UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	**CASE NUMBER**: 19-431 (PAD)

JULIA BEATRICE KELEHER'S
MOTION TO DISMISS COUNTS NINE THROUGH ELEVEN

COMES NOW the defendant, Julia Beatrice Keleher, by and through her undersigned counsel, and respectfully files this motion to dismiss all aggravated identity theft charges (Counts 9, 10, and 11) contained in the Superseding Indictment (Docket No. 368). Counts Nine through Eleven do not allege that Ms. Keleher intended that any means of identification be used for her or anyone else to assume the identity of another. At best, those counts allege that means of identification were incidental to the underlying wire fraud alleged in Counts One through Eight of the Superseding Indictment. To the extent the Court reads the aggravated identity theft statute as prohibiting the conduct alleged in Counts Nine through Eleven, the statute is unconstitutionally vague as applied: a person of common intelligence would not know that the aggravated identity theft statute proscribes the conduct alleged in these counts; further, a statute broad enough to encompass such conduct invites arbitrary enforcement. The Court, however, need not reach this constitutional issue. The aggravated identity theft statute can and should be construed in a manner that it does not purport to prohibit the conduct alleged in Counts Nine through Eleven and, accordingly, these counts should be dismissed for failure to state an offense.

I. THE RELEVANT CHARGES

Counts One through Eight of the Superseding Indictment allege that Ms. Keleher transferred purportedly confidential information of the Puerto Rico Department of Education (PRDE), the agency she headed, to Individual A, an individual who was seeking government contracts in relation to PRDE. Counts Nine, Ten, and Eleven of the Superseding Indictment each charge Ms. Keleher with a separate violation of the aggravated identity theft statute, 18 U.S.C. § 1028A, alleging that Ms. Keleher transferred means of identification during the commission of the wire fraud charged in Counts One through Eight, because the purportedly confidential information included the names and employee position numbers of various PRDE employees, which are considered "means of identification" under the identity theft statute. The Superseding Indictment does not allege, however, that Ms. Keleher intended that she or anyone else would use these means of identification to assume the identity of any of the PRDE employees. Nor does it allege she or anyone else would use the means of identification themselves to perpetrate the fraud alleged in Counts One through Eight.

The aggravated identity theft statute as relevant to the charges in the Superseding Indictment reads: "Whoever, during and in relation to [a wire fraud] violation . . . knowingly transfers . . . without lawful authority, a means of identification of another person shall, in addition to the punishment provided for [the wire fraud], be sentenced to a term of imprisonment of 2 years." *See* 18 U.S.C. § 1028A(a)(1); Docket No. 368 at pp. 9-11. The phrase, "'[M]eans of identification' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." 18 U.S.C. § 1028(d)(7) (18 U.S.C. § 1028 explicitly

applies the definitions in18 U.S.C. § 1028(d) to 18 U.S.C. § 1028A and lists various examples of what constitutes a "means of identification").[1]

According to the wire fraud charges set forth in Counts One through Eight, Ms. Keleher, as part of a scheme to "defraud and deprive [the PRDE] of the right to the exclusive use of its confidential information through deceptive means," emailed confidential PRDE information to Individual A, a former colleague who was purportedly seeking to contract with the Commonwealth of Puerto Rico in relation to PRDE. Docket No. 368 at ¶ 19. The aggravated identity theft charges, Counts Nine through Eleven, allege that this confidential information included the names and position numbers of various PRDE employees, which the Superseding Indictment alleges were "means of identification," thus making the act of emailing the information to Individual A aggravated identity theft, in addition to constituting wire fraud.

