No. 08-108

IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case begins, and should end, with the statutory language. Congress defined Aggravated Identity Theft to include only one who "knowingly transfers, possesses, or uses, without lawful authority, the means of identification of another person." 18 U.S.C. § 1028A(a)(1). In common discourse, to say that a person "knowingly uses" something is to say that he knows what it is that he is using. In fact, the Government is unable to come up with a single English sentence in which "knowingly used" would be construed to indicate only that the subject knew he was using *something*, although he did not know what it was. There is no reason to think that Congress intended Section 1028A(a)(1) to be the first. To the contrary, the common sense interpretation of its words is consistent with common law definitions of "theft," which also requires that the thief know that the property he has taken belongs to another.

Respondent nonetheless attempts to show that Congress's basic concerns about identity theft would be best served by a statute with a narrower mens rea requirement. Although limiting (or even omitting) a mens rea requirement from this (or any other) criminal statute might well advance an interest in protecting victims from harm, it runs counter to a basic presumption of our legal system that criminal punishment is reserved for, and calibrated to, a defendant's culpability, ordinarily requiring that the defendant at least be aware of all of the facts that make his conduct criminal. Departing from that rule in this case would engender serious anomalies, giving

markedly disparate punishment to defendants who engaged in the same conduct with the same basic knowledge and intentions, while at the same time giving identical punishments to defendants with vastly different levels of culpability. Even if one could imagine a Congress willing to abide such disparities in order to maximize protection against misuse of identification information, such speculation is no basis for reading a criminal statute against the grain of the text and in favor of the prosecution.

I. The Government's Reading Of The "Aggravated Identity Theft" Statute Is Incompatible With Section 1028A's Text.

The Government asserts that "[t]he most natural grammatical reading" of 18 U.S.C. § 1028A(a)(1) is that "the 'knowingly' requirement applies only" to the statute's verbs – "transfers, possesses, or uses." U.S. Br. 8. In the alternative, the Government argues that the knowledge requirement should extend only to the next words ("without lawful authority"). Or, as a backup to its backup argument, the United States suggests that the knowledge requirement might extend half-way through the phrase after that ("means of identification of another person"). U.S. Br. 12. Indeed, the only construction of the statute to which the Government is unwilling to agree is one that applies "knowingly" to the entirety of the direct object of the provision's transitive verbs. But that is precisely the construction the most natural reading of the text compels.

A. "Knowingly" Is Not Limited To The Provision's Verbs.

The Government's basic position is that as a general rule, a "knowingly" mens rea requirement applies only to the verbs the adverb directly modifies, unless a broader reading is required to avoid criminalizing innocent conduct. U.S. Br. 9-10, 37-38. This view is incompatible with common English usage and renders the knowledge requirement in Section 1028A(a)(1) surplusage.

1. To say that someone knowingly transfers, possesses, or uses something is to assert that she knows what it is that she is transferring, possessing, or using. *See generally* Petr. Br. 9; Linguists' Br. §§ A-B. To say that Susan knowingly transferred classified documents, that Charles knowingly possessed a baggie of cocaine, or that Jane knowingly used her mother's computer is to say that Susan knew that what she transferred were classified documents, that Charles knew that the substance in his pocket was cocaine, and that Jane knew that the computer she was using was her mother's and not her father's or her own.

Numerous other examples demonstrate this basic understanding. Petitioner provided many in his opening brief and the *amicus* brief for the Professors of Linguistics provided even more. *See infra* App. A (collecting petitioner's examples); Linguists' Br., App. C. In response, the Government quibbles unconvincingly with two of petitioner's

examples,[1] and asserts that the rest are "carefully selected" and "load the dice" in petitioner's favor. U.S. Br. 9. If this were true, it should have been easy for the Government to come up with a few counter-examples of its own. But neither it, nor its *amici*, has mustered even one.

The Government relies instead on its assertion that it is a basic rule of grammar that adverbs do not modify nouns. U.S. Br. 9. But as the Professors of Linguistics explain, and as petitioner's examples show, adverbs commonly modify verb *phrases*, which can include both a verb and its direct object. *See, e.g.*, Linguists' Br. 5-9 & n.8.

Nor is this Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), to the contrary. There, the Court stated that "[t]he most natural grammatical reading" of 18 U.S.C. § 2252(a) "suggests that the term 'knowingly' modifies only the surrounding verbs . . . ." *Id.* at 68. But whether the knowledge requirement extended to the direct object of the verbs was not at issue in the case. Indeed, no one questioned that the Government was required to

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[1] The Government claims, for example, that the meaning of the sentence "John knowingly ate the last slice of pizza" 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." U.S. Br. 9. But by the same token, a reader normally would assume that someone who transfers, possesses, or uses something, "knows what he is" transferring, possessing, or using. *Id*. Accordingly, by the Government's logic, the word "knowingly" in Section 1028A(a)(1) "must refer to something else," *id*. – namely to the fact that the means of identification belongs to another person.

prove that the defendant at least knew that what he was "transport[ing] or ship[ping]" was a "visual depiction" and not, for example, a box of chocolates. 18 U.S.C. § 2252(a). Moreover, the Court concluded that the knowledge requirement was not naturally read to extend further to "the elements of the minority of the performers, or the sexually explicit nature of the material," not because of any general rule of grammar, but because those elements were "set forth in independent clauses separated by interruptive punctuation." *X-Citement Video*, 513 U.S. at 68; *see* 18 U.S.C. § 2252(a)(1) (reproduced in Appendix C).[2]

2. The Government's grammar rule also renders Section 1028A(a)(1)'s express mens rea requirement essentially meaningless.

