

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID FOX DUBIN, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-10  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 106  
Place: Washington, D.C.  
Date: February 27, 2023

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DAVID FOX DUBIN, )

Petitioner, )

v. ) No. 22-10

UNITED STATES, )

Respondent. )

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Washington, D.C.

Monday, February 27, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQUIRE, Stanford, California; on behalf of the Petitioner.

VIVEK SURI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-10, Dubin versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit's decision here stretches the aggravated identity theft statute beyond its breaking point. Overbilling Medicaid by \$101 may provide fodder for a simple healthcare fraud prosecution, but, as even the concurring judges below recognized, it does not meet any ordinary understanding of the term "identity theft."

Nor, for two independent reasons, does Mr. Dubin's conduct fall within the terms of Section 1028A. First, he did not use Patient L's name in relation to his healthcare fraud offense. That statutory element requires that the use of the name be instrumental, not merely incidental, to the fraud.

1           In a fraud case, another way to think  
2 about that is it requires the name to be the  
3 "who" in the fraud, that is, misrepresenting who  
4 received services, not merely how or when those  
5 services were received. And Mr. Dubin's conduct  
6 falls only in the latter camp.

7           Second, Mr. Dubin did not use Patient  
8 L's identity without lawful authority. He had  
9 permission to use Patient L's identity to bill  
10 Medicaid for psychological services, and that's  
11 precisely what he did.

12           A contextual perspective confirms this  
13 analysis. The federal fraud statute that's the  
14 predicate here, like the other federal fraud  
15 statutes, covers an enormously broad swath of  
16 conduct, and, therefore, Congress has made  
17 prison time discretionary in those instances.

18           And as the Federal Defenders' brief  
19 explains, the median sentence in a fraud case in  
20 this country is 12 months. Twenty-five percent  
21 of offenders receive only probation. The --  
22 this statute, by contrast, requires a two-year  
23 mandatory minimum.

24           So all indications are what Congress  
25 was doing is targeting a particularly egregious

1 form of fraud, use of somebody's name through  
2 stealing it, misappropriating it, or -- or  
3 impersonating the person, identity theft.

4 But, if the government is right and if  
5 the Fifth Circuit is right about how broad the  
6 statute is, what it would do is it would  
7 transform fraud prosecutions to having every one  
8 of them be essentially an aggravated identity  
9 theft prosecution too, and that would thwart  
10 Congress's careful design.

11 The Court should reverse, and I'm  
12 happy to answer any questions the Court has.

13 JUSTICE THOMAS: Mr. Fisher, you said  
14 that -- that Mr. Dubin was authorized to use the  
15 -- Patient L's identity. Was Dubin authorized  
16 to use Patient -- Patient L's identity for this  
17 particular transaction?

18 MR. FISHER: Well, I think the best I  
19 can answer is yes, he was in the sense that he  
20 was authorized to use Patient L's identity for  
21 billing Medicaid. That was the name that was at  
22 the center --

23 JUSTICE THOMAS: Well, I understand --  
24 that's a little broader. Well, you could say  
25 that if you drop a car off at a valet, your

1 Porsche -- I don't have one -- but, if you had a  
2 Porsche, you'd be concerned about the use of it,  
3 and the valet is authorized to drive it  
4 generally but not to drive it around the city,  
5 but to park it.

6 So I don't see how this is any  
7 different from that. He's authorized to bill at  
8 the appropriate charges, but it's not a general  
9 authorization.

10 MR. FISHER: Well, I think, Justice  
11 Thomas, the only way to make sense of that  
12 element in the statute is to do it more  
13 generally, and I think there's a couple of  
14 reasons why that is so.

15 And, first, let me just start with the  
16 record in this case. The only thing the  
17 government ever argued in this case was that the  
18 unauthorized use was the fact that Mr. Dubin  
19 committed a crime with the name. That's at  
20 Joint Appendix page 31 and 32, and it's also at  
21 the Pet. App. 66a and 67a. So the Fifth  
22 Circuit's theory and the government's theory was  
23 simply using the name to commit a crime is what  
24 makes it unauthorized use.

25 And so, when you turn to the statute,

1 that cannot be right for two reasons. One is  
2 because the statute already requires a  
3 violation. That's the predicate crime. And  
4 this would just make it superfluous.

5 And, second of all, remember, just as  
6 a matter of grammar, lawful authorized --  
7 "lawful" modifies use, not -- I'm sorry,  
8 "lawful" modifies "authority," not "use."

9 And so what the government would do  
10 and I think, with all due respect, what your  
11 hypothetical would do would ask whether the --  
12 whether the item was used lawfully, not whether  
13 the person had authority in a general sense.

14 And I think one other analogy -- one  
15 other analogy that -- that we give the Court in  
16 our brief is burglary law, which is a common  
17 criminal law thing, where you don't ask whether  
18 the person had authority to enter the building  
19 to commit a crime, because nobody has that kind  
20 of authority. You ask whether they had general  
21 authority to enter the building. We think  
22 that's what the element is doing in the statute.

23 JUSTICE JACKSON: But how general are  
24 you -- you know, is your analysis? I mean, I --  
25 you use a reference to a hypo about a waiter,



1 and I thought that was very interesting and  
2 maybe illuminating in this regard.

3 So, you know, I give the waiter my  
4 credit card, and rather than charging me for the  
5 food, he charges me -- you know, he pays down  
6 his mortgage with my credit card.

7 Is that use with or without lawful  
8 authority and why?

9 MR. FISHER: I think that's probably  
10 use without lawful authority because, when you  
11 give your credit card to the waiter, you are  
12 assuming that the waiter's going to charge you  
13 for the meal or at least -- at least something  
14 from the restaurant.

15 JUSTICE JACKSON: All right. So, if  
16 he charges --

17 MR. FISHER: And so, if the waiter --

18 JUSTICE JACKSON: Yeah.

19 MR. FISHER: Sorry.

20 JUSTICE JACKSON: So go ahead.

21 Mm-hmm.

22 MR. FISHER: So, if the waiter uses it  
23 to charge something else, that's an additional  
24 transaction that is not authorized.

25 JUSTICE JACKSON: What if he charges

1 me for a bunch of things I didn't order? So it  
2 is using for the meal, right? We're not in that  
3 other scenario. But I didn't order all these  
4 things, and suddenly they're on the bill.

5 MR. FISHER: So I think that is --  
6 that is without lawful authority, but I think it  
7 might be -- you might -- it might still not be  
8 in relation to the crime because there --

9 JUSTICE JACKSON: Right, right. But  
10 I'm just -- so -- so you -- so isn't that the  
11 same thing as is being alleged here with respect  
12 to your client?

13 MR. FISHER: I don't think so because,  
14 if you look at the actual bill in this case or  
15 the Medicaid claim -- it's at the very last two  
16 pages of the Joint Appendix -- it is -- under --  
17 there's a procedure code that -- that says what  
18 you are billing for, and the procedure code is  
19 exactly the same as whether or not -- the  
20 dispute here is whether the licensed  
21 psychologist versus a licensed psychological  
22 associate provided the services.

23 JUSTICE JACKSON: But that's not what  
24 he ordered. I mean, that's not what the law --  
25 what the law orders. I don't see how that's any

1 different than the waiter putting something on  
2 the bill that was not -- you know, fraudulently,  
3 that -- that was not actually ordered.

4 MR. FISHER: Well, I think that the --  
5 the -- the mortgage example is easier. And I  
6 think that is why "without lawful authority" as  
7 -- I mean, I -- I acknowledge that it's -- that  
8 it's -- that it's challenging to figure out  
9 exactly what level of generality you're asking,  
10 but I think the best way to do it is say, did  
11 the person give authority to -- to bill for this  
12 type of service or this type of product? So --

13 JUSTICE KAGAN: So, when you --

14 MR. FISHER: -- I think, Justice --  
15 sorry.

16 JUSTICE KAGAN: Go ahead. Sorry.

17 MR. FISHER: I think, Justice Jackson,  
18 if it's just extra food on the bill, that may  
19 not be without lawful authority, but, if it's  
20 something different from the items in the  
21 restaurant, then that would be outside of the  
22 expectation of the transaction.

23 JUSTICE SOTOMAYOR: But that's not --

24 JUSTICE KAGAN: Same --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 JUSTICE KAGAN: No, go ahead.

2 JUSTICE SOTOMAYOR: That's not  
3 identity theft, meaning there's two --

4 MR. FISHER: It's still not identity  
5 theft --

6 JUSTICE SOTOMAYOR: -- there's two  
7 elements.

8 MR. FISHER: That's right.

9 JUSTICE SOTOMAYOR: And, as I  
10 understand your description of "in relation to,"  
11 you keep going back to that means that the name  
12 must be a part of what makes the predicate  
13 conduct fraudulent. And the name there isn't  
14 because the extra food isn't helping the --  
15 isn't on the who may -- who you're -- who that  
16 person is. They gave you the credit card.  
17 You're charging extra food.

18 MR. FISHER: That's right, Justice  
19 Sotomayor. I think it --

20 JUSTICE SOTOMAYOR: It's like, if I  
21 ordered a tomahawk steak and they gave me a big  
22 sirloin steak, that would be a fraud, but my  
23 name isn't used in that way, correct?

24 MR. FISHER: Right. That's right. I  
25 think it's important to keep -- these are --

1 CHIEF JUSTICE ROBERTS: Well, but --  
2 but you needed to use an actual patient's name,  
3 right? So it's not just like you got a credit  
4 card and you don't care whose it is and you're  
5 just sort of charging it. It had to be, if it's  
6 not Patient L, it had to be Patient A, B, C or  
7 whatever, because I assume they check that this  
8 is somebody covered by whatever it is, Medicare  
9 or Medicaid.

10 MR. FISHER: Well, two things, Your  
11 Honor. First of all, as a technical matter,  
12 under the Medicaid -- under the healthcare fraud  
13 statute here, there doesn't have to be any name  
14 at all, let alone a Medicaid-eligible name, on  
15 the claim to violate the statute. So, as a  
16 technical matter, I think a name is not required  
17 to violate the statute.

18 And I think this was --

19 CHIEF JUSTICE ROBERTS: There has to  
20 be --

21 MR. FISHER: -- the General's point --

22 CHIEF JUSTICE ROBERTS: Does there  
23 have to be a name not to violate the statute?

24 MR. FISHER: Pardon me?

25 CHIEF JUSTICE ROBERTS: Does there

1 have to be a name not to violate a statute? In  
2 other words, you're saying you could -- could  
3 put any name, somebody who doesn't have any  
4 coverage or any relation at all?

5 MR. FISHER: Yes, it would still be  
6 healthcare fraud if you were listing a service  
7 you didn't provide or overbilling or what -- or  
8 whatever else. So the name is not essential to  
9 commit the crime.

10 But I would add to that, even if the  
11 name were essential to commit the crime, we  
12 still think that's too low a bar for "in  
13 relation to." And, as we point out, one example  
14 is, if all you need is a but-for relationship to  
15 satisfy the "in relation to" element, then every  
16 mail or wire fraud case that has a name on an  
17 envelope or a name in the e-mail address or the  
18 phone number becomes identity theft.

19 JUSTICE SOTOMAYOR: Isn't that why --

20 MR. FISHER: Every time --

21 JUSTICE SOTOMAYOR: -- isn't that why  
22 the government disclaims that and it comes up  
23 with a theory that says a name on an envelope is  
24 something that anybody can use, correct?

25 MR. FISHER: Well, that's right,

1 Justice Sotomayor. That's what the government  
2 says, but, again, it's important to distinguish  
3 the elements, one from the other. I don't think  
4 the government disputes that the name on the  
5 envelope satisfies its but-for test under the  
6 "in relation to" element.

7 JUSTICE SOTOMAYOR: Right.

8 MR. FISHER: And so they do have a  
9 different answer for the mail fraud hypo there.  
10 On "without lawful authority," they say somebody  
11 is assumed to have authority to send an  
12 unsolicited letter, but that brings me back to  
13 the level of generality question. That answer  
14 violates their own rule.

15 Their rule is you have to have  
16 specific authorization to the exact thing you  
17 did in the manner you did it. So you would not  
18 ask whether somebody has authorization to send  
19 an unsolicited letter. You'd ask whether  
20 somebody has authorization to send a fraudulent  
21 letter, and the answer to that would be no, just  
22 like here.

23 JUSTICE JACKSON: But why isn't that  
24 right? I mean, I -- I -- I'm still struggling  
25 with the -- with the waiter hypo. Isolating

1 "without authority," I understand your point in  
2 -- "during and in relation," it probably still  
3 wouldn't be --

4 MR. FISHER: Yes.

5 JUSTICE JACKSON: -- triggering this  
6 statute, you know, because of the nature of it.  
7 Fine.

8 But, without authority, if the waiter  
9 is charging things, you've given him permission  
10 to charge it for food, you say that's enough to  
11 allow it to be with authority.

12 But I guess I don't understand why, if  
13 he's charging it for food that I didn't order  
14 fraudulently, that is with authority.

15 MR. FISHER: No, I think if I -- I may  
16 have misunderstood then if I said that. As to  
17 food on the menu, I think, if something is  
18 charged that was not ordered, you do -- or you  
19 are giving authority at least for the -- for the  
20 transaction where you give the credit card to  
21 charge the bill.

