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DIVISION II

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

No. 86772-1

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

DERRICK ROBERT EVANS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

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PETITION FOR REVIEW
of Case No. 40258-1 from Division II

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A. Identity of Petitioner

Petitioner, Derrick Robert Evans, asks this Court to accept review of the decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Mr. Evans seeks this Court's review of the published decision of the Court of Appeals of the State of Washington, Division II, case No. 40258-1-II, filed November 1, 2011. No motion for reconsideration was filed.

A copy of the court's decision is attached to this petition as Appendix 1.

C. Issues Presented for Review

1. In the criminal code, the term "person" only includes corporations "where relevant." RCW 9A.04.110(17). When the identity theft statute defines the victim of the crime to be "another person, living or dead," RCW 9.35.020(1), did Division Two greatly expand the intended scope of RCW 9.35.020(1) when it held corporations can be victims of identity theft, creating an issue of substantial public interest that should be determined by this Court?

2. Is the identity theft statute unconstitutionally vague as applied because defining "person" to include corporations "where relevant," and victims to be "another person, living or dead," leaves open the question of whether corporations are relevant as victims of identity theft, failing both to provide citizens with fair

warning of what conduct they must avoid and to protect them from arbitrary, ad hoc, or discriminatory law enforcement?

To counsel's knowledge, the decision for which review is sought represents the first published decision on these issues. However, in an unpublished opinion issued in 2009, Division Two held that "person," as defined in the identity theft statute, included corporations. See State v. Meske, No. 36417-4-II, 2009 WL 449071 (Wn. App. 2009).

D. Statement of the Case

Mr. Evans took a blank payroll check from his employer, Allube, Inc. On October 12, 2009, he presented it to a Rent-A-Center Financial Services in Grays Harbor County, Washington, as a legitimate payroll check. The handwritten check was purportedly signed by an authorized signatory and made payable to Mr. Evans in the amount of \$500. The Rent-A-Center manager cashed the check and Mr. Evans obtained \$480. CP at 10-11.

Allube, Inc. is a business that is organized as a corporation. CP at 11.

In November 2009, the State charged Mr. Evans with Identity Theft in the Second Degree in violation of RCW 9.35.020(3). The information alleged Mr. Evans knowingly possessed a means of identification and financial information of

Allube, Inc., with the intent to commit or aid or abet the crime of theft and/or forgery. CP at 1.

Mr. Evans was convicted after a bench trial, the Honorable David Foscue presiding pro tem. CP at 10-12. The court sentenced Mr. Evans to 6 months in the county jail, followed by 12 months of community custody. CP at 13-22. He appealed. CP at 23.

Division Two held that a corporation is a person under the plain language of RCW 9.35.020, the identity theft statute. It held that the term "person" for purposes of RCW 9.35.020 is defined by RCW 9A.01.110. That provision states: "Person,' 'he', and 'actor' include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." RCW 9A.04.110(17) . Thus, the court reasoned, the plain language of the statute reveals a person is a corporation. Appendix 1 at 2-4. Finding no ambiguity in the definition, even when combined with the provisions of RCW 9.35.020, the court held the rule of lenity is not applicable. Appendix 1 at 4-6. Finally, the court held the "where relevant" language of RCW 9A.04.110(17) was neither void for vagueness nor subject to arbitrary enforcement. Appendix 1 at 6-10.

E. Argument

Whether Corporations Are Considered Persons and Victims under RCW 9.35.020, the Identity Theft Statute, Is an Issue of Substantial Public Interest That This Court Should Decide

1. A Corporation Cannot be a Victim of Identity Theft Because the Crime is Committed Against "Another Person, Living or Dead," Rendering Corporations Irrelevant in this Context

The identity theft statute criminalizes the theft of a natural person's identity, not of a corporation's identity. Questions of statutory interpretation are reviewed *de novo*. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (citation omitted). A court's primary objective in statutory interpretation is to give effect to the intent of the Legislature, beginning with the plain language of the statute. *Id.* Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* Criminal statutes, moreover, are strictly construed: "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law." Internet Community & Entertainment Corp. v. Washington State Gambling Com'n, 169 Wn.2d 687, 691-92, 238 P.3d 1163 (2010). Following these rules in this case, the relevant definition of person, read together with the plain language of the identity theft

statute, compels the conclusion that a corporation is not a person against whom identity theft can be committed.