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[2] The Government claims that the commas setting off the phrase "without lawful authority" in Section 1028A(a)(1) constitute a similar "structural barrier" that prevents "knowingly" from applying further into the sentence. U.S. Br. 12. But the commas in this provision serve a different function – identifying a parenthetical phrase. The *pair* of commas reflects Congress's understanding that the insertion of "without lawful authority" between the provision's verbs and their direct object interrupted the natural flow of the sentence. While the first comma does indeed "direct[] a reader to make a slight pause," U.S. Br. 12 (citation and quotation marks omitted), the second comma just as clearly informs the reader that the interruption is over and that the flow of the sentence now continues. *See* WILLIAM STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE 2-5 (4th ed. 2000). Thus, for example, the assertion that "Jane knowingly used, without permission, her mother's computer" still is understood to assert that Jane knew that the computer she was using was her mother's.

Under the Government's view, the only role the knowledge requirement plays is to ensure that the defendant's transfer, possession, or use is not purely accidental. However, it is difficult to imagine how someone could "transfer[], possess[], or use[]" something without knowing it. But to the extent it could ever happen, such defendants are already protected from liability by the requirement that the transfer, possession, or use be "during and in relation to" a predicate offense, meaning that it "'must facilitate, or have the potential of facilitating,' the predicate crime." U.S. Br. 35 (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993)) (internal punctuation omitted). It is impossible to imagine that someone who does not even know that she *has* someone else's means of identification could nonetheless use it in a way that facilitates a predicate offense. That being so, the word "knowingly" must be given a broader scope if it is to play any role in the statute's meaning.

3. The Government nonetheless argues that applying "knowingly" beyond the verbs will create a surplusage problem of its own. U.S. Br. 12-16. The fact the Government needs several pages to lay out the argument, borrowed from Judge Bybee's partial concurrence in *United States v. Miranda-Lopez*, 532 F.3d 1034, 1041-44 (9th Cir. 2008), suggests it is unlikely to shed light on congressional intent. But in any event, the Government's objection is founded upon a false premise, as an example will show.

Consider John, who fills in a form with a made-up social security number as part of a predicate offense under Section 1028A(a)(2). Under the Government's view, once it proves that John knew

that he "use[d], without lawful authority, a means of identification," it would be duplicative to require it to also prove that John knew he was using a means of identification "of another person" or "a false identification document." That is because a person who knowingly uses "a means of identification without lawful authority *must necessarily* know," U.S. Br. 14 (citation omitted) (emphasis added), that the identification is either a "means of identification of another person" or is a "false identification document."

But that simply is not so. In our example, John did not know whether the social security number he made up belonged to another person. But that does not mean he therefore must have known that he was using a "false identification document." In fact, in simply writing the made-up social security number, he did not use any identification *document* at all. *See* 18 U.S.C. § 1028(d)(4) (defining a "false identification document" as an altered or counterfeit physical "document").[3] Because the term "means of identification" is significantly broader than "identification document," it is entirely possible to knowingly use, without lawful authority, a false means of identification that is neither the "means of identification of another person" nor a "false identification document." Consequently, requiring the Government to prove the defendant's knowledge with respect to each element of a Section 1028A(a)(2) offense creates no surplusage in that provision, much less in Section 1028A(a)(1).

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[3] 18 U.S.C. § 1028(d) is reproduced in Appendix B.

In any case, the Government's proposed cure for the alleged surplusage is worse than the disease, relying on an entirely implausible view of the statutory language. *See United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007) (noting that it is "appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity"). As discussed below, Judge Bybee's solution (extending the knowledge requirement to "without lawful authority" and "means of identification" but not to "of another person") is no better. *See infra* at 8-14. Moreover, it does not even resolve the surplusage problem, as both Judge Bybee and the Government acknowledge. *See Miranda-Lopez*, 532 F.3d at 1042 n.2; U.S. Br. 15-16.

B. Nor Can "Knowingly" Be Extended Only So Far As "Without Lawful Authority."

In the alternative, the Government suggests that, if necessary, the Court might extend the knowledge element past the verbs to the parenthetical phrase "without lawful authority," but no further. U.S. Br. 12. This fallback position has no more basis in the text than the Government's initial claim.

The parenthetical phrase "without lawful authority" does not limit the scope of "knowingly" in Section 1028A(a)(1). Saying that "Jane knowingly used, without permission, her mother's computer" is understood to assert that Jane knew that the computer she was using without permission was her mother's. It would be an exceedingly odd interpretation of the sentence to infer that Jane knew

only that she was using *something* and that she knew she did not have permission to use it, but that she did not necessarily know what it was that she was using. Likewise, just how a defendant can know that he lacks lawful authority to use a means of identification, when he does not even know that he is using a means of identification, is a mystery the Government makes no attempt to solve.

In addition, if any part of Section 1028A(a)(1) is textually isolated from the knowledge requirement, it is the parenthetical phrase "without lawful authority," which is set off from the rest of the sentence by commas and has a grammatically less direct connection to the verbs "knowingly" modifies than does the direct object. Moreover, extending the knowledge requirement to "without lawful authority" would run counter to the general presumption that ignorance of the law is no defense. *See, e.g*, *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994).

