United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

No. 19-50912

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID FOX DUBIN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CR-227-2

Before OWEN, *Chief Judge*, and JONES, SMITH, BARKSDALE, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM joined by OWEN, *Chief Judge*, and SMITH, BARKSDALE, STEWART, DENNIS, SOUTHWICK, GRAVES, HIGGINSON, and HO, *Circuit Judges*:

William Joseph Dubin and his son David Fox Dubin were convicted of several offenses related to Medicaid fraud. They appealed, and a panel of this court affirmed the district court's judgment.[1]

[1] *United States v. Dubin*, 982 F.3d 318 (5th Cir. 2020); *but see id.* at 330, 332 (ELROD, J., concurring) (concurring "reluctantly" concluding that binding circuit precedent governed).

The court granted rehearing en banc[2] to consider whether there was sufficient evidence to support David Dubin's conviction under 18 U.S.C. § 1028A(a)(1). We now affirm the district court's judgment for the reasons set forth in the panel's majority opinion.

We need not resolve whether our review of the § 1028A issue is de novo or for plain error because the conviction stands regardless of which standard of review applies.

Accordingly, the district court's judgment is AFFIRMED.

[2] *United States v. Dubin*, 989 F.3d 1068 (5th Cir. 2021).

PRISCILLA R. OWEN, *Chief Judge*, joined by SMITH, BARKSDALE, HIGGINSON, and HO, *Circuit Judges*, concurring:

Much ink has been spilled about "identity theft" in dissenting opinions in today's case.[1] However, the text of 18 U.S.C. § 1028A(a)(1) does not contain the words "identity theft" or even "theft." The text of the statute instead imposes a sentencing enhancement for the commission of enumerated federal felonies when the criminal "knowingly . . . uses, without lawful authority, a means of identification of another person."[2] Our focus must be on the actual text of the statute and not the meaning or scope of "identity theft."

David Dubin was convicted under 18 U.S.C. § 1347(a) of "defraud[ing] a[] health care benefit program" or "obtain[ing], by means of false or fraudulent pretenses [or] representations . . . money . . . owned by, or under the custody or control of, a[] health care benefit program" (in this case Medicaid), "in connection with the delivery of or payment for health care benefits, items, or services."[3] He was also convicted under 18 U.S.C. § 1349 of conspiracy to commit a § 1347(a) offense. The en banc court has held that these felony convictions stand.

The principal issue that has divided our court is the proper construction of § 1028A(a)(1), which sets forth a sentencing enhancement. That section provides "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person"

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[1] *Post*, at 32-39 (ELROD, J., dissenting); *post*, at 41-46 (COSTA, J., dissenting).

[2] 18 U.S.C. § 1028A(a)(1).

[3] 18 U.S.C. § 1347(a).

shall receive an additional two years of imprisonment.[4] The health care fraud and conspiracy offenses of which Dubin was convicted are felony violations enumerated in subsection (c)(5) of § 1028A.[5]

The resolution of this issue turns on the meaning of the phrase "uses, without lawful authority, a means of identification of another person" in § 1028A(a)(1).[6] At Dubin's trial, the jury found that he did "use[], without lawful authority, a means of identification of another person" in committing the offenses set forth in § 1347(a) and § 1349. That sentencing enhancement conviction must be affirmed based on a straightforward reading of § 1028A(a)(1) and the evidence before the jury. Relevant here is Dubin's fraudulent billing pertaining to Patient L, who was a minor and whose initials are AS. Dubin had the "lawful authority" to use Medicaid Patient L's identifying information to obtain lawful reimbursements from the government for covered services, but Dubin also "use[d]" Patient L's identifying information "during and in relation to" the felonies of Medicaid fraud and conspiracy to commit Medicaid fraud. That "use" was "without lawful authority."

Though there is undeniably a split among circuit courts as to how § 1028A(a)(1) should be construed,[7] the Fourth Circuit's analysis is solidly supported by the text of the statute and familiar principles of statutory

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[4] 18 U.S.C. § 1028A(a)(1).

[5] 18 U.S.C. § 1028A(c)(5) (listing as enumerated felony violations "any provision contained in chapter 63 (relating to mail, bank, and wire fraud)"; both § 1347 and § 1349 are contained in chapter 63 of Title 18).

[6] 18 U.S.C. § 1028A(a)(1).

[7] *Compare United States v. Abdelshafi*, 592 F.3d 602, 606-610 (4th Cir. 2010), *with United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019), *and United States v. Medlock*, 792 F.3d 700, 707 (6th Cir. 2015).

interpretation. In *United States v. Abdelshafi*,[8] the Fourth Circuit eloquently and ably addressed how § 1028A(a)(1) applies to facts indistinguishable from those in the present case. Abdelshafi owned and operated a company that transported Medicaid patients.[9] He lawfully received information about those patients including their names and Medicaid identification numbers.[10] In billing for transportation services, Abdelshafi "not only inflated mileage amounts, but also submitted claim forms for trips that did not, in fact, occur."[11] The Fourth Circuit affirmed his conviction under § 1028A(a)(1), rejecting the same arguments now asserted in the case before us by Dubin and the dissenting opinions of JUDGE ELROD and JUDGE COSTA. The Fourth Circuit held:

- "While Abdelshafi had authority to possess the Medicaid identification numbers, he had no authority to use them unlawfully so as to perpetuate a fraud. We, therefore, decline to narrow the application of § 1028A(a)(1) to cases in which an individual's identity has been misrepresented, as it would clearly be inappropriate for us 'to adopt an interpretation [ ] not supported by the plain text of the statute.' *United States v. Pressley*, 359 F.3d 347, 351 (4th Cir. 2004)."[12]
- "Our conclusion in this regard is not altered by Abdelshafi's representation that 'every single incident of health care fraud

[8] 592 F.3d 602.

[9] *Id.* at 605.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 609.

by a provider would also constitute aggravated identity theft' if his conduct is deemed to violate the statute."[13]

- "Section 1028A(a)(1) provides an enhanced penalty for those who unlawfully use another's identifying information during and in relation to a broad array of predicate offenses, including crimes related to the 'theft of government property' and 'fraud,' as well as offenses involving 'unlawful activities related to passports, visas, and immigration.'"[14]
- "That a single type of health care fraud related to provider payments—a subset of crimes involving fraud and theft—may fall within the statutory ambit is not particularly noteworthy."[15]
- "'Even if we were more persuaded than we are by [this] policy argument [ ], the result in this case would be unchanged. Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.' *United States v. Rodgers*, 466 U.S. 475, 484 (1984). We adhere to the principle that '[f]ederal crimes are defined by Congress, and so long as Congress acts within its constitutional power in enacting a criminal statute, this Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited.' *United States v. Kozminski*, 487 U.S. 931, 939 (1988)."[16]

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[13] *Id.*

[14] *Id.* (quoting *Flores–Figueroa v. United States*, 556 U.S. 646, 647-48 (2009)).

[15] *Id.*

[16] *Id.* at 609-10.

JUDGE ELROD and JUDGE COSTA's dissenting opinions disagree with the Fourth Circuit's interpretation of § 1028A(a)(1). As noted above, in advocating for their contrary view, those opinions deflect focus from the actual text of § 1028A(a)(1) by characterizing the offense defined in that statute as "identity theft."[17] It is much easier to argue, as the dissenting opinions do, about whether Dubin committed "identity theft"[18] and "what ordinary people understand identity theft to be"[19] as opposed to whether he "use[d] . . . a means of identification of another person" in committing his crimes or what ordinary people would understand the text of § 1028A(a)(1) to prohibit. We must not lose sight of the fact that the offense Congress concluded warranted a two-year sentencing enhancement is defined in § 1028A(a)(1), and the elements of that offense are not captured or even fairly described by the words "identity theft."

The aim of the dissenting opinions is to cabin the sentencing enhancement substantially. But in attempting to do so, they do not give effect to both "lawful" and "authority." JUDGE COSTA's dissenting opinion draws a distinction not found in the text of § 1028A(a)(1). That opinion says that § 1028A(a)(1) applies only when an entity was billed but no services were provided ("made-up billing cases" in the dissenting opinion's words) and does not apply to cases in which bills were fraudulently inflated ("overbilling cases," again in the dissenting opinion's words).[20]

With great respect, it is unreasonable to construe "uses, without lawful authority, a means of identification of another person" as drawing a

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[17] *See*, *e.g.*, *post*, at 34 (ELROD, J., dissenting); *post*, at 46 (COSTA, J., dissenting).