22 Now, if the next day the waiter were  
23 to charge something else after you've left the  
24 restaurant and after that charge has been done,  
25 then I think the authority is expired after you



1 leave the restaurant. But -- but maybe I  
2 misunderstood in the mix of --

3 JUSTICE JACKSON: I mean, where does  
4 that come from? I mean, that just sort of --  
5 why does it matter whether I'm still sitting in  
6 the restaurant or he does it the next day? The  
7 point is, what is the scope of my authority?  
8 When I give him the card, I am giving him the  
9 card, I think, to charge the food I ordered.

10 If he charges, you know, either the  
11 food I didn't order or something on Amazon or  
12 pays down his mortgage, aren't all of those  
13 scenarios the same with respect to the scope of  
14 my authority?

15 MR. FISHER: I don't think so, Justice  
16 Jackson. I think that, as I said to Justice  
17 Thomas, you need to say something more than  
18 you're billing for something other than exactly  
19 what was ordered because, if that's what the  
20 rule is, then it collapses into the requirement  
21 that there be a predicate fraud.

22 And the Solicitor General's rule or  
23 the Fifth Circuit's rule would then cover any  
24 misbilling anytime a cashier bills anything  
25 wrong. That cannot be right under the identity

1 theft statute.

2 JUSTICE KAGAN: Just -- just the same  
3 line of questions, but, you know, put it in a  
4 context that's closer to this one. I mean,  
5 suppose -- I think you say at one point that if  
6 he had charged for cancer services, that would  
7 fail your test, is that correct?

8 MR. FISHER: I think that would likely  
9 be outside of the scope of authority, so it  
10 would -- so it -- so it would do so --

11 JUSTICE KAGAN: Yeah, that's -- that's  
12 right. That's what I'm talking about.

13 MR. FISHER: So, if we had more facts  
14 in the record, it may be without authority. It  
15 would not be in relation to the crime for the  
16 reasons Justice Sotomayor mentioned.

17 JUSTICE KAGAN: Yeah. So it's outside  
18 the scope of authority for cancer services  
19 because the patient is only supposed to get  
20 psychological services.

21 But, you know, it's the same question  
22 as Justice Jackson is asking. Suppose now he  
23 bills for a hundred hours of sessions with a  
24 full-bore psychiatrist, right, very different  
25 both in type and in quantity of the services he

1 actually received.

2           Why should that be anything -- any  
3 less outside the authority that's been given?

4           MR. FISHER: I think the answer would  
5 be because, again, in that scenario, Mr. Dubin  
6 would have -- would have authority to bill for  
7 those kinds of services.

8           Now, Justice Kagan, to bill a hundred  
9 hours instead of three would be an egregious  
10 fraud for which he could be prosecuted and  
11 punished and perhaps severely, but it doesn't  
12 make it outside of his authority in a way that  
13 --

14           JUSTICE KAGAN: Right. I guess I --  
15 what I'm not getting, and it's the same thing  
16 that Justice Jackson is not getting, is -- is --  
17 is why you're drawing the line between, you  
18 know, here, cancer and psychological, as opposed  
19 to drawing the line between the psychological  
20 services I received and other psychological  
21 services that I never received and, indeed,  
22 didn't come close to.

23           MR. FISHER: I think the reason I'm  
24 drawing the line there with admittedly blunt  
25 textual tools that -- that Congress has given

1 us, but the reason I'm drawing the line there is  
2 because the only alternative that I think I see  
3 on the table is that literally every mischarge  
4 becomes without lawful authority.

5 JUSTICE ALITO: Mr. Fisher --

6 MR. FISHER: So it sweeps in --

7 JUSTICE ALITO: I'm sorry. Finish.

8 MR. FISHER: So -- so it would just  
9 sweep in every misbilling, a lawyer who bills  
10 4.9 hours when he worked 4.8, bills for a  
11 second-year associate when it was really a  
12 first-year, et cetera.

13 JUSTICE ALITO: Your argument has a  
14 lot of intuitive appeal because this does not  
15 seem like what one normally thinks of as  
16 identity theft, but I'm wondering if you are  
17 trying to get too much out of the caption of  
18 this -- out of -- of this provision.

19 And I know it's a little -- it's  
20 unfair to ask you about a case that we heard  
21 argument in last week, but I know you follow our  
22 cases, so I'm going to do it. If you just want  
23 to take a pass, that's fine.

24 But we heard very extensive argument  
25 on the meaning of Section 230 of the

1 Communications Act, which provides -- has been  
2 held by the lower courts to provide pretty broad  
3 immunity from civil liability for Internet  
4 service providers. But the -- the caption of  
5 that section is "Protection for Good Samaritan  
6 Blocking and Screening of Offensive Material."

7 So the -- the interpretation that the  
8 lower courts have given to that provision goes  
9 way beyond what you might think of just by  
10 looking at the caption. So, I mean, how far can  
11 we go in reading -- taking the caption as the  
12 gloss on the actual text of the statute?

13 MR. FISHER: So I don't think the tech  
14 -- I don't think the caption can trump otherwise  
15 clear language in the statute. I think the high  
16 watermark perhaps for the -- for -- for the  
17 title mattering, if I could turn the Court back  
18 to criminal law, would be the Yates case, where  
19 the Court dealt with the -- the provision in the  
20 Sarbanes-Oxley Act that said that any tangible  
21 object was covered by the statute, and what the  
22 Court said was that -- was that "records," the  
23 word in the title, limited actually the scope of  
24 that. And I think that was perhaps a quite  
25 muscular use of the title, nowhere near what

1 we're asking for here.

2 Our point here, which goes all the way  
3 back to 1805 and Chief Justice Marshall's  
4 opinion in the Fisher case, is that the title  
5 can illuminate and make you better understand  
6 what the statutory text means.

7 And so the title here, "Aggravated  
8 Identity Theft," simply gives you a lens through  
9 which you can understand these very ambiguous  
10 phrases like "without lawful authority" and "in  
11 relation to" and those sorts of things.

12 JUSTICE KAGAN: The dissent in Yates  
13 --

14 MR. FISHER: And we think --

15 JUSTICE KAGAN: -- pointed out that --  
16 pointed out that titles are always abridgements,  
17 right? I mean, you know, given the complexity  
18 of statutory language, you couldn't possibly put  
19 everything that statutory language is about into  
20 a three-word title.

21 So this seems like an unfortunate  
22 abridgement in -- in a way. It doesn't really  
23 get at the gist of what the statutory text seems  
24 to be about or it doesn't get to the scope of  
25 the apparent -- the apparent scope of the

1 statutory text, but it is just -- you know, it's  
2 -- it's Congress's attempt to abridge a  
3 complicated statutory provision.

4 MR. FISHER: Well, let me say two  
5 things, Justice Kagan. First of all, with due  
6 respect to the dissent in Yates, I'm not looking  
7 to use the title as -- as -- as aggressively as  
8 there. Really, there, the word "records" did  
9 limit the language quite directly.

10 Here, I'm just saying it gives you a  
11 lens through which to understand the words, and  
12 I think that is well in the Court's mainstream  
13 of cases, majority or dissents.

14 JUSTICE SOTOMAYOR: Mr. Fisher, when  
15 you look at the word "theft," I've gone through  
16 burglary statute -- not burglary statute -- a  
17 variety of different state statutes, and theft  
18 is always defined as transfers, possessions, or  
19 use.

20 So it's not as if the title is not in  
21 the very words of the statute. Most theft  
22 statutes are using transfer, possession, or  
23 using of someone else's property, correct?

24 MR. FISHER: I think that's right, and  
25 in Flores-Figueroa, the Court actually, with

1 this particular statute in mind, looked at the  
2 title. So there's precedent on the books from  
3 this Court as to the usefulness of this title.

4 JUSTICE SOTOMAYOR: So why do you rely  
5 on "in relation to"? I relied on -- just on the  
6 word "use." If I look at it through the lens of  
7 the words that are being used, "transfer,  
8 possession, or use," I think of a theft because  
9 that's what's generally defined as thieving, and  
10 the question is, are you lying about the person  
11 who gave you permission, and you're not,  
12 correct?

13 MR. FISHER: I think "use" gives you  
14 all you would need to get there. The Solicitor  
15 General itself recognized in this Court a couple  
16 terms ago that "use" can mean "instrumental to."  
17 That was the definition they used from the  
18 dictionary in Van Buren. And I think, when you  
19 couple "use" with the phrase "means of  
20 identification," it's a particular kind of  
21 instrumental use.

22 And I think, Justice Sotomayor, you  
23 could say that's enough, but my point in this  
24 Court is that when you couple that yet more with  
25 "in relation to," that cements the notion that



1 you need a nexus and you need something that is  
2 instrumental.

3           And, Justice Kagan, I did want to turn  
4 back to the second thing I wanted to say on your  
5 point about titles, which is that I understand  
6 that a title can be an abridgement and a  
7 shorthand, and there's courts -- the Court has  
8 cases that say every last little subsection  
9 within a provision is not going to be captured  
10 by a title, and we understand that.

11           But that's not the submission that  
12 you're being given today. The submission you're  
13 given today is that conduct by Mr. Dubin is the  
14 heartland of identity theft. Their argument is  
15 that this very conduct is exactly what Congress  
16 intended to capture. And so what they're be  
17 saying is that the title -- if you disagree with  
18 that, and maybe like Justice Alito was  
19 suggesting, that the words "identity theft"  
20 don't really cover this conduct, that they're  
21 suggesting that you should nevertheless read the  
22 statute to cover all this thing that doesn't  
23 fall under there, the -- you know, this vast  
24 swath of conduct.

25           And I think that's what I was trying

1 to say at the end of my opening, is that think  
2 about what this would mean for the fraud  
3 statutes. You know, you have a two-year  
4 mandatory minimum, which is a very, very big  
5 deal both for plea bargaining and back-end  
6 sentencing if somebody goes to trial, and that  
7 should be strong medicine for particularly  
8 egregious frauds. It's not something that ought  
9 to be there for every single case for charging.

10 JUSTICE JACKSON: And Mr. --

11 JUSTICE GORSUCH: Mr. Fisher --

12 JUSTICE JACKSON: -- Mr. Fisher, don't  
13 we know that in part because we have another  
14 statute that sort of covers this same conduct?  
15 So the reason why I thought you weren't  
16 necessarily relying on the title is because this  
17 seemed to me to be a pretty standard thing that  
18 Congress does, that in (a)(7) of -- of 1028,  
19 they're laying out the base offense --

20 MR. FISHER: Yes.

21 JUSTICE JACKSON: -- because it uses  
22 almost identical terms, right, "knowingly  
23 transfer, possess, or use," and then we have "in  
24 connection with" unlawful activity. So that's  
25 kind of like the base offense. And then, in

1 1028A, we have the aggravated offense, where  
2 they say not just "in connection with" but  
3 "during and in relation to" the particular  
4 enumerated crimes.

5           So it seemed to me to be a -- a  
6 familiar structure in penalty statutes at least,  
7 where Congress -- you have -- you -- you have  
8 one that doesn't have a mandatory minimum that's  
9 sort of the base, and then you get aggravated  
10 with this different level of, you know,  
11 egregiousness.

12           Is that -- is that close to your  
13 argument?

14           MR. FISHER: Yes and no --

15           JUSTICE JACKSON: Okay.

16           MR. FISHER: -- Justice Jackson. So,  
17 yes, in the sense I agree that (a)(7) is  
18 something of a base offense, and this is the  
19 aggravating offense, but I don't think it's so  
20 much with the "in connection to" versus "in  
21 relation to" language. You know, the Court has  
22 said in ERISA cases, for example, that those are  
23 basically interchangeable phrases.

24           The difference between (a)(7) and this  
25 statute is that you have a much -- you have a

1 tighter group of predicate offenses. In (a)(7),  
2 you have any federal offense or any -- any state  
3 offense, and there are federalism consequences  
4 for the reading that you're being urged to  
5 follow today that we lay out in our brief.

6 The narrowing effect of -- of -- of  
7 the statute you have in front of you today is  
8 the particular list of federal offenses.

9 JUSTICE JACKSON: Yeah, but it's a  
10 subset, right? It --- it has to be. There has  
11 to be a difference in terms of the egregiousness  
12 of the conduct because the -- the -- the federal  
13 offenses in this --

14 MR. FISHER: Yeah.

15 JUSTICE JACKSON: -- aggravated is a  
16 subset of the other.

17 MR. FISHER: That's right, but I just  
18 want to say that the -- the predicate offenses  
19 under 1028A are still a quite long list. And  
20 like the predicate offense here, the healthcare  
21 fraud offense, and like the mail and wire fraud  
22 statutes, there is no required jail time at all  
23 for those offenses.