C. Extending "Knowingly" To "Means of Identification" But Not To "Of Another Person" Is The Least Textually Tenable Construction Of All.

The Government's last stand is to argue that even if the defendant must know that he is using a "means of identification," he need not know that it is a "means of identification of another person." U.S. Br. 15. This argument presents the least plausible view of the text yet.

1. While the Government is able to articulate policy reasons why Congress might want to write a statute with a limited knowledge requirement, it offers scant evidence that Congress actually wrote

such a statute here. There is simply no textual cue whatsoever that Congress intended "knowingly" to extend to every word that follows, except the last three; that it intended to cover the first half of the direct object phrase "means of identification of another person," but not the second; or that it intended to encompass the direct object noun ("means") and one of the prepositional phrases that modifies it ("of identification"), but not the other ("of another person"). Once the word "knowingly" is "emancipated from merely modifying the verbs," and is conceded to extend to "means of identification," then "as a matter of grammar it is difficult to conclude that the word 'knowingly' modifies one of the elements in [the subsection,] but not the other." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994).

If Congress had intended the Government's interpretation, it surely would have provided some clear textual cue, because in common discourse, a word like "knowingly" is naturally understood to extend to the entirety of the direct object phrase of the transitive verbs it modifies. Petr. Br. 9; *see also* Linguists' Br. 10-13. Consider the following sentences, published in major newspapers in the past six weeks:

(1) "The food and drug agency and the Justice Department are conducting a criminal investigation into whether the Peanut

Corporation of America *knowingly sold contaminated products*."[4]

(2) "Now the process is repeating itself as Schapiro and other regulators begin to clean up after underwriters who *knowingly peddled securities of questionable value* . . . ."[5]

(3) "Officers . . . are investigating whether employees *knowingly received stolen property*."[6]

(4) "[The lawyer] . . . was under investigation on charges of *knowingly misappropriating clients' funds*."[7]

(5) "Bonds . . . denied *knowingly using performance-enhancing drugs*."[8]

(6) "Investors in private firms *knowingly assume the risks associated with economic*

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[4] Michael Falcone, *Peanut Supplier Banned From Federal Business*, N.Y. TIMES, Feb. 6, 2009 (emphasis added).

[5] Steven Pearlstein, *Obama's SEC Pick Is No Joe Kennedy*, WASH. POST, Jan. 7, 2009 (emphasis added).

[6] *Maryland Briefing: Delegate's Jewelry Shop Among 18 in Violation*, WASH. POST, Jan. 13, 2009 (emphasis added).

[7] John Eligon, *Lawyer Is Accused of Stealing Disabled People's Assets He Was Assigned to Protect*, N.Y. TIMES, Jan. 29, 2009 (emphasis added).

[8] Paul Elias, *Feds Press Harder on Bonds' Trainer; Agents Raid Home of Anderson's in-Law*, CHI. TRIB., Jan. 29, 2009 (emphasis added).

> *events* that affect their companies, industries and the broader economy."[9]

No one would understand the word "knowingly" in any of these sentences to refer to only a portion of the direct object phrase. In the first example, for instance, "knowingly" quite plainly applies not only to the verb "sold" and to the direct object noun "products" but also to the entirety of the direct object phrase "contaminated products." The same is true of the more complex direct object phrase "securities of questionable value" in the second example – the principal function of the word "knowingly" is to make clear that the underwriters knew that the securities they were selling were potentially worthless. And even the Government must admit that it could not charge Mr. Bonds with perjury for having claimed that he never "knowingly us[ed] performance-enhancing drugs" if the Government thought that Bonds honestly believed that he was injecting vitamins (not drugs) or antibiotic drugs (not performance-enhancing ones).

2. The Government nonetheless suggests (U.S. Br. 9) that there is significance in Congress's use of the phrase "means of identification *of another person*" rather than the possessive "*another person's* means of identification." Using the possessive, the Government contends, suggests that the subject knows to whom the object belongs. "A formulation that puts the modifier afterwards . . . does not *necessarily* convey

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[9] William Shughart, *Folly of Incentives*, Commentary, WASH. TIMES, Jan. 25, 2009 (emphasis added).

that implication." *Id*. (emphasis added). Frankly, petitioner "see[s] nothing of significance in that syntactic choice." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1239 (D.C. Cir. 2008). Few would think that there is any material difference between "Jane knowingly used, without permission, a toothbrush of another camper," and "Jane knowingly used, without permission, another camper's toothbrush." The overwhelmingly more plausible construction of either sentence is that Jane not only knew that she was using a toothbrush, but also knew that the toothbrush belonged to another camper. The same is true of other examples:

(7) "An Albuquerque lawmaker was criticized for 'grandstanding' Monday and knowingly subverting *the rules of the House of Representatives*."[10]

(8) The General knowingly risked *the lives of his soldiers* to achieve an important objective.

(9) The author knowingly used *the stories of everyday citizens* in his article to make his abstract theory more concrete.

In any case, even if there were some subtle difference in meaning between "another person's means of identification" and "a means of identification of another person," the Government cannot reasonably contend that Congress expected courts to divine the proper definition of the material

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[10] Dan Boyd, *Capitol Web Cast Ruffles Feathers: Lawmaker Chided for Broadcasting Legislative Committee Meeting*, ALBUQUERQUE J., Jan. 27, 2009 (emphasis added).

elements of this crime through such an exceedingly subtle cue.

