No. 22-10

In the Supreme Court of the United States

DAVID DUBIN, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PROFESSOR JOEL S. JOHNSON AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

Joel S. Johnson is an Associate Professor of Law at the Pepperdine Caruso School of Law. The interest of amicus curiae is the sound construction of federal penal statutes. This brief draws on amicus's articles, *Vagueness and Federal-State Relations*, 90 U. Chi. L. Rev. (2023) (forthcoming) <tinyurl.com/vaguenessFS> (*Federal-State*), and *Vagueness Avoidance* (Dec. 22, 2022 draft), <tinyurl.com/vaguenessavoidance> (*Vagueness Avoidance*).[1]

[1] No counsel for a party authored this brief in whole or in part. Nor did any person or entity, other than amicus and Pepperdine Caruso School of Law, financially contribute to preparing or submitting this brief. All parties have consented to this filing.

SUMMARY OF ARGUMENT

Amicus agrees with petitioner that the court of appeals adopted an overly broad and indeterminate construction of Section 1028A(a)(1) of the Identity Theft Penalty Enhancement Act. Amicus submits this brief to highlight the central role that concerns about unconstitutional vagueness should play in this Court's analysis of Section 1028A(a)(1). The Court should recognize the avoidance of vagueness concerns as a rule of construction that frames its reading of indeterminate language in penal statutes.

Vague and indeterminate language undermines due process and the separation of powers by effectively delegating the legislative task of defining criminal conduct. Yet such language in a federal penal statute can almost always be narrowly construed to avoid those constitutional concerns.

Vagueness avoidance is distinct from ordinary constitutional avoidance. The difference arises from the distinction between ambiguity and vagueness. Ordinary constitutional avoidance canons are tools of interpretation triggered by ambiguity—which arises when a term can be fairly understood to have two or more discrete semantic meanings. Vagueness, by contrast, refers to indeterminate language that is open to practically innumerable possible applications and cannot be resolved through mere interpretation; *construction* is required to give the term legal effect. Engaging in vagueness avoidance entails crafting a narrow construction of the text that encompasses an identifiable core while excising its indeterminate peripheries. Doing so promotes the separation of powers, the principle of legality, and the modern methodological commitment to implementing the legislative will.

Vagueness avoidance is deeply rooted in this Court's precedents. But the Court has recently retreated from using it as a tool of construction. That trend appears to be based on an erroneous conflation of vagueness avoidance and ordinary constitutional avoidance. The Court should restore its traditional practice of applying vagueness avoidance as a distinct tool of construction.

Taking that approach makes this an easy case. The literal semantic meaning of the term "uses" in Section 1028A(a)(1) presents vagueness concerns because it is open to practically innumerable applications. To avoid those concerns, the statute should be construed to restrict its application to an identifiable core—the nonconsensual use of another's identity as an instrumental part of committing a predicate crime—while excising its indeterminate peripheries.

ARGUMENT

SECTION 1028A(A)(1) SHOULD BE NARROWLY CONSTRUED TO AVOID VAGUENESS CONCERNS

Section 1028A(a)(1) of the Identity Theft Penalty Enhancement Act increases the penalty for anyone who, "during and in relation to" the commission of an enumerated predicate felony, "knowingly transfers, possesses, or uses, without a lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The court of appeals broadly construed the indeterminate term "uses" in that statute to encompass any person who recites someone else's name while committing a predicate crime, regardless whether the person has authority to use the other person's name or whether that use was instrumental to the commission of the predicate crime.

While amicus generally agrees with petitioner that the court of appeals erred in adopting that reading, amicus submits this brief to highlight the central role that concerns about unconstitutional vagueness should play in this Court's construction of Section 1028A(a)(1). The Court should recognize the avoidance of vagueness concerns as a robust rule of construction that frames its reading of indeterminate language in penal statutes.

A. Vagueness Avoidance Is Distinct From Ordinary Constitutional Avoidance

1. Vague language in a federal penal statute presents constitutional concerns because it does not sufficiently define the standard of conduct. *Johnson* v. *United States*, 576 U.S. 591, 595 (2015). That undermines due process and the separation of powers by effectively delegating the legislative task of crime definition, thereby inviting arbitrary enforcement and failing to provide adequate notice. *Davis* v. *United States*, 139 S. Ct. 2319, 2325 (2019).