24 So the aggravated identity theft  
25 kicker on top of any conviction there, predicate

1 offense conviction, is quite serious and quite a  
2 big deal. And that's my point, that Congress  
3 would have not expected --

4 JUSTICE JACKSON: And that's why you  
5 have to have more egregious conduct in order to  
6 trigger it, right?

7 MR. FISHER: That's right. And the  
8 more --

9 JUSTICE JACKSON: Yeah.

10 MR. FISHER: -- egregious conduct  
11 should be more than just incidentally using  
12 somebody's name while you're committing that  
13 crime. So my point is, if the government is  
14 right, then every provider who provides an  
15 improper bill and commits healthcare fraud is  
16 also committing identity theft. Everyone who  
17 sends a letter to somebody else or every cashier  
18 who mischarges a bill, et cetera, is also  
19 committing identity theft.

20 And I don't think Congress would have  
21 wanted to transform those discretionary  
22 sentencing regimes for those low-level frauds to  
23 all situations where somebody is facing a  
24 two-year mandatory minimum.

25 And if -- and I see my white light and

1 I wanted to circle back to one thing before the  
2 one-by-one questioning, which is we've talked a  
3 lot about "without lawful authority," and I just  
4 wanted to underscore one feature of the "in  
5 relation to" argument that I'm making here,  
6 which is the instrumental use, not merely  
7 incidental use.

8 Judge Sutton on the Sixth Circuit  
9 wrote a very -- I think probably the best  
10 opinion in the lower courts I've seen on that  
11 issue that describes how the idea is, because  
12 we're dealing with identity theft, it has to be  
13 a lie about who receives services or who obtains  
14 services, not a lie about how those services  
15 were rendered, when those services were  
16 rendered, et cetera. And that rule of thumb, I  
17 think, is very, very helpful for sorting out the  
18 "in relation to" element as it works in the  
19 statute here.

20 And it's also just intuitively  
21 correct. Remember, whether you want to rely on  
22 the -- the title "Identity Theft" or whether you  
23 want to just look at the words "means of  
24 identification" in the statute itself, you're  
25 being asked to decide whether the fraud had to

1 do with the misuse of somebody's name, whether  
2 it was instrumental -- that the name was  
3 instrumental to the crime, and you have a case  
4 like this, whereas the government put it in its  
5 own closing argument at pages 31 and 32, this is  
6 incorrect billing for services rendered. That's  
7 how the government put it to the jury when it  
8 described the fraud.

9 In the Fifth Circuit, where the  
10 government was asked to describe the fraud, the  
11 government said the fraud here is that Mr. Dubin  
12 claimed that the services were provided by a  
13 licensed psychologist when they were really  
14 provided by a licensed psychological associate.  
15 That's the fraud here.

16 So, when the government is asked in  
17 ordinary English to describe what the fraud is,  
18 it's described having nothing to do with Patient  
19 L's identity or who received the services. It's  
20 only in its brief, when forced to defend an  
21 aggravated identity thought -- theft conviction,  
22 that they twist the -- the notion here and say  
23 these are fictional services somehow or this is  
24 really about who received the services.

25 But, if you just use Judge -- Chief

1 Judge Sutton's heuristic, I think that helps you  
2 sort out the cases in a way on the "in relation  
3 to" side that can do all the work you need in  
4 this case.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. It seems to me that one of the factors  
7 that might be pertinent is whether it makes a  
8 difference whose name is used. Now the -- the  
9 Solicitor General says that here it -- it did  
10 because the overbilling for the three hours  
11 deprived Patient L of three of the eight hours  
12 to which he was entitled.

13 First of all, do you agree with that  
14 statement of the facts?

15 MR. FISHER: Well, I agree in the  
16 sense that billing for three hours takes three  
17 hours away, but, remember, Patient L did receive  
18 services here. And I think the more -- the more  
19 -- the more narrow argument the Solicitor  
20 General makes is that billing those services in  
21 May instead of April had some effect, but, as we  
22 explain at pages 1 and 15 of our reply brief,  
23 that's just factually incorrect. And the  
24 government itself admitted that in the district  
25 court, that that argument had been debunked.



1                   So you could have cases -- I -- I --  
2                   can I say one more thing, Mr. Chief Justice?

3                   CHIEF JUSTICE ROBERTS:   Sure.

4                   MR. FISHER:   You could have cases  
5                   where somebody would be, I think, sometimes  
6                   deprived of benefits they would have due.  We  
7                   don't disagree that could exist.  It's not in  
8                   this case, but we don't disagree.

9                   But those would be case-by-case  
10                  situations, where that could be, I think, better  
11                  taken into account at sentencing.  The statute  
12                  itself is not keyed to that kind of harm.  That  
13                  would just be something the district judge in an  
14                  ordinary fraud sentence could take account of.

15                  CHIEF JUSTICE ROBERTS:  The -- the  
16                  representative of the Solicitor General, I'll  
17                  ask him about the three hours --

18                  MR. FISHER:  Mm-hmm.

19                  CHIEF JUSTICE ROBERTS:  -- as well,  
20                  but, if it does make a difference how much harm  
21                  the person whose name is being used suffers,  
22                  wouldn't that be a significant factor?  I mean,  
23                  if it -- if it, you know, caused him to lose all  
24                  his credit and it took -- you know, it can take  
25                  a year and a half or whatever to restore that,

1 shouldn't that be taken into consideration if  
2 the -- in deciding whether or not this is the  
3 sort of identity theft that's covered?

4 MR. FISHER: I don't think there's any  
5 language in the statute that directs you to the  
6 type of harm. I think a better-written statute  
7 might have looked at the type of harm, whether  
8 it's --

9 CHIEF JUSTICE ROBERTS: It's not so  
10 much the type of harm that I -- that I'm  
11 concerned with but who is harmed. In other  
12 words, it makes a difference that this is  
13 Patient L rather than somebody else.

14 MR. FISHER: Well, no, I think,  
15 Mr. Chief Justice, just take your garden-variety  
16 fraud case where somebody is, you know, swindled  
17 out of money. They're harmed. They've lost  
18 their money, just like, in the hypothetical  
19 you're giving, somebody in an ordinary  
20 healthcare benefit case has been deprived of,  
21 you know, possible insurance coverage or  
22 overbilled or the like. So people are harmed  
23 quite regularly in these fraud statutes.

24 The question is whether their identity  
25 was stolen, to use the sort of colloquial here,

1 and whether the crime involves misrepresenting  
2 what they received or how they received it. And  
3 so that's what is -- that's what makes an  
4 identity theft case different from an ordinary  
5 fraud case, not the fact that the victim is  
6 harmed but that they're harmed in the sense that  
7 their identity is stolen.

8 CHIEF JUSTICE ROBERTS: Thank you.  
9 Justice Thomas?

10 JUSTICE THOMAS: Mr. Fisher, beyond  
11 the title, there is no reference to "identity  
12 theft," right?

13 MR. FISHER: Those words do not  
14 otherwise appear in the statute.

15 JUSTICE THOMAS: Let's assume that the  
16 title wasn't there. What would your argument  
17 look like?

18 MR. FISHER: I think it would look  
19 like most of what I've said today, which is  
20 understanding the -- the broad abstract phrases  
21 "in relation to" and "without lawful authority"  
22 needs to be done through the lens of  
23 understanding this is a sentence enhancement for  
24 a particularly egregious form of an underlying  
25 crime, the predicate offense.

1                   And I think what I would direct the  
2 Court to are cases like Marinello, cases like  
3 Yates, your honest services cases, where over  
4 and over the Court has said, when Congress uses  
5 broad language, we don't construe those  
6 literally in the maximalist way. Instead,  
7 because we're dealing with criminal statutes, we  
8 give them a measured reach.

9                   And I think that's underscored in this  
10 case, Justice Thomas, to end where I began,  
11 where you have -- you have a statute that is a  
12 enhancement, in effect, for a base offense. So  
13 you have to be understanding that you're dealing  
14 with a subset that are an egregious version of  
15 that underlying offense.

16                   JUSTICE THOMAS: But didn't we  
17 confront a similar problem with use in Smith?

18                   MR. FISHER: I don't think so. I  
19 don't -- I -- I think what you said in Smith  
20 were two things. One is you said the phrase "in  
21 relation to" limits the reach of "use." And the  
22 other thing is you said those words have to be  
23 read contextually.

24                   And so I -- on that score, I pull two  
25 things out of Smith. What the Court ended up

1 saying in Smith was that the gun there was used  
2 in relation to the crime because it was integral  
3 to the offense. And I think "integral" is a  
4 synonym for "instrumental," which is the word  
5 that I've been using today.

6 And I think that just shows that when  
7 you take that word in context, it has to be  
8 narrow and I think all the more so here.

9 JUSTICE THOMAS: So how would this  
10 particular crime that's charged have been  
11 effectuated without the use of Patient L's  
12 identity?

13 MR. FISHER: Well, I think, if the  
14 exact same bill had been submitted to Medicaid  
15 without Patient L's name on it, it likely would  
16 have still been healthcare fraud. It would have  
17 violated Section 1347 because it covers  
18 artifices and schemes that attempt to defraud  
19 the government. So, even if the bill had not  
20 been paid, it still would have been healthcare  
21 fraud.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: Suppose we think that  
24 "without lawful authority" can plausibly be read  
25 in a number of different ways. Then you need

1 something to persuade us that you -- we should  
2 adopt your interpretation.

3           Now one would be something, the force  
4 you can get from the title. Put that aside.  
5 Another would be perhaps some version of the  
6 Rule of Lenity. But you have accepted some  
7 limiting principles. So you would not read  
8 "without lawful authority" in its broadest  
9 sense, which might be where the Rule of Lenity  
10 would lead.

11           So, in the next case -- suppose we  
12 rule in your favor. The next case involves a  
13 different type of service, and the case after  
14 that involves a person who was once a patient of  
15 this doctor but hasn't been for a while.

16           How would you justify your limiting  
17 principles?

18           MR. FISHER: Well, Justice Alito, let  
19 me say a couple things about the other tools I  
20 would use to construe it and then how I would  
21 justify.

22           So, first, beyond the title and the  
23 Rule of Lenity, I would also look at the canon  
24 that says all elements of the statute have to  
25 have independent meaning. And so it has to mean

1 something more than simply you've committed a  
2 crime, committed a fraud, or put in the other  
3 words that I was answering questions this  
4 morning, it has to mean something more than  
5 you've billed for something other than the exact  
6 services provided. And so I think that pushes  
7 you towards something that narrows it.

8           Now -- now how I would answer those  
9 other cases is I think the "in relation to"  
10 element comes into play there. So, if you're  
11 billing for one service instead of another, I  
12 think, at some point, the other service becomes  
13 so different that you would lack authority to do  
14 so. But "in relation to," as Justice Sotomayor  
15 was saying, would still prevent some of those  
16 instances from being aggravated identity theft  
17 because you'd be lying about the service  
18 provided, not who received the service.

19           Now, when you get into additional  
20 billing for additional types of things, I think,  
21 there, you could start to be in the actual  
22 territory of identity theft. And, you know, I  
23 hope -- what I'm trying to do is give the Court  
24 some measured understanding of these terms that  
25 makes sense of them with a difficult statute

1 you've been provided.

2 Yes, I could say the whole thing is  
3 vague or the whole thing should be construed  
4 down to a nub of almost nothing, but I'm trying  
5 to give the Court a sensible understanding that  
6 at least gives the terms meaning and context and  
7 doesn't just say everything constitutes  
8 aggravated identity theft.

9 JUSTICE ALITO: All right. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Sotomayor?

12 JUSTICE SOTOMAYOR: If you take the  
13 government's definition at face value, it's hard  
14 to define exactly what their definition is  
15 because every time you point to something that  
16 seems absurd, they come up with a limiting rule.  
17 So the vagueness is a problem.

18 But let's talk about those  
19 absurdities. The patient tells the doctor: You  
20 can submit this a month later, it's okay by me,  
21 a co-conspirator, in other words.

22 The government -- on the government's  
23 reading, even though they have the permission of  
24 the person to use their name in the fraud, that  
25 would still be aggravated theft, correct?



1           MR. FISHER: I think that's right.  
2 I'm not a hundred percent sure what the  
3 government would say on that, but I think that's  
4 right. And that's certainly the argument they  
5 ran to the jury and in the lower courts.

6           JUSTICE SOTOMAYOR: That's what I  
7 read --

8           MR. FISHER: Yes.

9           JUSTICE SOTOMAYOR: -- in the Fifth  
10 Circuit's ruling as well.

11          MR. FISHER: Right. And so they say,  
12 as soon as you use the name to commit a crime,  
13 you are acting without lawful authority. And  
14 that was the -- that was the argument also if  
15 you look at the charging memo in the appendix to  
16 the Federal Defenders' brief --

17          JUSTICE SOTOMAYOR: I just want to  
18 give some of the other absurdities.

19          MR. FISHER: Yes.

20          JUSTICE SOTOMAYOR: Tax return, a  
21 parent lists their child as a dependent and lies  
22 about childcare services.

23                 There's no way to exempt that out  
24 because -- under the government's broad  
25 definition of the statute because they use the

1 child's name to commit a fraud on the  
2 government, correct?

3 MR. FISHER: I think that's right.  
4 And Justice -- Judge Easterbrook recognized that  
5 in his opinion dealing with the statute that  
6 talked about tax and immigration cases where  
7 every one of those --

8 JUSTICE SOTOMAYOR: You talked about  
9 the envelope case.

10 MR. FISHER: Yeah.

11 JUSTICE SOTOMAYOR: You put the name  
12 of your victim on an envelope and mail it to  
13 them, that's using their name without their  
14 permission, correct?