3. In fact, if Congress had wanted to prevent Section 1028A(a)(1)'s knowledge requirement from reaching "of another person," it knew how to make that intention clear. For example, following the model of the statute construed in *X-Citement Video*, Congress could have referred to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification, if the means of identification belongs to another." *Cf.* 513 U.S. at 68 (concluding that a similar comma-"if" construction in 18 U.S.C. § 2252(a) would limit the natural reach of the knowledge requirement).

Or Congress could also have excluded the mens rea element altogether, as it did in the drug penalty enhacement provisions the Government cites. U.S. Br. 46-47. There, Congress codified an offense with a mens rea requirement in one provision and then separately provided for increased penalties (based on drug quantities or committing the offense near a school) in another provision that conspicuously *omits* any additional mens rea element. *See* 21 U.S.C. § 841(b)(1)(A) (drug quantities) (reproduced in Appendix D); *id.* § 860(a) (school proximity) (reproduced in Appendix E). But Congress did the opposite here – it drafted Section 1028A(a)(1) as a separate crime, not a sentencing enhancement, and expressly included a mens rea requirement.[11]

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[11] The Government suggests that Congress would have repeated "knowingly" multiple times in Section 1028A(a)(1) if it had intended the knowledge requirement to apply throughout

II. The Most Natural Reading Of The Text Is Consistent With Background Assumptions About The Meaning Of "Theft" And The Scope Of Mens Rea Requirements.

Petitioner's construction of the text draws further support from the traditional meaning of "theft" and the scope of conventional mens rea requirements in criminal statutes.

A. The Traditional Understanding of "Theft"

Congress intended the "Aggravated Identity Theft" provision, adopted as part of the "Identity Theft Penalty Enhancement Act," to define a kind of theft, which is commonly understood to encompass only the taking of property known to belong to another person. See Petr. Br. 15-16 & n.3. The Government disagrees, but its reasons for doing so are unpersuasive.

1. As an initial matter, the Government argues that *Carter v. United States*, 530 U.S. 255 (2000), precludes looking to the meaning of "theft" because the word appears in the titles, but not the body, of

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the provision. As described above, in light of common usage, no such repetition was unnecessary. Moreover, the statutes the Government cites (U.S. Br. 16-17) repeat the knowledge element either because the statute has multiple clauses defining multiple prohibited acts (*e.g.*, 18 U.S.C. § 1546(a), reproduced in Appendix F, or in order to introduce clauses that add requirements beyond those already included in the direct object phrase (*e.g.*, 18 U.S.C. §§ 922(q)(2)(A), 1040(a)(2), reproduced in Appendices G and H, respectively).

the statute. U.S. Br. 29. But *Carter* itself acknowledges that the title of a statute is useful "when [it] shed[s] light on some ambiguous word or phrase in the statue itself." 530 U.S. at 267 (citations omitted) (modifications in original); *see also*, *e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (same). Here, petitioner is simply urging the Court to construe Section 1028A(a)(1)'s express knowledge requirement in light of the titles.[12]

The legislative history confirms that Congress saw Section 1028A(a)(1) as establishing a form of theft. *See* Petr. Br. 14-15. The Government claims this is not so, pointing to a sentence in the House Report that states, "[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. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780. But this general statement – describing the *collective* scope of the distinct concepts of "identity theft" and "identity fraud," *cf.* U.S. Br. 20 n.6 (wrongly asserting Congress equated the two) – does not negate the implication of the text and other aspects of the legislative history that to "wrongly obtain" another person's identification, the defendant must know that what he is "obtaining" is the means of identification

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[12] By contrast the defendant in *Carter* did "not claim that [the] title illuminate[d] any such ambiguous language." 530 U.S. at 267. Instead, he urged the Court to rely on the title to import into the statute an element Congress had expressly omitted. *Id*. at 262, 264.

of another person. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1244 (D.C. Cir. 2008). At the very least, this single statement is too slender a reed to counter the other strong indications that Congress saw identity theft as a form of theft.

2. The Government also argues that the Court should give no weight to the traditional understanding of theft because "theft," it says, is not a "'term with established meaning at common law.'" U.S. Br. 28 (quoting *Carter*, 530 U.S. at 264). This is simply incorrect.

While it is true that "theft" is no longer a word that describes a *specific* common law crime,[13] it is nonetheless a term with an established common law meaning, encompassing a class of crimes, including larceny, embezzlement, and false pretenses. *See* 3 WAYNE R. LAFAVE, SUBSTATIVE CRIMINAL LAW, § 19.1, at 56-61 (2d ed. 2003); *see also* U.S. Br. 29; *United States v. Turley*, 352 U.S. 407, 412 n.8 (1957).[14] In this way, the term "theft" is unlike the words "steal" and "stolen," which have only a colloquial meaning.

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[13] Initially, "theft" appears to have been the equivalent of common law larceny. *See*, *e.g.*, JAMES STEPHEN, IV STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 196 (5th ed. 1863) ("*Larceny*, or theft . . . is the unlawful taking and carrying away of things personal, with intent to deprive the owner of the same.") (footnotes omitted); WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 229 (1800) (same)

[14] Accordingly, the Government's observation (U.S. Br. 30-32) that Section 1028A(a)(1) does not contain all the elements of common law larceny is beside the point. Congress saw the provision as establishing a form of theft, broadly understood, not larceny.

