No. 08-108

IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Gary K. Koos
2828 Eighteenth St.
Suite 4A
Bettendorf, IA 52722

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

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REPLY BRIEF FOR THE PETITIONER

The Government acknowledges that the petition for certiorari in this case, along with the pending petition in *Mendoza-Gonzalez v. United States*, No. 08-5316, "presents an important and recurring issue that warrants this Court's review" in light of the "clear and entrenched conflict among the courts of appeals" over the mens rea requirement of 18 U.S.C. § 1028A(a)(1). BIO 4. Accordingly, the Government agrees that the Court should grant certiorari in a pending case to restore uniformity to this area of the law. *See id*.

The question, then, is which case, or cases, the Court should use to resolve that untenable conflict. The Solicitor General does not suggest any jurisprudential or discretionary reason for preferring plenary review in one case rather than the other. He does not dispute, for example, petitioner's showing, *see* Pet. 15-16, that this case presents an ideal vehicle for resolving the question presented. The Government nonetheless recommends that the Court grant the petition in *Mendoza-Gonzalez* and hold the petition in this case, apparently on the ground that the *Mendoza-Gonzalez* petition is the "earlier-filed" of the two petitions (by a week). BIO 4. But there surely are more important considerations, including this Court's interest in a ensuring the best and most comprehensive presentation of the legal arguments that will inform its decision.

And that consideration, petitioner respectfully suggests, militates strongly in favor of plenary review in this case, either in addition to, or instead of, *Mendoza-Gonzalez*. In particular, the petition in this

case raises a number of significant arguments that the petitioner in *Mendoza-Gonzalez* has not made and to which the Government has, as a result, provided no response. Those omissions are consequential, for once the omitted arguments are considered, the Government's attempt to defend the Eighth Circuit's construction of Section 1028A(a)(1) becomes entirely unconvincing.

1. The petition in this case sets out a number of arguments not made in *Mendoza-Gonzalez* but relied upon by the courts of appeals that have rejected the Government's construction of Section 1028A(a)(1). These include, among others, the arguments that:

- This Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), compels the conclusion that the language in Section 1028A(a)(1) is ambiguous as to the reach of the statute's knowledge requirement. *See* Pet. 17-18; *United States v. Godin*, 534 F.3d 51, 58 (1st Cir. 2008) (relying on argument in rejecting Government's reading of the statute); *United States v. Miranda-Lopez*, 532 F.3d 1034, 1038 (9th Cir. 2008) (same); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1241 (D.C. Cir. 2008) (same).
- The Government's view is incompatible with the structure of Section 1028A(a)(1)'s immediate neighbor, Section 1028A(a)(2). *See* Pet. 22-23; *Villanueva-Sotelo*, 515 F.3d at 1239-40; *cf. Godin*, 534 F.3d at 58-59 (comparison does not support the Government's view).

- Rather than limiting mens rea requirements narrowly to refer solely to the elements that immediate follow, as the Government contends, this Court has recognized a legal tradition of applying mens rea requirements broadly to each element of an offense, absent good reason to believe Congress intended a contrary result. *See* Pet. 21-22; *Villanueva-Sotelo*, 515 F.3d at 1239; *cf. Miranda-Lopez*, 532 F.3d at 1038 (noting Justice Stevens' recognition of the principle in his concurrence to *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).
- At the very least, the statute is ambiguous and must, therefore, be construed in favor of a broader mens rea requirement in accordance with the rule of lenity. *See* Pet. 27-28; *Godin*, 534 F.3d at 60-61; *Miranda-Lopez*, 532 F.3d at 1040; *see also Villanueva-Sotelo*, 515 F.3d at 1246.

Not only did Mendoza-Gonzalez fail to raise these important arguments in his petition for certiorari, but the Government has also declined to respond to any of them in its briefing in that case. Thus, for example, even though the First and Ninth Circuits based their decisions on the rule of lenity, the Government makes no mention of that venerable doctrine in its brief in *Mendoza-Gonzalez*. *Compare Godin*, 534 F.3d at 60-61, *and Miranda-Lopez*, 532 F.3d at 1040, *with Mendoza-Gonzalez* BIO 8-11.

Perhaps the Government may be excused for limiting its brief in *Mendoza-Gonzalez* to the

arguments raised by the petitioner in that case. More difficult to understand, however, is its recommendation that in choosing between two cases presenting the same certworthy question, this Court should grant plenary review in the case that presents the less comprehensive challenge to the Government's view of the statute.