15 MR. FISHER: Well, it's certainly  
16 using their name, and, under the government's  
17 theory, it's without permission because you're  
18 committing a crime by --

19 JUSTICE SOTOMAYOR: Now they come up  
20 later and say no, but you're socially permitted  
21 to use anybody's name on an envelope.

22 MR. FISHER: But, again, that's not  
23 the way their test works when you look at it in  
24 this case and everything else. They ask whether  
25 you're permitted to send it for that purpose, in

1 other words, to commit a fraud.

2 JUSTICE SOTOMAYOR: I'm defrauding a  
3 friend or someone that I'm trying to pretend I'm  
4 being a friend with, and I say: You know  
5 something, you should enter this deal with me.  
6 Bill Gates is a personal friend of mine and he  
7 taught me everything I know.

8 Would that be aggravated theft?

9 MR. FISHER: I think so. I think  
10 that's -- that's the problem here, is that at  
11 least when you have any situation where -- this  
12 goes back to the Chief Justice's questions --  
13 where you can say you couldn't have committed  
14 that fraud the way you did without using the  
15 name, then I think that falls within the  
16 government's test.

17 JUSTICE SOTOMAYOR: So the issue of  
18 vagueness permeates this statute on both sides  
19 potentially?

20 MR. FISHER: I think that's right. I  
21 think the government's argument or at least the  
22 Fifth Circuit's rule is vague in the sense that  
23 it covers -- seems to cover basically  
24 everything, and then it leads into the line of  
25 cases about vagueness that have just absolute

1 standardless --

2 JUSTICE SOTOMAYOR: All right. So  
3 what --

4 MR. FISHER: -- discretion left in  
5 prosecutors.

6 JUSTICE SOTOMAYOR: -- what principles  
7 of ours besides lenity would lead us to accept  
8 your narrower definition as opposed to the  
9 government's narrow individual doctrines?

10 MR. FISHER: Well --

11 JUSTICE SOTOMAYOR: The government  
12 seems to be creating exceptions --

13 MR. FISHER: Right.

14 JUSTICE SOTOMAYOR: -- as --

15 MR. FISHER: Well, I think, for one  
16 thing, constitutional avoidance, so when you do  
17 start to come up against vagueness, that's  
18 another principle that is operating in the  
19 background. For some of you, I think I would  
20 say the title, I think, does carry some weight.

21 And I think consequences. You know,  
22 the Court has had a lot of cases in recent  
23 years, I gave Marinello as one example, Van  
24 Buren was another recent example that held --  
25 some of the honest services cases are examples

1 where the Court has said not in -- not -- not so  
2 much the Rule of Lenity, but they've just said  
3 understanding what Congress meant by words, we  
4 would not assume Congress would sweep in vast  
5 arrays of conduct without doing it clearly.

6 And so I think, as Justice Breyer put  
7 it in *Marinello*, we use interpretive restraint  
8 in that setting, and I think that's what I'm  
9 asking the Court for today.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Fisher, you  
13 referred us to what you called Judge Sutton's  
14 heuristic, and I just want to make sure that I  
15 understand how that would work, and -- and --  
16 and maybe I'll ask it in reference to what I  
17 think is the toughest line that you're drawing,  
18 which is on the one hand, if you bill for cancer  
19 services, that falls within the enhancement,  
20 but, if you bill for psychiatric services that  
21 weren't rendered, it doesn't. So, to me,  
22 neither of those seems very much like a "who."  
23 They both seem like "whats."

24 MR. FISHER: Yeah.

25 JUSTICE KAGAN: So how does Judge

1 Sutton's heuristic work to draw that line? And,  
2 if it doesn't work, doesn't that suggest that we  
3 need something else?

4 MR. FISHER: So -- so two things, and  
5 I want to point out I think there's a little bit  
6 of a misconception in your question. So the --  
7 so the two things, is the heuristic that just --  
8 Judge Sutton lays out is who on the one category  
9 versus how or when on the other.

10 And so those are the easy cases. And  
11 that's where this case is. This is just a how  
12 or when case. And just like the stretchers case  
13 that Judge Sutton was deciding, the ambulance  
14 that lied -- the ambulance service that lied  
15 about whether stretchers were required, that's a  
16 "how," the nature of the services provided.  
17 That's what this case is.

18 JUSTICE KAGAN: Well, I mean, it's  
19 certain --

20 MR. FISHER: And so --

21 JUSTICE KAGAN: -- there's certainly a  
22 "when" in this case, but there's also a "what."  
23 It's like, which psychiatric services did you  
24 get? And that's the same for the cancer  
25 services. And how does this supposed heuristic,

1 you know, separating out three-letter words help  
2 us?

3 MR. FISHER: So -- so two things. One  
4 is I think this is not a "what" case because the  
5 procedure code used is the same whether it's a  
6 licensed psychologist or a psychological  
7 associate.

8 Now, even if it were a "what" case,  
9 what services were provided --

10 JUSTICE KAGAN: Okay. So, if the code  
11 were different for, let's say, a full-fledged  
12 psychiatrist, that would make all the  
13 difference?

14 MR. FISHER: It might. I'm just  
15 saying this is the easy case if you want to take  
16 the easy case. I think the "what" cases, which  
17 is what you're asking about, that's what the --  
18 that's what the cancer hypo is, and that's where  
19 the government moves in its brief, to the "what"  
20 category, which, I agree with you, Justice  
21 Kagan, is the hardest category. So that's the  
22 in between category, between the "who" or the  
23 "how" and the "when."

24 JUSTICE KAGAN: Okay. So you're  
25 saying --

1 MR. FISHER: And I think --

2 JUSTICE KAGAN: -- that the Sutton  
3 heuristic has nothing to say about that?

4 MR. FISHER: I don't think it speaks  
5 directly to it. So it's separating out who on  
6 the one side from how and when on the other.  
7 And I think -- and this gets to the  
8 misconception -- I'm agreeing that the cancer  
9 hypothetical would be potentially without lawful  
10 authority. That might be without lawful  
11 authority. It still would not be in relation  
12 to, and it still wouldn't violate the statute.

13 So I think what you should do is --  
14 the best way to read the statute is that the  
15 "who" cases, the lies about who received the  
16 services, are on one side of the line, and all  
17 the other lies about how, when, or even what are  
18 on the other side of the line.

19 And, again, I'm not saying those  
20 aren't fraud, and sometimes it can be egregious  
21 fraud. If it's a hundred hours instead of one  
22 or if it's a -- a -- the Rolls Royce version of  
23 the service instead of the -- the -- the base  
24 level, those can be frauds and they can be  
25 punished quite severely, but they're not lies



1 about who received the services, and they're not  
2 using the person's identity as the  
3 instrumentality, core instrumentality of the  
4 offense.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8 JUSTICE GORSUCH: So, Mr. Fisher,  
9 you've talked about various canons that you  
10 think might help us resolve this case, but one  
11 that hasn't been mentioned much is the  
12 federalism canon.

13 MR. FISHER: Mm-hmm.

14 JUSTICE GORSUCH: In Bond, for  
15 example, we -- we made clear that we don't  
16 normally interpret federal law to swallow up  
17 vast swaths of state law authority as  
18 traditionally understood.

19 And I wanted to return to the question  
20 about the impact of (a)(7) --

21 MR. FISHER: Yes.

22 JUSTICE GORSUCH: -- on -- on that.  
23 If the government's theory is correct and every  
24 time I order salmon at a restaurant I'm told  
25 it's fresh, but it's frozen, and my credit card

1 is run for fresh salmon, that's identity theft,  
2 what's left of state law?

3 MR. FISHER: I don't think much,  
4 Justice Gorsuch. And with all due respect to  
5 the government, I don't think they give an  
6 answer to our point that if they're right about  
7 what "in relation to" means and they're right  
8 about "without" -- "without lawful authority,"  
9 then every state law offense that uses  
10 somebody's name becomes identity theft.

11 JUSTICE GORSUCH: Whether it's in a  
12 restaurant billing scenario, a healthcare  
13 billing scenario, or lawyers who round their  
14 hours up, and I'm sure nobody --

15 (Laughter.)

16 JUSTICE GORSUCH: -- in this audience  
17 has ever done that.

18 MR. FISHER: Right. And I want to  
19 underscore -- I mean, we could think of even the  
20 salmon example as wire fraud if the credit card  
21 is run through --

22 JUSTICE GORSUCH: Sure.

23 MR. FISHER: -- so there's a federal  
24 predicate offense.

25 JUSTICE GORSUCH: But -- but -- but

1 put aside the federal --

2 MR. FISHER: But we give examples of  
3 graffiti and DUI --

4 JUSTICE GORSUCH: -- put aside the  
5 federal statutory crime that might be committed.

6 MR. FISHER: Yeah.

7 JUSTICE GORSUCH: All state  
8 misrepresentations become federal crimes under  
9 (a)(7).

10 MR. FISHER: That's right. That's  
11 right. And I think we give other examples in  
12 our brief of just using somebody's name in the  
13 course of committing the crime. That would all  
14 be chargeable as federal identity theft.

15 And, remember, the way these statutes  
16 works is -- I've called them enhancements,  
17 which, in a sense, they are, but they're truly  
18 stand-alone crimes. So a federal prosecutor  
19 could -- could -- could charge that even if the  
20 predicate offense under (a)(7) was nothing more  
21 than a state law offense.

22 JUSTICE GORSUCH: I guess my second  
23 question is, do we need to decide whose  
24 heuristic is right if we reject the government's  
25 view? Wouldn't it be enough for the day to say

1 that this reading of the statute was overbroad  
2 and that it cannot possibly mean that every time  
3 I order fresh salmon at a restaurant and get  
4 billed for -- given frozen salmon and billed for  
5 fresh, that cannot be federal identity theft --

6 MR. FISHER: Yes. I --

7 JUSTICE GORSUCH: -- and just simply  
8 reject that principle? And, as I understand it,  
9 there are at least two heuristics that are  
10 knocking around in the lower courts. One is  
11 Judge Sutton's thought, and the other is Judge  
12 Easterbrook's thought in -- in the Seventh  
13 Circuit, which is slightly different --

14 MR. FISHER: Right.

15 JUSTICE GORSUCH: -- as I read it.  
16 And you've kind of advanced echoes of both.

17 MR. FISHER: Yeah.

18 JUSTICE GORSUCH: Do we need to decide  
19 between them, or perhaps they're both right?  
20 Can't we just reject the Fifth Circuit's?

21 MR. FISHER: I think that would be  
22 enough, Justice Gorsuch. I've pointed the Court  
23 a couple of times to the government's closing  
24 argument, which I think is the best  
25 encapsulation of what it put in front of the

1 jury, and its argument was that you cannot use  
2 somebody's name to commit a crime. That's what  
3 "unlawful authority" means.

4 And if you just reject that, that was  
5 their only theory. They provided no other  
6 evidence that Mr. Dubin acted beyond the scope  
7 of authority. And maybe this is also responsive  
8 to Justice Kagan and some of the other  
9 hypotheticals, all the things about could you  
10 bill for this, could you bill for the other.  
11 Even the contract was not introduced by the  
12 government in this case.

13 The only theory they ran -- and this  
14 is also reflected in the charging memo in the  
15 appendix to the Federal Defenders' brief, this  
16 is the argument that prosecutors have been  
17 circulating with each other -- is that all you  
18 have to do is prove to the jury that an  
19 underlying crime was committed and you're home.

20 And if you reject that, that's enough  
21 to overturn the Fifth Circuit.

22 JUSTICE GORSUCH: And if that were  
23 right, maybe there's another canon besides  
24 federalism that we can mention, and you've  
25 alluded to it as well, which is vagueness. What

1 notice does a statute like that provide to the  
2 world, to every waiter in America who misbills a  
3 client for the food he -- he -- he purchases?

4 MR. FISHER: Right. I think -- I  
5 think you start to get into very serious  
6 vagueness problems here because of the un --  
7 incredible breadth, which I think, as we put in  
8 our brief, are compounded by the kind of  
9 misleading nature of the title. If somebody  
10 were looking at the table of contents of the  
11 U.S. Code, if that waiter were looking at the  
12 title of the U.S. Code, that waiter would  
13 probably not see, oh, I better look and see what  
14 identity theft is before I do that.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh?

18 JUSTICE KAVANAUGH: In response to  
19 Justice Kagan, you said that the cancer  
20 hypothetical would still not fall within the  
21 statute because it wouldn't meet the "in  
22 relation to" requirement. Can you just spell  
23 that out for us?

24 MR. FISHER: Yes, Justice Kavanaugh.  
25 The reason it wouldn't is because it would be a

1 lie about what services are provided, not who  
2 received those services, or, if it were a  
3 product, about what product was sold, not who  
4 received the product.

5 And that makes sense under the statute  
6 because we're asking whether the person's name,  
7 whether, as the statute puts it, the means of  
8 identification, was used in relation to the  
9 offense. And so the -- the critical nexus in  
10 the instrumentality requirement in the statute  
11 would not be satisfied.