As used in the identity theft statute, the term “person” includes “any natural person and, *where relevant*, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110(17) (emphasis added).¹ Thus, while a natural person is always a “person,” a corporation is a “person” only “where relevant.” Division Two pointed out that this definition “accommodate[s] a range of crimes, some of which can only involve natural persons.” Appendix 1 at 5. Identity theft is one such crime which can only be committed against natural persons.

The plain language of RCW 9.35.020 compels the conclusion that a corporation is not relevant as a victim in the crime of identity theft. The statute specifically defines the victim of the crime as “another person, living or dead”:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1). The term “living or dead” is undefined. “When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning.” Gonzalez, 168 Wn.2d 256,

1. RCW 9.35.005(4) defines “person” by referencing RCW 9A.04.110.

263. The ordinary meaning of “living or dead” is alive or deceased. Although counsel could find no definition of the phrase, it is commonly used, for example, in disclaimers used in works of media. A typical disclaimer reads: “All characters appearing in this work are fictitious. Any resemblance to real persons, living or dead, is purely coincidental.” This common usage confirms the ordinary meaning of the phrase: alive or deceased. That meaning cannot be applied to corporations.

Nor do the terms “living” and “dead” individually apply to corporations. The term “living” can have many definitions. However, the first meaning in several online dictionaries, is having or possessing life.² Other meanings include: active, functioning; exhibiting the life or motion of nature; and full of life or vigor. Merriam-Webster Online Dictionary.³ Only the first definition, having or possessing life, makes sense in the context of RCW 9.35.020(1). The Legislature could not have intended that only persons who are “active and functioning” or “full of life or vigor” could be victims under the statute. Thus, the plain meaning of “living” in this context means something having life, which a corporation does

2. <http://www.merriam-webster.com/dictionary/living>;
<http://dictionary.reference.com/browse/living>;
<http://www.thefreedictionary.com/living>.

3. Available at <http://www.merriam-webster.com/dictionary/living>.

not possess. Similarly, while “dead” can mean having the appearance of death or no longer functioning, its primary definition is “no longer living.”⁴ Because a corporation is never alive, it is never no longer living.

Indeed, if a corporation can be considered a victim of identity theft, this provision of RCW 9.35.020 is rendered an absurdity: “another corporation, living or dead.” Such a result cannot be endorsed: “Courts should avoid reading a statute in a way that results in unlikely, absurd, or strained consequences; it will not be presumed that the legislature intended absurd results.” SEIU Healthcare 775NW v. Gregoire, 168 Wn.2d 593, 620, 229 P.3d 774 (2010). To avoid this absurd result, this Court should hold that, in the context of the victim of identity theft, a corporation is not relevant and “another person, living or dead,” refers to a natural person.

Division Two incorrectly surmised that because a corporation can have interests in property and financial information, it follows that it could be a victim of identity theft. *See* Appendix 1 at 6. But crimes are defined strictly by statute, not by judicial inference. Internet Community & Entertainment Corp., 169 Wn.2d 687, 691-92. As discussed above, the plain language of RCW 9.35.020 does not

4. <http://www.merriam-webster.com/dictionary/dead>;
<http://dictionary.reference.com/browse/dead>;
<http://www.thefreedictionary.com/dead>.

contemplate corporate victims of identity theft. Of course, this does not mean a corporation's property rights go unprotected. The State could have charged Mr. Evans with other crimes, including, for example, theft or forgery. It could not, however, charge him with identity theft.