Yet, in virtually all cases involving a federal penal statute, this Court does not deem indeterminate statutory language unconstitutionally vague. Rather, the Court engages in vagueness avoidance—*i.e.*, "narrowly constru[ing] the indefinite law to avoid any constitutional vagueness concerns." *Federal-State* 29; see *Skilling* v. *United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice, * * * before striking a federal statute as impermissibly vague to consider whether the prescription is amenable to a limiting construction."); see, *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 306-307 (2008); *Posters 'n' Things, Ltd.* v. *United States*, 511 U.S. 513, 525-526 (1994); *Chapman* v. *United States*, 500 U.S. 453, 467-468 (1991);

Boos v. *Barry*, 485 U.S. 312, 329-332 (1988); *Smith* v. *United States*, 431 U.S. 291, 308-309 (1977); *Parker* v. *Levy*, 417 U.S. 733, 754-757 (1974); *United States* v. *Vuitch*, 402 U.S. 62, 71-72 (1971); *Scales* v. *United States*, 367 U.S. 203, 223 (1961); *United States* v. *Harriss*, 347 U.S. 612, 620-624 (1954).[2]

2. That approach—vagueness avoidance—is distinct from ordinary constitutional avoidance. The difference owes in large part to the distinct concepts of ambiguity and vagueness and their relation to an important legal-process distinction between interpretation and construction.

a. Ambiguity refers to linguistic indeterminacy that arises when a term "can be used in more than one sense such that it is open to a 'discrete number of pos-

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[2] When faced with vague language in *state* laws, by contrast, this Court has often held those laws void for vagueness, because the Court's analysis is "constrained by a distinctive federalism principle" requiring it to adhere to "any pre-existing state-court constructions of [the] indefinite statutory language." *Federal-State* 6; see *id.* at 43-52; see, *e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1999); *Gentile* v. *Nevada*, 501 U.S. 1030, 1048-1049 (1991); *Kolender* v. *Lawson*, 461 U.S. 352, 355-358 (1983); *Hynes* v. *Mayor & Council of Borough of Oradell*, 425 U.S. 610, 621-623 & n.6 (1976); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 157 & n.2, 163 (1972); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 612-614 (1971); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403-404 (1966); *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963); *Edwards* v. *South Carolina*, 372 U.S. 229, 234, 237-238 (1963); *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278, 285-288 (1961); *Winters* v. *New York*, 333 U.S. 507, 518-520 (1948); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 457-458 (1939); *Herndon* v. *Lowry*, 301 U.S. 242, 261-263 (1936); *Stromberg* v. *California*, 283 U.S. 359, 369-370 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 457, 465 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385, 393-395 (1926).

sible meanings.'" *Vagueness Avoidance* 12-13 (quoting Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 38-39 (2010)). Ambiguity can typically be resolved through *interpretation*, the process of recovering the "semantic content of the legal text," Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 96 (2010), by looking to materials such as "statutory context, rules of grammar, dictionaries, and usage norms embodied in descriptive canons of statutory interpretation," *Vagueness Avoidance* 19-20.

A term exhibits vagueness, by contrast, when "there are difficult, borderline cases to which the term may or may not apply, with the result that it is open to practically 'innumerable' * * * applications." *Vagueness Avoidance* 13-14 (quoting Solan 38-39). Vagueness cannot usually be resolved through interpretation, but only through "construction," the process of "giv[ing] a text legal effect * * * [b]y translating the linguistic meaning into legal doctrine." Solum 96; see *Vagueness Avoidance* 20 ("Vagueness * * * [is] typically irreducible at the interpretation stage" because "[e]vidence of linguistic meaning does not dictate how a court should define the [term's] scope.").

To be sure, lawyers and judges routinely use the term "interpretation" to refer both to the process of interpretation and to the process of construction. William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1085-1086 (2017). And doing so is typically inconsequential because "the inferential step from ascribed meaning to legal effect is usually uncontroversial." *Id.* at 1086. But when the relationship between semantic meaning and legal effect is particularly complex—as with vague statutory

language—"adherence to the interpretation-construction distinction clarifies the analysis." *Vagueness Avoidance* 19.

b. In light of that distinction, the ordinary constitutional avoidance canons[3] do not capture what occurs when a court engages in vagueness avoidance. A distinct conception of vagueness avoidance is warranted.

