Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. ARTHUR MONTOUR, a/k/a "Sugar Montour," PETER MONTOUR, KENNETH HILL, and NATIVE WHOLESALE SUPPLY, Defendants.	No. CR09-0214 MJP DEFENDANTS' MOTION TO DISMISS CCTA CHARGES UNDER THE VOID FOR VAGUENESS DOCTRINE NOTE ON MOTION CALENDAR: March 12, 2010 **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

Defendants move the Court to dismiss the CCTA charges against them on the ground that enforcement of the CCTA against these defendants violates due process under the void for vagueness doctrine. Defendants hereby incorporate by reference the background section and discussion and analysis of the relevant statutory and regulatory provisions set forth in their Motion to Strike Allegations and/or Dismiss Substantive CCTA Charges (Counts 7-16) for Failure to State an Offense.

II. ARGUMENT

A. A criminal statute must provide adequate notice of what conduct is prohibited

As a matter of substantive due process, criminal statutes must be sufficiently specific to provide adequate notice of what conduct is prohibited. *Kolender v. Lawson,* 461

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U.S. 352 (1983). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." 461 U.S. at 357. In the criminal context, courts "apply a more stringent analysis [under the void for vagueness doctrine] . . . because the consequences of imprecision are qualitatively more severe." *Thibodeau v. Portuondo,* 486 F.3d 61, 66 (2nd Cir. 2007). In the criminal context in particular, "cases identify loss of liberty as a particularly severe penalty to one who is unsure how to pattern his conduct." *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1013 -1014 (D.C. Ga., 1979).

> Laws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.

United States v. Wunsch, 84 F.3d 1110, 1119 (9th Cir. 1996). In the present case, the Washington statutes run afoul particularly of that first reason – providing adequate notice to ordinary people.

As a general rule, outside of the First Amendment context, the proper focus of a void-for-vagueness challenge is "whether the statute is impermissibly vague *in the circumstances of th[e particular] case*[,]" as opposed to whether it might be vague under some hypothetical set of circumstances (which latter test is referred to as a facial challenge). *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 822 (9th Cir. 2003) (emphasis in original). And, where "a criminal statute regulates economic activity, it generally 'is subject to a less strict vagueness test, because its subject matter is more often narrow and because businesses can be expected to consult relevant legislation in advance of action.'" *United States v. Iverson,* 162 F.3d 1015, 1021 (9th Cir. 1998). As the discussion below will demonstrate, consulting the relevant legislation gives no one, businessperson or otherwise, a way to resolve the vagueness in the statute.

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B. The laws at issue do not give an out-of-state cigarette suppler reasonable notice of what constitutes "contraband"

As discussed in Defendants' Motion to Strike and/or Dismiss, the advance notice allegations should be stricken and the substantive CCTA charges in Counts 7-16 should be dismissed for three reasons. First, the CCTA's language does not define contraband cigarettes as those distributed in violation of an advance notice provision. Such a provision may reasonably be read to that prohibit transportation of cigarettes, and not as a requirement that stamps be affixed to cigarettes and the CCTA specifically requires that the state law on which a violation is predicated must be one that directs that stamps be placed on cigarettes. Second, Washington's pass-through provision exempted the sales transactions identified in the Indictment from the advance notice provisions. The cigarette sales in the Indictment involved transportation of cigarettes from outside of Washington and into a separate sovereign territory – Stillaguamish trust land. But under Washington law, the transportation of cigarettes through Washington does not require advance notice unless they are destined for a location actually in the state. Third, *Baker* makes it clear that Defendants cannot be prosecuted for activities conducted wholly outside the State of Washington. But the Indictment seeks to do just that – to punish Defendants during the Distributor Period for cigarette sales outside the state.

For these same reasons, the Court should also dismiss the CCTA charges, including the conspiracy charge, because the CCTA, as applied here with Washington law as a predicate, does not give Defendants fair warning of what is prohibited. An ordinary person would not know, for example, whether the CCTA applies to the advance notice provision because the conflict between cases like *Smiskin* and *Fiander* and the plan language of the CCTA, which requires a predicate violation of a state law that requires that stamps be affixed to cigarettes. Nor would that person know whether he or she was exempt from the advance notice provisions because of the clear language of the state's pass-through provision because a person could reasonably believe that he or she was exempt under the

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Paul decision. And, finally, an ordinary person with knowledge of the *Baker* decision would believe that cigarette sales transactions taking place outside of one state cannot subject one to a CCTA prosecution based upon the regulatory requirements of the state in which one did not do direct business. In addition, a close examination of other vague and confusing aspects of these provisions Washington's cigarette taxing scheme when used as a predicate for CCTA violations demonstrates that these laws are void for vagueness as applied to these Defendants.

