No. 22-50160

Before the Honorable Daniel P. Collins, Holly A. Thomas, and Anthony D. Johnstone
Panel Opinion filed March 19, 2025

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAHSA PARVIZ, Defendant-Appellant.	D.C. No. 2:21-cr-00293-SB-1

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

Appeal from the United States District Court
for the Central District of California

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Criminal Defense Attorneys (NACDL) certifies that it is a non-profit entity that does not have a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in NACDL.

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INTEREST OF AMICUS

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL and its members have an important interest in ensuring the appropriate the construction of the aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), particularly in light of the mandatory two-year prison sentence for violations of the statute. In this case, the panel has decided issues that directly relate to the organizational missions of amicus.[1]

[1] All parties consent to the filing of this amicus brief. Pursuant to Fed. R. App. P. 29(a), amicus affirms that no counsel, party, person, or entity other than NACDL, its members, and its undersigned counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief.

REASONS TO GRANT REHEARING OR REHEARING EN BANC

The panel decision endorses a unreasonably broad interpretation of two terms in the aggravated identity theft statute, 18 U.S.C. Section 1028A: "use" and "without lawful authority." Panel Op. 12–14. The consequence of the panel's interpretation is that the crime of aggravated identity theft is no longer distinct from the predicate fraud offense. The panel's reasoning risks sweeping a wide range of conduct into the ambit of aggravated identity theft—a crime that carries a mandatory and significant sentencing enhancement.

This Court should grant rehearing to address the panel's overly broad construction of the two statutory terms. Only two years ago, the Supreme Court rejected the expansive approach courts across the country had taken to the aggravated identity theft statute, and confined Section 1028A to cases of "classic identity theft." *Dubin v. United States*, 599 U.S. 110, 126 (2023). If left to stand, the panel's opinion will improperly re-expand the statute's application.

First, through its analysis of the "use" element, the panel conflated two distinct issues: whether the factual misrepresentations in

a letter defendant Mahsa Parviz submitted to a passport officer were false, and whether Parviz misappropriated the identity of the signatory. The false statements in the letter are what make it fraudulent, but neither the statements nor the letter itself amounts to identity theft. Rehearing is necessary to correct the panel's erroneous expansion of "use."

Second, in interpreting the "without lawful authority" element of the crime, the panel disregarded the issue of consent and thereby stripped the element of its meaning. People routinely and legitimately authorize others to use their names or other identifying information. People committing crimes may also authorize others to use their names, but that does not mean they are committing the separate crime of aggravated identity theft. Under the panel's formulation, two co-conspirators who jointly prepare a false document using both of their names have each committed aggravated identity theft against the other—a result both illogical and unjustly punitive. Rehearing is necessary to correct the panel's faulty formulation and to ensure that issues of consent remain relevant throughout the analysis of lawful authority.

I. The Court Should Grant Rehearing or Rehearing En Banc Because the Panel's Application of the "Use" Element Conflates Aggravated Identity Theft with the Predicate Fraud

Aggravated identity theft is identity theft perpetrated during and in relation to one of a list of enumerated predicate felonies. 18 U.S.C. § 1028A(a), (c). Identity theft itself is a misappropriation of another person's identifying information. Identity theft not only inflicts financial losses but also often threatens a "more significant injury" in the form of "harm to [the victim's] credit rating" and "great difficulty in clearing what appeared to be delinquent accounts." H.R. Rep. No. 108-528 at 6 (2004). While identity thieves are motivated "typically for economic or other gain," they simultaneously inflict additional "costs to individual consumers." *Id.* at 4. In the words of the en banc Seventh Circuit, identity theft harms "a victim other than the public at large." *United States v. Spears*, 729 F.3d 753, 757 (7th Cir. 2013) (en banc). Those victims may be at risk of continuing losses as the identity thief repeatedly exploits their personal information—be it name, birth date, account number, or the like—leaving them with almost no ability to stop the bleeding.