2. The Government's incomplete engagement with the arguments undermining its interpretation of Section 1028A(a)(1) also renders its defense of the Eighth Circuit's construction of the statute unpersuasive.

a. *Text*. In its brief in *Mendoza-Gonzalez*, the Government argues that as "'a matter of common usage,' the adverb 'knowingly' is not sensibly read as 'modify[ing] the entire lengthy predicate that follows it.'" *Mendoza-Gonzalez* BIO 8 (citation omitted). But the Government ignores that this Court has held quite to the contrary, recognizing that as a matter of "ordinary usage," the formulation used in provisions like Section 1028A(a)(1) *can* sensibly be read to apply the statute's mens rea requirement to the entire predicate that follows. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (construing 7 U.S.C. § 2024(b)(1)); *see also X-Citement Video, Inc.*, 513 U.S. at 68-79 (construing 18 U.S.C. § 2252(a)); Pet. 17-20.

The Government insists, however, that the "'last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote.'" *Mendoza-Gonzalez* BIO 8 (quoting *Mendoza-Gonzalez* Pet. App. 4a-5a). But as noted in the petition in this case, even the

Government apparently does not believe that the last antecedent rule results in a sensible construction of this statute, for it has conceded elsewhere that the knowledge requirement of Section 1028A(a)(1) must extend beyond the words that immediately follow it to encompass at least the phrase "means of identification." *See* Pet. 9 (citing *Villanueva-Sotelo*, 515 F.3d at 1238).

In truth, whatever its value in other contexts, the last antecedent rule has little bearing on the question of the scope of the mens rea requirement of a criminal statute. *See* Pet. 18-20. (In fact, the Government does not cite any case from this Court in which the principle has been applied in that context, and petitioner is aware of none). Instead, as petitioner has shown, this Court has applied a general presumption that a mens rea requirement ordinarily extends to all of the elements of the offense. Pet. 21-22.

This Court recently applied that presumption in *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). There, the Court construed a provision that criminally punished anyone who "knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects a belief, or that is intended to cause another to believe, that the material or purported material is, or contains" child pornography. 18 U.S.C. § 2252A(a)(3)(B). This Court did not apply the last antecedent rule to hold that the knowledge requirement was limited to the verbs that immediately followed (in fact, the Court did not even mention the rule). Instead, the Court proceeded from the assumption that the mens rea requirement

"applies to every element of" the offense. 128 S. Ct. at 1839. The Court then acknowledged that the presumption could be overcome by other grammatical or structural cues, but found that this was "not a case where grammar or structure enables the challenged provision or some of its parts to be read apart from the 'knowingly' requirement." *Id*.

The Government argues that the result in *Williams* was driven by the fact that the word "'knowingly' was set off from and 'introduce[d]' two distinct statutory subsections." *Mendoza-Gonzalez* BIO 11 n.3 (quoting *Williams*, 128 S.Ct. at 1839). That feature of the statute explains why the Court concluded that the knowledge requirement applied to both of the separately codified subsections of Section 2252A(a)(3). *See* 128 S. Ct. at 1839. But it does not explain why the Court concluded that the mens rea requirement applied to each of the elements *within* each of the subsections as well. *See* 128 S. Ct. at 1839 ("We think that the best reading of the term in context is that it applies to every element of the two provisions."). The Court reached *that* conclusion not because the word "knowingly" was set apart from the subsections but rather because the word preceded the other elements of the offense and there was no grammatical or structural indication that Congress intended its reach to apply to less than the full scope of the provision. *Id*. The same is true here: the word "knowingly" precedes and introduces the rest of the elements of the Section 1028A(a)(1) offense and "there is no grammatical barrier" to reading it as applying to all of the elements that follow. *Id.*

b. *Structure*. The Government's interpretation of Section 1028A(a)(1) also cannot be squared with Congress's construction of that provision's immediate neighbor, Section 1028A(a)(2). *See* Pet. 22-23; *see also Villanueva-Sotelo*, 515 F.3d at 1239-40. The latter provision creates a sentencing enhancement for a person who, "during and in relation to" certain terrorism-related offenses, "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) (emphasis added). Consistency seemingly would require the Government to argue that the knowledge requirement of this provision applies to neither of the italicized phrases, as neither directly follows the qualifying adverb and both modify the direct object of the provision's verbs. Yet the Government conceded in the D.C. Circuit that the provision must at least require proof that the defendant knew that the identification document he possessed was false. *Villanueva-Sotelo*, 515 F.3d at 1239-40. And it has provided no explanation here as to why the same should not also be true when the defendant is charged with using a means of identification of another person. (Indeed, the Government has provided no response to this argument at all, either in response to the petition in *Mendoza-Gonzalez* – which does not raise this argument – or in its response to the petition in this case.)