[18] *Post*, at 34 (ELROD, J., dissenting).

[19] *Post*, at 43 (COSTA, J., dissenting).

[20] *Post*, at 45.

distinction based on whether some services or no services were provided, as JUDGE COSTA's dissenting opinion[21] and two decisions from other circuits have done.[22] In health care benefit fraud cases that use real people's identifying information to perpetrate the fraud, the criminal enterprise depends entirely upon access to and unlawful use of "a means of identification of another person." There is a direct causal link between the "use[], without lawful authority, [of] a means of identification of another person" and the offense, regardless of whether the offense was overbilling for services provided or billing when no services at all were provided. Those engaged in health care fraud like that committed by Dubin actively seek, then mine, sources of "a means of identification of another person" because those "means of identification of another person" are what they use to perpetrate the fraud. Health care fraud like that committed by Dubin costs taxpayers billions of dollars each year.

Why is a criminal who uses a person's means of identification to bill for medical services when none were provided more culpable than a criminal who uses a person's means of identification to bill more for medical services than the law allows? How can it logically be said that there is a causal nexus between the use of the identifying information as a means of committing the former crime but not as a means of committing the latter? In both cases, benefits were paid because the criminal used a person's means of identification as the key to duping the government. In both situations, the fraud causes precisely the same type of loss to taxpayers. I see no textual basis for concluding that Congress drew a distinction in § 1028A(a)(1) between use of identifying information to obtain benefits when no services

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[21] *Post*, at 45.

[22] *See United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019); *United States v. Medlock*, 792 F.3d 700, 707-08 (6th Cir. 2015).

were provided and use of identifying information to obtain benefits by inflating the cost of services that were provided.

There is certainly nothing "breathtaking"[23] about punishing a criminal who, for example, commits fraud by overbilling $100,000 for medical services the same as a criminal who bills $100,000 for medical services that were not provided. Both have committed the *same crime* (defined by § 1028A(a)(1)) by equally culpable means when they use a real person's "means of identification" "during and in relation to" a violation of § 1347(a). Nor is there any issue of "fair notice" or "fair warning" as to what conduct is prohibited.[24] The statute plainly states that it is a crime to use a means of identification of another person in committing enumerated offenses that include health care benefit fraud.

I

It should be beyond debate that Dubin "used" Patient L's identifying information[25] "during and in relation to" the offenses for which he was

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[23] *Post*, at 32 (ELROD, J., dissenting).

[24] *Post*, at 42, 44 (COSTA, J., dissenting).

[25] See 18 U.S.C. § 1028(d)(7), defining "means of identification" for both § 1028 and § 1028A:

> (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--
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> (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;

convicted. He could not have effectuated the health care fraud or the conspiracy to commit health care fraud without using Patient L's identifying information.[26]

The focus should be on whether he "use[d]" the identifying information "without lawful authority." The authority to use Patient L's identifying information came from both Patient L (or someone authorized to act on the minor patient's behalf) and the Medicaid program itself. But neither Patient L nor Medicaid authorized Dubin to use that information or Patient L's name to commit health care fraud. (There is no evidence or even a suggestion that Patient L was a party to the fraud.) Though Dubin was authorized to use Patient L's identifying information, he had no "lawful" authority to use the information in the manner he did when he committed the felonies for which he was convicted.

Dubin, a managing partner at a psychological services company, directed that company to overbill for mental health evaluations at an emergency shelter for children. Dubin falsified information in at least four

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> (C) unique electronic identification number, address, or routing code; or
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> (D) telecommunication identifying information or access device (as defined in section 1029(e)). . . .

[26] *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228-29 (1993)) ("The word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'"); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 880 (9th Cir. 2002) (quoting *Webster's Ninth New Collegiate Dictionary* (1985)) (applying the "ordinary definition" of use, which is "'to put into action or service, avail oneself of, employ'"); *United States v. Ramsey*, 237 F.3d 853, 859 (7th Cir. 2001) (quoting *Black's Law Dictionary* (6th ed. 1990)) (interpreting "use" according to its dictionary definition of "'to avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end'").

respects. First, he billed at a rate set for a licensed psychologist, even though a clinician without that credential saw Patient L (AS), and the billing rates for the actual provider could only be billed under Medicaid regulations at a much lower rate. Second, Dubin instructed employees to bill the maximum number of hours (eight) permitted by Medicaid regulations for certain services, even if the actual number of hours they spent performing the services was less. Third, Dubin billed for an evaluation that his company only partially performed. Patient L underwent psychological testing but did not receive a clinical interview. Nor did the shelter receive any report describing the patient's condition or any recommended treatment, which was necessary in order to bill for the evaluation. The fact that an evaluation occurred was useless to the shelter, and to Patient L, unless the provider furnished a report of the outcome of the evaluation. Fourth, Dubin falsified the date that services were provided since, had he used the correct date, the services would have been ineligible for reimbursement because they were performed within a twelve-month period for which maximum benefits had already been paid. Medicaid covers one psychological evaluation each year. After Dubin learned that Patient L (AS) had already been evaluated within a one-year period, Dubin billed Medicaid using a falsified treatment date.

Dubin challenges his § 1028A(a)(1) conviction on the ground that he did not "use" Patient L's identity within the meaning of the statute. He contends that his overbilling concerned only "how and when" Patient L was evaluated, since Patient L did receive some services. He attempts to limit "use" to false claims in which the patient received no services at all. JUDGE COSTA's dissenting opinion agrees with that interpretation of § 1028A(a)(1).

This dichotomy finds no support in § 1028A(a)(1)'s text. If Dubin's company had provided no services at all to Patient L, but had billed for services, Dubin would have "used" Patient L's identifying information (the

patient's name and unique Medicaid identification number) to make the false claim. If Dubin's company provided some services but "used" Patient L's identifying information to overbill, the fact remains that Dubin could not have effectuated the false claim without the identifying information. There is no principled or textual basis for concluding that Dubin "used" Patient L's identifying information "without lawful authority" in the first scenario but not the second. Nothing in the statute permits a distinction between using identifying information to submit an entirely fabricated claim for Medicaid benefits and using the same information to submit a partially fabricated claim. Moreover, as noted above, in both scenarios, the "use" of the identifying information would be "without lawful authority."

II

JUDGE ELROD's dissenting opinion would reverse Dubin's conviction under the sentencing enhancement statute on the basis that Dubin did not commit "identity theft."[27] That opinion asserts "Dubin did not commit identity theft,"[28] and "[t]he only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A."[29] But none of the elements in the text of 18 U.S.C. § 1028A(a)(1) requires "theft" of any kind. Instead, the statute speaks in terms of "use[], without lawful authority." The words "without lawful authority" contemplate that the use of "a means of identification" can be authorized but

[27] *Post*, at 34 (ELROD, J., dissenting).

[28] *Post*, at 34.

[29] *Post*, at 34.

that authorized "use" can be violative of § 1028A(a)(1) if the use is "unlawful."[30]

Though the caption of 18 U.S.C. § 1028A is indeed "Aggravated identity theft," the text of § 1028A(a)(1) does not require "theft" or set forth elements that are traditionally considered "theft." We cannot import *the caption* of § 1028A, which is "Aggravated identity theft", into *the text* of the statute defining the offense.[31] That would impermissibly add elements not found in the statute's text.[32]

The Seventh Circuit's en banc decision in *United States v. Spears*,[33] on which JUDGE ELROD's dissenting opinion relies, imported a "theft" requirement.[34] I have great respect for our sister circuit, but I cannot agree with its analysis because there is no textual basis for requiring "theft."

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[30] *See generally United States v. Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013) (concluding "that the phrase 'without lawful authority' in § 1028A is not limited to instances of theft, but includes cases where the defendant obtained the permission of the person whose information the defendant misused"); *United States v. Ozuna–Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011); *United States v. Retana*, 641 F.3d 272, 275 (8th Cir. 2011) (holding father's authorization of his son to use his social security number does not amount to "lawful authority" to excuse son's fraudulent use of the information to commit crimes); *United States v. Hines*, 472 F.3d 1038, 1040 (8th Cir. 2007) (holding that even if the defendant obtained consent to use another person's name and social security number in exchange for illegal drugs, the defendant acted without lawful authority when using the information to defraud police).