12 And I think the government -- the  
13 government only response to that in its brief,  
14 Justice Kavanaugh, is, well, we can kind of play  
15 word games and we can say, well, these cases  
16 about what services were provided could also be  
17 thought of as lies about who received them.

18 But, if you just use ordinary speech  
19 and imagine complaining to somebody the next day  
20 about being charged for something different than  
21 what you've -- than what you ordered, you  
22 probably wouldn't say -- you'd say they charged  
23 me for the wrong thing. You wouldn't say they  
24 stole my name and used my name improperly.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: I have a question  
4 that's similar to Justice Sotomayor's. So you  
5 didn't make much of ejusdem generis in your  
6 brief, but I looked at "transfer and possess,"  
7 you know, "transfer to sell or give, convey or  
8 remove from one place to another." "Possess,"  
9 you know, to have possession of. And it seems  
10 to me that you can't transfer or possess unless  
11 something is stolen. It seems to me like that's  
12 a tie to the title to identity theft.

13 MR. FISHER: Mm-hmm. Mm-hmm.

14 JUSTICE BARRETT: And so it seems to  
15 me that if you're trying to interpret "use,"  
16 which is a really broad route -- a really broad  
17 "word" in the context of that trio, that that  
18 serves a narrowing function. Why didn't you  
19 advance that argument?

20 MR. FISHER: I think some lower courts  
21 have pointed that out, and we -- we -- we agree  
22 with it. I think, Justice Barrett, the only  
23 thing that I would acknowledge is I don't think  
24 it's a requirement under the statute that  
25 something be stolen. I think you can -- you --



1     like, you can get something legitimately and  
2     then misappropriate it.  So there are examples  
3     in legislative history of government --  
4     government workers who get somebody's Social  
5     Security number by way of their ordinary work,  
6     and then they misuse it to do other things or  
7     sell those security numbers to somebody else.  
8     Or we give a hypothetical in our -- in our reply  
9     brief of a landlord who gets credit information  
10    of a -- of a would-be tenant and then uses --  
11    misuses that credit information.

12                 So I think that's where "uses" comes  
13    in for this narrow slice of misappropriation  
14    cases.  But they're still for entirely fictional  
15    services where you are, in effect, making the  
16    identity the sole driver of the offense.

17                 JUSTICE BARRETT:  And I agree with  
18    you, and it seems to me that that's the  
19    different work that "use" does --

20                 MR. FISHER:  Mm-hmm.

21                 JUSTICE BARRETT:  -- to transfer and  
22    possession --

23                 MR. FISHER:  Mm-hmm.

24                 JUSTICE BARRETT:  -- are the kinds of  
25    cases that you're talking about, but it still

1 seems to me that all of those verbs have as  
2 their focus the unlawful possession of the  
3 identity itself, the who --

4 MR. FISHER: Yes.

5 JUSTICE BARRETT: -- in Judge Sutton's  
6 heuristic.

7 Okay. Second question. I appreciate  
8 Justice Gorsuch's point about we could decide  
9 the case narrowly by just saying whatever it  
10 means this is wrong, but what if we wanted to  
11 rule in your favor? What does the holding look  
12 like? Because it can't quite be Judge Sutton's  
13 heuristic, right, because it won't solve all the  
14 cases. Maybe it solves some heartland cases.

15 You've said must be instrumental, not  
16 incidental.

17 MR. FISHER: Mm-hmm.

18 JUSTICE BARRETT: But you could say  
19 Patient L's identity was instrumental because he  
20 was a Medicaid, you know, recipient, and so,  
21 without Patient L's name on the form, the crime  
22 couldn't have been completed.

23 So I'm not sure instrumental, not  
24 incidental, will kind of do the work for the  
25 lower court having to decide the case. So tell

1 me what the -- the decision line should say.

2 MR. FISHER: So I think you could do  
3 two things, and it might be quite helpful to the  
4 lower court if you talked about both elements.  
5 I think the "without lawful authority" element,  
6 as I described with Justice Gorsuch, can be  
7 decided the way we talked about, and that would  
8 -- that would be enough to reverse.

9 But, if you look at the "in relation  
10 to" element, which the lower courts are also  
11 struggling mightily -- mightily with, I think I  
12 agree with you, Justice Barrett, "instrumental"  
13 is a standard, it's a more descriptive term, but  
14 it could use some fleshing out. And I think  
15 that's where the Judge Sutton heuristic --  
16 forgive me for returning to that -- actually,  
17 that's the work it's doing.

18 JUSTICE BARRETT: No, I like Judge  
19 Sutton. I'm fine with that.

20 MR. FISHER: But that -- that's  
21 actually the work it's doing, is it's saying  
22 when is something -- he used the word "integral"  
23 -- when is something integral, and that's -- and  
24 that -- his heuristic is enough to decide this  
25 case "in relation to."

1           I mean, this case is remarkably like  
2           the one he described, which is the example of  
3           the -- the ambulance operator that lied about  
4           using stretchers when they did the service.

5           And he said, if you lie about the  
6           nature of the services provided, not who  
7           received those services, you are not committing  
8           the crime in relation to -- you're not using the  
9           name in relation to the crime. And that would  
10          totally decide this case.

11          JUSTICE BARRETT: Thank you.

12          CHIEF JUSTICE ROBERTS: Justice  
13          Jackson?

14          JUSTICE JACKSON: So you've given us a  
15          number of ways in which we could rule in your  
16          favor and things we can look at and rely on.  
17          I -- I was trying to keep a list. We have  
18          title, the Rule of Lenity, all the statutory  
19          terms have meaning, federalism canon, and then  
20          there was this talk of constitutional avoidance.

21          And I am interested in particular in  
22          sort of the species of constitutional avoidance  
23          that I was bringing up with you before, which  
24          basically looks at this provision in context and  
25          in relation to (a)(7). In other words, this is

1 an aggravated penalty and we have a mandatory  
2 minimum that attaches.

3 MR. FISHER: Mm-hmm.

4 JUSTICE JACKSON: And so don't we have  
5 to believe that it is calling for something more  
6 than just use in connection with the crimes?

7 MR. FISHER: I don't think so, Justice  
8 Jackson, and I hope I can be clear on this. The  
9 difference between (a)(7) --

10 JUSTICE JACKSON: Yeah.

11 MR. FISHER: -- and -- and 1028A,  
12 which is what you have here, is the list of  
13 predicate offenses, so --

14 JUSTICE JACKSON: No, I understand.  
15 You said that before. But I guess what I'm  
16 saying is the list of predicate offenses in this  
17 statute --

18 MR. FISHER: Mm-hmm.

19 JUSTICE JACKSON: -- in this one, is a  
20 subset of all federal crimes --

21 MR. FISHER: Correct.

22 JUSTICE JACKSON: -- which is in the  
23 other statute.

24 MR. FISHER: Right.

25 JUSTICE JACKSON: And if I'm wrong

1 about this, then we have two statutes that would  
2 be calling for exactly the same thing, and --

3 MR. FISHER: I see, I see.

4 JUSTICE JACKSON: -- the second one  
5 gives you a mandatory minimum. And I feel like  
6 there's a constitutional problem if the  
7 executive could look at these two statutes and  
8 arbitrarily pick between the two, some people  
9 get the one with the mandatory minimum, some  
10 don't. If their elements are exactly the same,  
11 you would have that problem.

12 So the (a)(7) says use, you know,  
13 without lawful authority, the same language, a  
14 means of identification, right, in connection  
15 with the crime.

16 And this one says use -- everything is  
17 the same --

18 MR. FISHER: Yeah.

19 JUSTICE JACKSON: -- during and in  
20 relation to the crime. And it's a list of  
21 crimes. I get that. But --

22 MR. FISHER: Yeah. Uh-huh.

23 JUSTICE JACKSON: -- don't we have to  
24 believe that what Congress is calling for to  
25 attach the mandatory minimum is something more

1 than just in connection with?

2 MR. FISHER: I think that's one -- so  
3 now I'm following you. And forgive me.

4 JUSTICE JACKSON: Yes.

5 MR. FISHER: I think that's one way to  
6 answer, that would be one way to compare the two  
7 statutes and read "in relation to" the way that  
8 I'm describing.

9 I think the push-back from that could  
10 be, well, they could still mean the same thing  
11 and all you're dealing with then is a lesser  
12 included offense, which doesn't create a  
13 constitutional problem.

14 But I think then my reply to that  
15 would be you nevertheless under the government's  
16 theory are left with this incredibly broad  
17 statute that makes every fraud prosecution also  
18 punishable as aggravated identity theft, and  
19 that --

20 JUSTICE JACKSON: And it's vague to  
21 know in the world when you would get the  
22 mandatory minimum or not, right?

23 MR. FISHER: Exactly. And so that  
24 creates exactly the kind of standardless sweep,  
25 to use a term from this Court's cases, that the

1 -- that the Due Process Clause is directly  
2 concerned with and gives you very serious pause.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
5 Fisher.

6 Mr. Suri.

7 ORAL ARGUMENT OF VIVEK SURI

8 ON BEHALF OF THE RESPONDENT

9 MR. SURI: Mr. Chief Justice, and may  
10 it please the Court:

11 I'd like to start with the  
12 hypothetical that Justice Jackson was discussing  
13 with Mr. Fisher about the waiter who uses a  
14 customer's credit card to bill for something  
15 that the customer didn't order. Let's say the  
16 customer ordered steak, and the waiter uses the  
17 credit card to ring up a bottle of wine as well.

18 And I think the discussion earlier  
19 today established that the waiter was acting  
20 without lawful authority. He had the authority  
21 to use the credit card number to bill only for  
22 the food that was ordered. He didn't have the  
23 authority to use it for other things, whether it  
24 be wine or Amazon.com products or paying down  
25 his mortgage.



1           But I think, Justice Sotomayor, you  
2           had suggested that the "in relation to" element  
3           might do some work there and might keep that  
4           hypothetical out of the statute.

5           I don't think that's correct, and the  
6           reason it's not correct is that no matter how  
7           you define "in relation to" -- you can say a  
8           substantial nexus, you can say instrumental to,  
9           integral to, facilitates further -- on any of  
10          those definitions, the use of the credit card  
11          number is going to be in relation to the fraud  
12          of charging that credit card account improperly.

13          Of course, you can't charge a  
14          particular credit card without using that credit  
15          card number. And that's analogous to the  
16          relationship that's at issue here. In this  
17          case, you can't possibly charge a particular  
18          Medicaid account fraudulently without using that  
19          patient's Medicaid number. And, therefore, the  
20          use of the Medicaid number is on any reasonable  
21          definition in relation to that particular fraud.

22          Now I understand the argument on the  
23          other side about the title. Maybe, as Justice  
24          Alito pointed out, that doesn't seem like  
25          identity theft. But the test that this Court

1 should be applying is not "does it seem like  
2 identity theft." Congress translated the  
3 concept of identity theft into specific textual  
4 elements in the statute, and because that  
5 hypothetical, like this case, falls within those  
6 elements, that's covered by the statute.

7 I'll turn to the Court's questions.

8 JUSTICE THOMAS: The -- we're talking  
9 about very broad language. I mean, when I first  
10 came on the Court, in ERISA, we wrestled with  
11 "in relation to," and, of course, in Smith and  
12 some of the others, we wrestled with "use." I'd  
13 like to see how far you will go with this.

14 Let's say the only allegation here  
15 involved the rounding up from 2.5 hours to three  
16 hours. Would that be sufficient to violate this  
17 provision?

18 MR. SURI: Yes, Justice Thomas. And I  
19 appreciate that that may seem an unattractive  
20 result.

21 JUSTICE THOMAS: Well, I think  
22 unattractive is -- is an understatement.

23 (Laughter.)

24 MR. SURI: It is nevertheless the  
25 correct reading of the statute. The reason that

1 result seems unattractive is that the fraud in  
2 that context is a relatively small fraud. It's  
3 not a big fraud.

4 But it's inherent in this statute,  
5 which has a flat two-year penalty, regardless of  
6 the size of the fraud in a particular case, that  
7 the small fraud is going to be punished the same  
8 way as the big fraud.

9 JUSTICE THOMAS: How -- how would you  
10 distinguish in this context between a mistake  
11 and a fraud? Let's say it's 2.75 to 3.0.

12 MR. SURI: Well, we still have to  
13 prove that there was a fraud. That has a  
14 scienter element. We have to prove that it  
15 wasn't just an accident, that the person had the  
16 requisite fraudulent intent.

17 So, if we couldn't prove beyond a  
18 reasonable doubt that the person fraudulently,  
19 rather than accidentally, overbilled, then we  
20 wouldn't have the predicate crime in the first  
21 place and the -- this additional --

22 JUSTICE THOMAS: I mean, we're dealing  
23 with small amounts in this case, so it doesn't  
24 seem inconceivable that you could be successful  
25 in prosecuting someone for a smaller amount.

1           MR. SURI: First, with respect to this  
2 case, it's true that this one claim was \$338,  
3 but the entire conspiracy the district court  
4 found involved a lot of claims, \$282,000.