II. VAGUENESS, AVOIDANCE OF CONSITTUTIONAL ISSUES, AND LENITY

"Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers." *United States v. Davis*, 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019) (citing *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212-13 (2018)). The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory

[1] For the sake of completeness, we note that the unedited aggravated identity theft statute reads: "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1). However, the indictment specifies that all three charges are under the "transfers" provision and relate to wire fraud. *See* Docket No. 368 at pp. 9-11 ("[1] JULIA BEATRICE KELEHER did knowingly transfer, without lawful authority, a means of identification of other persons . . . during and in relation to . . . wire fraud . . ."); *see also* 18 U.S.C. § 1028A(c)(5) (identifying wire fraud as an applicable predicate offense for aggravated identity theft).

enforcement.' The void-for-vagueness doctrine embraces these requirements." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

"Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Davis*, 139 S. Ct. at 2325 (citing *United States v. Hudson*, 7 Cranch 32, 34, 11 U.S. 32, 3 L. Ed. 259 (1812)). "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.* (citing *Kolender*, 461 U.S. at 357–358; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 (1921); *United States v. Reese*, 92 U.S. 214, 221 (1876)).

"The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 576 U.S. 591, 595–96 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

If a court determines that a statute would be vague if applied to a certain set of facts, the Court must find the statute unconstitutional as applied and, on that basis, dismiss charges premised on this constitutionally impermissible application of the statute. Under the doctrine of unconstitutional avoidance, however, if a court may reasonably "construe" the statute in a manner that it simply does not reach the facts at issue, it should interpret the statute in such a manner. *Skilling*, 561 U.S. at 403.

"A statute is vague as applied if it either fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly' or fails to 'provide explicit standards for those who apply them." *United States v. Sandsness*, 988 F.2d 970, 971–72 (9th Cir. 1993) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2f299, 33 L.Ed.2d 222 (1972)); *see also United States v. Zhen Zhou Wu*, 711 F.3d 1, 15 (1st Cir. 2013) ("Outside the First Amendment context, we consider whether a statute is vague as applied to the particular facts at issue...." (emphasis in original) (internal quotation marks omitted)). In this case, the provisions of aggravated identity theft statute are vague as applied to Ms. Keleher's conduct, as alleged by the Government in Counts Nine through Eleven of the Superseding Indictment.

Moreover, in the criminal context, the vagueness doctrine must be viewed in light of the rule of lenity. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))). "[T]he rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. "That rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *Id.* (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L. Ed. 37 (1820) (Marshall, C.J.)). "And much like the vagueness doctrine, it is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *Id.* (citing Wiltberger, 18 U.S. (5 Wheat.) 76; *United States v. Lanier*, 520 U.S. 259, 265-66 (1997)).

As set forth below, to the extent that the aggravated identity theft statute by its terms purports to apply to the facts alleged in Counts Nine through Eleven, it is unconstitutional as

applied. To avoid reaching that constitutional issue, however, because the statute can be reasonably interpreted as not proscribing the conduct alleged in Counts Nine through Eleven, it should not be interpreted as prohibiting Ms. Keleher's alleged conduct. In any event, at best, the statute is ambiguous as to whether it applies to the facts alleged in Counts Nine through Eleven. Accordingly, under the rule of lenity, the statute may not be interpreted to proscribe that alleged conduct.

If the Court finds that the aggravated identity theft statute purports to proscribe the conduct alleged in the Superseding Indictment and that this application of the statute is unconstitutional, it should dismiss Counts Nine through Eleven because the statute is unconstitutional as the Government seeks to apply it in this case. Alternatively, if the Court finds, with or without reliance on the rule of lenity, that the aggravated identity theft statute does not extend to the facts alleged in the Superseding Indictment, Counts Nine through Eleven should be dismissed for failure to state an offense.