1. The definitions of "contraband" at issue are overlapping and inconsistent

The conflicts between Washington regulatory requirements, the CCTA and Ninth Circuit case law do not end with those identified above. In *Baker*, for example, the Ninth Circuit several times spoke as if the question of whether cigarettes were "contraband" under Washington law was relevant to, and at times as if it were actually determinative of, the CCTA question. *See, e.g.*, *Baker*, 63 F.3d at 1488 ("We conclude, based on a fair reading of the statutes and their interpretation by the Washington courts, that at the time the defendants were involved in trafficking in unstamped, unapproved cigarettes as charged in this case, the cigarettes *were contraband under Washington law. Accordingly, the defendants' conduct violated the CCTA*") (emphasis added). Contrary to the *Baker* court's apparent linkage of the two jurisdictions' definitions, however, cigarettes can be contraband under state law without being contraband under the CCTA. And the opposite can be true – they may be contraband under the CCTA without being such under state law. Thus, even the Ninth Circuit's holdings are inconsistent with state statutory provisions.

The interaction of the CCTA and Chapter 82.24 generates this confusion. Both use the term "contraband," but use it in different ways. Under the CCTA, as previously noted, "contraband" means more than 10,000 cigarettes, found in a state where there is an applicable cigarettes tax and a requirement of physically evidencing the payment of that tax, if the tax is applicable to those cigarettes and the evidence is lacking. But "contraband"

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under Chapter 82.24 is much broader. It means items that may be seized by the state. Like the CCTA, it includes taxed cigarettes that lack the required stamp. RCW 82.24.130(1)(a). But it also includes unstamped cigarettes, regardless of whether the stamp is required, if the name or address of the purchaser or consignee is falsified, RCW 82.24.250(4); cigarettes involved in violations of any of the provision in RCW 82.24.250; cigarettes used in violation of various statutes outside of the taxing provisions; RCW 82.24.130(1)(d) and (e).

The CCTA excludes from its definition of "contraband" cigarettes those that are in the possession of various persons, including a common carrier transporting the cigarettes with a proper bill of lading stating their quantity, source, and destination. Chapter 82.24 does exempt from search and seizure those conveyances used by common carriers under similar circumstances, under RCW 82.24.130(1)(b)(i), but it does not exempt common carriers from the various requirements of the cigarettes tax laws, such as bans on possession or requirements for notification prior to transport.

For there to be fair notice of a CCTA prosecution, there must at a minimum be clarity as to what constitutes "contraband" under that statute. There is no such clarity under the current state of the law.

2. The term "transporting" as employed in Washington law is vague

An additional problem relates to the entire concept of "transport." The primary provisions of Chapter 82.24, setting forth the requirement for a tax, notably do not include transportation in their list of events that trigger the tax. *See, e.g.*, RCW 82.24.020 (addressing the "sale, use, consumption, handling, possession, or distribution"); RCW 82.24.080(1) (same); RCW 82.24.295(1), RCW 82.24.300 and RCW 82.24.302 (all three including that same list of events when discussing exemptions for certain Indian retailers); RCW 82.24.030(2) (applying to wholesaler's obligation to affix stamps before he "offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes"). Yet the Washington statutes clearly envision "transportation" as something different from these

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other activities, so it cannot be thought that "transportation" is subsumed within any of them. *See, e.g.,* RCW 82.24.110(1)(n) ("For any person to possess or transport "); RCW 82.24.110(1)(p) ("To possess, sell, distribute, purchase, receive, ship, or transport"); WAC 458-20-186(703)(a)("Transportation or possession of 60,000 or fewer unstamped cigarettes"). Thus, an ordinary reader of the taxing provisions of the Washington statutes would reasonably conclude that transportation is not within the activities that give rise to an obligation to pay tax.

3. Washington's advance notice provisions provide no notice of who is subject to them

The potential breadth and ambiguity of the advance notice provision's application adds further confusion. The statutory provision says that a person must provide advance notice if he "transports or causes to be transported in this state" unstamped cigarettes. Thus, the "transporter" and the "causer" of the "transportation" must give notice. It is not clear, however, what categories of persons these terms apply to.

To "transport" means to actually "carry" or convey, and a transporter is "one who transports, especially a vehicle for large or heavy loads." http://www.merriam-webster.com/dictionary/transporter. In ordinary language, the transporter is, therefore, the person, such as the common carrier, or a distributor in his own vehicle, that is actually carrying the cigarettes into the state. Without question, the "transporter" – as commonly understood and defined – is required to give notice when transporting cigarettes *in* Washington. But who qualifies as a "causer" of transportation *in* the state is not at all clear. It is reasonable to conclude that the in-state purchaser is causing the transportation, as he owns the cigarettes and is directing them to be shipped. But there is no authority defining who within a vertical chain of distribution "causes" the transportation of cigarettes beyond the purchaser. The seller or supplier to the in-state purchaser could also be a "causer." But as to that person, he has sold the cigarettes and no longer possesses or owns them at the time of the transportation. Moreover, as to an out-of-state supplier, he could reasonably

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believe that the purchaser has the obligation; after all, the purchaser is primarily the reason – or the "cause" – that the cigarettes are being shipped in the first state, and the purchaser is "in the state" and owns the cigarettes during transportation.