See Turley, 352 U.S. at 411-12; *Bell v. United States*, 462 U.S. 356, 360 (1983).

As a result, while it would be improper to imply into Section 1028A(a)(1) an element that is not common to all forms of theft, it is appropriate to look to the generic meaning of "theft" in interpreting the words Congress used to define what it viewed as a form of theft in a new and modern context. *Cf., e.g.*, *Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007) (construing statute's reference to "theft" as encompassing "a generic definition of theft").

The canon, after all, applies whenever "Congress borrows *terms of art* in which are accumulated the legal tradition," and thereby embraces a "cluster of ideas that [are] attached to each borrowed word," *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added), not solely when Congress refers to a specific common law crime. *See, e.g.*, *Molzof v. United States*, 502 U.S. 301, 306-08 (1992) (relying upon the common law definition of "punitive damages" to construe the Federal Tort Claims Act). And the Government does not deny that part of the "accumulated legal tradition" and "cluster of ideas" encompassed within the concept of "theft" in all its forms is the requirement that the defendant know that what he is taking belongs to another. *See* Petr. Br. 13-16; U.S. Br. 31; *Duenas-Alvarez*, 127 S. Ct. at 820; *cf. generally* LAFAVE, *supra*, ch. 19.

B. The Traditional Scope Of Mens Rea Requirements

Part of our legal tradition as well is the presumption that mens rea requirements ordinarily extend to all the elements of the offense, absent some

reason for a contrary construction. *See* Petr. Br. 18-20.

1. As this Court has observed, a "conventional mens rea requirement . . . require[s] that the defendant know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994); *see also* Petr. Br. 18. It is only natural that when confronted by a statute with a written mens rea requirement, courts should begin with the presumption that Congress intended a conventional one. *See*, *e.g.*, *United States v. Pasillas-Gayton*, 192 F.3d 864, 868-69 (9th Cir. 1999). While the Court may not have articulated this commonsense principle as clearly as it has some canons of construction, the presumption is consistent with the Court's statements and holdings in other cases, and with the background rule of lenity. *See* Petr. Br. 18 & 34-38.

2. The Government contends that the Court's cases show that no such presumption exists. Indeed, relying on this Court's decisions in *United States v. X-Citement Video*, 513 U.S. 64 (1994), *Liparota v. United States*, 471 U.S. 419 (1985), and *Carter v. United States*, 530 U.S. 255 (2000), the Government insists that the Court has adopted nearly the opposite presumption, generally reading mens rea elements only as broadly as necessary to avoid criminalizing innocent conduct. U.S. Br. 37-38, 40-42. This view is mistaken.

In some cases, the Court has pointed to a risk of criminalizing innocent conduct as a reason to give a mens rea element unexpected and exceptional breadth. In *X-Citement Video*, for example, the Court relied on the consideration to construe a mens rea element more expansively that the "most natural

grammatical reading" of the text would otherwise indicate. 513 U.S. at 68; *see id*. at 72-73. In *Liparota*, the concern likewise was one factor that led the Court to construe the Food Stamps Act to require proof of a defendant's knowledge of the unlawfulness of his conduct, despite the ordinary presumption that a "mistake of law" is no defense. 471 U.S. at 425 n.9. In both cases, it was uncontroversial that the knowledge requirement extended to the direct object of the provision's verbs ("visual depiction" in *X-Citement Video*, 513 U.S. at 69; and "coupons or authorization cards" in *Liparota*, 471 U.S. at 423 n.5). Innocent conduct came into the analysis only to justify an even *broader* application.

In *Carter*, on the other hand, the Court did say 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.'" 530 U.S. at 269 (citation omitted). But as the quotation makes clear, this rule applies when a court is required to "read into a statute" a mens rea requirement that is not already there, a situation that has no relevance here. There is a world of difference between cases in which "Congress has not addressed the question of criminal intent" and those in which the Court is called upon to interpret the "import of what *it has said*." *X-Citement Video,* 513 U.S. at 81 (Scalia, J., dissenting) (emphasis added). It is unsurprising that the Court should act with restraint when implying into a statute elements that Congress did not include in the text. But the same respect for congressional prerogatives, founded on separation of powers concerns, rightly leads courts to construe *written*

mens rea elements broadly to avoid giving criminal statutes an unintended breadth. *See*, *e.g.*, *Liparota*, 471 U.S. at 427.

The other cases the Government cites (U.S. Br. 39-42) are also inapt. Most, like *Carter*, involve statutes with no express mens rea element to interpret.[15] Those involving written mens rea elements are consistent with petitioner's rule of construction. Some apply the mens rea requirement to all the statute's elements.[16] Others involved a recognized exception to the general rule.[17] And some found that textual cues overcame the presumption and limited the scope of the intent element.[18]

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[15] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); *United States v. Feola*, 420 U.S. 671, 676-77 (1975); *United States v. Freed*, 401 U.S. 601, 607 (1971); *United States v. Balint*, 258 U.S. 250, 253 n.1 (1922).

[16] *See Liparota*, 471 U.S. at 433; *Morissette*, 342 U.S. at 270-71.