For these reasons, the plain language of the statute compels the conclusion that Allube, Inc. was not a person who could be a victim in this case and Division Two's decision is erroneous. When the plain meaning of the statute resolves the issue, the Court's inquiry is at an end. Gonzalez, 168 Wn.2d 256, 263.

However, if this Court holds that the plain language of RCW 9.35.020(1) does not resolve this issue, the identity theft statute is ambiguous as to whether the crime may be committed against a corporation. When a statute is subject to more than one reasonable interpretation, it is ambiguous. State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010) (citations omitted). The rule of lenity requires a court "to interpret an ambiguous statute in favor of a criminal defendant absent legislative intent to the contrary." *Id.* at 87-88. "A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." Gonzalez, 168 Wn.2d 256, 263.

Here, *assuming arguendo*, the plain language of the statute leaves open the question of whether corporations are relevant as victims of identity theft, the statute is ambiguous. For purposes of the identity theft statute, “person” includes “any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110(17). Thus, as noted earlier, while a natural person is always a “person,” a corporation is a “person” only “where relevant.” In the context of the RCW 9.35.020(1), this definition leaves open the question of when it is relevant to consider a corporation a person.

As Division Two pointed out, the definition of person from RCW 9A.04.110(17) applies throughout the criminal code. In most situations, perhaps, the context of the provision in which it is used makes clear when a corporation is or is not relevant as a “person.” *See* Appendix 1 at 5-6 & 5 n.3 & 6 n.4. However, here an ambiguity exists. “Person” is defined to include corporations where relevant, but the identity theft statute defines victim to be “another person, living or dead.” Thus, under the interpretation discussed above, a corporation cannot be a person/victim because it cannot be either alive or dead. However, the State and Division Two interpret the statute to include corporate victims. Thus, the statute is ambiguous. Accordingly, the rule of lenity requires this Court “to

interpret [the] statute in favor of [the] criminal defendant absent legislative intent to the contrary.” See Mandanas, 168 Wn.2d at 87-88.

In this case, the statute should be interpreted in Mr. Evans’s favor because no legislative intent requires otherwise. Indeed, as explained above, the plain language of the statute indicates corporations were not intended to be victims. Moreover, the stated legislative intent is consistent with the goal of protecting natural persons, not corporations. RCW 9.35.001 sets out the intent behind the crime of identity theft:

The legislature finds that means of identification and financial information are *personal* and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to *a person’s privacy*, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer *another person’s* means of identification or financial information.

RCW 9.35.001 (emphases added). The terms “personal” and “privacy” are inappropriate in the context of a corporate victim. In addition, while “person” may at times be defined to include corporations, in normal parlance it is not. Thus, this provision is consistent with interpreting the identity theft statute to protect natural persons, not corporations.

Further, in passing the 2001 version of the statute, the Legislative Report indicated the legislation was intended to help *consumers* who are victims of identity theft:

In July 1999, the Attorney General formed a *consumer privacy* task force representing a wide variety of interests including retailers, banks, the technology industry, legislators, *and victims of identity theft*. During the public hearing phase of the task force, *many consumers testified about identity theft*. From this testimony and other consumer inquiries and complaints, the Attorney General concluded that the incidence of identity theft is growing rapidly, and that victims need help in obtaining information to reestablish their identity, deal with creditors, and help assist law enforcement.

E.S.S.B. 5449, 57th Leg., Reg. Sess. (Legislative Reports) at 198 (Wn. 2001). No mention was made in the report of corporate victims of the crime. Accordingly, the legislative history is consistent with interpreting RCW 9.35.020(1) to include natural persons, but not corporations, as victims of identity theft.

Indeed, identity theft is a personal crime that, as its name implies, is a crime against an individual's identity. One commentator described the crime in the context of federal criminal statutes, listing the myriad *personal identification* information thieves target:

Personal information that is valuable to identity thieves includes Social Security numbers, driver's license or identification card numbers, financial account numbers, credit or debit card numbers, and personal passwords or unique identifiers used to verify identity or gain access to information via telephone or on-line services.