[31] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio Ry. Co.*, 331 U.S. 519, 529 (1947)) ("The caption of a statute, this Court has cautioned, 'cannot undo or limit that which the [statute's] text makes plain.'").

[32] *Id.*; *see also United States v. Gomez*, 960 F.3d 173, 178 (5th Cir. 2020); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 465 (5th Cir. 2015).

[33] 729 F.3d 753 (7th Cir. 2013).

[34] *Id.* at 756.

JUDGE COSTA's dissenting opinion concludes that § 1028A(a)(1) is an "aggravated-identity-theft law"[35] but rejects the argument that § 1028A requires actual theft. That opinion advocates that "consent" is the "dividing line," emphasizing, "[n]ote that this interpretation does not require that the identity be stolen, just that it be used without consent."[36] JUDGE COSTA's opinion points out, "[i]ndeed, nearby statutes include a 'stolen' requirement while section 1028A does not. *See* 18 U.S.C. § 1028(a)(2) (criminalizing the transfer of an 'identification document . . . knowing that such document . . . was stolen'); *id.* § 1028(a)(6) (criminalizing the knowing possession of a document that appears to be identification of the United States 'which is stolen')."[37]

JUDGE ELROD's dissenting opinion states "I join Judge Costa's dissent in full. Contrary to Chief Judge Owen's assertion, I do not read the statute as requiring that the defendant stole the identification."[38] With respect, that assertion is difficult to reconcile with what JUDGE ELROD's opinion actually says. That opinion is insistent that § 1028A(a)(1) requires "identity *theft*."[39]

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[35] *Post*, at 42 (COSTA, J., dissenting).

[36] *Post*, at 45 & n.2.

[37] *Post*, at 45 n.2.

[38] *Post*, at 32 n.1 (ELROD, J., dissenting).

[39] *Post*, at 34 (emphasis added); *see also post*, at 34 ("The only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A."); *post*, at 34 ("Dubin did not commit identity theft."); *post*, at 35 ("What Dubin did is not identity theft."); *post*, at 36 (citing the *Spears* decision with approval, saying "[w]riting for the *en banc* court, Judge Easterbrook agreed with Spears: 'Providing a client with a bogus credential containing the client's own information is identity fraud but not identity theft; no one's identity has been stolen or misappropriated.'"); *post*, at 38 ("Dubin lied only about the nature—the when and how—of the services provided to Patient L. That is not identity theft."); *post*, at 38-39 ("Dubin's conviction should be vacated because he

III

As noted above, the dissenting opinion authored by JUDGE COSTA posits that § 1028A(a)(1) draws a distinction between "an overbilling case and a made-up bill case."[40] This distinction rests on "consent" according to JUDGE COSTA's opinion, which says, "[t]he meaningful difference for identity theft purposes between an overbilling case and a made-up bill case is that in only the former did the patient consent to use of identifying information for the transaction."[41] But here again, the text of the statute does not draw this distinction. The statute says that "[w]hoever . . . uses, without lawful authority, a means of identification of another person" "during and in relation to any felony violation enumerated" shall be sentenced to a term of imprisonment of two years.[42] It bears repeating that a Medicaid beneficiary can consent to the use of her unique identifying number for lawful purposes, such as filing a claim for covered benefits.[43] But when the provider fraudulently overbills for services in a case such as the present one, the provider is doing so "without lawful authority" because fraudulent billing submissions are unlawful.[44]

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had permission to use Patient L's means of identification on this Medicaid bill and did not commit identity theft.").

[40] *Post*, at 44 (COSTA, J., dissenting).

[41] *Post*, at 44.

[42] 18 U.S.C. § 1028A(a)(1).

[43] *See generally United States v. Lumbard*, 707 F.3d 716, 725 (6th Cir. 2013); *United States v. Ozuna–Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011); *United States v. Retana*, 641 F.3d 272, 275 (8th Cir. 2011); *United States v. Hines*, 472 F.3d 1038, 1040; *United States v. Carrion–Brito*, 362 F. App'x 267, 273 (3d Cir. 2010) (unpublished opinion).

[44] *See United States v. Abdelshafi*, 592 F.3d 602, 610 (4th Cir. 2010) (holding that the defendant "came into lawful possession, initially, of Medicaid patients' identifying information and had 'lawful authority' to use that information for proper billing purposes"

In this regard, and with great respect, JUDGE COSTA's dissenting opinion meets itself coming around. That opinion acknowledges that "section 1028A applies if a defendant initially has consent to use identifying information for a certain purpose but then later engages in a separate transaction without permission."[45] That is exactly what happened in this case. Both Patient L (AS) and Medicaid consented to the use of the patient's name and unique identifying number to seek reimbursement for services provided. But Dubin then went beyond that consent and claimed inflated reimbursements based on fraudulent representations as to who provided services and when, and the extent of services provided. An example of a factual scenario set forth in JUDGE COSTA's dissenting opinion as to when § 1028A would apply drives home the point that the statute does not distinguish "services-provided" cases from "no-services-provided" cases. The example given in JUDGE COSTA's dissenting opinion is that "[i]t thus is a crime if a waiter who is given a customer's credit card to pay the restaurant bill later uses that credit card number to buy products on the internet."[46] There was consent to use the credit card number, but that consent extended only so far. In other words, the waiter had the lawful authority to use the credit card number to charge for dinner but was "without lawful authority" to use the number for internet purchases for himself. By the same token, Dubin was authorized to bill for services provided by a licensed psychological associate at a particular rate but not to bill at a higher rate based on the misrepresentation that the services were provided by a psychologist. Dubin was authorized to bill for an evaluation if it was the only

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but "[h]e did not have 'lawful authority' . . . to use Medicaid patients' identifying information to submit fraudulent billing claims").

[45] *Post*, at 45 n.2 (COSTA, J., dissenting).

[46] *Post*, at 45 n.2.

one performed in a twelve-month period, but not if it was a second evaluation within a year. Dubin was authorized to bill for an evaluation and report but not for an evaluation that was not followed by a report. The "consent" distinction that JUDGE COSTA's dissenting opinion attempts to construct folds in on itself, as reflected by the illustration it proffers.

Dubin used Patient L's identifying information to commit health care fraud. A straightforward reading of § 1028A compels the conclusion that this was "use, without lawful authority," and the two-year sentencing enhancement applied.

IV

As already discussed above, the Fourth Circuit's holdings and reasoning in *Abdelshafi*[47] support affirming Dubin's conviction under § 1028A(a)(1). I will not repeat that discussion.

There is contrary authority. At least two other circuit courts, the Sixth and the Ninth, have held, on facts similar to those in the present case, that the health care fraud for which the defendant was convicted did not involve the "use" of a patient's identity within the meaning of § 1028A(a)(1). In *United States v. Medlock*,[48] the government alleged that the defendants "'used' the name and Medicare Identification Numbers of Medicare beneficiaries when they 'caused a claim to be submitted to Medicare for reimbursement that contained' such names and numbers 'without lawful authority to do so because the claim falsely stated that'

[47] 592 F.3d 602 (4th Cir. 2010).

[48] 792 F.3d 700 (6th Cir. 2015).

stretchers were required for transport."[49] The Sixth Circuit held that this was not "use" within the meaning of § 1028A.[50] It reasoned:

> The Medlocks *did* transport the specific beneficiaries whose names they entered on the forms; they lied only about their own eligibility for reimbursement for the service. There was nothing about those particular beneficiaries, rather than some other lawful beneficiaries of Medicare, that entitled them to reimbursed rides.[51]

Later in the opinion, the court seems to amplify upon or at least repeat this reasoning, stating, "the Medlocks' misrepresentation that certain beneficiaries were transported by stretchers does not constitute a 'use' of those beneficiaries' identification under the federal aggravated-identity-theft statute, 18 U.S.C. § 1028A, because their company really did transport them."[52]

With great respect to the Sixth Circuit, I find that reasoning wholly unpersuasive. It does not even attempt to engage with the text of § 1028A(a)(1). When the text is examined, the fact that the defendants lied about their own eligibility for reimbursements does not take the defendants' conduct outside the statute. The fact remains that the defendants "knowlingly . . . use[d], without lawful authority," Medicare identification numbers "during and in relation to" the underlying felony of falsely representing that the Medicaid beneficiaries whose numbers were provided met federal regulatory requirements for transportation by stretcher. Without the beneficiaries' identifying information, the fraud could not have occurred.