[17] Some of the cases involved "public welfare" offenses that dispense with traditional *mens rea* requirements. *See United States v. International Minerals & Chem. Corp*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Balint*, 258 U.S. 250 (1922). *Cf. Liparota*, 471 U.S. at 432-33 (classifying these cases as "involving public welfare" offenses). Others involved jurisdictional elements. *See United States v. Yermian*, 468 U.S. 63, 68 (1984); *United States v. Feola*, 420 U.S. 671, 685 (1975).

[18] *See X-Citement Video*, 513 U.S. at 68 (finding that "knowingly" was not naturally read to extend to age of minority because that element was "set forth in independent clauses separated by interruptive punctuation," but ultimately relying on other considerations to overcome the natural reading of the text).

3. Nor does petitioner's position "risk disruption of a great deal of well-settled authority with respect to the construction of" federal drug statutes. U.S. Br. 46. Most of the provisions the Government cites (U.S. Br. 46-48) make plain on their face that the mens rea requirement of the underlying offense – codified in an entirely separate provision – does not apply to the aggravating facts identified in the penalty provision (*e.g.*, drug quantity, or activity within a school zone). *See supra* at 14. And while 21 U.S.C. § 861(a)(1) does include its own mens rea element, it is a statute "intended to protect a vulnerable class defined by age," thereby implicating special concerns that have led courts to narrowly construe mens rea requirements in similar exceptional contexts. *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

III. Petitioner's Reading Is Consistent With The Statute's Purposes.

The Government argues that construing the Aggravated Identity Theft statute in a traditional manner would be incompatible with the statute's core purpose of protecting potential victims from harm. U.S. Br. 19. It explains that Congress sometimes punishes defendants for the unintended consequences of their criminal acts, for example in cases of felony-murder or under statutes providing enhanced sentences for crimes committed near schools whether the defendant knows he is in a school zone or not. U.S. Br. 48. Congress would have intended the same kind of treatment here, the Government insists. This speculation is unfounded.

1. Petitioner does not disagree that Congress intended the Aggravated Identity Theft provision to protect potential victims from harm. But that does not distinguish this Act from most other criminal statutes, including other criminal theft statutes, which are also "victim-focused." And while it is presumably true that construing mens rea requirements narrowly would facilitate prosecutions, and therefore promote the purpose of protecting victims, this has not led the Court to generally construe the mens rea elements of criminal statutes narrowly. Indeed, the Court's general interpretative presumption, grounded in separation of powers concerns, is quite the opposite. *See*, *e.g.*, *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Thus, while victim protection is surely an important objective of the Aggravated Identity Theft provision, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). In the criminal context, Congress generally does *not* pursue its interest in protecting victims "at all costs." *Id*. To the contrary, our legal tradition overwhelmingly reserves criminal sanctions for cases in which victim harm is coupled with defendant culpability. *See*, *e.g.*, Prof. of Crim. Law Br. 3-10.[19] The Government has many tools for

[19] The Government suggests that *United States v. Feola*, 420 U.S. 671 (1975), stands for the broad proposition that a mens rea element will be narrowly construed to provide "maximum protection" to those whom the statute is designed to shield. U.S. Br. 23 (quoting *Feola*, 420 U.S. at 684). But the

protecting its citizens, but it generally reserves criminal sanctions for those who act with full knowledge of the facts that make their conduct unlawful. *See*, *e.g.*, *Staples*, 511 U.S. at 605; *supra* § II.B.

2. To be sure, as the Government notes, criminal defendants sometimes commit more serious offenses than they intended, based on unexpected consequences of their acts, as in the case of felony-murder or vehicular manslaughter. U.S. Br. 48-49. But rather than being "routine," *id*. at 48, such laws constitute "notable exceptions to th[e] general rule that mental state as to one type of harm will not suffice for a crime involving another type of harm." LAFAVE, *supra,* § 6.3(d); *see also id*. § 6.3(e) (same where *degree* of harm is greater than intended). There is no indication that Congress would have thought identity theft should be included among the rare exceptions, which ordinarily involve very serious harm to the victim. *See id*. § 6.3(d) (noting that in most, "the unintended harm is the death of another"). Here, serious harm is not an element; indeed, Section 1028A(a)(1) does not require the Government to prove that that the defendant intended or inflicted

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case established no such principle. Instead, the Court simply held that when Congress provides protection *in a particular manner – i.e.*, by providing a federal forum for the criminal prosecution – then the Government need not prove the defendant's knowledge of a solely jurisdictional element of the crime. *See id*. at 685 ("The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.").

any harm at all. Moreover, it would be surprising for Congress to write a felony-murder-like statute in language that appears, on its face, indistinguishable from an ordinary crime requiring the defendant's knowledge of all the elements of the offense.

It is also true that Congress sometimes will provide special sentencing enhancements for an ordinary crime, without requiring proof that the defendant was aware of the facts giving rise to the harsher punishment. U.S. Br. 46-47. But this is surely not such a provision. By its terms, Section 1028A creates a *separate criminal offense*, not a penalty enhancement for the predicate offense. And while sentencing enhancement provisions conspicuously *omit* any mens rea element, Section 1028A expressly *includes* one. *Compare* 21 U.S.C. § 860(a) *with* 18 U.S.C. § 1028A(a)(1).