Importantly, ordinary canons of constitutional avoidance are triggered by ambiguity: the Court will not consider applying them unless the statutory language can be fairly understood to have two or more discrete semantic meanings, one of which is unconstitutional or at least raises serious constitutional questions. See*, e.g.*, *Johnson* v. *Artega-Martinez*, 142 S. Ct. 1827, 1833 (2022); *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021); *Nielsen* v. *Preap*, 139 S. Ct. 954, 972 (2019); see also *Clark* v. *Martinez*, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting) (observing that "traditional avoidance" applies to "ambiguous" statutory language). Ordinary constitutional avoidance thus "functions as a means of choosing between" available alternatives, *Clark*, 543 U.S. at 385 (emphasis omitted), which can often be applied at the interpretation stage to aid in determining semantic meaning. See *Vagueness Avoidance* 24-26.

Vagueness avoidance, by contrast, is not triggered by ambiguity—but by vague statutory language that cannot be resolved through mere interpretation. It is thus a tool of *construction* by which the Court crafts a

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[3] The ordinary constitutional avoidance canons are the classical "unconstitutionality" canon and the more modern "constitutional questions" canon. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 Harv. L. Rev. F. 331, 331-333 (2015); see *Vagueness Avoidance* 23-25.

supplemental rule that limits the legal effect of a text that conveys a semantic meaning that is irreducibly indeterminate. By engaging in vagueness avoidance, the Court can usually remove the delegation threat posed by such language while also constraining its reach. Because most vague statutory terms have some identifiable core, the Court may legitimately craft a judicial construction of the text that encompasses that core while excising its indeterminate peripheries. *Vagueness Avoidance* 29-30, 33, 55.

3. Treating vagueness avoidance as a distinct tool of statutory construction promotes the separation of powers, the principle of legality, and the modern methodological commitment to implementing the legislative will through statutory construction.

a. When the Court engages in vagueness avoidance, it does not offend the principle requiring the legislature to define crime and fix punishments, *Jones* v. *Thomas*, 491 U.S. 376, 381 (1989), because the narrowing construction hews to the identifiable core within the semantic meaning of the vague term enacted by the legislature. In such circumstances, the act of constraining the legal effect of the vague term often functions as a form of severance—the Court declines to apply the statute to the case before it while simultaneously recognizing that some portion of the statute remains in force and is constitutionally valid. *Vagueness Avoidance* 30-31.[4]

b. Engaging in vagueness avoidance also promotes the principle of legality, which guards against

[4] Functional equivalence to severability is another way in which vagueness avoidance is distinct from ordinary constitutional avoidance. *Vagueness Avoidance* 31.

"retroactive" crime definition through "judicial innovation." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 196 (1985). Those whose conduct falls within the identifiable core have no claim that they lacked notice, and those whose conduct falls outside it will not be subject to punishment under the narrowly construed statute. *Vagueness Avoidance* 29, 30.

c. Finally, vagueness avoidance comports with "faithful agency," the modern methodological commitment to implementing legislative will through judicial construction. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 112 (2010) (referring to the faithful-agent theory as the "conventional" approach). That is largely because vagueness avoidance is not a substantive canon triggered by ambiguity—a type of indeterminacy that can usually be resolved through descriptive tools that recover semantic meaning. See pp. 5-6, *supra*.

Members of this Court have expressed misgivings about heavy reliance on ambiguity-triggered substantive canons. One criticism centers on the manipulability of such canons. See *Wooden* v. *United States*, 142 S. Ct. 1063, 1075-1076 (2022) (Kavanaugh, J., concurring in the judgment); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2136-2139 (2016). But vagueness avoidance is not prone to the same degree of outcome-driven manipulation, because a vagueness trigger typically yields less discretion than does an ambiguity trigger. A court that has deemed statutory text ambiguous unlocks two or more possible interpretations that need not overlap—giving the judge significant discretion to choose one over another. A court that has deemed statutory language vague opens a range of possible

constructions; yet wherever the line is drawn within that range, roughly the same core will be retained. The choice is between relatively marginal differences among borderline cases rather than wholesale differences in meaning. *Vagueness Avoidance* 59-60.

Nor does the charge that substantive canons erroneously set "something other than the legislative will as [the] interpretive lodestar," Barrett 110, extend to vagueness avoidance. Because it is "[c]onstitutionally inspired," vagueness avoidance "promot[es]" a "set of norms that have been sanctioned by a super-majority as higher law." *Id.* at 168. In addition, Congress's use of vague statutory language that cannot be resolved through ordinary tools of interpretation, see p. 6, *supra*, conveys the legislative will to "delegat[ing] resolution" of that indeterminacy "to the courts." *Cf.* Barrett 123 (applying same logic to irreducible ambiguity). Insofar as the vague language has an identifiable core, a court may legitimately craft a judicial construction that retains that core—which reflects legislative will—while excising the indefinte penumbra. *Vagueness Avoidance* 59.