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[49] *Id.* at 705.

[50] *Id.* at 708.

[51] *Id.* at 706.

[52] *Id.* at 708.

In *Medlock*, the court also observed "the Medlocks did not attempt to pass themselves off as anyone other than themselves. Their [sic] misrepresented *how and why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so."[53] The text of § 1028A(a)(1) does not require that the person who committed the predicate felony violation "attempt to pass [him or herself] off as anyone other than [him or herself]." Further, as just explained, the defendants in *Medlock* identified specific beneficiaries with their individual Medicaid numbers as having the physical impairments necessary to qualify for transportation by stretcher, which was a "use" of that identifying information "during and in relation to" the underlying felony violation. The phrase "during and in relation to" sweeps broadly enough to encompass the manner in which the Medlocks "use[d]" the identification of another person.

The Sixth Circuit offered a hypothetical about "an overcharging merchant" in *Medlock*:

> In the course of the [sic] committing health-care fraud, our hypothetical defendant bills his patient (or that patient's insurer, public or private) in his actual name, stating that the medical service, which the defendant really did provide, costs $200, when really it costs $100. On the government's logic, that lie would constitute a use of the patient's name, and so would be aggravated identity theft.[54]

But here again, this discussion was not tied to the text of § 1028A(a)(1), nor, I submit, can it be.

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[53] *Id.* at 707.

[54] *Id.*

For the same reasons, the Ninth Circuit's decision in *United States v. Hong*[55] is not persuasive authority. In that case, "Hong provided massage services to patients to treat their pain, and then participated in a scheme where that treatment was misrepresented as a Medicare-eligible physical therapy service."[56] Concluding that "[t]his case is analogous to *Medlock*," the Ninth Circuit reversed the conviction under § 1028A.[57]

The Sixth Circuit's decision in *United States v. White*,[58] cited in JUDGE ELROD's dissenting opinion,[59] adds little. It discusses at some length the court's prior decisions in *Medlock* and *United States v. Miller*,[60] but decided, "we cannot conclude that they counsel in favor of reversal."[61] In *White*, a travel agent had falsely represented to airlines that passengers were members of the military and qualified for military fares.[62] When questioned by airlines, she "manufacture[d] fake Armed Forces Identification Cards, which she then sent by means of interstate wire communications" to those airlines. The Sixth Circuit affirmed her conviction under § 1028A(a)(1), because she "creat[ed] false military identification cards and attempt[ed] to pass them off as her clients' own personal means of identification."[63]

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[55] 938 F.3d 1040 (9th Cir. 2019).

[56] *Id*. at 1051.

[57] *Id.*

[58] 846 F.3d 170 (6th Cir. 2017).

[59] *Post*, at 37 (ELROD, J., dissenting).

[60] 734 F.3d 530 (6th Cir. 2013).

[61] *White*, 846 F.3d at 175.

[62] *Id.* at 172.

[63] *Id*. at 177.

The facts in *United States v. Michael*,[64] also cited in JUDGE ELROD's dissenting opinion,[65] were quite different from those in the present case. "Philip Michael used a doctor's means of identification (his name and identification number) and a patient's means of identification (his name and birth date) to request insurance reimbursement for a drug the doctor never prescribed and the patient never requested."[66] In the course of affirming the conviction under § 1028A(a)(1), the Sixth Circuit discussed and distinguished its prior decisions in *Miller* and *Medlock*.[67]

The rationale of the decision in *United States v. Munksgard*[68] does not clearly lead to the conclusion that the Eleventh Circuit would reverse Dubin's conviction under § 1028A(a)(1) were his appeal pending in that court, as JUDGE ELROD's dissenting opinion asserts.[69] In *Munksgard*, "in an effort to obtain financing to support his land-surveying business, [Munksgard] forged another person's name to a surveying contract that he submitted to a bank in support of his loan application."[70] In affirming the conviction, the Eleventh Circuit examined the first five subsections of § 1028A(c)(1) that enumerate the predicate felony violations, including subsection (5), which enumerates the offenses of which Dubin was convicted.[71] The Eleventh Circuit reasoned that these references "support

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[64] 882 F.3d 624 (6th Cir. 2018).

[65] *Post*, at 37-38 (ELROD, J., dissenting).

[66] *Id.* at 625.

[67] *Id.* at 627-29.

[68] 913 F.3d 1327 (11th Cir. 2019).

[69] *Post*, at 37 (ELROD, J., dissenting).

[70] *Munksgard*, 913 F.3d at 1329-30.

[71] *Id.* at 1335.

. . . an interpretation of 'use[ ]' that more broadly forbids one from 'employ[ing]' or 'convert[ing] to [his] service' another's name."[72] The court then discussed the meaning of "use" in other federal statutes, which confirmed its conclusion that the word "use" "entail[s] employing or converting an object to one's service."[73] Dubin employed a patient's identifying information to his own service in committing fraud.

JUDGE ELROD's opinion[74] cites the First Circuit's decision in *United States v. Berroa,*[75] but it involved facts very different from those in Dubin's case. The defendants in *Berroa* aspired to become physicians in Puerto Rico but failed a requisite exam.[76] They then persuaded (bribed)[77] an employee of the Board of Medical Examiners to falsify their test scores and place that false information in their files.[78] The mail was used to notify the defendants that licenses to practice medicine had been issued and could be obtained from the Board.[79] The defendants were convicted of "honest-services mail fraud conspiracy," and those convictions were affirmed on appeal.[80] Two of the defendants also appealed convictions under § 1028A, and the First Circuit reversed.[81] It is unclear how the allegations in support of the § 1028A

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[72] *Id.*

[73] *Id.*

[74] *Post*, at 38 (ELROD, J., dissenting).

[75] 856 F.3d 141 (1st Cir. 2017).

[76] *Id.* at 147.

[77] *Id.* at 154.

[78] *Id.* at 147.

[79] *Id.* at 154-55.

[80] *Id.* at 163.

[81] *Id.* at 155-57.

offenses related to the honest-services mail fraud conspiracy. The opinion in *Berroa* reflects that it was alleged that patients obtained prescriptions from the defendants, and the government contended "that the use of patient names and addresses on the prescriptions constituted use without lawful authority of the identification of another person."[82] In any event, the First Circuit rejected that argument, concluding the "use" language in § 1028A(a)(1) was ambiguous and "require[d] that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf."[83] This latter statement would mean that § 1028A(a)(1) would not apply to individuals who steal a means of identification and sell it to a third person for an unlawful use. That certainly cannot be a correct interpretation of § 1028A(a)(1).

The decisions that have attempted to narrow the application of § 1028A(a)(1) have seized upon varying rationales for doing so, and those rationales often conflict with one another.[84] A "straight line" cannot be drawn through those cases. That is because they are unmoored from the text of § 1028A(a)(1).

* * *

Dubin's conviction must be affirmed based on the text of § 1028A(a)(1). Nor is § 1028A(a)(1)'s scope "breathtaking" when applied to health care fraud like that committed by Dubin. Neither Medicaid beneficiaries nor taxpayers who are the actual victims of Medicaid fraud

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[82] *Id.* at 155.

[83] *Id.* at 156.

[84] Even were there merit to any narrowing construction, the multitude of them is all the more reason that preservation of any one is mandatory when a district court has its jury charge conference and asks the government and defense what legal theory they request before a case is given to a jury.

would find it shocking or unreasonable to impose an additional sentence of two years of imprisonment when health care providers use unique Medicaid identifying numbers and Medicaid patients' names to submit fraudulent claims that result in billions of dollars of losses to the health care system each year.

ANDREW S. OLDHAM, *Circuit Judge*, joined by SMITH, BARKSDALE, HIGGINSON, and HO, *Circuit Judges*, concurring:

Today's two dissenting opinions eloquently argue that David Dubin's conduct did not amount to "use" of Patient L's identity within the meaning of 18 U.S.C. § 1028A(a)(1). But the issue is not properly before us. That's because Dubin did not raise a timely sufficiency-of-the-evidence challenge to the "use" element of his § 1028A conviction in the district court. Under two different Federal Rules, Dubin's failure to properly raise the "use" element means he's entitled only to plain-error review. And Dubin cannot come close to showing such error.

I.

