No. 19-1306

IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

THE STATE OF NEW YORK, THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JAMES E. JOHNSON
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for Respondent City of New York

RICHARD DEARING*
JEREMY W. SHWEDER
**Counsel of Record*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

After a bench trial, petitioner United Parcel Service, Inc. was found to have knowingly delivered around 80 million contraband cigarettes to New York addresses between 2010 and 2015 on behalf of seventeen distributors located on Native American reservations in upstate New York. As modified by the court of appeals, the judgment awards the State and City of New York (a) penalties of nearly $80 million for violations of a New York prohibition on shipment of cigarettes to unauthorized persons, (b) lost-taxes damages of nearly $19 million under the federal Contraband Cigarette Trafficking Act (CCTA), and (c) around $20,000 in other penalties.

The questions presented are:

1. Where the CCTA prohibits transportation of any quantity of more than 10,000 untaxed cigarettes, did UPS's delivery of around 80 million untaxed cigarettes to New Yorkers for seventeen upstate New York shippers violate the statute?

2. Where Congress conditioned a special preemption clause in the Prevent All Cigarette Trafficking Act of 2009 (PACT Act) on whether UPS "honored" a prior settlement agreement with the State of New York, did the company's pervasive and knowing violations of that agreement over years cause it to lose the benefit of preemption as to the conduct covered here?

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INTRODUCTION

Following a two-week bench trial, the district court found that petitioner United Parcel Service, Inc. (UPS) had, for years, knowingly delivered tens of millions of untaxed cigarettes on behalf of seventeen cigarette distributors in upstate New York, in violation of federal and state laws, and a separate Assurance of Discontinuance (AOD) with the State. The Second Circuit affirmed the findings that UPS had violated each of the relevant laws, and held that a combined penalty and damages award of nearly $100 million was appropriate.

From this sprawling and fact-laden case, UPS teases out two legal issues in its petition for certiorari. The first presents a narrow question of statutory construction under the CCTA that implicates no circuit split and, indeed, seems to have been addressed by only one circuit court in the CCTA's forty-year life—in the decision below. The issue is not cert-worthy.

The second issue—by UPS's admission a plea for "error correction" (Pet. at 21)—concerns whether the Second Circuit correctly interpreted a special exemption in the PACT Act covering UPS by name. While the court of appeals got it right, the more pertinent point is that it's hard to imagine a more company- and case-specific legal question than this one. UPS's efforts to equate its own interests with the national interest do not provide a basis for granting certiorari.

STATEMENT

1. The imposition of significant excise taxes on cigarettes at the federal, state, and local level stands as a primary driver of the substantial reduction in cigarette smoking by Americans over the past decades—and thus represents one of the Nation's most successful public health interventions during that period.[1] At the same time, evasion of cigarette taxation through smuggling of untaxed cigarettes has been a widespread and stubborn problem.[2] Such evasion not only costs states and cities massive amounts of revenue, but also limits the ability of excise taxation to achieve even more dramatic public-health gains.

The problem of cigarette smuggling has thus received repeated legislative attention at the federal and state levels. As relevant here, in 1978, Congress passed the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2341 *et seq.*, which established criminal and civil penalties for

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[1] U.S. Office of the Surgeon General, The Health Consequences of Smoking—50 Years of Progress 788 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

[2] *See*, *e.g.*, RTI Int'l. 2014 Independent Evaluation Report of the N.Y. Tobacco Control Program 25 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

trafficking in untaxed cigarettes. The law allows for civil enforcement by state and local governments. 18 U.S.C. § 2346(b). In 2000, the New York Legislature passed Public Health Law (PHL) § 1399-*ll*, which effectively requires that all cigarette sales to New York consumers be made face-to-face. And in 2010, Congress returned to the issue again in the Prevent All Cigarette Trafficking (PACT) Act, 15 U.S.C. § 375 *et seq.*, 18 U.S.C. § 1716E, strengthening measures against cigarette smuggling by, among other things, barring the United States Postal Service from accepting cigarettes for mailing, and imposing significant penalties on common carriers for shipping cigarettes for entities identified by the U.S. Attorney General as non-compliant with cigarette tax-stamping laws.