Terrance J. Keenan, *The Fact Act of 2003: Securing Personal Information in an Age of Identity Theft*, 2 *Shidler J.L. Com. & Tech.* 5, Autumn, 2005. Given the nature of the crime, it makes no sense to convict someone for committing identity theft against a corporation, which has no personal identity to be stolen.

For all these reasons, Division Two greatly expanded the intended scope of RCW 9.35.020(1) when it held corporations can be victims of identity theft and this Court should accept review to clarify the limits intended by the Legislature.

2. The Identity Theft Statute is Unconstitutionally Vague as Applied Because it Defines “Person” to Include Corporations “Where Relevant,” an Inherently Subjective Definition

If this Court reads RCW 9.35.020(1) to include corporations as victims, the statute is unconstitutionally vague and this Court should accept review and reverse Mr. Evans’s conviction. The due process vagueness doctrine under both the federal and state constitutions serves two purposes: to provide citizens with fair warning of what conduct they must avoid and to protect them from arbitrary, ad hoc, or discriminatory law enforcement.⁵ *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993) (citations omitted). The party asserting a vagueness challenge bears the heavy burden of proving the statute’s unconstitutionality beyond a reasonable doubt. The presumption of the statute’s constitutionality is

5. U.S. Const. amend. 14, § 1 and Const. art. 1, § 3.

overcome only in exceptional cases. State v. Allenbach, 136 Wn. App. 95, 100, 147 P.3d 644 (2006), *citing*, City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

First, the statute failed fairly to inform Mr. Evans of the conduct to avoid. This test is satisfied if a person of ordinary intelligence cannot understand what the law prohibits: “Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct the [law] proscribes.” Douglass, 115 Wn.2d 171, 179. The challenged language is not examined in a vacuum, but in the context of the entire enactment. Seattle v. Huff, 111 Wn.2d 923, 929, 767 P.2d 572 (1989).

Here, the identity theft statute criminalizes, *inter alia*, possessing “a means of identification or financial information of another person, living or dead.” RCW 9.35.020(1).⁶ It is in the statute’s interaction with the definition of “person” that the statute becomes vague. “Person” is defined “to include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110(17) (emphasis added).

5. This Court has previously held the definition of “financial information” passed the vagueness test. Allenbach, 136 Wn. App. 95, 147 P.3d 644. In an unpublished opinion, Division 3 held that the conduct prohibited by the statute was not void for vagueness. State v. Gilbert, No. 24100-9-III, 2006 WL 1851396 (Ct. App. 2006).

Thus, while a natural person is always a “person,” a corporation is a “person” only “where relevant.” This open-ended definition is vague on its face as it pertains to the identity theft statute. The “where relevant” language combined with RCW 9.35.020(1)’s definition of victim as “another person, living or dead,” results in an individual having to guess as to whether taking identifying or financial information from a corporation is identity theft. While Mr. Evans could have predicted he could be charged with theft or forgery, the language “another person, living or dead,” would not have enabled him to foresee identity theft charges for unlawfully cashing a corporate check. Under these circumstances, the statute fails to inform a person of ordinary intelligence when identity theft can be committed against a corporation, the statute was vague as applied to him and this Court should accept review and reverse his conviction.

Even more significantly, the statute is vague as it failed to protect Mr. Evans from arbitrary, erratic, or discriminatory law enforcement. The due process clause forbids “criminal statutes that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” Douglass, 115 Wn.2d 171, 181. The test for this prong of the vagueness challenge is whether the statute is “inherently subjective”: “In determining if a penal statute provides

adequate standards for enforcement, one must decide whether the ordinance proscribes conduct by resort to ‘inherently subjective terms.’” *Id.* at 181 (citation omitted). The United States Supreme Court holds this to be the more important aspect of the vagueness doctrine. *Id.* at 180, n.6.