III. ARGUMENT

A. If the statute is read to proscribe to the conduct alleged, it is unconstitutionally vague as applied.

"In our constitutional order, a vague law is no law at all." *Davis*, 139 S. Ct. at 2323. "When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Id.* The two criteria of the vagueness analysis are whether the challenged penal statute is defined "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03. Both factors counsel the Court to declare the aggravated identity theft statute as

unconstitutionally vague as applied to the conduct alleged in Counts Nine through Eleven of the Superseding Indictment.[2]

Counts Nine through Eleven of the Superseding Indictment charge Ms. Keleher with "transfer[ing], without lawful authority . . . the names and position numbers" of PRDE employees. Unquestionably, a name is considered a "means of identification" for purposes of the statute. *See* 18 U.S.C. § 1028(d)(7) ("'[M]eans of identification' means any name . . . *that may be used, alone or in conjunction with any other information, to identify a specific individual.*" (emphasis added)). The statute, thus, can be read to proscribe, under penalty of a mandatory consecutive two-year prison sentence, providing the first name of one individual to another person, without lawful authority, without ever intending to steal the person's identity, to use it falsely for personal gain, or to facilitate the commission of such identity theft by another.

Concerns regarding the breadth and vagueness of the federal identity fraud statutes have been raised since 1982, when § 1028, the precursor to § 1028A was enacted. *See* H.R. Rep. No. 97-802, at 19-20 (1982) (discussing additional views and reservations of Rep. Robert W. Kastenmeier related to breadth of statutory language and federalism concerns). While §§ 1028 and 1028A may understandably be invoked in egregious circumstances where the names and credit card or bank account numbers of an individual are disclosed to a third-party with the intent that the third-party use that information to engage in fraudulent transactions by falsely purporting to be that individual, the reach of the statutes also appears to prohibit transfer of many other types of information as well – including email addresses, online usernames, or any unique numeric

[2] Aggravated identity theft charges rest on the shoulders of underlying predicate offenses. Accordingly, in this case, the three aggravated identity theft counts depend on three separate wire fraud counts. Thus, if the applicable wire fraud counts fail, then so do these aggravated identity theft counts. As we have already spoken at length about the many reasons why the wire fraud counts in this case must fail as a matter of law, we will not rehash these arguments here. Instead, we refer the Court to our contemporaneously filed *Motion to Dismiss Counts One Through Twenty-Three of the Superseding Indictment*. Notwithstanding, the instant motion also takes aim at the aggravated identity theft charges under the assumption that these wire fraud counts are legally sufficient.

identifiers, which are regularly transferred in myriad other contexts. The sweeping breadth of the statute fails to put people of ordinary intelligence on notice of the conduct that falls within its reach and invites arbitrary and discriminatory enforcement of the law.

In this case, Ms. Keleher is charged with aggravated identity theft for transferring lists of employee name and position numbers to Individual A. Ms. Keleher is not alleged to have stolen anyone's identity nor facilitated the theft identify by anyone else. She is not alleged to have used the names and PRDE position numbers of PRDE employees in furtherance of the alleged scheme to defraud, nor to have understood that anyone else was going to use "means of identification" in furtherance of the alleged fraud scheme. The "means of identification" are, at best, incidental to the alleged scheme to defraud. No ordinary person, even a person who transmits confidential data to a third-party without lawful authority, would understand she would be thrust under the breadth of the aggravated identity theft statute simply because the confidential data happened to include the names and PRDE position numbers of PRDE employees. To the extent that the aggravated identity theft statute encompasses the conduct alleged against Ms. Keleher, it is unconstitutional vague.

B. The statute should not be construed to apply to the conduct alleged in Counts Nine through Eleven thereby avoiding constitutional concerns.

The use of another person's means of identification must be more than incidental to the fraud. *See United States v. Gatwas,* No. 70-3683 (8th Cir. 2018). As is evident from the emails that the Government has identified as constituting the wire fraud, the information was provided for its statistical data, in order to facilitate the submission by Individual A of a contractual proposal related to the PRDE. The names of the employees, or the ability to ascertain their identity through their position number, was of no moment. This information is not alleged to have given Individual A any competitive advantage in putting together a bid proposal. There is no allegation that the

identity of individual employees was going to be used in any bid proposal or in any other fraudulent manner. In other words, the use of the information did not further any illegal or corrupt purpose, nor was the transmission of the information intended to perpetrate a harm on any potential victim nor secure a pecuniary advantage for Ms. Keleher.