Despite these laws, the widespread sale of contraband cigarettes continues to be a vexing problem for state and local regulators. In New York, for instance, the differential tax scheme that applies to some sales made on Native American reservations has presented opportunities for abuse. While New York may tax the sale of cigarettes from reservation sellers to non-tribal members, the state may not tax sales made to tribal members on their own reservation for personal use. *Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 64 (1994); *cf. Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976). For many years, cigarette dealers located on upstate reservations in New York have exploited

the enforcement difficulties that these laws create by selling untaxed cigarettes to non-tribal members throughout the state. *Milhelm Attea*, 512 U.S. at 64-65; Pet. App. 12a-13a. Recent records show that New York loses around two billion dollars in tax revenue annually due to cigarette smuggling (*see supra* n.2).

2. UPS is a Fortune 50 company that, along with Federal Express (FedEx), is one of the two major private domestic shipping companies currently operating in the United States. Its net income ranges between four and five billion dollars annually.[3]

In 2004, the New York State Attorney General's Office (NYAG) opened an investigation into cigarette deliveries being made by UPS to residential customers, in violation of state law (Pet. App. 14a). The investigation culminated in an Assurance of Discontinuance (AOD) executed in 2005, where UPS agreed that it would stop accepting cigarettes for shipment and would audit shippers where it had reason to suspect they were engaged in shipment of cigarettes (Pet. App. 14a-16a). FedEx entered into a similar agreement, as did DHL, a third company then active in the domestic shipment industry.

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[3] *See* UPS 2019 Annual Report, http://www.investors.ups.com/static-files/e4d06ff9-8dcd-45a7-a8f5-b400c944455e.

After entering into the AOD, UPS never developed any auditing protocol for suspected cigarette shipments (Pet. App. 36a, 160a-162a). Nor did the company develop any centralized training program to educate its employees about its compliance and auditing obligations (Pet. App. 35a, 144a-145a). In essence, UPS simply filed the AOD away.

It did so, that is, until Congress was considering passing the PACT Act in 2009. At that point, UPS, along with FedEx and DHL, dusted off their agreements with the NYAG and used them to persuade Congress to (a) exempt the three companies from the PACT Act, and (b) preempt corresponding state laws as to them. *See* 15 U.S.C. § 376a(e)(3)(B)(ii)(I), (e)(5)(C)(ii). Critically, Congress made clear that the exemption (and preemption clause) were to apply only so long as the companies "honored" their agreements with the NYAG "throughout" the country to "block illegal deliveries of cigarettes … to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(I).

3. But UPS's use of its AOD to obtain a conditional PACT Act exemption was not accompanied by efforts to comply with that agreement. An internal UPS email showed that account executives viewed the PACT Act's prohibition on cigarette shipment by the U.S. Postal Service as a "business opportunity" for UPS (Pet. App. 38a, 169a). And as the statute went into effect, barring UPS's government competitor from

delivering untaxed cigarettes from reservations to consumers' doorsteps, UPS's New York account executives eagerly snapped up new accounts and touted their high shipping volumes (Pet. App. 169a). All the while, UPS was well aware that cigarette dealers located on reservations were "at a higher risk" of flouting the state's cigarette tax laws (Pet. App. 137a, 14a).

Nor were UPS's representatives in the dark about what these businesses were shipping. Several openly described themselves as "smoke shops" or had storefronts plastered with cigarette advertisements (Pet. App. 37a, 139a, 142a, 210a, 220a-221a). Others were overtly manufacturing cigarettes (Pet. App. 227a). On several occasions, when packages broke open in UPS's custody to reveal cigarettes, UPS forwent audits and continued shipping for these businesses (Pet. App. 228a). And in those circumstances where account personnel did finally terminate accounts with known cigarette shippers, they often soon opened new accounts with the very same principals, frequently using close variants of the same account name, and, again, kept shipping their untaxed cigarettes to customers (Pet. App. 36a, 191a, 198a, 210a).