Here, the “where relevant” language combined with RCW 9.35.020(1)’s definition of victim as “another person, living or dead,” is by definition subjective, rendering the statute blatantly unconstitutional. The language gives police officers and prosecutors the unfettered discretion to determine when it is relevant to consider a corporation “another person, living or dead.” The statute creates the very problem the due process requirement of definiteness is designed to prevent: It allows “police officers, judge, and jury to subjectively decide what conduct the statute proscribes.” Accordingly, the provision is void for vagueness under this prong of the constitutional test.

For all these reasons, the definition of “person” in the identity theft statute is unconstitutionally vague as applied to Mr. Evans and this Court should accept review and reverse his conviction.

F. Conclusion

For the reasons indicated in Part E, Division Two greatly expanded the intended scope of RCW 9.35.020(1) when it held corporations can be victims of

identity theft and Mr. Evans respectfully asks this Court to accept review and reverse his conviction.

Dated this 1st day of December, 2011.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on December 1, 2011, I mailed one copy of the attached Petition for Review, postage prepaid, to the attorney for the Respondent, Katherine L. Svoboda, Senior Deputy Prosecuting Attorney, Grays Harbor County, 102 W. Broadway, Room 102, Montesano, WA 98563.



Carol Elewski

APPENDIX 1

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the day, and without Wright's knowledge, Evans took a blank business check from the check register in the office.

Evans presented the check taken from the Allube office at Rent-A-Center Financial Services in Grays Harbor County where he had previously cashed Allube checks. The check was handwritten, made payable to Evans in the amount of \$500, and purportedly carried the authorized signature of Kris Wright. The Rent-A-Center Services manager cashed the check. Evans completed the transaction without the permission or knowledge of anyone associated with Allube. When Wright reported the check missing, police interviewed Evans, who admitted that he had forged and cashed the Allube check.

On November 19, the State charged Evans with second degree identity theft in violation of RCW 9.35.020(3). The information charged that Evans "did knowingly possess a means of identification and financial information of Allube Incorporated with the intent to commit or aid[] or abet in the . . . crime of [t]heft and/or [f]orgery." Clerk's Papers at 1.

Evans waived his right to a jury trial and proceeded to a bench trial. The trial court heard testimony regarding the above described events, resulting in a guilty verdict. Evans appeals.

ANALYSIS

Evans first argues that the trial court erred in convicting him of identity theft because Allube is organized as a corporation and, thus, cannot qualify as a "person" under the plain language of the identity theft statute that he was charged with violating. We disagree.

I. A CORPORATION IS A "PERSON"

"We review questions of statutory interpretation de novo," with the goal of effectuating the legislature's intent. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131, cert. denied, ___ U.S. ___, 131 S. Ct. 318, 178 L. Ed. 2d 207 (2010). Our first step in interpreting a statute is to

examine its plain language. *Gonzalez*, 168 Wn.2d at 263. A statute's "[p]lain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Gonzalez*, 168 Wn.2d at 263 (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the statute is unambiguous, upon reviewing its plain meaning, our inquiry is at an end. *Gonzalez*, 168 Wn.2d at 263. Although a statute is ambiguous when it is susceptible to two or more reasonable interpretations, a statute is not ambiguous merely because different interpretations are conceivable. *Gonzalez*, 168 Wn.2d at 263.

Here our inquiry turns on what the legislature meant by the term "person" in the identity theft statute, RCW 9.35.020. When a statutory term is undefined, we give that word its ordinary meaning, and we may look to a dictionary for such meaning. *Gonzalez*, 168 Wn.2d at 263. But when the legislature has defined a statutory term, "[t]he statutory definition of a term controls its interpretation." *State v. Morris*, 77 Wn. App. 948, 950, 896 P.2d 81 (1995); *see also State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.") (quoting *State v. Standifer*, 110 Wn.2d 90, 92, 750 P.2d 258 (1988)).