5           Second, I acknowledge, yes, it is  
6 possible that when it's a small amount, we could  
7 still prosecute. But we'd have hurdles that  
8 we'd have to overcome when it's a small amount.  
9 It's going to be harder to convince a jury of  
10 fraudulent intent when the amount is extremely  
11 small.

12           I take, however, the point of the  
13 question --

14           JUSTICE GORSUCH: Counsel, it seems to  
15 me you've just given up the ghost and -- and  
16 clarified things substantially that every time  
17 anyone overbills for anything, that triggers  
18 this statute, and all you have to prove -- now  
19 it may be small, as the amounts here were, \$338,  
20 or it might be rounding up, a lawyer rounding up  
21 his hours to the next tenth of an hour, but that  
22 is still identity theft because you are using  
23 somebody's identity in a way that is unlawful  
24 and perhaps arguably exceeds their permission.

25           If that's true, where do we stand in

1 terms of federalism, given that (a)(7) speaks in  
2 much the same language and would seem to  
3 federalize pretty much every state  
4 misrepresentation claim? Where do we stand in  
5 terms of vagueness, notice to the world, fair  
6 notice to the world?

7 I'm not sure most waiters in America  
8 appreciate that they're committing identity  
9 theft when they bill for that bottle of wine.

10 MR. SURI: Let me start with  
11 federalism and (a)(7). (a)(7)'s language is not  
12 the same as the language of 1028A. (a)(7) uses  
13 the phrase "with [...] intent to commit, or  
14 [...] aid or abet or in connection with." And  
15 you could read "in connection with" differently  
16 from "during and in relation to" and there --

17 JUSTICE GORSUCH: We -- we could.  
18 But, if we read them the same, as this Court has  
19 done in the past --

20 MR. SURI: Well, if you read them --

21 JUSTICE GORSUCH: -- then we'd have a  
22 serious federalism problem, wouldn't we?

23 MR. SURI: -- if you read them the  
24 same, you'd be creating a federalism problem  
25 that you could avoid by reading them

1 differently.

2 (Laughter.)

3 MR. SURI: And --

4 JUSTICE GORSUCH: That seems a bit  
5 question-begging, but --

6 JUSTICE KAGAN: Well, but in this  
7 case, necessarily, really, "in connection with,"  
8 "in relation to," who draws a distinction  
9 between those words?

10 MR. SURI: Let me explain why there's  
11 a distinction. First of all --

12 JUSTICE GORSUCH: Let -- let -- let --  
13 first of all -- first of all, just so we're  
14 clear -- I'm sorry to interrupt.

15 JUSTICE KAGAN: No, please. I  
16 interrupted you.

17 JUSTICE GORSUCH: Well, okay. Suppose  
18 we did read them the same way. Then you would  
19 concede there would be a federalism problem?

20 MR. SURI: No, I wouldn't concede that  
21 because there's also a jurisdictional element in  
22 1028(a)(7). That's contained in 1028(c). And  
23 that jurisdictional element ensures that every  
24 prosecution is within --

25 JUSTICE GORSUCH: How?

1           MR. SURI: -- the federal government's  
2 authority.

3           It has a list of elements that must be  
4 satisfied in order for an (a)(7) prosecution to  
5 be brought. And I grant one of them is affects  
6 commerce, but --

7           JUSTICE GORSUCH: Yeah. So, if -- if  
8 -- if he runs the credit card and it goes across  
9 state lines, good to go?

10          MR. SURI: But this Court has held  
11 that --

12          JUSTICE GORSUCH: Can't you concede  
13 that's a serious federal -- federalism problem  
14 if we were to read those terms the same way?

15          MR. SURI: No, because this Court has  
16 held that that's within the scope of the  
17 Commerce Clause. So it's not a federalism --

18          JUSTICE GORSUCH: Every fraud in  
19 America is within the scope of the Commerce  
20 Clause, counsel?

21          MR. SURI: If that's a problem,  
22 Justice Gorsuch, it's attributable to the  
23 Court's Commerce Clause cases and not to this --

24                   (Laughter.)

25          JUSTICE GORSUCH: Okay. All right.

1 It's our -- it's our fault. Fine. How about  
2 the -- how about the vagueness problem then?

3 MR. SURI: I -- I -- I -- might I  
4 finish explaining why --

5 JUSTICE GORSUCH: Well, move on to the  
6 vagueness problem.

7 MR. SURI: Yes.

8 JUSTICE GORSUCH: You know, what about  
9 the vagueness problem? What notice does this  
10 provide to people in the world that they're  
11 committing a federal felony?

12 MR. SURI: Again, Justice Gorsuch, you  
13 can avoid that problem by reading "in connection  
14 with" --

15 JUSTICE GORSUCH: I understand that.  
16 Put that aside. I asked you to put that aside,  
17 counsel. Please do so.

18 MR. SURI: Yes.

19 JUSTICE GORSUCH: Answer my question  
20 about vagueness.

21 MR. SURI: The Court's vagueness  
22 precedents are concerned with ensuring that  
23 law-abiding people aren't trapped into being  
24 prosecuted for a violation that they couldn't  
25 have anticipated. And that problem doesn't



1 arise with respect to either of these statutes  
2 because these statutes apply only if an  
3 individual has committed a predicate crime in  
4 the first place. So --

5 JUSTICE GORSUCH: Well, we -- we know,  
6 though, that the law has to provide notice not  
7 just that you committed some crime; it has to  
8 provide notice to the bad man that there are  
9 more consequences for worse crimes.

10 And I don't doubt that the waiter who  
11 overbills for that bottle of wine knows he's  
12 committed some sort of state misdemeanor or  
13 maybe even felony, but does he know that he's  
14 committed a federal offense too?

15 MR. SURI: The way he would know is by  
16 reading that statute and by looking at the  
17 elements and finding that his conduct fits  
18 within the most natural reading of those  
19 elements.

20 JUSTICE GORSUCH: Thank you.

21 JUSTICE JACKSON: Mr. Suri, can I --  
22 can I ask you to do almost the opposite of what  
23 Justice Gorsuch was just asking you, and that is  
24 to assume that the statute (a)(7) and 1028A are  
25 distinct.

1 MR. SURI: Yes.

2 JUSTICE JACKSON: All right. So can  
3 you just help me to understand how your --  
4 first, how your "facilitates" view of 1028A is  
5 different than "use in connection with"?

6 MR. SURI: Yeah, I'm not taking a  
7 definitive position on what exactly "in  
8 connection with" would mean because that's not  
9 presented in this case. I'm suggesting the  
10 Court could interpret it differently.

11 JUSTICE KAGAN: It means "in relation  
12 to."

13 JUSTICE JACKSON: But -- but what I'm  
14 asking is, you know, this is kind of like, I  
15 think, creating another constitutional problem  
16 that I hope we can focus on, which is, to the  
17 extent they are the same --

18 MR. SURI: Yes.

19 JUSTICE JACKSON: -- then I don't  
20 understand why we don't have a serious due  
21 process problem because we have a mandatory  
22 minimum with respect to the second one. So,  
23 unlike Mr. Fisher's suggestion that the second  
24 one is a lesser included offense, it is, in  
25 fact, an aggravated offense. It is more serious

1 because you get two years tacked onto your  
2 underlying offense as a result of it.

3 So is -- is -- is it the government's  
4 position that you do not have to have more  
5 egregious conduct or behavior to -- to trigger  
6 the two-year man min?

7 MR. SURI: It is more egregious  
8 because the predicate offense has to be more  
9 egregious. And I appreciate --

10 JUSTICE JACKSON: I don't think that's  
11 how it works. It doesn't. Mr. -- Mr. Fisher  
12 says look at the list of predicate offenses.  
13 It's like every fraud in the world. And you've  
14 just admitted in response to Justice Thomas that  
15 it could be a teeny, teeny fraud.

16 So it's not more serious just because  
17 of the predicate offense. It would seem to me  
18 it would have to be more serious because of the  
19 way in which you're using the name.

20 MR. SURI: No, I respectfully disagree  
21 with that.

22 JUSTICE JACKSON: Okay.

23 MR. SURI: It is a subset of crimes  
24 that triggers 1028A. And --

25 JUSTICE JACKSON: But, if those crimes

1 are broader and less serious than other crimes  
2 you can put into the other -- and into (a)(7),  
3 you're still believing that it's a lesser  
4 included offense? The --

5 MR. SURI: But they're not -- but  
6 they're not broader. They're a narrower set of  
7 crimes. They're a more serious set of crimes  
8 than all crimes whatsoever.

9 You can violate 1028A if the predicate  
10 crime is a felony. You can violate 1028(a)(7)  
11 if the predicate crime is a misdemeanor. So,  
12 yes, 1028A is going to be more serious than  
13 1028. And there's no due process problem.

14 CHIEF JUSTICE ROBERTS: Does it make  
15 any difference to your position if the predicate  
16 crime always requires a misuse of identifying  
17 information? In other words, my -- my  
18 conception of the identity theft crime is that  
19 it is -- it provides additional punishment. But  
20 what if the underlying offense always requires  
21 misuse of identity?

22 MR. SURI: That can happen under the  
23 statute with respect to other predicate  
24 offenses, though not this one. For example, one  
25 of the other predicate offenses is Section -- I

1 think it's 1424 if I -- I might be  
2 misremembering the number, but it's  
3 impersonating another person in an immigration  
4 proceeding. Now that's always going to involve  
5 using another person's identity even on Mr.  
6 Fisher's definition, so --

7 CHIEF JUSTICE ROBERTS: Well, doesn't  
8 that suggest that you ought to have a narrower  
9 definition of the aggravated identity theft  
10 provision?

11 MR. SURI: No, Mr. Chief Justice.  
12 What it suggests is that Congress picked out a  
13 specific set of predicate crimes, and it picked  
14 those out where the aggravated identity theft  
15 elements are more likely to arise than with  
16 respect to other crimes. So it shouldn't be a  
17 surprise that with respect to this particular  
18 set of crimes, there are going to be some where  
19 the elements of the statute are met more  
20 frequently.

21 But, of course, we don't run into that  
22 problem here because there are a lot of  
23 different ways you can commit healthcare fraud  
24 without using a means of identification of  
25 another person without lawful authority in

1 relation to that crime.

2 JUSTICE KAGAN: Well, what are those  
3 ways? Because it strikes me that the delta here  
4 is very slim, that in your brief, you had, you  
5 know, some hypotheticals which were more or less  
6 outlandish but that when you really get down to  
7 it, all healthcare fraud is done using people's  
8 names.

9 MR. SURI: I'll give some of the less  
10 outlandish hypotheticals then.

11 First, frauds committed by patients.  
12 For example, if someone lies about his income in  
13 order to become eligible for Medicaid or lies  
14 about whether he smokes in order to get a lower  
15 health insurance premium.

16 Second, healthcare frauds committed by  
17 pharmaceutical companies. Let's say a vaccine  
18 manufacturer commits fraud in connection with a  
19 contract to provide vaccine doses, or a  
20 prescription drug manufacturer commits fraud  
21 when negotiating with Medicare about  
22 prescription drug prices. That doesn't involve  
23 individual patients.

24 Third set of examples: Frauds by  
25 providers that don't involve specific patients.

1 Let's say the provider here lied when he was  
2 enrolling for Medicaid in the first place, or he  
3 -- the Court had a case last year about the  
4 disproportionate share fraction reimbursements  
5 under Medicare and Medicaid. Let's say there's  
6 a fraud in connection with that. That's not  
7 connected with any specific patient.

8 Fourth set of examples is honest  
9 services healthcare fraud. Let's say an  
10 insurance executive accepts a bribe or a  
11 kickback. Again, that doesn't involve a  
12 specific patient.

13 I grant that --

14 JUSTICE KAGAN: So that's very  
15 helpful. Are you saying that anytime that  
16 there's a provider that bills Medicaid for  
17 services, it's covered?

18 MR. SURI: Almost.

19 JUSTICE KAGAN: I guess this just goes  
20 --

21 MR. SURI: Almost. I mean, you could  
22 imagine the fictitious patient or other  
23 hypotheticals like that, but, yes, almost all of  
24 those cases would be covered, I -- I grant that.

25 And, Mr. Chief Justice, you had --

1 JUSTICE SOTOMAYOR: But what do we do  
2 about the incongruity that under Flores-Figueroa  
3 we said fictitious people are not covered by  
4 this?

5 MR. SURI: That's right. I'm  
6 conceding that fictitious people aren't covered.

7 JUSTICE SOTOMAYOR: So we're not going  
8 to cover fictitious people under our case law,  
9 but we're going to cover the stretcher case,  
10 Justice Sutton's stretcher case?

11 MR. SURI: Yes, but there's a reason  
12 that Congress drew that distinction. When  
13 you're billing to a fictitious patient, you're  
14 not causing a harm to a real person. You're  
15 just harming --

16 JUSTICE SOTOMAYOR: Well, I don't -- I  
17 actually don't think that the patient thinks  
18 that he's been -- his identity has been stolen.  
19 He may think that -- at rightly, that you  
20 cheated the government or your healthcare  
21 provider, insurance, but I doubt very much he  
22 thinks that you've misused his name or -- or  
23 transferred his name or that you committed  
24 identity theft with his name.