4. All of this evidence—and considerably more—was presented by the State and the City in the two-week bench trial in this case, which followed the filing of a civil enforcement action in 2015. The trial featured nearly forty witnesses and

hundreds of exhibits. After hearing all of the evidence, the district court made numerous factual findings that are, at this point, unchallenged.

Overall, the District Court for the Southern District of New York found that UPS knowingly delivered untaxed cigarettes on behalf of seventeen different cigarette shippers located on various upstate New York Native American reservations (Pet. App. 34a, 192a-237a). The court found that, over a roughly five-year period, the company shipped approximately 400,000 cartons of untaxed cigarettes—totaling about 80 million cigarettes—to New York addressees for these shippers (*see* S.D.N.Y. Dkt. No. 15-cv-01136, ECF No. 530; Pet. App. 354a-357a).

The deliveries violated the CCTA, the PACT Act, the New York Public Health Law, and the AOD's audit requirement. The CCTA makes it unlawful to knowingly "ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," defined, in relevant part, as "a quantity" of untaxed cigarettes "in excess of 10,000 cigarettes." 18 U.S.C. §§ 2341(2), 2342(a). In a pre-trial ruling, the district court confirmed that, consistent with every court to have considered the question, the CCTA allowed for aggregation of multiple shipments to reach the over-10,000 cigarette threshold (Pet. App. 439a-440a).

The trial evidence showed that UPS's contraband cigarette deliveries exceeded that

threshold many times over on behalf of numerous shippers. The district court ultimately found that UPS's deliveries totaled in the tens of millions of cigarettes. And UPS delivered individual shipments for unlicensed cigarette manufacturers that, by themselves, exceeded the statutory threshold (Pet. App. 301a).

UPS also violated the PACT Act by delivering packages for entities listed on a federal non-compliant list. 15 U.S.C. § 376a(e)(2)(A). The evidence showed that UPS was not exempt from liability from that law, or the state law barring cigarette shipments, because UPS's knowing shipment of millions of untaxed cigarettes to consumers throughout New York meant that the company had not "honored" the AOD, as required by the PACT Act (Pet. App. 270a-272a).

Finding that UPS had violated each of the CCTA, PACT Act, N.Y. Pub. Health Law § 1399-*ll*, and the AOD, the district court assessed penalties and damages amounting to nearly $247 million (Pet. App. 352a-375a). But crediting "significant" evidence showing that UPS had "implemented oversight procedures" after plaintiffs filed this enforcement action, and that those procedures should "prevent repetition" of its myriad violations, the court denied plaintiffs' request for injunctive relief (Pet. App. 350a).

5. In a split decision, the Second Circuit affirmed the district court's interpretation of the

CCTA and the PACT Act (Pet. App. 46a-62a, 68a-72a). The court also unanimously affirmed the court's methodology for determining the number of contraband cigarettes shipped (Pet. App. 76a-85a, 103a). The court of appeals dramatically reduced the size of the judgment, however. It cut the overall penalties roughly in third, down to nearly $80 million (Pet. App. 94a, 99a). But it doubled the amount of lost taxes attributable to UPS's conduct, resulting in a damages award of about $19 million (Pet. App. 85a-90a).

The dissenting judge would have held that UPS was exempted from liability under the PACT Act and the state Public Health Law because UPS had "honored" the AOD by "subjecting itself" to the agreement (Pet. App. 103a-104a). He also concluded that the CCTA did not permit aggregation to reach the more-than-10,000 cigarette statutory threshold (Pet. App. 104a). But the dissenting judge still would have remanded for imposition of penalties—the judge suggested $30 million—for UPS's violation of the AOD by knowingly shipping untaxed cigarettes (Pet. App. 109a).