Evans was charged with violating RCW 9.35.020(3), which provides in relevant part, "A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree." Subsection (1) of the statute provides, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). In 2001, the legislature enacted a new section that provided definitions of certain terms to be used throughout the identity crimes

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chapter, 9.35 RCW. See LAWS OF 2001, ch. 217, §1; see also RCW 9.35.005 (“The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.”). RCW 9.35.005(4) provides that “[p]erson” means a person as defined in RCW 9A.04.110.” RCW 9A.04.110(17) provides, “‘Person’, ‘he or she’, and ‘actor’ include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.”²

We are bound by the statutory definition of “person,” which expressly includes a corporation, and which the legislature incorporated into the identity theft statute as explained above. Accordingly, Evans’s contention that a corporation cannot qualify as a person for purposes of the identity theft statute fails.

II. RULE OF LENITY

Evans next contends that even if we are bound by the statutory definition of “person,” the phrase “and, where relevant, a corporation” in RCW 9A.04.110(17)’s definition of “person” renders the inclusion of the term “corporation” within that definition contingent and, thus, ambiguous; thereby triggering application of the rule of lenity. Again, we disagree.

If a statute is subject to more than one *reasonable* interpretation, it is ambiguous; and the rule of lenity requires us to interpret an ambiguous criminal statute in the defendant’s favor absent legislative intent to the contrary. *State v. Mandanas*, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010). But the proffered alternative interpretation must be reasonable. See *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999) (“While a statute is ambiguous if it is susceptible to two or more reasonable interpretations, it is not ambiguous merely because different interpretations are

² The legislature amended RCW 9A.04.110, effective July 22, 2011, with two different acts. Senate Bill 5045 added gender neutrality (“he or she”) to subsection 17, but it did not alter its substantive definition of “[p]erson.” LAWS OF 2011, ch. 336, § 350. Substitute House Bill 1188 did not affect subsection 17. LAWS OF 2011, ch. 166, § 2.

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conceivable.”); *see also W. Telepage, Inc. v. City of Tacoma Dep't of Financing*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000) (“A statute is ambiguous if it can be *reasonably* interpreted in more than one way” and a reviewing court “[is] not obliged to discern an ambiguity by imagining a variety of alternative interpretations.”).

Evans argues that the phrase “where relevant” renders the inclusion of corporation in the definition of “person” in RCW 9A.04.110(17) inherently ambiguous; and such ambiguity is particularly acute here because the identity theft statute’s reference to “another person, living or dead,” clearly refers to a natural person. RCW 9.35.020(1). We are not convinced that the legislature’s use of the phrase “where relevant” results in an ambiguity. *See State v. Taplin*, 55 Wn. App. 668, 670, 779 P.2d 1151 (1989) (“The parties’ ability to argue two interpretations of a statute does not necessarily render the statute ambiguous.”).

As we discussed above, the legislature expressly incorporated the general definition of “person” contained in RCW 9A.04.110 into the identity crimes chapter. The definitions appearing in RCW 9A.04.110 expressly apply throughout the Washington criminal code. *See* RCW 9A.04.110 (definitions apply “[i]n this title [Title 9A, Washington Criminal Code] unless a different meaning plainly is required”). Thus, the definitions must accommodate a range of crimes, some of which can involve only natural persons,³ and others that may involve both

³ Examples include sex offenses such as first degree rape of a child, RCW 9A.44.073, which prohibits “[a] person” from having sexual intercourse “with another [person]” where the victim is under 12 years of age and the perpetrator is at least 24 months older than the victim.

natural persons and business entities, such as crimes concerning possessory interests in property.⁴ Thus, the “where relevant” provision of RCW 9A.04.110(17) that incorporates business entities into the definition of “person” has no logical application in crimes describing sex offenses because those crimes require physical attributes. *See, e.g.*, RCW 9A.44.010(1),(2) (defining “[s]exual intercourse” and “[s]exual contact,” respectively).

But a corporation can have possessory interest in tangible property, as well as proprietary interest in its financial and other information, and it can suffer from the theft of such property. Accordingly, the “where relevant” provision does not result in ambiguity; rather it adds necessary flexibility in defining the scope of “person[s]” involved in specifically defined crimes across the gamut of the Washington criminal code. RCW 9A.04.110(17). We hold that the definition of “[p]erson” in RCW 9A.04.110(17) is not ambiguous in the present context. Accordingly, because the statute is not ambiguous, the rule of lenity is not available. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004) (rule of lenity requires reviewing court to interpret only ambiguous criminal statutes in the defendant’s favor).