3. In the end, the Government cannot persuasively claim that petitioner's interpretation would be so disruptive of Congress's victim-protection purposes as to warrant reading the statute contrary to the normal reading of the text and legal tradition. Petitioner's construction does not prevent punishment of the identity thieves Congress had foremost in mind in passing this statute. *See* Petr. Br. 20-21. Congress focused principally on individuals whose criminal aims (*e.g.*, access to financial accounts and credit) generally depend on the fact that a stolen identification belongs to a real person. *See, e.g.*, H.R. Rep. No. 108-528, at 4-6, 2004 U.S.C.C.A.N. 779, 780-82. These are the individuals

who pose the greatest risk of harm to victims.[20] And these are precisely the people whose conduct should easily provide convincing circumstantial evidence of their knowledge that the means of identification they steal and misuse belong to another. *See* Petr. Br. 33.

4. At the same time, the contrary rule advocated by the Government risks arbitrary results Congress could not have intended.

While Section 1028A(a)(1) never applies to someone who is wholly innocent, it nonetheless seeks to identify those who have engaged in culpable conduct above and beyond the acts constituting their predicate offense, acts that make them worthy of additional punishment as aggravated identity thieves. Yet, under the Government's view, the statute dispenses additional two-year sentences on the basis of a coin toss. For example, two brothers applying for work at the same facility, using false social security cards provided by the same counterfeiter, neither knowing whether the numbers

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[20] No doubt, the unknowing use of another person's means of identification may pose a risk of harm to the person whose identification is used. There is, however, every reason to believe that the risk of harm is smaller than that posed by the classic identity thief. *See* Petr. Br. 20-21. The Government suggests that this is not so, claiming that someone like petitioner could use a false social security number to open a credit card account, fail to pay the bill, and injure the credit of the person whose number he had unknowingly used. U.S. Br. 23-24. But the defendant's success in opening the account would provide powerful circumstantial evidence that he knew (by the time he completed a predicate offense) that the number was valid and belonged to another person.

belonged to someone else, could receive dramatically different punishments depending entirely on whether one of them received a number that had been issued to someone else. *See* MALDEF Br. 5.

At the same time, the brother who unknowingly received the identification number assigned to another person would receive exactly the same additional sentence under Section 1028A(a)(1) as a more culpable co-worker who intentionally stole someone's identity in order to empty the victim's bank account. The fact that Congress assigned a single harsh penalty for all convicted of Aggravated Identity Theft – with no opportunity for a court to adjust the sentence to take into account substantial disparities in culpability – is an additional reason to believe that Congress did not intend § 1028A(a)(1) to apply to both highly culpable traditional identity thieves and to less culpable individuals who unknowingly use another person's identification number.

Congress was aware that giving Section 1028A(a)(1) a focused application would not leave individuals like petitioner unpunished, or those injured by acts like his without a remedy. Petitioner is serving a long prison sentence for his admitted use of identification documents he knew to be false. In sentencing petitioner for that predicate offense, the district court was authorized to take account the risk of harm his use of those documents posed. And if that use had resulted in any actual injury, the court had the power to order restitution to the victims. *See* 18 U.S.C. § 3663(a)(1)(A) (authorizing restitution for any violation of Title 18); *see also Morissette v. United States*, 342 U.S. 246, 270 (1952) (noting availability of

civil relief for "unwitting acts," under which the "defendant's knowledge, intent, mistake, and good faith are generally irrelevant").

IV. At A Minimum, Section 1028A(a)(1) Is Ambiguous, Requiring Application Of The Rule of Lenity.

Even if the Court ultimately concludes that the language of Section 1028A(a)(1) does not unambiguously support petitioner's construction, the Court should at the very least acknowledge that the language does not unambiguously support the Government's construction either, thereby requiring application of the rule of lenity unless other indicia of intent resolve the ambiguity decisively in the Government's favor.

In *Liparota v. United States*, 471 U.S. 419 (1985), this Court described a similarly formulated provision as grammatically ambiguous. *Id.* at 424 & n.7. (citing W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972)).[21] The Government asserts that "*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." U.S. Br. 18 (citation omitted). But the Government makes no attempt to explain how the Court's policy concerns could affect its view of the clarity of the statutory language, much less

[21] As petitioner has explained, the Court did not, however, doubt that the knowledge requirement in the statute in *Liparota* extended at least through the direct object phrase. *See* Petr. Br. 28-29; *supra* at 20.

how policy concerns would lead the Court to approvingly quote a treatise that generalized the observation far beyond the context of statutes risking criminalization of innocent conduct. Moreover, the Court is not alone in thinking that the scope of a knowledge requirement in similar statutes often gives rise to ambiguity. The American Law Institute drafted a specific rule in the Model Penal Code addressing the scope of mens rea elements precisely because its scholars and practitioners recognized that such ambiguities were "pervasive" in criminal statutes. *See* MODEL PENAL CODE § 2.02(4), Explanatory Note (1985).

Whatever the "trigger for the rule of lenity," U.S. Br. 49, it is satisfied in this case. While the Government hypothesizes policy reasons why Congress might wish to enact an identity theft statute with a narrow mens rea requirement, "it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990); *see also Hughey v. United States*, 495 U.S. 411, 422 (1990). "In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—[the Court] appl[ies] the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). Thus, "[i]f Congress desires to go further, it must speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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Appendix A

Collected Example Sentences From Petitioner's Briefs

From Brief For The Petitioner

(1) "Jane knowingly took that cat of Mr. Smith's."[22]

(2) "John knowingly discarded his sister's homework."[23]

(3) "Jane knowingly ate the last slice of pizza."[24]

(4) "John knowingly ate a bushel of his neighbor's apples."[25]

(5) "John knowingly ate a bushel of apples of his neighbor's."[26]

(6) "John knowingly discarded his sister's homework."[27]

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[22] Petr. Br. 6.