1. Congress passed the False Identification Crime Control Act in 1982, following a decade-long legislative effort to strengthen federal criminal laws addressing the proliferation of false identifications.[2] The 1982 legislation had two principal components. First, it established federal offenses related to counterfeiting and trafficking in federal identification documents. H.R. Rep. No. 97-802 (1982). Second, it created federal offenses related to counterfeiting and trafficking in or possessing stolen state, local, and foreign identification documents. *Id.*

In 2004, Congress amended the False Identification Crime Control Act by passing the Identity Theft Penalty Enhancement Act. This amendment introduced a mandatory consecutive penalty enhancement of two years—to be imposed in addition to any sentence for the underlying offense—for any person who knowingly transfers, possesses, or uses the means of identification of another person in order to commit a serious federal predicate offense. H.R. Rep. No. 108-528 (2004).

The bill included several examples of identity theft. "Notably, each of these examples involved the defendant's use of personal information

[2] U.S. Dep't of Justice, Criminal Resource Manual, https://www.justice.gov/archives/jm/criminal-resource-manual-1501-false-identification-18-usc-1028.

to pass him or herself off as another person, or the transfer of such information to a third party for use in a similar manner." *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) (quoting H.R. Rep. No. 108-528 at 5–6, reprinted in 2004 U.S.C.C.A.N. 779, 781–82). The examples include "bogus Federal income tax returns in others' names," and "use of stolen identity to apply for and receive Social Security benefits." H.R. Rep. 108-528 at 6.

The 2004 amendment produced the aggravated identity theft statute as it exists today—Section 1028A(a)(1). The statute provides that:

> [w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of two years.

2. The Supreme Court first addressed the statute in *Flores–Figueroa v. United States,* 556 U.S. 646 (2009). It held there that the government must prove that a defendant knew that the means of identification he or she unlawfully transferred, possessed, or used actually belonged to a real individual—not simply that it was a fake or counterfeit identification. *Id.* at 657. The Solicitor General conceded in

Flores-Figueroa that "'[t]he statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a *real victim*.'" *Spears*, 729 F.3d at 757 (discussing *Flores-Figueroa*; emphasis added).

The existence of a real victim is one reason the penalty for aggravated identity theft is more severe than the penalty for simple identity fraud, addressed by the "next-door neighbor" statute 18 U.S.C. Section 1028(a).[3] As the Seventh Circuit explained, the typical identity theft victim is not only "out of pocket (if the thief uses information to buy from merchants)" but is also likely to "be put to the task of rehabilitating a damaged reputation or credit history." *Id.*[4]

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[3] *Id.* ("The abbreviation of the list of predicate offenses is one reason why § 1028A carries a harsher sentence; the fact that identity *theft* has a victim other than the public at large is another.") (emphasis in *Spears*).

[4] This Court's ruling in *Hong* is consistent with the Seventh Circuit's analysis in *Spears*. *Hong* reversed the aggravated identity theft convictions of defendant healthcare providers who committed Medicare fraud in circumstances nearly identical to those the Supreme Court subsequently encountered in *Dubin*. *Hong* held that that the defendants did not "use" patients' identifications in the way proscribed by Section 1028A because they never "attempt[ed] to pass themselves off as [their] patients." 938 F.3d at 1051. In *Spears* itself, the defendant created a counterfeit firearms permit for a third person, using that person's own name and birthdate. The third person was not a victim of the fraud but was herself attempting to gain something she was not entitled to.

The Supreme Court returned to the aggravated identity theft statute in *Dubin*, the seminal decision on the meaning of the "use" element. *Dubin* holds that "use" requires *more* than the employment of another person's identity in connection with a predicate offense. 599 U.S. at 129. The element of "use" is satisfied only if "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." *Id.* at 114. In cases involving fraud or deceit, the "means of identification specifically must be used in a manner *that is fraudulent or deceptive*." *Id.* at 132 (emphasis added). In *Dubin* itself, the defendant healthcare provider committed Medicaid fraud, and in so doing employed a patient's Medicaid identification number. The Court held that this did not qualify as a "use" proscribed by Section 1028A because "[t]he crux of the healthcare fraud was a misrepresentation about the qualifications of petitioner's employee," not the patient's Medicaid number. *Id.* at 132.