25 MR. SURI: I -- I have already



1 accepted that you could say this doesn't feel  
2 like identity theft, but that's not the test,  
3 whether the patient feels like his identity has  
4 been stolen. The test is the elements set forth  
5 in the statute, and the conduct here meets that.

6 JUSTICE KAVANAUGH: But the elements  
7 in the statute are -- are vague, "in relation  
8 to," "uses authority." And why doesn't the  
9 title then give us a helpful clue about how  
10 broadly to read those somewhat elastic terms?

11 MR. SURI: Yeah, I -- I certainly  
12 accept, Justice Kavanaugh, that if you thought  
13 the statute were ambiguous, then the title is a  
14 useful clue in resolving that ambiguity. But I  
15 don't think the title --

16 JUSTICE KAVANAUGH: Well, -- well,  
17 isn't "in relation to," for example, an  
18 inherently, I guess, vague term in the sense  
19 that everything can relate to everything else?  
20 You have to have -- make a judgment call about  
21 the unit of or the level of generality you're  
22 going to read it, and to help guide us where to  
23 draw the line there, the title can help pinpoint  
24 a place where to do that.

25 MR. SURI: Yeah, I agree with that in

1 principle, but there's a better source of  
2 guidance to look to than the title, namely, this  
3 Court's interpretation of 924(c). 924(c) was  
4 the model for this statute. It used the same  
5 language. It used "during and in relation to."  
6 And, in that context, the Court has interpreted  
7 "in relation to" to mean have some purpose or  
8 effect with respect to the predicate crime.

9 And since Congress adopted this  
10 statute modeled on that other statute, the most  
11 sensible thing to do, I would submit, is to  
12 interpret "in relation to" the same way.

13 Now, Mr. Chief Justice, you had said  
14 that you wanted to address a question to me  
15 about the three hours of harm and whether there  
16 really were three hours of harm. I'd like to  
17 address that. Yes, there were. There's a  
18 factual dispute between the defendant and us  
19 about whether Medicaid billed on a rolling  
20 12-month basis or a calendar year basis.

21 The evidence supporting our view is  
22 set forth at Joint Appendix pages 19, 20, and  
23 27. And, since this is a sufficiency of the  
24 evidence challenge, you should look at the  
25 evidence in the light most favorable to us.

1                   In addition to that, even if you  
2                   resolve that factual dispute the way they  
3                   proposed, it would make no difference, because  
4                   it would mean that instead of saying three hours  
5                   of testing are taken out of the rolling 12-month  
6                   period, Patient L would have lost three hours of  
7                   testing out of the calendar year period.

8                   Now, Justice Gorsuch, I -- I must get  
9                   back to this question of "in connection with"  
10                  and the federalism problems.

11                  JUSTICE GORSUCH: Well, let's -- let's  
12                  -- let's skip that.

13                  (Laughter.)

14                  JUSTICE GORSUCH: I think we've beaten  
15                  that horse, but I do have another question for  
16                  you since you -- you looked over here. Maybe  
17                  you -- maybe you regret that.

18                  (Laughter.)

19                  MR. SURI: I regret it already.

20                  (Laughter.)

21                  JUSTICE GORSUCH: If we were to reject  
22                  the government's view, so, yes, you are going to  
23                  regret it, is there a reducible core? Is there  
24                  an alternative? Is there a backup? If -- if we  
25                  reject the idea that every time a real patient's

1 name is used in an overbilling, that that is  
2 automatically identity theft, which is your  
3 position --

4 MR. SURI: Yes.

5 JUSTICE GORSUCH: -- is there  
6 something else that the government wishes to  
7 purvey today?

8 MR. SURI: Yes. If the Court is to  
9 rule against us, then I would urge the Court to  
10 adopt the Sixth Circuit's interpretation that  
11 has been attributed to Judge Sutton, even though  
12 he was bound by circuit precedent in adopting  
13 that. And the reason --

14 JUSTICE GORSUCH: Let's not diminish  
15 our colleagues, okay? But you -- you -- you  
16 then are where Mr. Fisher is as an alternative?

17 MR. SURI: All I'm suggesting is we  
18 shouldn't be blaming Judge Sutton for that test  
19 --

20 JUSTICE GORSUCH: Oh.

21 MR. SURI: -- which we think is  
22 incorrect. But the reason we suggest that that  
23 test would be better than the "with law" --  
24 "without lawful authority" alternative that Mr.  
25 Fisher has suggested is that the "without lawful

1 authority" test raises all sorts of -- that he's  
2 proposed raises all sorts of complications about  
3 where to draw the line in terms of the level of  
4 generality at which authority is being assessed.  
5 And the Judge Sutton test avoids those concerns.

6 JUSTICE ALITO: Well, how does the --  
7 what's the justification for that? What -- what  
8 exactly is the Sixth Circuit Sutton test?

9 MR. SURI: The Sixth Circuit test is a  
10 distinction between lies about who received a  
11 service --

12 JUSTICE ALITO: Yeah.

13 MR. SURI: -- and lies about how and  
14 when the service was provided. We don't think  
15 it's justified, which is why we think we prevail  
16 in this particular case, but it's the least  
17 unjustified approach if you were to rule against  
18 us.

19 JUSTICE ALITO: Well, isn't the "who"  
20 question answered by the statutory term, another  
21 person?

22 MR. SURI: No, I took the test that  
23 the Sixth Circuit was putting forward to be that  
24 the false statement has to be a falsity as to  
25 who received a particular service. So they're

1 not interpreting the term "another person."  
2 They're interpreting the term "in relation to"  
3 in that context.

4 JUSTICE JACKSON: Do you dispute that  
5 this 1028A is an aggravated nature of the  
6 commission of this crime?

7 MR. SURI: No, I don't dispute that.

8 JUSTICE JACKSON: All right. And you  
9 suggested in response to me earlier that the  
10 aggravation comes from the list of offenses?

11 MR. SURI: Yes.

12 JUSTICE JACKSON: Do you agree, as I'm  
13 looking at the list of offenses, that it  
14 includes things like mail, bank, and wire fraud?

15 MR. SURI: Yes.

16 JUSTICE JACKSON: And so you're  
17 suggesting that -- that the aggravation alone --  
18 it has nothing to do with the use -- the way in  
19 which you use? You can use it --

20 MR. SURI: Yeah.

21 JUSTICE JACKSON: -- in the same way  
22 as triggering (a)(7) in connection to, but it's  
23 just the fact that you're committing mail and  
24 wire or bank fraud that subjects you to the  
25 two-year man min?

1           MR. SURI: Yes. Let me summarize the  
2 point in the following way. If you use  
3 someone's identity with respect to a federal  
4 misdemeanor, that could be covered by  
5 1028(a)(7).

6           If you use it with respect to a  
7 federal felony that's on that list, such as mail  
8 fraud, then that's aggravated identity theft.

9           JUSTICE JACKSON: Yes, but (a)(7) also  
10 covers felonies.

11          MR. SURI: State felonies.

12          JUSTICE JACKSON: Yes, "unlawful  
13 activity that constitutes a violation of federal  
14 law." And I appreciate that that sweeps in  
15 misdemeanors, but --

16          MR. SURI: Yes.

17          JUSTICE JACKSON: -- you're suggesting  
18 that the two-year mandatory minimum penalty in  
19 this area of fraud is only distinguishable on  
20 the basis of the fact that you could do -- you  
21 -- you could be charged with a misdemeanor under  
22 (a)(7), that that's the difference, that's the  
23 delta between the two?

24          MR. SURI: That is the difference  
25 between the two. And, remember, (a)(7) in one

1 respect is harsher than 1028A because it has a  
2 five-year maximum penalty.

3 So, under 1028A, you -- you're getting  
4 --

5 JUSTICE JACKSON: Of course, that's  
6 not the function of mandatory minimums. I mean,  
7 they're not really -- I appreciate that it has a  
8 higher top level, but Congress, when it -- when  
9 it enacts a mandatory minimum, is constraining  
10 judicial discretion with respect to what you can  
11 impose as a penalty. And usually Congress does  
12 that in situations in which it has identified  
13 substantially more serious or more egregious  
14 conduct on the part of the person who is subject  
15 to the mandatory minimum.

16 And what's strange to me about your  
17 argument is that you're saying, in this  
18 situation, unlike many others, we don't care  
19 about that. We're not focused on the fact that  
20 it's necessarily more egregious. We're just  
21 looking at the list of offenses, and, to the  
22 extent a misdemeanor could be charged in the  
23 other world, that -- that justifies a two-year  
24 mandatory minimum in this one?

25 MR. SURI: Let me take the worst



1 version of that hypothetical for us and say  
2 Congress has enacted two identical statutes and  
3 one has a mandatory minimum and one doesn't, and  
4 it's entirely up to the prosecutor which of  
5 those charges is -- is brought.

6 This Court has held specifically that  
7 that is not a violation of the Constitution. I  
8 believe the case is United States against  
9 Batchelder if I'm remembering correctly.

10 JUSTICE JACKSON: All right. I  
11 appreciate that. But, here, we don't have two  
12 entirely identical statutes. We have ones that,  
13 in fact, use different terms.

14 So why would we interpret them to be  
15 identical? I mean, even if we've said that's  
16 okay to do, we have "in connection with" in one  
17 and we have "during and in relation to" in  
18 another.

19 MR. SURI: I --

20 JUSTICE JACKSON: And you're asking us  
21 to interpret "during and in relation to" as if  
22 it is the same.

23 MR. SURI: I'm not asking you to  
24 interpret them as if they're the same. I think  
25 that was the point of my colloquy with Justice

1 Gorsuch. They're different.

2 JUSTICE JACKSON: But you can't tell  
3 me what difference "facilitates" makes. Your --  
4 your definition is facilitates, and so all I  
5 want to know is, why is that any different than  
6 "in connection with"?

7 MR. SURI: "In connection with" is  
8 used alongside with "intent to aid" -- "commit  
9 or to aid or abet." And you could read that  
10 ejusdem generis to be similar to "with intent to  
11 commit or to aid or abet." And you don't have  
12 that contextual limitation with respect to  
13 "during and in relation to."

14 In the phrase "during and in relation  
15 to," the word "during" is what is doing most of  
16 the limiting work. The word "during" is saying  
17 that the use of the identity must be  
18 contemporaneous with the crime. So that's  
19 already limiting the universe quite a bit.

20 Now, within that context, "relation  
21 to" simply serves to exclude fortuities, cases  
22 in which it's a coincidence that the name was  
23 used at the same time as the commission of that  
24 particular crime.

25 JUSTICE ALITO: Speaking of ejusdem

1 generis, could you address the argument  
2 regarding the application of that canon to the  
3 statutory terms -- terms use, possess, transfer?

4 MR. SURI: Yes, Justice Alito. I  
5 think that the presence of the term "possess"  
6 strongly supports our interpretation, and the  
7 reason is that it would be quite odd for this  
8 statute to prohibit the passive possession of  
9 another person's name, to prohibit a  
10 particularly egregious type of use, namely, use  
11 for the purpose of impersonation, but to cover  
12 nothing in between the active uses that fall  
13 short of impersonation. There's no reason to  
14 think Congress would have included that  
15 discontinuity in the statute.

16 In addition, I think Justice Barrett  
17 raised the question that "transfer and possess"  
18 could be read to refer to circumstances in which  
19 the information is stolen. And I agree with  
20 that.

21 But "use" has to be doing some  
22 independent work. If you've stolen the  
23 information, you've already possessed it without  
24 lawful authority. And in order to give "use"  
25 some independent work to do, you have to make

1 sure that there -- there isn't a stealing  
2 element built into that.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 JUSTICE KAGAN: Mr. Suri, you -- just  
10 on this question of "without lawful authority,"  
11 different kind of issue, in your brief, you say  
12 that means if he uses it with permission -- no,  
13 sorry, if he uses it without permission or --  
14 here's what I want to ask you about -- if he  
15 uses it with permission but the conferral of  
16 that permission contravened some other law.

17 So suppose somebody had said to this  
18 doctor -- that Patient L had said to this  
19 doctor, you know, you gave me five hours of  
20 service X, but you've been a great doctor; I'm  
21 happy for you to bill 20 hours of some more  
22 expensive service.

23 Would that count as without lawful  
24 authority or not?

25 MR. SURI: We would say that we could

1 prosecute that case, but that's a more difficult  
2 case and would raise issues that are not present  
3 here. In that hypothetical, unlike this case,  
4 there would be authority, and the question would  
5 be whether the authority was lawful.

6 The argument on the other side would  
7 be that "lawful" should be interpreted to apply  
8 only to procedural unlawfulness. You've held a  
9 gun to the person's head in order to extract the  
10 consent. But you could also interpret "lawful"  
11 to include substantive unlawfulness.

12 JUSTICE KAGAN: So you think it goes  
13 that far, but you're saying, you know, don't  
14 worry about it, we can do that next case?

15 MR. SURI: Correct.

16 JUSTICE KAGAN: And last question is,  
17 just coming back to the Judge Sutton test, which  
18 may or may not be the Judge Sutton test, how do  
19 you understand the Judge Sutton test to work  
20 with respect to hypotheticals which I take the  
21 Petitioner to have conceded, which is like  
22 billing cancer services, billing some other  
23 product entirely, not psychological services now  
24 but something else entirely.