6. Two years before bringing this enforcement action against UPS, the City and State filed a similar action against FedEx, one of the two other common carriers specifically referenced in the PACT Act. 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The suit alleged that FedEx had violated the same federal and state laws, and an agreement with the State,

by shipping untaxed cigarettes (*see City of New York v. FedEx Ground Package System, Inc.*, S.D.N.Y. Dkt. No. 13-cv-9173). In 2018, FedEx settled that action by, among other things, paying $35 million, agreeing to cease most domestic shipments of tobacco products, and retaining an independent consultant to monitor compliance (*id.* at ECF No. 631). The third carrier referenced in the PACT Act, DHL, no longer delivers packages from domestic shippers.

REASONS FOR DENYING THE PETITION

The City refers the Court to the separate brief in opposition filed by the State of New York for a comprehensive statement of the reasons for denying certiorari. We highlight here a few of the most straightforward bases for denying review.

1. The petition's core contention is that the Second Circuit's construction of the CCTA's quantity threshold has created a circuit split. But the claim does not hold up.

The petition cites no decision that interprets the CCTA differently than the Second Circuit did. To the City's knowledge, no such decision exists. As the court of appeals observed (Pet. App. 69a), the handful of district court cases within the Second Circuit that have addressed the question all reached the same conclusion: the CCTA allows for aggregation of multiple shipments to reach the greater-than-10,000-cigarette threshold. The

Second Circuit's decision endorsing that conclusion appears to be the first circuit-level decision speaking to the point. Not only is there no circuit split, but there has been none of the percolation or circuit-level dialogue that the Court would ordinarily await before jumping in on a question of statutory construction.

UPS's claim of a circuit split rests on four decisions addressing *different* statutes with substantially *different* language from that found in the CCTA. To the extent those cases circle around a common theme, it is, by UPS's own framing, to recognize a "general" but not absolute rule (Pet. at 14) that when a statute criminalizes possession of a certain quantity of an item, the prosecution must prove that the defendant possessed the specified quantity at a single point in time, rather than by aggregating separate and non-overlapping acts of possession.

But that supposed general rule is not in play in this civil action. Section 2342(a) of the CCTA covers a number of activities involving the prohibited quantity of untaxed cigarettes, not just possession of them. It forbids anyone "knowingly to ship, transport, receive, possess, sell, distribute, or purchase" a quantity of untaxed cigarettes exceeding 10,000. The statutory verbs most pertinent to UPS's conduct are "transport" and "ship"—not "possess." And as the Second Circuit correctly held, it makes "perfect sense" that a company making several deliveries amounting to

more than 10,000 untaxed cigarettes has transported "a quantity" in excess of that amount (Pet. App. 69a-70a). Four circuit decisions addressing the different verb "possess" cannot show any relevant split in authority.

Even if UPS's general rule did apply, two CCTA-specific provisions, not at issue in any of UPS's four cases addressing other statutes, would still strongly support the Second Circuit's ruling. First, Congress expressly limited a separate CCTA prohibition on false statements to persons who distribute more than 10,000 cigarettes (taxed or untaxed) "in a single transaction." 18 U.S.C. § 2342(b). Had Congress intended to limit liability under § 2342(a) to only those transporting more than 10,000 cigarettes in a single transaction, "it presumably would have done so expressly as it did in the immediately following subsection." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, the CCTA imposes a reporting requirement on anyone who distributes more than 10,000 cigarettes (taxed or untaxed) "within a single month." 18 U.S.C. § 2343(b). No language of that sort appears in § 2342(a) either. And this month-based reporting threshold—designed to facilitate investigation of underlying violations—would make little sense if the underlying prohibition were moment- or transaction-specific.

In the provision at issue here, Congress neither barred aggregation, as it did in § 2342(b), nor

placed a hard time limit on it, as it did in § 2343(b). The specific drafting choices reflected in the CCTA confirm that Congress intended to permit aggregation of activities forming a single course of conduct under § 2342(a). And they provide another reason that this case is sharply different from those that UPS tries to place on the other side of a "split."