c. *Purposes and Legislative History*. The Government does not seriously dispute that the legislative history reveals a congressional purpose to target acts of intentional identity theft in which the defendant acquires a means of identification he or

she knows belongs to another person. *See Mendoza-Gonzalez* BIO 10.[1] The Solicitor General nonetheless insists that Congress intended to enact a broader statute because "the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence," and because requiring the Government to prove intentional theft (as opposed to accidental misappropriation) would impose an undue burden on the prosecution. *Mendoza-Gonzalez* BIO 9. Neither argument is persuasive.

First, as noted in the petition, Pet. 26 n.10, the premise of the Government's first argument is

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[1] The Government quotes part of a sentence in the House Report, which it says "states that the crime of identity theft encompasses '*all* types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception.'" *Mendoza-Gonzalez* BIO 11 (quoting H.R. REP. NO. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780) (emphasis added by BIO). But the Government's quotation is incomplete and its characterization of the passage mistaken. The language the Government quotes does not define "the crime of identity theft" standing alone, *Mendoza-Gonzalez* BIO 11, but rather the collective scope of *both* "'identity theft' *and* 'identity fraud,'" H.R. REP. NO. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780 (emphasis added), which *together* cover the gamut of cases involving both the intentional theft of another known person's identification and the fraudulent use of false identification documents without any knowledge of whether the identification numbers belong to someone else. Consistent with this distinction, the statute then imposes a two-year enhancement for identity *theft*, Section 1028A(a)(1), and a separate enhancement for identity *fraud* when the fraud is in relation to a terrorism offense, Section 1028A(a)(2).

doubtful. Congress could reasonably conclude that the risk of harm to victims is substantially greater when a defendant seeks out an identification number he knows belongs to another person, as is always the case in the instances of quintessential identity theft upon which Congress focused when enacting this provision. *See* Pet. 23-27. In any event, sentencing enhancements ordinarily are directed at providing additional punishment for especially culpable behavior. And that culpability turns most critically on the state of the defendant's intentions. Pet. 25-26. The Government does not, and cannot reasonably, contest that a defendant who seeks out an identification number that he knows belongs to another person is more culpable than a defendant who makes up a fake social security number without any belief that it has been assigned to another real person.

As to the Government's insistence that Congress would have intended a more prosecution-friendly interpretation, Congress routinely requires prosecutors to prove that a defendant was aware of the facts that make his actions criminal, even though the requirement makes convicting defendants more difficult. *See* Pet. 19-20. Moreover, the Government's argument "turns the rule of lenity upside-down." *United States v. Santos*, 128 S. Ct. 2020, 2028 (2008) (plurality). This Court "interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Id*.

d. *Rule of Lenity*. Indeed, the entirety of Government's defense of the Eighth Circuit's interpretation of Section 1028A(a)(1) founders upon the long-established rule of lenity, which precludes a

court from resolving the ambiguity in a criminal statute by guessing at which reading would best serve a presumed congressional purpose or by relying on snippets of legislative history to find clarity missing from the provision's text. *See*, *e.g.*, *id.* at 2025 & n.3.

In this case, the circuit conflict arises precisely because of the unavoidable uncertainty as to the statute's scope. The statutory text standing alone is inherently ambiguous. *See Liparota*, 471 U.S. at 424. The broader statutory context does not resolve the ambiguity in the Government's favor; to the contrary, if anything, it supports petitioner's view. *See Villanueva-Sotelo*, 515 F.3d at 1239-40. And at best, the Government can claim that the legislative history and general purposes of the statute do not point strongly in either direction on the question presented. In such circumstances, the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Santos*, 128 S. Ct. at 2025 (plurality). At the same time, the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Id*.

Because Congress did not unambiguously extend Section 1028A(a)(1)'a sentencing enhancement for "identity theft" to accidental misappropriation of identification numbers, the Eighth Circuit erred in applying that provision to petitioner and his conviction accordingly should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

Gary K. Koos
2828 Eighteenth St.
Suite 4A
Bettendorf, IA 52722

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

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