25 How does the Judge Sutton test work

1 with relationship to those hypotheticals --

2 MR. SURI: I think --

3 JUSTICE KAGAN: -- which also means  
4 with connection to those hypotheticals.

5 (Laughter.)

6 MR. SURI: I think the fairest answer  
7 to that question is that the opinion doesn't  
8 address that, and, therefore, I'm not sure how  
9 the Sixth Circuit would resolve that issue.

10 We would suggest that if the Court  
11 adopt that test, it'd say that those  
12 hypotheticals are covered, because it seems  
13 pretty clear that the fraud in that case is in  
14 relation to the use of the name and also that  
15 it's without lawful authority.

16 JUSTICE KAGAN: Right. But, if I  
17 understood the Judge Sutton test to be asking,  
18 well, was there a misrepresentation with respect  
19 to identity, it would seem as though in those  
20 hypotheticals there is no misrepresentation with  
21 respect to identity. So I would think -- I  
22 guess I was a little bit surprised that you came  
23 out in favor of the Judge Sutton test as your  
24 preferred way of losing because I would think  
25 then that you lose those set of cases.

1           MR. SURI: Judge Sutton suggested that  
2 if no one received a particular service and you  
3 say that someone did, that is a  
4 misrepresentation as to identity. So, in the  
5 cancer services example, the clinic is providing  
6 cancer services to no one and you're still  
7 saying you provided it to Patient L, that is a  
8 misrepresentation as to identity as he conceived  
9 of the test.

10           JUSTICE KAGAN: I see. And then how  
11 would he separate or the -- somebody received  
12 psychological services from a certain level of  
13 psychologist but not from a psychiatrist, let's  
14 say?

15           MR. SURI: I don't think those should  
16 be separated, Justice Kagan. That's precisely  
17 why we think we should prevail in this case.  
18 There is no principal distinction between those.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

21           Justice Kavanaugh?

22           JUSTICE KAVANAUGH: In the court of  
23 appeals, Judge Costa's opinion said that this  
24 Court's precedents had sent an "unmistakable"  
25 message that "[c]ourts should not assign federal

1 criminal statutes [of] a 'breath-taking' scope  
2 when a narrower reading is reasonable."

3           And the Petitioner also cites a long  
4 line of cases you're familiar with, Marinello,  
5 Van Buren, Kelly, the list goes on, where we  
6 have rejected, I would say, the broadest  
7 interpretation of criminal statutes, the literal  
8 reading as compared to the ordinary reading of  
9 criminal statutes, based on fair notice concerns  
10 and not trapping the unwary or increasing the  
11 sentence on an unwary person.

12           So what -- why does this case not fall  
13 within that concern and with that body of  
14 precedent about reading it as broadly as you  
15 possibly could and thereby raising fair notice  
16 concerns of the kinds that Judge Costa raised?

17           MR. SURI: Because this statute,  
18 unlike the statutes in all of those other cases,  
19 comes into play only if someone has committed a  
20 predicate crime. In all of the cases that  
21 you've just mentioned, there was a concern that  
22 law-abiding individuals would be prosecuted by  
23 the federal government for routine conduct.

24           For example, in Marinello, you could  
25 be prosecuted under the interpretation that was



1 advanced there for paying someone in cash rather  
2 than paying by check. And in Van Buren, there  
3 was a concern that you could prosecute people  
4 who used their computers at work to check sports  
5 scores.

6           There's no concern like that in this  
7 case. In this case, the statute at issue here  
8 comes into play only if a predicate federal  
9 offense has already been committed.

10           JUSTICE KAVANAUGH: Well, that's  
11 similar to an argument I heard years ago from  
12 the government about mens rea: Don't worry  
13 about mens rea requirements for sentence  
14 enhancements as opposed to the crime itself.  
15 And I didn't find that persuasive then because  
16 the concern about sentence enhancements is -- is  
17 still, as Justice Gorsuch said earlier, you  
18 know, the -- the ordinary citizen may know,  
19 okay, well, this is going to trigger a certain  
20 amount of punishment, but you're on no notice  
21 that it could trigger a mandatory minimum or a  
22 significantly increased amount of punishment.

23           So don't the same concerns about fair  
24 notice still kick in in that situation, where  
25 you're talking about an enhancement as to the

1 underlying crime?

2 MR. SURI: I don't think the same  
3 concerns kick in. I think -- I -- I appreciate  
4 that the concerns do arise, but they're  
5 mitigated by the fact that the person has to  
6 have committed a predicate crime in the first  
7 place.

8 And there is no danger of giving  
9 federal prosecutors the power to turn otherwise  
10 law-abiding citizens into criminals. That  
11 simply doesn't arise with respect to this  
12 statute.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: Can I just quickly  
18 get your understanding of the Fifth Circuit's  
19 view of "without lawful authority" and whether  
20 or not the government endorses it?

21 MR. SURI: I don't take the Fifth  
22 Circuit to have taken a view on "without lawful  
23 authority." It wasn't raised at the panel  
24 stage, and at the en banc stage, all the Fifth  
25 Circuit did was say we affirm for the reasons

1 given in the panel opinion.

2 JUSTICE JACKSON: Oh, so you don't  
3 think they held that "without lawful authority"  
4 means to use it to commit a crime?

5 MR. SURI: No, I don't think they did.

6 JUSTICE JACKSON: What -- is that the  
7 government's position or no?

8 MR. SURI: No, that's not the  
9 government's position.

10 JUSTICE JACKSON: What is the  
11 government's position?

12 MR. SURI: The government's position  
13 is that a person acts without lawful authority  
14 only if he uses the means of identification in a  
15 manner that requires prior authorization, but he  
16 either didn't get that authorization or the  
17 authorization was conferred in an invalid way.

18 And I think that limitation eliminates  
19 a lot of the parade of horrors that arises on  
20 the other side. So circumstances in which  
21 you're simply addressing someone by his name or  
22 mentioning his name or talking about him or  
23 making a statement about him wouldn't be covered  
24 by this phrase because those don't require prior  
25 authorization in the first place. Neither --

1 JUSTICE JACKSON: So -- you can end  
2 where you started, which is with the waiter  
3 hypothetical. The government's view is that all  
4 of those would be without lawful authority?

5 MR. SURI: Those would be without  
6 lawful authority because you do need someone's  
7 permission to charge his credit card in the same  
8 way you do need someone's permission to bill  
9 something to his Medicaid number.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Sotomayor?

13 JUSTICE SOTOMAYOR: A couple  
14 follow-ups. In the Bond case, clearly, the  
15 woman who poisoned the mistress or the person  
16 she suspected of being a mistress wasn't a  
17 law-abiding citizen, and we still narrowed that  
18 statute, correct?

19 MR. SURI: Correct.

20 JUSTICE SOTOMAYOR: Number two,  
21 following up on what Justice Jackson just said,  
22 if I disagree with you, reading the record,  
23 because I have, it was very clear that the Fifth  
24 Circuit said "without lawful authority" exists  
25 whenever someone uses the name -- the means of

1 identification of another person to commit a  
2 crime.

3           You argued the same thing. That's the  
4 jury instruction that was given to the jury. If  
5 this is my view of the evidence, where does that  
6 leave us on this case? Do we vacate and remand  
7 and say that's too broad, now pay attention to  
8 what the scope of "without lawful authority"  
9 might mean? It's unsatisfying, by the way, but  
10 is that what we do?

11           MR. SURI: No. You would still rule  
12 for us, and the reason is that they haven't  
13 challenged the jury instructions here. In fact,  
14 they agreed to the jury instructions that were  
15 given.

16           This is a sufficiency of the evidence  
17 challenge. The issue is whether the evidence  
18 supports findings on each of the elements of the  
19 crimes, not whether the jury was instructed  
20 properly.

21           JUSTICE SOTOMAYOR: Thank you.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Mr. Fisher.

25

1                   REBUTTAL ARGUMENT OF JEFFREY L. FISHER  
2                   ON BEHALF OF THE PETITIONER

3                   MR. FISHER: Thank you. I'd like to  
4 first -- first address a couple things about the  
5 two different components of the statutory text  
6 that we've been discussing today and then turn  
7 to consequences.

8                   So, first, on the statutory text,  
9 we've talked about the "in relation to" element  
10 and the "without lawful authority" element. On  
11 "in relation to," forgive me, but I'll turn back  
12 to just -- Judge Sutton's opinion and point out  
13 at page 628 of that opinion, in describing the  
14 Sixth Circuit's prior case, he said the Sixth  
15 Circuit held quite correctly that this -- that  
16 the claim of the stretchers did not fall within  
17 the statute. So he not only discussed the prior  
18 case, he endorsed it.

19                   And that paragraph says, if the lie  
20 just goes to about the nature of the services  
21 provided, not who received them, it does not --  
22 it is not falling within the "in relation to"  
23 element of the statute.

24                   So we think that would resolve the  
25 case in our favor in a way that Judge Sutton has

1 explicitly endorsed.

2           As to "without lawful authority," I  
3 think Justice Sotomayor is right, the only  
4 argument ever made below was the one you  
5 described. It's at JA 31 and 32.

6           And, Justice Jackson, at pages 66a and  
7 67a of the Petition Appendix, the Fifth Circuit  
8 panel decision, which was adopted by the en banc  
9 court, quite directly adopts that reading of the  
10 "without lawful authority" element in this case  
11 and applies it to Mr. Dubin's conduct, and then  
12 the en banc court, of course, accepts that. So  
13 the Fifth Circuit quite directly did address  
14 that issue and got it wrong.

15           Now we heard a suggestion in the brief  
16 and I just heard it a moment ago that the  
17 government maybe doesn't agree anymore with the  
18 argument it made below, that -- that any use to  
19 violate the law constitutes "without lawful  
20 authority," but, with due respect to my friend,  
21 I just don't understand what their alternative  
22 test means.

23           No court has ever adopted it. And  
24 this notion that you need to have permission --  
25 it's only something that you need to have

1 permission for to do, I don't even understand  
2 how that works with respect to the one example  
3 we used in the briefs, which is putting a name  
4 on an envelope or making a phone call because  
5 things like the Do Not Call List and Junk Fax  
6 restrictions under federal law do require  
7 permission to send those sorts of things.

8           So I don't understand, as we said in  
9 our reply brief, how that test would even work.  
10 And, at the very least, you'd just be  
11 interjecting another layer of vagueness and  
12 difficulty into the statute. So we think it's  
13 best to stick with what the government argued  
14 below and what the Fifth Circuit decided.

15           Now let me turn to the scope and the  
16 consequences of this very broad position that  
17 the government has endorsed, and I think the  
18 government stood here and said yes, every  
19 mischarge by a waiter, a cashier, et cetera,  
20 constitutes -- that -- that violates the mail or  
21 wire fraud statute would fall within our  
22 understanding. That's an incredibly broad  
23 sweep.

24           I heard some resistance about the  
25 healthcare fraud statute. So there was an



1 admission that virtually every provider case  
2 would fall within the statute.

3 Now the government in its brief tried  
4 to give a few other examples, and we answered  
5 those in our reply brief, and this is at pages  
6 18 and 19 of our reply brief. We point out that  
7 the examples the government gave would require  
8 the use of somebody's name. So, again, I heard  
9 today the notion of applying for Medicare  
10 benefits and then lying or Medicaid benefits and  
11 lying about your age or your smoking.

12 But, to do that application, you have  
13 to list your doctor, your employer, a contact at  
14 your employer. You're putting names all over  
15 that form. And the form won't be approved if  
16 those names are not there.

17 So exactly the same argument the  
18 government is making today would apply to the  
19 only hypotheticals that the government has put  
20 forth in a brief, and I -- some of these things  
21 were new today. I don't know every last detail,  
22 but I bet you, if you run down the details,  
23 you'll find names on those forms as well.

24 And I think that leads me to the  
25 consequences and the real-world consequences for

1 this. So it's not just that a mandatory minimum  
2 comes into play where it wouldn't otherwise come  
3 into play. But what you would be doing by  
4 accepting the government's position is creating  
5 a world where every simple fraud prosecution is  
6 now also chargeable as aggravated identity  
7 theft.

8           And what happens then? Well, in a  
9 world of plea bargaining, that becomes, in the  
10 words that other prosecutors have used, powerful  
11 plea bargaining leverage we can use to procure  
12 quick pleas in federal fraud cases.

13           We're not talking about an aggravated  
14 penalty for actually misusing somebody's name.  
15 We're talking about in practical terms a very  
16 strong cudgel to use against people to procure  
17 pleas in very low-level fraud cases.

18           And that's not what Congress was aimed  
19 for in this case. Congress wasn't trying to  
20 create a two-year mandatory minimum all of a  
21 sudden for ordinary fraud offenses. It was  
22 aimed at a particular new form of misconduct  
23 that's simply not present in the words  
24 "aggravated identity theft" and on the facts of  
25 this case.

1                   If there are no further questions,  
2           I'll submit.

3                   CHIEF JUSTICE ROBERTS: Thank you, Mr.  
4           Fisher, Mr. Suri. The case is submitted.

5                   (Whereupon, at 11:36 a.m., the case  
6           was submitted.)

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