UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 20 CR 721**
	)	**Magistrate Judge Jeffrey Cole**
KRIKOR TOPOUZIAN,	)	
	)	
Defendant.	)	

MOTION TO DISMISS THE INFORMATION

Defendant, Krikor Topouzian, by and through his attorneys, Thomas M. Leinenweber and Matthew J. McQuaid, respectfully moves this Court to dismiss the information for vagueness. Defendant states as follows:

1. On October 8th, 2020, Defendant was charged by information with violating the Defense Production Act in violation of 50 U.S.C. Sections 4512 and 4513. The government alleges that between March 6, 2020 and April 7, 2020, Defendant, through his company, accumulated a large amount of N-95 respirator facemasks, an item designated as scarce by the Secretary of HHS pursuant to his authority under the Defense Production Act. Defendant allegedly sold the facemasks to predominantly individual customers at prices more than prevailing market prices to inflate his own profits.

2. The information reads as follows:

> From on or about March 29, 2020, through on or about April 22, 2020, at Skokie, in the Northern District of Illinois, Eastern Division, and elsewhere, KRIKOR TOPOUZIAN, defendant herein, willfully accumulated for the purpose of resale at prices in

> excess of prevailing market prices, materials which had been designated by the President of the United States as scarce and the supply of which would be threatened by such accumulation;
> In violation of Title 50, United States Code, Sections 4512 and 4513.

3. The information filed in this case is void for vagueness. To survive a vagueness challenge, a penal statute must define an offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). The Defendant is entitled to be able to plan his behavior based on laws which afford a reasonable opportunity to know what is and is not permitted. The Defendant was not ordered by the government to stop selling N-95 masks. He was not on notice that the price he charged for the masks was in violation of the law. He was not informed of what price he could charge for the masks. The information does not inform the Defendant of what was and was not permitted. The information filed in this case does not impart that knowledge on the Defendant.

4. The COVID-19 pandemic has placed unprecedented stress on the hospital system and on the availability of critical medical equipment and supplies. To address the crisis, the federal government invoked the Defense Production Act, but it did not use its powers under the Act to become the sole buyer and distributor of goods in short supply. Instead, it chose to leave the market to operate, except for unprecedented criminal prosecutions for hoarding under DPA § 102.

5. However, the statutory standard of wrongdoing, "the purpose of resale at prices in excess of prevailing market prices," does not provide an ascertainable standard of criminal liability. The government did not impose safe harbor regulations declaring what markups are

permissible, or by civil enforcement using the injunction power under DPA § 706 to first enjoin a defined violation and then enforce the injunction by civil or criminal contempt if necessary.

6. In this case, the government merely told the Defendant to stop selling masks at the price he had used to that point. They did not tell him to stop selling the masks altogether. They offered no parameters or guidance to indicate what markups were permissible or if he could markup the price for a mask at all.

7. The DPA §§ 102-03 criminalizes the hoarding of designated materials or charging in excess of prevailing prices for them. In addition, DPA § 706 authorizes the courts to enjoin violations of the Act. In Executive Order 10109 (Mar. 18, 2020), the President delegated to the Secretary of Health and Human Services authority under DPA § 101 to designate medical equipment and supplies as critical to the national defense.

8. On March 25, 2020, the Secretary designated a broad range of equipment and supplies, from mechanical ventilators to face masks, under this authority. The DPA as drafted contemplates the federal government as the sole customer for and allocator of defense equipment and necessary raw materials, so that the armed services do not compete against each other for priority of defense production capacity.

9. However, the federal government decided not to use that model in the COVID-19 crisis, instead choosing to leave state governments and private buyers to compete for critical medical equipment and supplies in the market. In Executive Order 13910 (Mar. 23, 2020), the President delegated to the Secretary of Health and Human Services the authority under DPA § 102 to "prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19."

10. Rather than displacing the market with government-controlled production and allocation, the Administration chose to let the market operate subject to criminal prosecution for hoarding of scarce materials. Section 102 of the DPA provides: "no person shall accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which have been designated by the President as scarce materials, or materials the supply of which would be threatened by such accumulation." Under § 103 of the DPA, those found in violation of the conduct prohibited by §102 are subject to a $10,000 fine and/ or one year of imprisonment.

11. The fact is that much is unclear about the kind of behavior covered by the DPA's hoarding and price control provisions and their applicability in the wake of COVID-19. Before COVID-19, the DPA had not been invoked for public health emergencies. Critically, the DPA does not define what constitutes "prevailing market prices," at what relevant point in time, or how much of a markup is "excess." Nor is there any case law construing the language. Further adding to the confusion is the lack of articulable standards within the government's prosecution and charging strategy that could have the potential to put retailers or manufacturers on notice of the kind of behavior that is prohibited under DPA § 102.