Although there are numerous cases applying § 1028A(a)(1) to a fact pattern under which the defendant neither stole nor assumed the identity of the other person, these decisions involve the use of means of identification to perpetrate a fraud based on false identity. *See, e.g., United States v. White*, 846 F.3d 170, 177-78 (6th Cir. 2017) (travel agent passed off false military identification cards as clients' means of identification); *United States v. Reynolds*, 710 F.3d 434, 435-36 (D.C. Cir. 2013) (use of false church officer signatures to increase church's authorized borrowing); *United States v. Dvorak*, 617 F.3d 1017, 1024-27 (8th Cir. 2010) (chiropractor submitted false claims for children he did not treat to obtain Medicaid reimbursement).

In the case of *United States v. Berroa*, the First Circuit "read the term 'use' to require that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." 856 F.3d 141, 156-57 (1st Cir. 2017). Similarly, the word "transfer" can and should be construed to encompass only those situations where the means of identification is transferred for the purpose of having the recipient use the information to pass himself or herself off as another person. Ms. Keleher, by contrast, is not alleged to have passed herself off as anyone other than herself or to have transferred the names and employee position numbers to Individual A for the purpose of Individual A passing himself off as someone he was not.

In this case, the alleged conduct of Ms. Keleher does not fit the universe of any accepted interpretation of the statute in any reported decision that we have been able to review. Accordingly,

the Court can easily, and consistent with previous applications of the aggravated identity theft statute, construe the statute as only reaching those transfers of means of identification that are alleged to have been for the purpose of facility the use of a false identity, *i.e.*, the assumption of the identity of another or the direct use of a person's identification to perpetrate a fraud.

C. The rule of lenity provides a further basis for not construing the aggravated identity theft statute expansively enough to reach the conduct alleged here.

As set forth above, the statute need not be read to proscribe the conduct alleged here and, in order to avoid constitutional concerns, should not be read to prohibit the conduct alleged against Mr. Keleher. If, however, in construing the statute there is ambiguity as to whether it prohibits the conduct alleged here, that ambiguity should be resolved in Ms. Keleher's favor. Put another way, *only* if the statute *unambiguously* reaches the conduct alleged here, can the Court find that the Superseding Indictment alleges a violation of the aggravated identity theft statute. For the reasons set forth above, it does not.

IV. CONCLUSION

In the Superseding Indictment, the Government has advanced a theory of wire fraud based on the transfer of purportedly confidential government information to a potential government contractor. It then attempts to bootstrap that allegation into aggravated identity theft based on the mere inclusion of employee names and position numbers within that data. We have not been able to locate any decision where the aggravated identity theft statute has been held to prohibit a person from using or transferring means of identification in the absence of any attempt to assume the identity of the victim(s), act under the victims' purported authority, or to perpetrate a fraud by use of the means of identification. A person of common intelligence would not be on notice that the statute proscribes such conduct. Accordingly, if the statute is read to purport to proscribe such conduct, it is unconstitutional as applied and Counts Nine through Eleven would need to be

dismissed. There is, however, no need for the Court to reach this constitutional issue and dismiss these counts on that basis. The Court can easily construe the aggravated identity theft statute as not reaching the type of conduct alleged here. The Court may do so because a fair reading of the statutory language and the prior application of the statute do not lead to the conclusion that the statute prohibits the conduct alleged against Ms. Keleher. Alternatively, it can reach this conclusion because the Court finds the statutory language is ambiguous with respect to whether it precludes the conduct alleged against Ms. Keleher. If the Court reads the statute not to proscribe the conduct alleged against Ms. Keleher, which avoid a constitutionally vague application of the statute, Counts Nine through Eleven must be dismissed for failure to state an offense. Whether, as a result of constitutional vagueness or statutory interpretation, Counts Nine through Eleven of the Superseding Indictment are found defective, they must be dismissed.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests that the Honorable Court dismiss Counts Nine, Ten, and Eleven.

Respectfully submitted on this 7th day of January 2021, in San Juan, Puerto Rico.

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will provide access to all parties of record.

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