these dangerous drugs” bear the burden of “ascertain[ing] at [their] peril whether [what they] sell[] comes within the inhibition of the statute.” *Ibid.*

Similarly, in *United States v. Freed*, 401 U.S. 601 (1971), the Court construed a statute that made it unlawful for a person “to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record” (26 U.S.C. 5861(d)) as “not requir[ing] proof of knowledge that a firearm is *unregis-*

tered.” *Staples*, 511 U.S. at 609 (first emphasis added). The defendant in *Freed* “knew that the items he had in his possession were grenades,” *id.* at 608, and the Court emphasized that “one would hardly be surprised to learn that possession of hand grenades is not an innocent act,” *Freed*, 401 U.S. at 609;<sup>15</sup> accord *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (describing *Balint* and *Freed* as standing for the proposition that “anyone who is aware that he is in possession of [dangerous or deleterious devices or products or obnoxious waste materials] must be presumed to be aware of” the possibility that such items may be subject to regulation).

The same is true of *Feola*, where this Court held that a defendant’s awareness of the person’s status is not required for a conviction under a statute criminalizing assaults on federal officers. See 420 U.S. at 684. After concluding that the statute’s purpose of protecting federal officers would be frustrated by the imposition of such a requirement, see *id.* at 677-684; p. 23, *supra*, the Court also stated that its interpretation was “no snare for the unsuspecting” and “pose[d] no risk of unfairness to defendants,” *Feola*, 420 U.S. at 685. The Court ex-

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<sup>15</sup> In *Staples*, the Court concluded that, in light of “the background rule of common law favoring *mens rea*” and “the long tradition of widespread lawful gun ownership by private individuals in this country,” a defendant who is charged under the same statute at issue in *Freed* must have “kn[own] of the features of his [particular firearm] that brought it within the scope of the Act.” *Staples*, 511 U.S. at 610, 619. The contrast between *Freed* and *Staples* further undermines petitioner’s claim that there is a presumption that the same *mens rea* is required with respect to every fact that makes a defendant’s conduct a violation of a particular criminal statute. Accord *Liparota*, 471 U.S. at 423 n.5 (“The required mental state may of course be different for different elements of a crime.”).

plained that “[a]lthough a perpetrator of a narcotics ‘rip-off’ \* \* \* may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful,” and it distinguished a situation where “legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected.” *Ibid.*<sup>16</sup>

The other authorities relied upon by petitioner likewise fail to demonstrate the existence of the “presumption” he seeks to invoke. *X-Citement Video* did not announce (Pet. Br. 18) a policy of according maximum scope to all statutory scienter requirements. Instead, the Court stated that its reluctance “to simply follow the most grammatical reading of the statute” at issue was “heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements.” 513 U.S. at 70. And, as the Court noted (*id.* at 70-71), the cases upon which it relied—*Morissette*, *United States*

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<sup>16</sup> Petitioner attempts to dismiss *Feola* as having been based on a “‘jurisdictional’ elements” exception to what he claims is the general presumption that any statutory *mens rea* requirement applies to all facts that make the defendant’s conduct unlawful. Pet. Br. 18 & n.4. But that argument assumes that such a broad presumption exists, and, for the reasons stated above, it does not. In addition, *Feola* cautioned that focusing on whether a particular requirement was “jurisdictional” had the “potential to mislead.” *Feola*, 420 U.S. at 676 n.9. The Court explained “[t]he question \* \* \* is not whether [a particular] requirement is jurisdictional, but whether it is jurisdictional *only*.” *Id.* at 677 n.9 (emphasis added). And that latter determination, *Feola* indicates, is made using the regular tools of statutory construction, including consideration of statutory purpose (*id.* at 678-679, 684), legislative history (*id.* at 679-683), and whether labeling a particular requirement “jurisdictional only” would threaten to criminalize seemingly innocent or apparently lawful conduct (*id.* at 677 n.9, 685).