12. The position is complicated further by the fact that DPA § 104 prohibits the President from using the DPA to impose price controls without express authorization by Congress. This forecloses the option of the Secretary fixing a benchmark date for prevailing market prices or prescribing an allowable markup under the rulemaking authority delegated in E.O. 10109 and 10110. This criminal complaint alleges that the Defendant, a seller of PPE has violated DPA § 102, and it is unclear and inconsistent as to what constitutes "in excess of

prevailing market prices." No set percentage was put forward to determine what constitutes an excess of prevailing market prices.

13. The lack of clarity within § 102 results in the application of the void for vagueness doctrine because the statute fails to provide fair advance notice of what is prohibited and allows scope for arbitrary enforcement discretion. The void for vagueness doctrine stems from the provision of the Due Process Clause of the Fifth Amendment that no person may be deprived of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. The test for determining if a law is unconstitutionally vague consists of two prongs: either (1) "a failure to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or (2) the "encouragement of arbitrary and erratic arrests and convictions."

14. Under the modern test, a statute need only fail one of the two prongs to be held unconstitutionally vague. Under the first prong, the "courts look for 'reasonably clear lines between the kinds of' conduct that are permitted and those that are not." Two cases that represent the Court's most recent exegesis of the void for vagueness doctrine are *Skilling v. United States*, 561 U.S. 358 (2010) and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). However, the Supreme Court has held that a clear scienter requirement may alleviate notice concerns. While *Skilling* narrowed the statute prior to engaging in the fair notice analysis, *Humanitarian Law Project* held that, as applied to the plaintiffs and their conduct, the statute was not unconstitutionally vague. In each of these cases, however, the court relied on the scienter requirement in the statutes at issue to conclude that sufficient notice was provided. Yet, the presence of a scienter element "does not guarantee the wording of a law provides fair notice."

15. DPA § 102 arguably violates the void for vagueness doctrine on both fair notice and discriminatory enforcement grounds. Section 102 does not provide clear notice because it does not define what constitutes the prevailing market price, at what point in time, or how much of a margin over that benchmark price is considered excessive. Nor does it determine whether or at what degree a middleman that is passing on higher prices from its own supplier is in violation. Sellers are left to guess whether the prevailing market price is the one that existed before the COVID-19 crisis, or whether it reflects the increased demand and disrupted supply chains created by the pandemic.

16. The lack of notice is not saved by the statutory scienter, "purpose to sell at a price in excess of prevailing market prices," because it is exactly that intended result that is undefined. In *United States v. National Dairy Products*, 372 U.S. 29 (1963), a seller of common intelligence could easily know whether he intended to drive his competitor out of business by underselling him at an unreasonably low price. Under § 102, he cannot know how high a price is too high. *Federal Communications Commission v. Fox TV Stations, Inc.*, 576 U.S. 239, 240, 254 (2012)(fair notice is lacking when the prohibited behavior is defined only after enforcement). In contrast, many state price-gouging statutes specify both the benchmark date and the prohibited level of markup. Unlike "unreasonably low" prices in the Robinson-Patman Act, moreover, there are no decisions defining the key terms. The government's criminal complaint alleging violation of the statute fail to articulate a clear and consistent standard. Knowing that one is increasing the price of goods in order to increase profits or cover higher costs does not equate to knowing that one's conduct violates the law. The economic premise of price gouging and other price control

statutes is that sellers receive a windfall profit by charging a price that does not increase supply because inputs are not available.

17. On the contrary, increasing the price of goods in response to sharply increased demand can be legitimate economic activity if it brings otherwise unavailable goods into the market. Regarding fair notice, the DPA fails under both standards that have been articulated by the courts. Under the *Skilling* standard, a law is held to be void for vagueness when it fails to establish a minimal standard. The undefined language "in excess of prevailing market prices" within the DPA fails to do just that, and as a result encourages arbitrary and discriminatory enforcement. The lack of an articulable standard places discretion in the hands of enforcement officials to determine which behavior they wish to punish. This information fails for all these reasons.

WHEREFORE, the Defendant asks this Court to dismiss the indictment for vagueness.

Dated: February 3, 2021

Respectfully submitted,

s/Thomas M. Leinenweber
s/Matthew J. McQuaid
Attorneys for Defendant

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of the attached MOTION TO DISMISS to be served upon all parties by electronically serving it through the CM/ECF system on February 3, 2021.

s/Matthew J. McQuaid
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