3. The panel here reasoned that the government offered sufficient evidence on the use element—specifically, that Parviz's use of Bret Barker's means of identification was at the crux of her underlying criminality. Panel Op. 13. This was erroneous. By seeking a passport

based on misrepresentations about the child C.P.'s medical condition, Parviz was guilty of passport fraud regardless of whether she attempted to deceive the passport officer with a note corroborating her false representations. The crux of what made Parviz's act criminal was the content of the false statements about C.P.'s health—not the use of another person's identity. Adding Barker's name and NPI number may have lent credence to Parviz's false statements and facilitated the crime of passport fraud. But it did not make Barker the victim of a separate crime.

To commit aggravated identity theft, a defendant generally must take control of another person's identity and pass himself or herself off as that person. *Dubin* underscores this, distinguishing identity theft from fraudulent acts that involve a means of identification but do not amount to taking control of another person's identity. *Dubin* rooted that critical distinction in the statutory text: Section 1028A separates aggravated identity theft from the lesser offense of identity fraud addressed by Section 1028(a). 599 U.S. at 121.

To demonstrate what it means for the misuse of identity to be at the "crux" of a fraud, the *Dubin* Court offered the example of a

pharmacist who steals patient information from pharmacy records and uses it to open a bank account in a patient's name. *Id.* at 118. In this scenario, the pharmacist has exploited the patient's credit history. When the pharmacist uses the patient's identifying information in connection with a predicate crime, that use will predictably cause extensive ongoing damage to the patient, as well as inflicting immediate financial harm.

Other familiar scenarios illustrate the same control (and related consequences) inherent in identity theft. A thief who makes unauthorized purchases on a stolen credit card has taken control of the victim's identity. So too has a scammer in a phishing scheme who impersonates a legitimate business to trick victims into revealing sensitive personal information then used to commit further acts of fraud. In these examples, as in the Supreme Court's pharmacist hypothetical, the defendant has done more than commit fraud involving another person's identity. The defendant has taken control of a real victim's identity—often clandestinely or on false pretenses—and convincingly pretended to *be* the victim in order to further an underlying criminal objective. Meanwhile, the victim suffers a waterfall

of consequences from the misuse of his or her identity. Indeed, the victim may find it virtually impossible to stanch the flow of continuing harms.

None of that occurred in this case. The evidence is not disputed on this point. By holding that the "use" element is satisfied here, the panel strayed far from the "classic identity theft"—with its cascading harms to real victims—at which the statute is aimed.

4. This Court's decision in *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), illustrates by way of contrast the flaw in the panel's analysis. The Court there affirmed a conviction for aggravated identity theft where the defendant used his twin brother's passport to enter the United States. Although the Court focused on the "without lawful authority" element rather than the "use" element, the conduct at issue fit within the narrowed interpretation of "use" the Supreme Court subsequently adopted in *Dubin*. The defendant had taken control of his brother's identity and sought to pass himself off as his brother. The harms to a person whose passport is used to enter this country illegally may be incalculable—whether or not the identity thief commits further crimes once here.

On the other side of the ledger, *Dubin* made clear that not every use of another person's means of identification in furtherance of a criminal fraud amounts to aggravated identity theft. The Court, as noted, found it critical that Congress had formulated a statute hewing closely to "classic identity theft." 599 U.S. at 126; *supra* at 2.

The conduct at issue here falls on the other side of the line *Dubin* drew. Parviz's conduct is distinguishable from that of *Dubin's* hypothetical pharmacist, the credit card thief, the phisher, and the user of the false passport in *Osuna-Alvarez*. Parviz did not take control of another person's identity. There was no "real victim" here, as required by *Flores-Figueroa* and *Spears*. Indeed, the victim was wholly fictitious—a non-existent physician with Barker's name and identification number.

The crux of the fraud here lay in the false statements made to the passport officer—that the child C.P. was gravely ill, had received care at the Packard Hospital in Palo Alto, and needed to travel out of the country for treatment. As in *Dubin*, a third party's identity was used to facilitate the fraud, but it was not the crux of the fraud. As in *Hong*, Parviz did not attempt to pass herself off as that third party. Instead,

she used certain aspects of Barker's identity to frame the false statements that were the crux of her misconduct. She did not victimize Barker in any tangible way.