The first relevant Rule is Federal Rule of Criminal Procedure 29. It supplies the framework for sufficiency-of-the-evidence challenges to criminal convictions. The Rule allows a defendant to move for "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). The motion, *inter alia*, must be made "within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." *Id.* 29(c)(1). Such a motion must "specify . . . the particular basis on which acquittal is sought so that the Government and district court are provided notice." *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). Of particular importance here, if a defendant raises a sufficiency objection to one element of a charged crime, he waives any sufficiency objections to other elements of that crime. *See United States v. Huntsberry*, 956 F.3d 270, 282 (5th Cir. 2020); *United States v. Herrera*, 313 F.3d 882, 884 (5th Cir. 2002) (en banc) (per curiam).

In this case, Dubin raised a timely sufficiency challenge under Rule 29. But that challenge was specific, not general, because he objected only to the predicate-felony element of his § 1028A conviction. Under *Huntsberry* and

Herrera, Dubin thus waived any objection to the sufficiency of the evidence for any other element—including the "use" element. That means we can review the sufficiency of the evidence to convict Dubin of the "use" element only for plain error. *See Huntsberry*, 956 F.3d at 282 ("When a sufficiency challenge is not preserved, we review for plain error."); *Herrera*, 313 F.3d at 884 ("Where, as here, a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.").

More than six months *after* the verdict, Dubin belatedly objected to the "use" element. The Federal Rules make clear that this objection was untimely. *See* FED. R. CRIM. P. 29(c)(1). The district court's conflicted musings about the "use" element—invoked by the dissenters, *see post*, at 33 (Elrod, J., dissenting)—were thus irrelevant because they did not occur until Dubin's sentencing, long after he had waived his objection. *Cf. Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021) ("Courts should not selectively address forfeited arguments just because they have sympathy for a particular litigant.").

Judge Elrod responds that Dubin's untimeliness under Rule 29 does not matter because the district court eventually addressed the "use" argument. *See post*, at 35 n.3 (Elrod, J., dissenting). But Judge Elrod cites just one case involving a Rule 29 motion—and there we *did* apply plain-error review. *See United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009). Judge Elrod claims we only did so because the district court did not rule on the merits of the defendant's untimely motion. But we announced no such rule, and we cited authorities that affirmatively preclude such an approach. *See ibid.* ("It is well-established that the failure to timely and properly raise these contentions before the district court . . . *precludes us from reviewing them unless they constitute plain error*." (emphasis added) (quoting *United States v. Ortega–Chavez*, 682 F.2d 1086, 1088 (5th Cir. 1982)).

Judge Elrod does not explain why her other three cases—which do not involve criminal defendants and the strictures of Rule 29—have any relevance here. To the contrary, her reliance on civil cases is particularly inapposite because Judge Elrod fails to consider the distinct operation of the jury system in criminal cases. Her theory would allow criminal defendants to argue one legal theory to the jury, lose on that theory, wait six months, and argue a completely new theory after dismissal of the jury. By that point, the defendant has nothing to lose; the jury already convicted him. And he has everything to gain; if the court accepts his new legal argument, he's protected by the Double Jeopardy Clause. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). This creates precisely the sort of incentives for sandbagging that our system is designed to prevent. *See Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (overruling a precedent that incentivized "sandbagging"); *Lucio v. Lumpkin*, 987 F.3d 451, 474–76 (5th Cir.) (en banc) (plurality opinion) (applying the anti-sandbagging principle), *cert. denied*, 142 S. Ct. 404 (2021).

Finally, Judge Elrod asserts that "if anyone is sandbagging, it is the [G]overnment," and she says that the Government forfeited plain-error review by belatedly raising it. *Post*, at 35 n.3 (Elrod, J., dissenting). But again, the law says the precise opposite. As we've emphasized time and time and time again: "A party cannot waive, concede, or abandon the applicable standard of review," so the Government's position on the matter "is irrelevant." *United States v. Vasquez*, 899 F.3d 363, 380 (5th Cir. 2018) (quotation omitted); *see also id.* at 381 (reviewing only for plain error, notwithstanding the Government's concession that *de novo* review should

apply).[1] It was Dubin's job—and his alone—to preserve his "use" argument under Rule 29. His failure to do that means our review is only for plain error.

II.

The second relevant Rule is Federal Rule of Criminal Procedure 30. It gives defendants the opportunity to object to the court's jury instructions. FED. R. CRIM. P. 30(d). And "[f]ailure to object in accordance with [Rule 30] precludes appellate review," except for plain error. *Ibid.* Thus, we have held that when a defendant "failed to object to [a jury] instruction, which is directly adverse to the argument he now advances on appeal, we review only for plain error." *United States v. McRae*, 702 F.3d 806, 834 (5th Cir. 2012). This principle prevents defendants from bringing a sufficiency-of-the-

[1] *See also, e.g.*, *United States v. Gaspar-Felipe*, 4 F.4th 330, 341 n.9 (5th Cir. 2021); *United States v. Quinn*, 826 F. App'x 337, 339 (5th Cir. 2020); *United States v. Griffin*, 780 F. App'x 103 (5th Cir. 2019) (per curiam); *United States v. Johnson*, 760 F. App'x 261, 265 (5th Cir. 2019) (per curiam); *United States v. Valle-Ramirez*, 908 F.3d 981, 985 n.5 (5th Cir. 2018); *United States v. Warren*, 728 F. App'x 249, 254 n.4 (5th Cir. 2018) (per curiam); *United States v. Escobar*, 866 F.3d 333, 339 n.13 (5th Cir. 2017) (per curiam); *United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir. 2016); *United States v. Torres-Perez*, 777 F.3d 764, 766 (5th Cir. 2015); *United States v. Schofield*, 802 F.3d 722, 725 (5th Cir. 2015); *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015); *United States v. Whitworth*, 602 F. App'x 208, 208 (5th Cir. 2015) (per curiam); *Pisharodi v. Columbia Valley Healthcare Sys., LP*, 615 F. App'x 225, 225 n.2 (5th Cir. 2015) (per curiam); *United States v. Herrera-Alvarez*, 753 F.3d 132, 135 (5th Cir. 2014); *United States v. Sanchez*, 458 F. App'x 374, 377 (5th Cir. 2012); *United States v. Wilson*, 453 F. App'x 498, 511 n.5 (5th Cir. 2011) (per curiam); *Sykes v. Public Storage Inc.*, 425 F. App'x 359, 363 (5th Cir. 2011) (per curiam); *United States v. McCall*, 419 F. App'x 454, 456 (5th Cir. 2011) (per curiam); *United States v. Breland*, 366 F. App'x 548, 551 (5th Cir. 2010) (per curiam); *United States v. Rodriguez*, 602 F.3d 346, 351 (5th Cir. 2010); *United States v. Bueno*, 585 F.3d 847, 849 n.2 (5th Cir. 2009); *Mushtaq v. Holder*, 583 F.3d 875, 876 (5th Cir. 2009); *United States v. Molina*, 174 F. App'x 812, 816 (5th Cir. 2006) (per curiam); *United States v. Civil*, 174 F. App'x 221, 222 n.3 (5th Cir. 2006) (per curiam); *United States v. Vasquez-Castaneda*, 185 F. App'x 351, 352 (5th Cir. 2006) (per curiam); *United States v. Davis*, 380 F.3d 821, 827 (5th Cir. 2004); *United States v. Milton*, 147 F.3d 414, 420 n.* (5th Cir. 1998); *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 782 (5th Cir. 1998); *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc).

evidence challenge premised on an interpretation of the relevant statute that contradicts an unopposed jury instruction. *See id.* at 835 (holding a defendant may not argue "that there was insufficient evidence to convict [the defendant] under the jury instruction that the court should have given, despite his acquiescence to the instruction the court actually gave" (quotation omitted)).

In this case, Dubin acquiesced to the following jury instruction: "To be found guilty of this crime, the defendant does not have to actually steal a means of identification. Rather, the statute criminalizes a situation in which a defendant gains access to a person's identifying information lawfully but then, proceeds to use that information unlawfully and in excess of that person's permission." This unopposed jury instruction is "directly adverse to the argument [Dubin] now advances on appeal"— namely, that he did not "use" Patient L's identity because he lawfully acquired her identifying information. *Id.* at 834. Because Dubin did not challenge the correctness of the court's jury instruction regarding the meaning of "use," he cannot now advance an argument contradicting that instruction unless the instruction was plain error.[2]

[2] The Chief Judge's thorough concurring opinion highlights the need for *contemporaneous* objections to the content of jury instructions in the district court. As the Chief Judge details at length, each dissent proposes a different limiting principle that it would tack onto § 1028A(a)(1)'s text. *See ante*, at 7–9, 12–13 (Owen, C.J., concurring). But neither of these limiting principles were argued to the jury—or to the district court as it formulated the jury instructions. Under Rule 30, such arguments must be proposed through contemporaneous objections, so that the district court may sort through any interpretive disputes regarding the charged offense and properly instruct the triers of fact as to the meaning of each element.