III. VAGUENESS CHALLENGE

Evans alternatively argues that the “where relevant” language renders the definitional statute void for vagueness. Again, we disagree.

⁴ For example, the second degree burglary statute, RCW 9A.52.030, prohibits “[a] person” from entering or remaining unlawfully in a building with intent to commit a crime against “a person” or property therein. *See also* RCW 9A.56.060 (defining unlawful issuance of checks or drafts that prohibits “[a]ny person” from making and delivering a check to “another person” with intent to defraud, while knowing that the bank upon which the check is drawn has insufficient funds to meet such check); *see also* RCW 9A.48.060 (providing a defense to first or second degree reckless burning where a defendant can establish that “[n]o person” other than the defendant had a possessory or pecuniary interest in the damaged or threatened property, or that such “other persons” consented to defendant’s conduct); *see also* RCW 9A.56.070(1) (defining first degree taking a motor vehicle without permission in relevant part as “[a] person” taking a vehicle without the permission of the owner or “person” entitled to possession).

The due process vagueness doctrine under U.S. Const. amend. 14, § 1 and Wash. Const. art. 1, § 3 serves two important purposes.⁵ It provides citizens with fair warning of what conduct they must avoid, and it protects them from arbitrary or discriminatory law enforcement. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). Accordingly, a criminal prohibition is void for vagueness under the due process clause if it fails either (1) to define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited or (2) to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Allenbach*, 136 Wn. App. 95, 100-01, 147 P.3d 644 (2006); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

We presume that a statute is constitutional, and the party asserting a vagueness challenge bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt. *Allenbach*, 136 Wn. at 100. Moreover, "impossible standards of specificity are not required." *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). As our Supreme Court has said:

[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. As th[e Washington Supreme C]ourt has previously stated, "[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty."

Eze, 111 Wn.2d at 27 (one alteration and emphasis in original) (internal quotation marks omitted) (quoting *State v. Maciolek*, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)). Thus, "the presumption in favor of a law's constitutionality should be overcome only in exceptional cases." *Eze*, 111 Wn.2d at 28.

⁵ Evans has offered no argument addressing why the due process clause in our state constitution should be construed differently than in our federal constitution. Accordingly, we apply federal due process principles as addressed in Washington case law precedent. See *State v. Halstien*, 122 Wn.2d 109, 116 n. 3, 857 P.2d 270 (1993).

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Evans does not challenge the constitutionality of the identity theft statute, RCW 9A.04.110, under which he was charged. He contends only that the “where relevant” phrase in RCW 9A.04.110(17)’s definition of “person” is vague. But “[w]e do not look at the language of a challenged statute in a vacuum; rather, we consider its entire context.” *Allenbach*, 136 Wn. App. at 101. Evans fails to show that a person of common intelligence could not understand what conduct is prohibited. “A statute is not rendered unconstitutional if the general area of conduct against which it is directed is made plain.” *Maciolek*, 101 Wn.2d at 266. All that is necessary is that the statutes in question “are directed at identifiable articulable conduct, have a reasonably definite focus[,] and do not encourage arbitrary enforcement.” *Maciolek*, 101 Wn.2d at 269. The statute at issue here meets these requirements.

The improper taking or use of another’s financial or identifying information with the intent to facilitate a crime is both the focus and gravamen of the charged offense. See RCW 9A.04.110(1), (3). The prohibited conduct is clearly identified and easily understood. That a corporation would also have financial and identifying information of the type protected by the identity theft statute, and that the corporation, too, would suffer from such information being improperly taken and misused, are not foreign concepts to the average citizen. Thus, the inclusion of “corporation” within the definition of “person” in this context is both logical and “relevant.” RCW 9A.04.110(17). Accordingly, such inclusion is appropriately provided for by the “where relevant” provision of RCW 9A.04.110(17). The proviso does not result in a vagary

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as Evans contends.⁶

IV. ARBITRARY ENFORCEMENT CHALLENGE

Evans also argues that the “where relevant” language in RCW 9A.04.110(17) renders the statute subject to arbitrary enforcement. This argument also fails.