B. Vagueness Avoidance Is Rooted In Precedent

Vagueness avoidance is deeply rooted in this Court's precedents. Recently, however, the Court has retreated from explicitly engaging in vagueness avoidance as a tool of construction. That trend appears to be based on an erroneous conflation of vagueness avoidance and ordinary constitutional avoidance triggered by ambiguity. The Court should restore its traditional practice of treating vagueness avoidance as a distinct tool of construction.

1. This Court has a long history of explicitly engaging in vagueness avoidance to narrow excessively broad and indeterminate language in federal penal statutes. See pp. 4-5, *supra* (collecting cases).

a. An early example is *Screws* v. *United States*, 325 U.S. 91 (1945), which involved a federal criminal statute that punished any person who "under color of any law * * * willfully subjects" anyone "to the deprivation of any rights * * * secured or protected by the Constitution." *Id.* at 93 (Douglas, J., plurality). The literal semantic meaning of that language "provide[d] no ascertainable standard of guilt," but instead "referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited." *Id.* at 95, 96 (Douglas, J., plurality).

To avoid that vagueness concern, the Court narrowly construed the statute to apply only to violations of constitutional rights clearly established at the time of the defendant's conduct. Justice Douglas justified that construction for a plurality of the Court by focusing on the statutory term "willfully," reasoning that the "requirement of a specific intent to deprive a person of a federal right *made definite by a decision or other rule of law* save[d] the Act from any charge of unconstitutionality on the grounds of vagueness." *Screws*, 325 U.S. at 103.

In other words, once a judicial decision had established a specific type of conduct as violative of the Constitution, a standard of conduct was ascertainable and could be willfully violated. In effect, that narrowing construction limited the statute's application to its identifiable core—clearly established rights—while effectively severing the statute's vague peripheries. *Vagueness Avoidance* 44.

b. More recently, the Court engaged in explicit vagueness avoidance in *Skilling*, *supra*, a case concerning the honest-services statute enacted to resurrect a lower-court body of law that had been rejected in *McNally* v. *United States*, 483 U.S. 350 (1987).

In *Skilling*, the Court recognized the "force" of the argument that the honest-services statute was unconstitutionally vague. 561 U.S. at 405. Although the pre-*McNally* lower-court decisions had consistently applied to bribery or kickback schemes, the Court explained, "there was considerable disarray over the statute's application to conduct outside that core category." *Ibid.* To save the statute, the Court "pare[d]" it "down" to "*only* the bribe-and-kickback core of pre-*McNally* case law." *Id.* at 404, 408-409.

That narrowing construction effectively severed the vague penumbra of the honest-services statute while maintaining its core. Yet, unlike in *Screws*, the statutory text provided no basis for drawing that core-penumbra distinction. Instead, the Court in *Skilling* drew that distinction on the basis of pre-*McNally* case law, which Congress had plainly attempted to reinstate. *Id.* at 405; see *id.* at 423 (Scalia, J., concurring in part and concurring in the judgment).

Skilling thus suggests that the core of indefinite statutory language can sometimes be identified even without textual clues. *Vagueness Avoidance* 46.

2. In a recent series of cases, however, the Court has retreated from explicitly engaging in vagueness avoidance. In these cases, a narrowing construction is still ultimately adopted. But the Court purports to justify that result using mere interpretation that determines semantic meaning, rather than relying on vagueness avoidance as an integral tool of judicial construction. See, *e.g.*, *Ruan* v. *United States*, 142 S.

Ct. 2370, 2377-2380 (2022); *Van Buren* v. *United States*, 141 S. Ct. 1648, 1665 (2021); *Kelly* v. *United States*, 140 S. Ct. 1566, 1571-1574 (2020); *McDonnell* v. *United States*, 136 S. Ct. 2355, 23670-2372 (2016); *Yates* v. *United States*, 574 U.S. 528, 540 (2015) (plurality opinion); see also *Vagueness Avoidance* 46-52.

That trend gets vagueness avoidance wrong by treating it as indistinguishable from ordinary constitutional avoidance, a tool for resolving *ambiguity*. See p. 7, *supra*. The upshot is to give vagueness concerns a significantly diminished role—tacked on as an extra justification for an already-adopted reading, *e.g.*, *McDonnell*, 136 S. Ct. at 2372, relegated to dicta, *e.g.*, *Van Buren*, 141 S. Ct. at 1661, or not even mentioned at all, *e.g.*, *Yates*, 574 U.S. at 539-549 (plurality opinion). Each of those outcomes makes vagueness avoidance virtually useless as an analytical matter, rendering it much like the modern form of the rule of lenity that is used only to resolve "grievous ambiguity" after all other tools have been exhausted. *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 610, 619 n.17 (1994)).