III.

Under the applicable plain-error standard, Dubin cannot come close to winning relief. Plain-error review is required by Federal Rule of Criminal Procedure 52(b). And it involves four steps:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—*discretion* which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Puckett v. United States, 556 U.S. 129, 135 (2009) (quotation omitted). It's Dubin's obligation to satisfy all four prongs of this standard, which "is difficult, as it should be." *Ibid.* (quotation omitted). Because Rule 52(b) is phrased in discretionary terms, we have discretion in how to apply the four-part test—including whether to grant relief where all four parts are met. *See United States v. Olano*, 507 U.S. 725, 735–37 (1993); *see also* FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights *may* be considered even though it was not brought to the court's attention." (emphasis added)).

Prong two is most important here. An error is "plain" only if it's "'clear' or 'obvious.'" *Olano*, 507 U.S. at 734. "[A] court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear *under current law*." *Ibid.* (emphasis added). And "[a]n error is not plain under current law if a defendant's theory requires the extension of precedent," or if "[w]e have

not directly addressed" the defendant's theory in the past. *United States v. Lucas*, 849 F.3d 638, 645 (5th Cir. 2017) (quotation omitted).

All members of our court agree that Dubin cannot show plain error because his interpretation of "use" in § 1028A is not plain, clear, or obvious under current law. One of the dissents describes the statutory word "use" as a non-obvious "chameleon-like word." *Post*, at 34 (Elrod, J., dissenting). The other dissenting opinion recognizes that both parties have strong textual arguments for their interpretation of "use." *Post*, at 42–43 (Costa, J., dissenting); *cf. Bailey v. United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable to it."). In fact, a major reason we took this case *en banc* is because the parties assured us—wrongly, as it turns out—that the "use" question was properly before us, and because the parties agreed—correctly, as it turns out—that the answer to that question was *not* obvious. *See, e.g.*, Blue Br. at 28–29 (arguing the standard of review is *de novo*); Red Br. at 24 (same). And whatever § 1028A might mean at some future point, there is no debate that today, under current law, it means that Dubin is plainly wrong not plainly right. *See United States v. Mahmood*, 820 F.3d 177, 187–88 (5th Cir. 2016) (foreclosing Dubin's interpretation of "use"); *United States v. Dubin*, 982 F.3d 318, 330 (5th Cir. 2020) (Elrod, J., concurring) (conceding *Mahmood* controls this case).

* * *

In some future case, where the "use" question is properly preserved, it might be wise for our court to reconsider our interpretation. In the posture of this case, however, the majority is quite right to refuse the dissents' efforts to enter the fray today. Our refusal reaffirms the centrality of the Federal Rules and the consequences of ignoring them.

JENNIFER WALKER ELROD, *Circuit Judge*, joined by JONES, COSTA, WILLETT, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting:[1]

The panel majority opinion adopted an interpretation of the Aggravated Identity Theft statute as expansive as it was erroneous. I had hoped that we took the case *en banc* to fix that mistake but, regrettably, the court today chooses to remain both wrong and out of step with our sister circuits. Moreover, as Judge Costa explains in his superb dissent, the court fails to heed the "unmistakable" message of the Supreme Court—that we ought "not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *Post* at 41 (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)). I respectfully dissent.

I.

David Dubin worked at his father's psychological services company. The company provided mental health testing to youths at an emergency shelter. The services generally consisted of a clinical interview, testing, assessments, and a report containing findings and recommendations.

As pertinent here, a licensed psychological associate working for the Dubins conducted psychological testing of Patient L but did not do a clinical interview. After the testing, the Dubins realized that Patient L had already been evaluated within the past year. Medicaid will not reimburse for more than one of these evaluations per year, so Dubin told the psychological associate to wait until the one-year mark had passed before conducting the clinical interview and writing the report about Patient L. The one-year mark was May 29th, but Patient L had been discharged and the post-evaluation

[1] Judge Jones joins in all but the second paragraph of n.3 of this opinion. I join Judge Costa's dissent in full. Contrary to Chief Judge Owen's assertion, I do not read the statute as *requiring* that the defendant stole the identification.

report and clinical interview were never finished. On May 31st, Dubin directed an employee to bill Medicaid for three hours of psychological testing of Patient L by a psychologist—not a psychological associate—as having been provided on May 30th.

A jury convicted Dubin and his father of various healthcare fraud and related offenses. As to Patient L, Dubin was convicted of healthcare fraud under 18 U.S.C. §§ 1347 and 1349 because he fraudulently billed Medicaid for services on May 30th (when no services were performed on that day) and for services conducted by a licensed psychologist (when a psychological associate evaluated Patient L).

Dubin was also convicted under 18 U.S.C. § 1028A, the Aggravated Identity Theft statute, for his billing of services provided to Patient L. The statute provides: "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1).

At trial, the government argued that Dubin's "committ[ing] this healthcare fraud offense[] obviously" meant that he was "also guilty of" aggravated identity theft. The government argued that aggravated identity theft is an "automatic" additional offense whenever someone commits provider-payment healthcare fraud. In the district court, Dubin moved for judgment of acquittal on his aggravated-identity-theft conviction. The district court judge reluctantly denied the motion, thinking he was bound by an unpublished decision of our court, and stated that he "hope[d] [he] get[s] reversed on the aggravated identity theft count." In the district court's view, the Dubins were certainly running a criminal enterprise based on "how they were billing" but "it wasn't aggravated identity theft."

A panel of this court affirmed Dubin's automatic identity-theft conviction, holding that he "used" Patient L's means of identification under § 1028A. Puzzlingly, the panel majority's reasoning was based entirely on dictionary definitions of the word "use." *See United States v. Dubin*, 982 F.3d 318, 325 (5th Cir. 2020), *reh'g en banc granted*, *opinion vacated*, 989 F.3d 1068 (5th Cir. 2021).[2] Yet, this is not the way that we are to interpret that chameleon-like word, "use." *See Bailey v. United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable to it. . . . 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended.").

II.

The only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A. Dubin did not commit identity theft. His fraud concerned the exact contours of the services Patient L received, but he did not misrepresent that Patient L did indeed receive services. Patient L's not receiving the full array of psychological services does not erase the fact that Patient L—and not someone else—received services. Dubin did not lie about Patient L's identity or make any misrepresentations involving Patient L's identity. Nor did anyone else pretend to be Patient L. Any forgery alleged in this case relates only to the nature of the services, not to the patient's identity. And, as Judge Costa

[2] Although dictionaries certainly can be helpful, we must remember that a word can be defined "inadequately—without accounting for its semantic nuances as they may shift from context to context." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 422 (2013).

explains in his dissent, Dubin had permission to use Patient L's means of identification on this Medicaid bill. What Dubin did is not identity theft.[3]

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[3] Judge Oldham's concurrence claims that Dubin forfeited his "use" argument and thus concludes we should review for plain error. But the panel that first considered this appeal applied *de novo* review, with no judge or party even suggesting that Dubin forfeited the issue. As the government itself acknowledges, Dubin *did* raise the issue in the district court, albeit in his motion for reconsideration. Though the issue could have been raised earlier (i.e., in his Rule 29 motion), the district court considered and rejected the argument on the merits. *Cf. United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009) ("If an issue is raised for the first time on an untimely motion before the district court and the district court does *not* consider it, the issue is not preserved for appeal." (emphasis added)); *see also United States v. Hassan*, 83 F.3d 693, 696–97 (5th Cir. 1996) (government's argument was preserved, even though it was late, because the district court ultimately rejected the argument on the merits). We have applied *de novo* review in similar situations. *See Am. Elec. Power Co., Inc. v. Affiliated FM Ins. Co.*, 556 F.3d 282, 287 (5th Cir. 2009); *Quest Med., Inc. v. Apprill*, 90 F.3d 1080, 1087 (5th Cir. 1996) ("[A]n issue first presented to the district court in a post-trial brief is properly raised below when the district court exercises its discretion to consider the issue."). Because the district court considered and rejected Dubin's "use" claim on the merits, *de novo* review applies.