“What is forbidden by the due process clause are criminal statutes that contain *no standards* and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” *Maciolek*, 101 Wn.2d at 267 (emphasis added). There is no absence of legally fixed standards here. RCW 9A.04.110(17) logically incorporates listed business entities, including corporations, into the identity theft statute, and the identity theft statute in turn provides legally fixed standards for judge and jury to decide what is or is not prohibited.

We reject Evans’s vagueness challenge because the identity theft statute, RCW 9.35.020(1), (3) and the relevant definitional statute, RCW 9A.04.110(17) (defining “[p]erson”),

⁶ Even if we agreed with Evans that the “where relevant” language at issue might generally create a measure of uncertainty about the inclusion of corporations in the definition of “person,” a proposition that we reject, Evans has failed to carry his burden. “[T]here are statutes which contain both precisely worded prohibitions and prohibitions of uncertain application, and such a statute, though potentially vague as to some conduct, may nevertheless be constitutionally applied to one whose act clearly falls within the statute’s hard core.” *Maciolek*, 101 Wn.2d at 266 (alteration in original) (internal quotation marks omitted) (quoting *City of Bellevue v. Miller*, 85 Wn.2d 539, 541, 536 P.2d 603 (1975), *abrogated on other grounds in State v. Smith*, 111 Wn.2d 1, 13-14, 759 P.2d 372 (1988)).

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are directed at identifiable articulable conduct, have a reasonably definite focus, and do not encourage arbitrary enforcement. *Maciolek*, 101 Wn.2d at 268-69.

We affirm:

Van Deren, J.

VAN DEREN, J.

We concur:

Hunt, J.

HUNT, J.

Johanson, J.

JOHANSON, J.

APPENDIX 2

RCW 9.35.020 Identity theft.

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(4) Each crime prosecuted under this section shall be punished separately under chapter 9.94A RCW, unless it is the same criminal conduct as any other crime, under RCW 9.94A.589.

(5) Whenever any series of transactions involving a single person's means of identification or financial information which constitute identity theft would, when considered separately, constitute identity theft in the second degree because of value, and the series of transactions are a part of a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all of the transactions shall be the value considered in determining the degree of identity theft involved.

(6) Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately.

(7) A person who violates this section is liable for civil damages of one thousand dollars or actual damages, whichever is greater, including costs to repair the victim's credit record, and reasonable attorneys' fees as determined by the court.

(8) In a proceeding under this section, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(9) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting his or her age.

(10) In a proceeding under this section in which a person's means of identification or financial information was used without that person's authorization, and when there has been a conviction, the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from a violation of this section.

[2008 c 207 § 4; 2004 c 273 § 2; 2003 c 53 § 22; 2001 c 217 § 9; 1999 c 368 § 3.]

RCW 9.35.005 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

(a) Account numbers and balances;

(b) Transactional information concerning an account; and

(c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

(2) "Financial information repository" means a person engaged in the business of providing services to customers who have a credit, deposit, trust, stock, or other financial account or relationship with the person.

(3) "Means of identification" means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

(4) "Person" means a person as defined in RCW 9A.04.110.

(5) "Victim" means a person whose means of identification or financial information has been used or transferred with the intent to commit, or to aid or abet, any unlawful activity.

[2001 c 217 § 1.]

RCW 9A.04.110 Definitions.

In this title unless a different meaning plainly is required:

...

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

...

[2007 c 79 § 3; 2005 c 458 § 3; 1988 c 158 § 1; 1987 c 324 § 1; 1986 c 257 § 3; 1975 1st ex.s. c 260 § 9A.04.110.]