*Gypsum Co.*, *Liparota*, and *Staples*—all implicated the presumptions that statutes imposing criminal liability have at least some *mens rea* requirement and should not lightly be construed to criminalize conduct that might reasonably be viewed as innocent or presumptively lawful in nature. The portions of the plurality opinion in *Rogers v. United States*, 522 U.S. 252 (1998), upon which petitioner relies (Pet. Br. 18) simply restate the Court’s holding in *Staples*. Compare *Rogers*, 522 U.S. at 254, with *Staples*, 511 U.S. at 619-620. Finally, the statements from *Bryan v. United States*, 524 U.S. 184, 193 (1998), *Staples*, 511 U.S. at 605, and *Morissette*, 342 U.S. at 270-271, that petitioner quotes involved the determination of the *meaning* of a “knowingly” requirement rather than an assessment of its *scope* in a particular statute. Cf. NACDL Amicus Br. 12 (acknowledging that neither *Bryan* nor *Staples* “involved the question of the scope of a specified *mens rea* requirement”).

2. Petitioner (see Pet. Br. 19-20) and his amici (see NACDL Br. 3-15) urge this Court to adopt, as a matter of federal law, a general principle of construction proposed in the American Law Institute’s Model Penal Code. The relevant provision states that “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing between the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.” Model Penal Code § 2.02(4) (1985). That suggestion lacks merit.

a. This Court has made clear that courts “must follow Congress’ intent as to the required level of mental culpability for any particular offense.” *United States v. Bailey*, 444 U.S. 394, 406 (1980). Congress has directed

courts to follow certain interpretive precepts in construing its enactments. See, *e.g.*, 1 U.S.C. 1 (Dictionary Act). Congress has not, however, directed courts to follow the Model Penal Code’s approach in construing the reach of *mens rea* requirements in federal criminal statutes. Cf. NADCL Amicus Br. 9 n.2 (noting that “[a]t least eighteen American states have codified this interpretive canon by statute”). That fact alone should be the end of the matter.

b. This Court presumes that Congress is familiar with prevailing common-law precepts and may contemplate that courts would use them to fill gaps in statutes. See *Dixon v. United States*, 548 U.S. 1, 12 (2006). But Congress cannot be presumed to have enacted Section 1028A(a)(1) against any background assumption that courts will follow the Model Penal Code’s approach to assessing the reach of statutory *mens rea* requirements. Although this Court has referred to the Model Penal Code for various other purposes, see Pet. Br. 19 n.6; NACDL Amicus Br. 6, the Court has not found it useful to assume that Congress would follow the Model Penal Code when that Code departs from, rather than reflects, “‘well established’ federal law,” *id.* at 16 (citation omitted); see *id.* at 15-16 (giving “no weight” to the Model Penal Code’s approach to the duress defense, in the absence of “evidence that Congress endorsed the Code’s views or incorporated them into the [relevant statutes]”).

In fact, this Court has conspicuously failed to adopt the Model Penal Code’s proposed approach to analyzing questions like those presented here. The Model Penal Code was adopted by the American Law Institute in 1962. See *Manual Enters., Inc. v. Day*, 370 U.S. 478, 486 n.8 (1962). In the more than four decades between the Model Penal Code’s promulgation and Section

1028A(a)(1)’s 2004 enactment, this Court decided at least three cases that involved the interpretation of a federal statute in which “knowingly” was followed by a series of verbs and where the question was whether the “knowingly” requirement applied to other aspects of the statute—*United States v. Yermain*, 468 U.S. 63 (1984), *Liparota* (1985), and *X-Citement Video* (1994). In none of those cases did the Court even cite the proposed rule of construction set forth in Section 2.02(4) of the Model Penal Code.<sup>17</sup> The Court’s failure to do so in *Liparota* is particularly significant given that the petitioner in that case expressly urged the Court to adopt the Model Penal Code’s approach, see *Liparota* Pet. Br. at 17; Pet. Rep. Br. at 1, and that the Court’s decision cited the Model Penal Code for other purposes, see 471 U.S. at 425 n.9.