Judge Oldham's opinion dubs Dubin a sandbagger and contends that we are "selectively address[ing]" forfeiture out of "sympathy for" Dubin. But if anyone is sandbagging, it is the government. Even if the district court's ruling on the issue was not enough to trigger *de novo* review, the government did not say a word about forfeiture until its *en banc* response brief. *Cf. Eberhart v. United States*, 546 U.S. 12, 19 (2005) (the government forfeited its defense of untimeliness to a tardy new-trial motion). And it does so now only half-heartedly, suggesting that the "use" argument *may* have been forfeited and thus plain-error review *might* apply. The United States, being "the richest, most powerful, and best represented litigant to appear before us," does not need us to make its arguments more forcefully than it does for itself. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (citation and quotations omitted); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). In other words, we need not feel sympathy for the government. *Cf. Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021) ("It would surely be unacceptable, for example, if courts granted motions for extension of deadlines only for prosecutors and not for criminal defendants. Addressing forfeited issues in a biased manner is no different."). Judge Oldham's concurrence also contends that we (and apparently the panel opinion) are allowing the parties to manipulate the standard of review by applying *de novo* review. That misunderstands what occurred here. Simply put, the *en banc* majority

Moreover, Dubin's conviction would be vacated under the reasoning of the overwhelming majority of published opinions in our sister circuits. In *United States v. Spears*, the *en banc* Seventh Circuit declined a maximalist interpretation of § 1028A—similar to what the majority adopts here—that would have given the statute "a surprising scope." 729 F.3d 753, 756 (7th Cir. 2013) (*en banc*) (Easterbrook, J.). In *Spears*, the defendant, Spears, made a counterfeit handgun permit for Payne using Payne's real name and birthdate. *Id.* at 754. Payne took the fake permit and unsuccessfully attempted to buy a gun. *Id.* Spears was convicted under § 1028A. *Id.* On appeal, Spears argued that he did not "'transfer[]' anything 'to another person' because Payne used her own name and birthdate." *Id.* at 755 (alteration in original). After all, "[f]rom Payne's perspective, the card she received did not pertain to 'another'; it had her own identifying details." *Id.* at 755–56. Writing for the *en banc* court, Judge Easterbrook agreed with Spears: "Providing a client with a bogus credential containing the client's own information is identity *fraud* but not identity *theft*; no one's identity has been stolen or misappropriated." *Id.* at 756.

Ninth Circuit precedent, likewise, would dictate that Dubin's conviction be vacated. *See United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) (defendant, like Dubin, did not steal or use patient's identity and thus did not violate § 1028A); *United States v. Gagarin*, 950 F.3d 596, 603–04 (9th Cir. 2020) (defendant, unlike Dubin, attempted to pass herself off as

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opinion takes no position on the matter, and we think the panel opinion properly applied *de novo* review—not because the parties tell us so, but because we have deduced that from the proceedings.

the victim and used forgery and impersonation, thus violating § 1028A), *cert. denied*, 141 S. Ct. 2729 (2021).

So too would Eleventh Circuit precedent require vacating Dubin's conviction. *See United States v. Munksgard*, 913 F.3d 1327, 1334 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 939 (2020) (defendant, unlike Dubin, forged the victim's identity and misrepresented the victim's actions, thereby violating § 1028A).

Take your pick of the Sixth Circuit's cases. Applying the reasoning of any one of them would result in Dubin's conviction being vacated. Dubin's conviction would be vacated under the Sixth Circuit's decision in *White* because, unlike the defendant there, Dubin did not fraudulently represent Patient L's identity nor did he fraudulently purport to act on Patient L's behalf. Unlike the defendant in *White*, Dubin "lied about [his] own actions," but not about Patient L's actions. *See United States v. White*, 846 F.3d 170, 177 (6th Cir. 2017). Dubin's conviction would also be vacated under the Sixth Circuit's decision in *Medlock* because he lied only about the nature of the services provided. *United States v. Medlock*, 792 F.3d 700, 707 (6th Cir. 2015) ("[The Medlocks] misrepresented *how and why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so.").

Dubin's conviction would surely be vacated on Judge Sutton's reasoning in *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018). In that case, favorably citing *Medlock*, the court held that the defendant had violated § 1028A because he did more than "inflate" the price of services. *Id.* at 629.[4]

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[4] As Judge Sutton, writing for the Sixth Circuit, explained:

> Had Michael, in the course of dispensing drugs to a patient under a doctor's prescription, only *inflated* the amount of drugs he dispensed, the means of identification of the doctor and patient would not have facilitated the fraud. But that is not what he did. He used [the victims'] identifying

Unlike the defendant in *Michael*, Dubin merely "inflated" the price of the services provided to Patient L. *See also* Panel Oral Argument at 11:29–12:38 (Dubin's counsel explaining that *Michael* compels reversal here because *Michael* held that inflating the bill does not qualify as "use" under § 1028A and all Dubin did here was inflate the Medicaid bill).

Add the First Circuit to the chorus. In *Berroa*, that court held that "use" in § 1028A "require[s] that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." *United States v. Berroa*, 856 F.3d 141, 156 (1st Cir. 2017). Under this rule, Dubin's conviction would be vacated because he did not "pass him[self] . . . off [as Patient L or] another person or purport to take some other action on [Patient L's or another person's] behalf." *Id.*

Here, the result should be the same as that reached by our sister circuits. The district court recognized as much when it hoped that it would be reversed. The government also recognized the true nature of the case when it said at oral argument: "The fraud here is that the hours that were charged were billed as being performed as a licensed psychologist, when it was performed by a licensed psychological associate . . . ." Panel Oral Argument at 17:43–17:55. Dubin lied only about the nature—the when and how—of the services provided to Patient L. That is not identity theft.

III.

Dubin's conviction should be vacated because he had permission to use Patient L's means of identification on this Medicaid bill and did not

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> information to fashion a fraudulent submission *out of whole cloth*, making the misuse of these means of identification "during and in relation to"—indeed integral to—the predicate act of healthcare fraud.

Michael, 882 F.3d at 629 (emphasis added).

commit identity theft. Indeed, it would be vacated under the reasoning of the vast majority of published opinions in our sister circuits. Against that unison, the court today strikes a discordant note. I respectfully dissent.

HAYNES, *Circuit Judge*, dissenting:

I respectfully dissent from the en banc court's judgment in this case for the reasons set forth in Sections II and III of Judge Elrod's dissenting opinion.

GREGG COSTA, *Circuit Judge*, joined by JONES, ELROD, WILLETT, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting:

The Supreme Court's message is unmistakable: Courts should not assign federal criminal statutes a "breathtaking" scope when a narrower reading is reasonable. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). In the last decade, it has become nearly an annual event for the Court to give this instruction. *See id.* at 1661 (avoiding reading Computer Fraud and Abuse Act in a way that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity"); *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (avoiding reading federal fraud statutes to "criminalize all [] conduct" that involves "deception, corruption, [or] abuse of power"); *Marinello v. United States*, 138 S. Ct. 1101, 1107, 1110 (2018) (looking to "broader statutory context" of tax obstruction law to reject reading that would "transform every violation of the Tax Code into [a felony] obstruction charge"); *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (rejecting "expansive interpretation" of bribery law and refusing to construe it "on the assumption that the Government will 'use it responsibly'" (citation omitted)); *Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (looking to obstruction statute's caption and context to avoid reading it as an "across-the-board ban on the destruction of physical evidence of every kind"); *Bond v. United States*, 572 U.S. 844, 863 (2014) (rejecting government's interpretation of chemical weapons ban when it would transform statute "into a massive federal anti-poisoning regime that reaches the simplest of assaults"); *see also Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (adopting a "reasonable limiting construction" of honest-services wire fraud statute and "resist[ing] the Government's less constrained construction absent Congress' clear instruction otherwise"); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (exercising "restraint" in interpreting obstruction statute to

avoid criminalizing "innocuous" acts of persuasion). This tradition of "exercis[ing] restraint in assessing the reach of a federal criminal statute" comes "both out of deference to the prerogatives of Congress, . . . and out of concern that 'a fair warning should be given, . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (citations omitted).