The contrast between this case and *Osuna-Alvarez* may illustrate the point best. The use of another person's identity in *Osuna-Alvarez* was indistinguishable from the passport fraud; the defendant's use of his brother's identity *was* the passport fraud. Parviz's use of Barker's name and NPI number, by contrast, was only ancillary to the predicate passport fraud offense.

The panel's decision blurs the line *Dubin* established between aggravated identity theft and the underlying predicate fraud. The Court should grant rehearing to cabin Section 1028A to cases of "classic identity theft," as *Dubin* instructs.

II. The Court Should Grant Rehearing or Rehearing En Banc to Correct the Panel's Overly Broad Interpretation of "Without Lawful Authority"

The panel's interpretation of "without lawful authority" is also overly broad, and also incorrect. In holding that sufficient evidence existed to find that Parviz used Barker's means of identification "without lawful authority," the panel drew on *Osuna-Alvarez* to

conclude that the statute encompasses "situations like the present, where an individual grants the defendant permission to possess his or her means of identification, but the defendant then proceeds to use the identification unlawfully." Panel Op. at 14 (quoting *Osuna-Alvarez*, 788 F.3d at 1185).

This formulation is erroneous. It negates the significance of knowledge and consent, which are typically at issue in determining whether or not the defendant has used the identity of another person without lawful authority. Under the panel's formulation, permission no longer matters once the defendant "proceeds" with an unlawful act, seemingly on the premise that a person cannot commit an unlawful act with lawful authority. But that effectively reads the "without lawful authority" element out of the statute—a result inconsistent with proper statutory construction. *Infra* at 19-20. The panel's formulation also threatens to re-open the floodgates closed by *Dubin*, such that any enumerated crime implicating an identity other than the defendant's own may constitute aggravated identity theft. Only by revising the panel's formulation in a way that accounts for consent throughout the "without lawful authority" analysis can the Court give meaning to the

statute's plain language and adhere to the approach dictated by *Dubin*. *Id.*

Significantly, the panel's formulation is not mandated by *Osuna-Alvarez*. While the Court in that case affirmed an aggravated identity theft conviction despite the consent of the defendant's brother to the use of his passport, the lawful authority on which the defendant trespassed was not his brother's but the government's—and the government plainly did not consent. *Infra* at 18-19. The Court should grant rehearing to revise the panel's erroneous formulation.

1. At the outset, the panel's formulation puts this Court's law into irreconcilable tension with that of the Seventh Circuit—if it does not create an outright circuit split. Sitting en banc, the Seventh Circuit in *Spears* considered the meaning of "another person" in the statutory phrase "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 729 F.3d at 755-58. The *Spears* court held that the only acceptable reading of "another person" is a "person who did not consent to the information's use." *Id.* at 756. Any broader definition, the court held, would collapse aggravated identity theft into the lesser crime of identity fraud. *Id.* at 756-58.

By adopting a formulation in which consent becomes irrelevant once a defendant "proceeds to use the identification unlawfully," the panel reached the opposite of the conclusion the en banc Seventh Circuit reached—that a defendant who consensually uses another's means of identification is not guilty of aggravated identity theft. The fact that the panel's holding is rooted in the term "without lawful authority" while the Seventh Circuit's contrary holding arises from the neighboring term "another person" does little to alleviate the conflict between the two decisions.

2. The panel's formulation also clashes with *Dubin* and *Flores-Figueroa*. It threatens to sweep back in exactly the kinds of cases *Dubin* and *Flores-Figueroa* held fall outside the statute.

A hypothetical may help to illustrate the problem. Imagine a defendant commits fraud in applying for a Paycheck Protection Program loan by submitting false financial data. If the defendant does so together with another person who consents to the use of his or her name in the application, the defendant will have committed aggravated identity theft under the panel's formulation. The co-conspirator's consent would not matter. Under the panel's formulation, the defendant

would have acted without lawful authority because he or she had "proceed[ed] to use the identification unlawfully."

Another hypothetical: A tax preparer claims unauthorized deductions for a client. The client consents to the use of his or her name, hoping to enjoy the financial benefit of the unwarranted deductions. But because the tax preparer has "proceed[ed] to use the identification unlawfully," the co-conspiring taxpayer would be a victim and the accountant an aggravated identity thief despite the willing participation of the client.