c. This Court’s failure to adopt the Model Penal Code’s approach is well-justified. Federal criminal statutes have widely varying texts, contexts, purposes, legislative histories, and backgrounds. Yet petitioner and his amici advocate an across-the-board presumption that “could not ordinarily be overcome” by a conclusion that an alternate reading of a statute is “the ‘most grammatical’” or by reference to “legislative history, comparisons to common law analogues, comparisons to related statutes, or the difficulty of prosecution.” NACDL Amicus Br. 6. There is no basis for believing that such a context-ignoring approach would reliably capture congressional intent.

d. As petitioner notes (Pet. Br. 20), there can be “virtue [in] giving legislators a predictable background rule against which to legislate.” *Landgraf v. USI Film*

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<sup>17</sup> The Court likewise did not mention the Model Penal Code’s proposed approach in *Arthur Andersen* or *Williams*, which were decided after Section 1028A(a)(1)’s enactment.



*Prods.*, 511 U.S. 244, 273 (1994). For any such “background rule” to properly serve that purpose, however, Congress must be aware of the rule before it acts and the *source* of the rule must be such that it is appropriate to inpute to Congress an intent to follow it. Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979) (stating that the Court’s “evaluation of congressional action in 1972 must take into account its contemporary legal context”). The Congress that enacted Section 1028A(a)(1) in 2004 cannot possibly be viewed as having been on notice, or intended, that it would be viewed through the lens of a four-decades-old proposal that the Court has not, even to this point, so much as referenced.

3. The adoption of the broad presumptions urged by petitioner and his *amici* would not simply be unprecedented. It would also risk disruption of a great deal of well-settled authority with respect to the construction of other federal criminal statutes.

The most notable potential consequences would relate to the federal drug statutes. Any “knowing[] and intentional[]” manufacture, distribution, or possession with intent to distribute of “a controlled substance” is a federal crime unless the defendant has a valid permit. 21 U.S.C. 841(a). In addition, Congress has enacted a number of other provisions that prescribe enhanced punishment for those who engage in drug trafficking in a particular way or in a particular place. For example, a defendant “who violates section 841(a)(1),” and whose violation occurs “in or on, or within one thousand feet of” a school, is subject to “twice the maximum punishment” that would otherwise be authorized. 21 U.S.C. 860(a). The courts of appeals that have considered the question have uniformly held that 21 U.S.C. 841(a)(1)’s “know-

ingly” requirement does not require the defendant have been aware of his proximity to the school.<sup>18</sup>

The same is true with respect to determinations regarding drug quantity. The amount of drugs involved in a Section 841(a) offense can result in a substantial increase in the defendant’s maximum sentence. Compare 21 U.S.C. 841(b)(1)(A), with 21 U.S.C. 841(b)(1)(C). As a result, this Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires the government to prove drug quantity to the jury in order to obtain such an enhanced maximum sentence. See *United States v. Cotton*, 535 U.S. 625, 632 (2002). Notwithstanding that fact, however, the courts of appeals have uniformly held that the government need *not* prove that the defendant had knowledge of the quantity of the drugs involved. See, e.g., *United States v. King*, 345 F.3d 149, 153 (2d Cir. 2003) (citing cases), cert. denied, 540 U.S. 1167 (2004).

Nor have the courts of appeals followed petitioner’s proposed approach in situations where the provision calling for an enhanced sentence clearly creates a separate offense and contains its own express *mens rea* requirement. For example, 21 U.S.C. 861(a) makes it unlawful to “knowingly and intentionally—(1) employ \* \* \* [or] use \* \* \* a person under eighteen years of age to violate” various federal drug laws, including Section 841(a). 21 U.S.C. 861(a)(1). The courts of appeals that have con-

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<sup>18</sup> See *Falu*, 776 F.2d at 50; see also *United States v. Jackson*, 443 F.3d 293, 299 (3d Cir. 2006); *United States v. Cross*, 900 F.2d 66, 69 (6th Cir. 1990); *United States v. Dimas*, 3 F.3d 1015, 1022 (7th Cir. 1993); *United States v. Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States v. Pitts*, 908 F.2d 458, 461 (9th Cir. 1990); *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993) (aiding and abetting a 21 U.S.C. 860 violation); *United States v. Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987).