Despite the frequency and firmness of this instruction from above, the majority fails to heed it. In adopting the government's broad reading of the statute—something the Supreme Court has not done once this century for a white collar/regulatory criminal statute—the majority allows every single act of provider-payment health care fraud involving a real patient to also count as aggravated identity theft. After all, any payment form submitted to Medicare, Medicaid, or an insurer needs identifying information for the patient. This means that section 1028A's mandatory two-year sentence can be tacked on to each and every act of such fraud when the listed patient is a real person. *See* 18 U.S.C. § 1028A(a)(1), (b).

To be sure, a textual case can be made for such an expansive reading of the aggravated-identity-theft law. But strong textual support existed for the government's broad interpretations of other criminal laws—interpretations the Supreme Court did not buy. *See, e.g.*, *Marinello*, 138 S. Ct. at 1112–13 (Thomas, J., dissenting) (arguing that the majority's approach went against a "straightforward reading" of the statute); *Yates*, 574 U.S. at 552–53 (Kagan, J., dissenting) ("This case raises the question whether the term 'tangible object' means the same thing in [this statute] as it means in everyday language—any object capable of being touched. The answer should be easy: Yes."); *see also* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEXAS L. REV. 225, 264 (2018) ("The authors of the *Skilling*, *Yates*, and *McDonnell* opinions narrowed key statutory terms—sometimes beyond the

point of recognition—to keep a criminal statute from diverging too far from its intended prototype."). Because those sweeping interpretations were not the only plausible reading of the statute, the Supreme Court adopted also-plausible narrower interpretations.

As JUDGE ELROD's dissent chronicles, such reasonable, alternative interpretations exist that would limit section 1028A to what ordinary people understand identity theft to be—the unauthorized use of someone's identity. The Sixth Circuit reads "uses" in tandem with "during and in relation to" to hold that an aggravated-identity-theft conviction requires the government to show that a defendant "used the means of identification to further or facilitate the health care fraud." *United States v. Michael*, 882 F.3d 624, 628 (6th Cir. 2018). If a defendant's use of another's name is only incidental to the fraud, there is no identity theft. *Id.* at 629. But if the use of the name is "integral" to the fraud, there is identity theft. *Id.*

My concern with this approach is that a facilitation standard, with its incidental/integral dividing line, lacks clear lines and a limiting principle. The Sixth Circuit has said that the use of a patient's identifying information in a prescription that increases the amount of an otherwise validly prescribed drug is incidental and thus not a crime. *Id.* On the other hand, use of a patient's identifying information in a prescription that is invented out of whole cloth is integral to the fraud and thus a crime. *Id.* But why is that so? In both cases, use of the identifying information facilitates the fraud in that the fraud could not have occurred without it. *Facilitate*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 415 (10th ed. 2001) (defining facilitate, in part, as "[to] help bring about"). In both cases, use of the identifying information seems integral to the fraud because it is a necessary part of the fraud. *Integral*, *id.* at 606 (defining integral, in part, as "essential to completeness"). The facilitation requirement thus does not appear to preclude identity theft liability in overbilling cases. It certainly does not

provide helpful guidance to juries that would have to figure out the difference between an incidental use of identifying information and an integral one. Worse yet, it does not provide notice to the public of what the law prohibits. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (explaining that criminal "statutes must give people 'of common intelligence' fair notice of what the law demands of them" (citation omitted)).

The meaningful difference for identity theft purposes between an overbilling case and a made-up bill case is that in only the former did the patient consent to use of identifying information for the transaction. A Seventh Circuit decision lends support for a reading of the statute that accords with this commonsense notion that identity theft means using another's identity without consent. *See United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013) (en banc). *Spears* addressed a section 1028A charge against a defendant who made a counterfeit handgun permit for someone else, with permission to use the permitee's name and birthdate. *Id.* at 754. The government argued that Spears committed aggravated identity theft because he used the "means of identification" of "another person" on the permit in the course of committing a predicate felony (making false statements in connection with acquisition of a firearm). *Id.* at 755 (quoting 18 U.S.C. § 1028A). The en banc court disagreed, observing that the government's reading of "another person" to include any "person other than the defendant," would give section 1028A "a surprising scope" as it would apply even when the supposed identity theft victim granted full permission to use the identity. *Id.* at 756.

Judge Easterbrook's opinion followed recent Supreme Court guidance in looking to the statutory language and context to discern a reasonable limit on the reach of aggravated identity theft. Because section 1028A "deals with identity *theft*," the court reasoned, the law's "another person" requirement is best understood as a "person who did not consent to

the information's use" rather than any "person other than the defendant." *Id.* The statute's "without lawful authority" language may provide additional support for reading the statute to apply only when "another person's" identity was used without permission. 18 U.S.C. § 1028A.

Reading "another person" as applying only to people who did not consent to disclosure of identifying information prevents every fraud case from becoming an identity theft case. It distinguishes overbilling cases, in which a person knows her identity will be used for that transaction (no aggravated identity theft), from made-up billing cases, in which the person is unaware her identity is being used as she didn't receive any service (aggravated identity theft). This dividing line captures how most section 1028A cases have come out in other circuits.[1] But it does so with a principled interpretation that turns on consent rather than blurry causation inquiries.[2]

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[1] *See, e.g.*, *United States v. Munksgard*, 913 F.3d 1327, 1330, 1336 (11th Cir. 2019) (using another's name without permission on loan application violated 1028A); *United States v. Hong*, 938 F.3d 1040, 1050–51 (9th Cir. 2019) (misrepresenting massage services provided to patients as Medicare-eligible physical therapy did not violate 1028A); *Michael*, 882 F.3d at 625 (pharmacist submitting insurance reimbursement using names of doctor and patient without permission violated 1028A); *United States v. Berroa*, 856 F.3d 141, 155–57 (1st Cir. 2017) (doctors who fraudulently obtained licenses and issued prescriptions using patients' names with patients' permission did not violate 1028A); *United States v. Medlock*, 792 F.3d 700, 708 (6th Cir. 2015) (claiming Medicare beneficiaries were transported by stretcher when no stretchers were used during transport did not violate 1028A). *But cf. United States v. Osuna-Alvarez*, 788 F.3d 1183, 1186 (9th Cir. 2015) (using twin brother's passport at border crossing with brother's permission violated 1028A).

[2] Note that this interpretation does not require that the identity be stolen, just that it be used without consent. Indeed, nearby statutes include a "stolen" requirement while section 1028A does not. *See* 18 U.S.C. § 1028(a)(2) (criminalizing the transfer of an "identification document . . . knowing that such document . . . was stolen"); *id.* § 1028(a)(6) (criminalizing the knowing possession of a document that appears to be identification of the United States "which is stolen").

This means that section 1028A applies if a defendant initially has consent to use identifying information for a certain purpose but then later engages in a separate transaction without permission. It thus is a crime if a waiter who is given a customer's credit card to

Reading section 1028A to require a lack of consent would mean no aggravated identity theft happened in this case. Indeed, who would be the victim of that crime? Patient L consented to the use of her name for this Medicaid claim. Although Dubin falsified the claim by misrepresenting the services performed, Patient L understood that her identifying information would be used on the paperwork. Fraud? Yes. Identity theft? No.

* * *

Identity theft is one of the scourges of our high-tech society. The aggravated identity theft law recognizes that when fraud occurs in connection with identity theft, the financial loss targeted by fraud laws is not the only harm. Untold inconvenience, perpetual concern about another privacy breach, and loss of trust result when a person's identity is used without permission. Section 1028A targets such identity theft. Fairly read, it does not criminalize the use of another's identity when that person consented to the use.

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pay the restaurant bill later uses that credit card number to buy products on the internet. Every circuit to consider the question agrees that section 1028A does not require that the initial receipt of the identifying information be unlawful. *See, e.g.*, *United States v. Mahmood*, 820 F.3d 177 (5th Cir. 2016) (holding that "§ 1028A unambiguously criminalizes a wider array of conduct than actual theft"); *United States v. Lumbard*, 706 F.3d 716, 721 (6th Cir. 2013) (citing seven circuits decisions all concluding that section 1028A does not require an initial act of stealing the identity).

Although *Mahmood* correctly rejected an actual theft requirement, it was a case in which the doctor had upcoded treatments that patients had actually received. 820 F.3d at 182–84 Because the *Mahmood* patients agreed to use of their identifying information for the Medicare bills—they were just unaware that those bills were going to include codes for more expensive services than they received—it is an overbilling case. I thus now believe that Mahmood should not have had an aggravated identify theft conviction added to his fraud convictions.