Outside the criminal context, people authorize one another to use their identities regularly. Secretaries and assistants are routinely asked to sign letters on behalf of others. A government official's name may appear on millions of documents of which she was not personally the author. Attorneys likewise put their names on briefs written by others. Appellate judges do the same with court opinions.

People committing crimes also give permission to others to use their names and identities, as the hypotheticals above show. Within the world of criminality, as outside that world, people authorize the use of

their identities. But the fact that they do so in connection with crimes is not enough to constitute the separate crime of aggravated identity theft.

The panel's formulation—in which "without lawful authority" is satisfied as long as the defendant "proceeds to use the identification unlawfully"—simply requires the defendant to commit a crime. In the examples above, the panel's formulation transforms every predicate offense involving another person's identity into an additional aggravated identity theft—because it makes consent irrelevant and reads "without lawful authority" out of the statute. The panel's formulation does not work.

3. *Osuna-Alvarez* neither mandates nor supports the panel's formulation. The Court held there that a defendant who used his brother's passport to enter the United States acted "without lawful authority" notwithstanding his brother's consent. But the authority the defendant trespassed on was not his brother's. It was the *government's* authority. A government-issued identification is akin to a license from the government to travel and identify oneself as a citizen of a particular nation; the license is not transferrable to another person. Falsely presenting another's passport as proof of identity also fits comfortably

within *Hong's* conclusion that identity theft requires impersonating or passing oneself off as another. *Supra* at 7 n.4.

Parviz's situation is plainly different. The underlying crime in this case was also passport fraud, but Parviz did not use another person's passport or attempt to pass herself off as the lawful passport holder. Parviz's conduct neither implicated government authority nor suggested government endorsement.

The identity at issue in this case was that of a fictitious doctor, not a passport holder. In creating that fictitious identity, Parviz used aspects of Barker's identity—but did so with Barker's consent. The panel's formulation makes that consent irrelevant. Again, simply because Parviz "proceed[ed] to use that identification unlawfully," the panel deemed the "without lawful authority" element satisfied. But acting unlawfully in a way that involves another person's identity is not enough; *Dubin* makes that very clear. The panel erred by applying *Osuna-Alvarez* outside the context of a usurpation of the *government's* lawful authority.

4. By rendering consent irrelevant, the panel's formulation makes the "without lawful authority" element meaningless in any case

where consent is at issue. That is improper as a matter of statutory construction. "Without lawful authority" appears on the face of Section 1028A. The Court must endeavor to give meaning to that language rather than allowing it to stand as surplusage. *E.g.*, *In re Pangang Grp. Co., Ltd.*, 901 F.3d 1046, 1056 (9th Cir. 2018) (the "superfluity canon guides a court to infer that Congress did not intend to make any portion of a statute superfluous and therefore, we must give effect to every word of a statute wherever possible."). The *Dubin* Court made the same point in analyzing the "use" element, explaining that the "risk of superfluity suggests giving § 1028A(a)(1) a more precise reading." 599 U.S. at 127.

The need for a precise reading of each element of the aggravated identity theft offense finds further support in statute's central premise: that the crime exists to address situations involving injury to a "victim other than the public at large." *Spears*, 729 F.3d at 757; *supra* at 6-7 (citing additional authority). The panel's formulation—and its extension of *Osuna-Alvarez* outside the limited context of that case—leads to illogical results, conflating consenting participants in criminal activity with the victims of identity theft the statute was enacted to protect. Rehearing is necessary to correct that error.

CONCLUSION

The Court should grant Parviz's petition for rehearing or rehearing en banc.

Date: May 19, 2025

By: */s/ Sarah A. Hemmendinger*
Sarah A. Hemmendinger

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(5), 32(a)(6), and Ninth Circuit Rule 29-2(c), I certify that this brief is proportionally spaced, has a 14-point typeface, and contains 3923 words according to the word-count feature of the word processing system used to prepare this brief.

Date: May 19, 2025

By: */s/ Sarah A. Hemmendinger*
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