sidered the question—including the D.C. Circuit in an opinion by then-Judge Ginsburg—have uniformly held that Section 861(a)(1) *does not* require the government to prove that the defendant knew that the person in question was less than eighteen years old. See *Chin*, 981 F.2d at 1280; see also *United States v. Frazier*, 213 F.3d 409, 418-419 (7th Cir.) (citing cases), cert. denied, 531 U.S. 1015 (2000).<sup>19</sup>

4. More broadly, it is routine for criminal defendants who have the same culpable mental state to be subject to different levels of punishment based on the often unplanned and unintended consequences of their actions. The felony-murder rule rests on just such a premise. Other examples abound. For example, attempts are generally punished less severely than completed crimes, see 2 *LaFave* § 11.5(c), at 251, even though both groups of wrongdoers meant to commit precisely the same wrongful act. A defendant who sought only to wound his victim may find himself charged with manslaughter or even murder if the victim dies. See *id.* §§ 14.3, 14.4, 15.4(d), at 434, 436-437, 528. And, most pertinently here, a person who knowingly chooses to commit one offense (for exam-

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<sup>19</sup> Because employing a minor to sell drugs is not a “sex offense[,]” these decisions cannot be explained by the fact that the common-law presumption in favor of *mens rea* did not apply to “sex offenses, such as rape, in which the victim’s actual age was determinative despite defendant’s reasonable belief that the girl had reached age of consent,” *Morissette*, 342 U.S. at 251 n.8. Cf. *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir.) (holding that a defendant need not know the victim’s true age under 18 U.S.C. 2423(a) (2000), which makes it unlawful to “knowingly transport[] an individual who has not attained the age of 18 in interstate or foreign commerce \* \* \* with the intent that the person engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense”), cert. denied, 537 U.S. 986 (2002).

ple, operating a car after using drugs) may find himself charged with a far greater one if his conduct results in harm to another person. 1 *LaFave* § 6.4(a), at 465; 2 *LaFave* § 15.5, at 531. These examples underscore that criminal law often refrains from requiring a culpable mental state with respect to a fact that triggers increased punishment for a defendant who has already been determined to have committed a crime.

#### E. There Is No Reason To Resort To The Rule Of Lenity

1. Petitioner and his amici misunderstand the trigger for the rule of lenity. The rule does not apply simply because there is “some statutory ambiguity,” *Muscarello v. United States*, 524 U.S. 125, 138 (1998), or because it is “possible to articulate a construction more narrow than that urged by the Government,” *Moskal v. United States*, 498 U.S. 103, 108, 118 (1990). “The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991) (citation omitted).

As a result, resort to the rule of lenity is appropriate only when there is a “grievous ambiguity” in the statutory text, such that, “after seizing every thing from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended.” *Muscarello*, 524 U.S. at 138-139 (citation omitted). In determining whether that standard is satisfied, the Court has stated that it is appropriate to consider “the language and structure, legislative history, and motivating policies of the statute,” *Moskal*, 498 U.S. at 108 (internal quotation marks and citation omitted), and it has refused to apply the rule where a defendant’s interpretation rested

on “an implausible reading of the congressional purpose,” *Caron v. United States*, 524 U.S. 308, 316 (1998); accord *Liparota*, 471 U.S. at 427 (stating that the rule of lenity “is not to be applied where to do so would conflict with the implied or expressed intent of Congress”).

There is no “grievous ambiguity” (*Muscarello*, 524 U.S. at 138) in this case. For all the reasons identified above, an examination of statutory text, history, and purpose demonstrates that Section 1028A(a)(1) does not require the government to establish that the defendant knew the means of identification in question was that of another actual person. This is “not a case of guesswork reaching out for lenity,” *United States v. Wells*, 519 U.S. 482, 499 (1997), or one where, “after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute.” *Shabani*, 513 U.S. at 17.