Beyond the purchaser and the seller, in its broadest form, the "causer" could be any company, or any of the company's employees, or any other individual, that performed any act that could be characterized as a "but for" cause of the transportation in Washington. There is no specific statutory limitation. And the government, in this case, runs with the long rope – in an affidavit submitted in the civil forfeiture action, the lead case agent, appears to take the position that Turtle Island, Isleta and NWS, and all of their employees, and the FTZ, and the FTZ's employees (who are not alleged to have any knowledge leading to violations of the CCTA) were all subject to the advance notice provision. *See United States v. First Regional Bank Account #xxxxx1859 Fund Held in the Name of RK Company, Inc., et al.*, No. CV-08-314MJP, Dkt. 1, Att. A, ¶ 74. Given the breadth of the government's interpretation, and the reasonableness of an interpretation that requires only the purchaser to notify, there is no reasonable way to know what is prohibited under the advance notice provision.

4. A conflict exists between Washington's statutory and regulatory provision as to whether "causing transport" is included in the advance notice prohibition

In addition to the confusion that the language "causes to be transported" creates in the statute, it is contradicted by the regulations. The statutory language does appear to obligate persons who "cause" unstamped cigarettes to be transported to give advance notice. RCW 82.24.250(1). The regulations enacted pursuant to the Washington statute, however, include no reference to causing transport, only to actual transport. WAC 458-20-186(501) and (502). This raises a question of whether the narrower regulatory provision controls over the statutory provision, or at least whether the combination of the two result in

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a lack of fair warning that Washington's regulatory scheme encompasses both those who transport and those who only "cause to transport."

In *United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985), *superseded by statute on other grounds as stated in United States v. Morales-Vasquez,* 919 F.2d 258 (5th Cir. 1990), the statute in question obligated financial institutions "and any other participant" in certain financial transactions to file a report with the federal government. The regulations, however, omitted reference to the statutory language "and any other participant." The court observed that, "[t]he present ambiguity regarding coverage of the Reporting Act and its regulations has been created by the government itself." 766 F.2d at 680. It then held that the regulatory omission would "cause confusion in the minds of 'other participants in the transaction,' and even more likely lead them to conclude that they had been excluded from its affirmative duties." *Id.* The court therefore concluded that applying criminal laws to such "other participants" would violate "the fair warning requirements of the due process clause of the fifth amendment." *Id.* This is precisely the situation in this case.

5. The advance notice provision, read with the CTTA, is vague as to the timing of any required notice

Moreover, if the transportation is from outside the state, the statute is unclear as to when or if advance notice must be given. RCW 82.24.250(1) refers to "notice to the board in advance of the commencement of transportation." This suggests that one must report before the cigarettes depart from their out-of-state location. But the statute's reference to transportation "in this state" suggests, to the contrary, that the notice need be given only before the cigarettes begin to travel within Washington. Furthermore, with respect to Indian tribal sellers, who are specifically authorized to possess unstamped cigarettes, RCW 82.24.250(7) only appears to require notice in advance of *receipt* of the unstamped cigarettes. This ambiguity as to the appropriate timing of advance notification under Washington law is compounded by the differing language in the CCTA. Cigarettes can only be contraband under the CCTA when they are "found" in the state where the taxing

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requirements are in issue. 18 U.S.C. § 2341(2). If Washington's law is violated the moment that cigarettes begin their journey from out of state without advance notice, this interaction between the two statutes engenders even more confusion.

C. *Baker's* observation that the laws at issue are "simple" does not obviate the vagueness challenge brought by these defendants

In *Baker,* the Ninth Circuit stated:

> The law is quite simple. All cigarettes in quantities exceeding 60,000 [now 10,000] which are brought into the state must either be stamped or preapproved by the state's Department of Revenue.

Baker, 63 F.2d at 1492. Two things must be observed about this comment. First, the *Baker* was not faced with a vagueness challenge. Instead, the comment was made in the context of determining whether an element of the CCTA is knowledge that one's acts are illegal under the CCTA. Secondly, the facts in *Baker* were much different, involving much simpler aspects of the Washington law. The primary defendants were the owner and manager of retail smokeshops, who purchased and transported the cigarettes themselves from their smokeshops from Idaho. As discussed more fully in Defendants' Motion to Strike Allegations and/or Dismiss Substantive CCTA Charges (Counts 7-16) for Failure to State an Offense, those participants who did not engage in transporting cigarettes in Washington were dismissed because Washington laws vis-à-vis the CCTA simply did not apply to them. As a result, the *Baker* court did not face many of the issues that the Washington law leaves confusing or unanswered for parties who never act within Washington or who sell only to distributors that are also out-of-state.

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III. CONCLUSION

For the foregoing reasons, the Court should dismiss the CCTA charges under the void for vagueness doctrine.

Respectfully submitted this 8th day of February, 2010.

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