[23] Petr. Br. 9.

[24] Petr. Br. 9.

[25] Petr. Br. 10.

[26] Petr. Br. 10.

(7) "John discarded his sister's homework knowingly."[28]

From Reply Brief For The Petitioner

(8) "Susan knowingly transferred classified documents."[29]

(9) "Charles knowingly possessed a baggie of cocaine."[30]

(10) "Jane knowingly used her mother's computer."[31]

(11) "Jane knowingly used, without permission, her mother's computer."[32]

(12) "The food and drug agency and the Justice Department are conducting a criminal investigation into whether the Peanut

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[27] Petr. Br. 26 n.13.

[28] Petr. Br. 26 n.13.

[29] *Supra* at 3.

[30] *Supra* at 3.

[31] *Supra* at 3.

[32] *Supra* at 5 n.12, 9.

Corporation of America knowingly sold contaminated products."[33]

(13) "Now the process is repeating itself as Schapiro and other regulators begin to clean up after underwriters who knowingly peddled securities of questionable value . . . ."[34]

(14) "Officers . . . are investigating whether employees knowingly received stolen property."[35]

(15) "[The lawyer] . . . was under investigation on charges of knowingly misappropriating clients' funds."[36]

(16) "Bonds . . . denied knowingly using performance-enhancing drugs."[37]

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[33] *Supra* at 11 (citing Michael Falcone, *Peanut Supplier Banned From Federal Business*, N.Y. TIMES, Feb. 6, 2009).

[34] *Supra* at 11 (citing Steven Pearlstein, *Obama's SEC Pick Is No Joe Kennedy*, WASH. POST, Jan. 7, 2009).

[35] *Supra* at 11 (citing Maryland *Briefing: Delegate's Jewelry Shop Among 18 in Violation*, WASH. POST, Jan. 13, 2009).

[36] *Supra* at 11 (citing John Eligon, *Lawyer Is Accused of Stealing Disabled People's Assets He Was Assigned to Protect*, N.Y. TIMES, Jan. 29, 2009).

[37] *Supra* at 11 (citing Paul Elias, *Feds Press Harder on Bonds' Trainer; Agents Raid Home of Anderson's in-Law*, CHI. TRIB., Jan. 29, 2009).

(17) "Investors in private firms knowingly assume the risks associated with economic events that affect their companies, industries and the broader economy."[38]

(18) "Jane knowingly used, without permission, a toothbrush of another camper."[39]

(19) "Jane knowingly used, without permission, another camper's toothbrush."[40]

(20) "An Albuquerque lawmaker was criticized for 'grandstanding' Monday and knowingly subverting the rules of the House of Representatives."[41]

(21) "The General knowingly risked the lives of his soldiers to achieve an important objective."[42]

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[38] *Supra* at 11 (citing William Shughart, *Folly of Incentives*, Commentary, WASH. TIMES, Jan. 25, 2009).

[39] *Supra* at 13.

[40] *Supra* at 13.

[41] *Supra* at 13 (citing Dan Boyd, *Capitol Web Cast Ruffles Feathers: Lawmaker Chided for Broadcasting Legislative Committee Meeting*, ALBUQUERQUE J., Jan. 27, 2009).

[42] *Supra* at 13.

(22) "The author knowingly used the stories of everyday citizens in his article to make his abstract theory more concrete."[43]

[43] *Supra* at 13.

Appendix B

18 U.S.C. § 1028(d)

18 U.S.C. § 1028. Fraud and related activity in connection with identification documents, authentication features, and information.

(d) In this section and section 1028A—

(1) the term "authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified;

(2) the term "document-making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement;

(3) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political

subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(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 special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;

(5) the term "false authentication feature" means an authentication feature that—

(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

(C) appears to be genuine, but is not;

(6) the term "issuing authority"—

(A) means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government 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—

> (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));

(8) the term “personal identification card” means an identification document issued by a State or local government solely for the purpose of identification;

(9) the term “produce” includes alter, authenticate, or assemble;

(10) the term “transfer” includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others;

(11) the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States; and

(12) the term "traffic" means--

(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

Appendix C

18 U.S.C. § 2252(a)

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting 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 using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting 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 using any means or facility of interstate or foreign commerce or in or affecting 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;

Appendix D

21 U.S.C. § 841(a)-(b)(1)(A)

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury

results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Appendix E

21 U.S.C. § 860(a)

21 U.S.C. § 860. Distribution or manufacturing in or near schools and colleges

(a) Penalty

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this

paragraph shall not apply to offenses involving 5 grams or less of marihuana.

Appendix F

18 U.S.C. § 1546(a)

18 U.S.C. § 1546. 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; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness

of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

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.

Appendix G

18 U.S.C. § 922(q)(2)(a)

18 U.S.C. § (q)(2)(A) It shall be 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.

Appendix H

18 U.S.C. § 1040(a)

18 U.S.C. § 1040. Fraud in connection with major disaster or emergency benefits

(a) whoever, in a circumstance described in subsection (b) of this section, knowingly—

> (1) falsifies, conceals, or covers up by any trick, scheme, or device any material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation,

in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191), or in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United

States, shall be fined under this title, imprisoned not more than 30 years, or both.