The practical effect is that these recent decisions rejecting exceedingly broad readings of federal penal statutes do not deter lower courts from adopting similarly broad constructions of other statutes. Each decision is essentially *ad hoc*, providing no broadly applicable principles of construction. That emboldens prosecutors to continue exploiting indeterminate language in the federal criminal code to "attach criminal penalties to a breathtaking amount of commonplace" conduct. *Van Buren*, 141 S. Ct. at 1661; see *Vagueness Avoidance* 55 (observing that "[t]he Justice Department generally advocates for broad readings of indeterminate federal criminal laws, often with the

[empty] promise not to abuse those laws through unexpected enforcements"). And some lower courts—including the court of appeals in this case—justify those broad applications at the interpretation stage based on "plain meaning" analysis of the statute's literal text, Pet. App. 67a, without meaningful consideration of whether a plain meaning that is open-ended might pose vagueness concerns. Splits as to the scope of federal statutes thus routinely emerge from the courts of appeals, with the result that this Court's correction of broad lower-court readings of criminal statutes "has become nearly an annual event." Pet. App. 48a (Costa, J., dissenting); see *Vagueness Avoidance* 53.

* * * * *

The Court should correct course by disentangling vagueness avoidance from ordinary constitutional avoidance. It should return to the approach reflected in *Screws* and *Skilling*, explicitly treating vagueness avoidance as central to arriving at a narrowing construction. When using vagueness avoidance as a rule of construction, the Court should expressly distinguish the vague term's identifiable core from its indefinite peripheries, relying on clues from the text or other sources, such as statutory history or precedent. Once the Court has ascertained the core, it should be explicit about severing the indeterminate peripheries. See *Vagueness Avoidance* 54-55.

C. Vagueness Avoidance Requires A Narrow Construction Of Section 1028A(a)(1)

Employing vagueness avoidance as a guiding rule of construction makes this an easy case.

The plain text of Section 1028A(a)(1) applies to anyone who, "during and in relation to" the commission

of an enumerated predicate felony, "knowingly transfers, possess, or *uses*, without a lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1) (emphasis added). The literal semantic meaning of the term "uses" presents vagueness concerns, because "it is open to practically 'innumerable' * * * applications." *Vagueness Avoidance* 13 (quoting Solan 38-39); see *Bailey* v. *United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational difficulties[.]"); *Smith* v. *United States*, 508 U.S. 223, 241-242 (1993) (Scalia, J., dissenting) (characterizing the word "use" as "elastic"); see also Pet. Br. 3, 32-34 (noting how a "sweeping" understanding of Section 1028A(a)(1) would ensnare a wide swath of individuals applying for bank loans, preparing taxes, or engaging in electronic communication).

That threatens due process and the separation of powers by effectively delegating the legislative task of defining what conduct triggers the statute to prosecutors, with the effect of inviting arbitrary enforcement and failing to provide adequate notice. *Davis*, 139 S. Ct. at 2325; see Pet. Br. 38 (noting that the broad construction would effectively "give prosecutors the ability to bring an aggravated identity theft charge[] every time a defendant commits [a] predicate offense[]"). To avoid those vagueness concerns, the irreducible indeterminacy inherent in the semantic meaning of the term "uses" should be construed in a way that restricts the statute's application to its identifiable core while excising its indefinite peripheries.

Identifying that core is straightforward. Congress enacted Section 1028A as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004), and gave Section 1028A the title "Aggravated identity theft." Those labels clearly convey

a goal of increasing punishment when the unconsented use of another's identity was instrumental to the commission of a predicate crime. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) (making clear that titles of penal statutes shed light on their scope); *cf. Skilling*, 561 U.S. at 404, 408-409 (identifying statute's core by looking to statutory history).

That clearly identifiable legislative goal should be understood to establish the core of the term "uses" in Section 1028A(a)(1). The Court should employ vagueness avoidance to adopt a narrow construction of the term that captures only that core—the nonconsensual use of another's identity as an instrumental part of committing a predicate crime—while excising its indeterminate peripheries, thereby removing petitioner from the statute's compass.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2022