UPS also greatly overstates the aggregation issue's significance to this case, suggesting that its theory would wipe out the entire award for lost taxes that forms roughly a fifth of the judgment. Even ignoring that lost taxes are also recoverable under the PACT Act (Pet. App. 85a, 87a), the trial evidence showed that UPS "routinely" made individual deliveries in excess of 10,000 untaxed cigarettes (Pet. App. 69a). And, more broadly, most or all of the shipments here would violate the "possession" prong of the CCTA under UPS's own moment-in-time theory. The district court found that UPS shipped approximately 80 million untaxed cigarettes (to New York addresses alone) over a period of about 1,700 days—meaning that, as a conservative average, the company knowingly took possession of well over 40,000 untaxed cigarettes daily during this period.

To be sure, because the district court ruled in favor of the aggregation approach in advance of trial, plaintiffs organized their trial proof accordingly. But if the district court had ruled otherwise, plaintiffs likely could have proved CCTA violations of similar scope through painstaking

analysis of UPS's delivery spreadsheets. And if the Court were to accept UPS's theory now, the result would only be further trial-court proceedings that would probably end at or near the same place regarding the amount of CCTA damages.

In sum, the lead question presented in UPS's petition is not the subject of any circuit split, has been addressed by exactly one circuit in the CCTA's four-decade existence, was correctly decided below, and has questionable practical significance even to the resolution of this case. The Court should deny review.

2. The second issue in the petition—the scope of UPS's PACT Act exemption—is equally unworthy of certiorari. We defer to the State's showing that the Second Circuit correctly held that UPS had not "honored" its 2005 AOD with the State, as required by the PACT Act exemption, given that UPS "violated so many different AOD obligations," for "so many shippers," from "the time the AOD became effective" until plaintiffs brought this enforcement action (Pet. App. 47a). Such "wholesale noncompliance" cannot fairly be considered honoring the agreement (Pet. App. 50a).

But even if UPS were right on the merits (and it is not), the PACT Act issue would not warrant review. UPS's confession that this prong of its petition seeks "error correction" should alone be fatal (Pet. at 21). Contrary to UPS's theory, its success in persuading Congress to afford it a

statutory exemption by "name" does not mean that the Court is obliged to give it an automatic right to certiorari too. Nor is UPS's disagreement with the Second Circuit's construction of its special exemption a matter of national importance.

The PACT Act question could hardly be more one-off. UPS avoided injunctive relief below by convincing the district court that it had cleaned up its act regarding shipment of untaxed cigarettes (Pet. App. 350a). If that's true, UPS has no reason to believe its exemption will ever again come into question. Meanwhile, in 2018, FedEx agreed to pay $35 million to the State and City for unlawful cigarette shipments and to retain an independent consultant to oversee its future compliance. *See supra* at 10. The third company named in the statutory exemption, DHL, is no longer engaged in domestic shipment at all.

It would seem that the PACT Act issue's only relevance is to affect how much UPS should pay in this particular case to account for its unchallenged record of years of past wrongdoing. And even there, UPS exaggerates the impact. The company argues that Congress intended the special exemption to ensure that it would be subject either to penalties under the AOD or to penalties under the PACT Act and corresponding state laws, but not to both (Pet. at 26). UPS is wrong about that, but even if were right, the bottom-line outcome here effectively tracks what UPS proposes. The Second Circuit reduced penalties under the AOD to a nominal

amount, eliminated penalties under the PACT Act, and retained only the penalties awarded for violations of New York's Public Health Law (at half the maximum level authorized by that statute).

UPS's real point is simply that it thinks the penalty number should be lower. There is nothing unique about this type of request for error correction. The Court sees and rejects it in petition after petition. As the Court should here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel of the
City of New York

Counsel for Respondent City of New York

RICHARD DEARING*
JEREMY W. SHWEDER
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

**Counsel of Record*