2. Petitioner errs in asserting (Pet. Br. 37) that resort to the rule of lenity “is especially appropriate in the context of provisions like Section 1028A.” This Court has stated that the rule of lenity “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *Bifulco v. United States*, 447 U.S. 381, 387 (1980). But even if lenity concerns are not eliminated in the sentencing context, they are particularly attenuated where, as here, the provision in question does not demarcate a line between legally innocent and criminally culpable conduct, but instead involves an offense that requires, as an element, the commission of a different felony. Cf. *Ressam*, *supra* (rejecting defendant’s proposed interpretation of such a statute without mentioning the rule of lenity).

Contrary to the suggestions of petitioner and his amici (see Pet. Br. 37; NACDL Amicus Br. 18-20), the fact that Congress has prescribed a mandatory penalty

for a given offense is entitled to no special weight in the rule-of-lenity analysis. As petitioner acknowledges (Pet. Br. 34), the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct, and that Congress, not courts, defines the scope of criminal liability. See *Crandon v. United States*, 494 U.S. 152, 158 (1990); *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *United States v. Bass*, 404 U.S. 336, 348 (1971).

Neither of those purposes warrants applying an especially stringent version of the rule of lenity for statutes that prescribe mandatory penalties. A mandatory penalty adds to, rather than detracts from, the clarity of the warning provided by the underlying criminal statute. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (stating that “a fair warning should be given to the world \* \* \* of what the law intends to do if a certain line is passed”) (emphasis added). Such statutes in no way detract from traditional judicial powers. Cf. Pet. Br. 37. This Court has recognized that Congress has unquestioned “power to define criminal punishments without giving the courts any sentencing discretion.” *Chapman v. United States*, 500 U.S. 453, 467 (1991). Indeed, “[d]eterminate sentences were found in this country’s penal codes from its inception.” *Ibid.* While Congress may choose to permit individualized tailoring of sentences, that is only a matter of “public policy.” *Ibid.* (citation omitted). Thus, this Court has previously rejected applying the rule of lenity to a statute providing for a mandatory minimum, without any suggestion that the statute’s mandatory character warranted heightened lenity concerns. *Id.* at 463-464.

Petitioner also asserts (Pet. Br. 38) that “unduly broad interpretations of statutes with mandatory mini-

mum sentences also risk aggrandizing the discretionary authority (and institutional power) of federal prosecutors.” That is a broadside attack on mandatory minimums, not an argument about the rule of lenity. And prosecutorial discretion is “an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.” *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 1028A provides:

### **Aggravated identity theft**

#### (a) OFFENSES.—

(1) IN GENERAL.—Whoever, 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.

(2) TERRORISM OFFENSE.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

#### (b) CONSECUTIVE SENTENCE.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(1a)



(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) DEFINITION.—For purposes of this section, the term “felony violation enumerated in subsection (c)” means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards<sup>1</sup>), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

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<sup>1</sup> So in original. Probably should be “records”.

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

2. 18 U.S.C. 1028 provides in pertinent part:

**Fraud and related activity in connection with identification documents, authentication features, and information**

\* \* \* \* \*

(d) In this section and section 1028A—

\* \* \* \* \*

(4) the term “false identification document” means a document of a type intended or commonly accepted for the purposes of identification of individuals that—

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a specified event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;

\* \* \* \* \*

(7) the term “means of identification” means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

5a

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

\* \* \* \* \*

3. 18 U.S.C. 1546 provides in pertinent part:

**Fraud and misuse of visas, permits, and other documents**

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained;

\* \* \* \* \*

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

4. 18 U.S.C. 2252A provides in pertinent part:

**Certain activities relating to material constituting or containing child pornography**

(a) Any person who—

\* \* \* \* \*

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

\* \* \* \* \*

5. 18 U.S.C. 2252(a)(1) and (2) provide in pertinent part:

**Certain activities relating to material involving the sexual exploitation of minors**

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

\* \* \* \* \*

shall be punished as provided in subsection (b) of this section.

\* \* \* \* \*