No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Contraband Cigarette Trafficking Act prohibits the knowing transportation of "a quantity" of more than 10,000 untaxed cigarettes in the "possession" of unauthorized persons. 18 U.S.C. § 2341(2). The first question presented is whether multiple shipments from different shippers may be aggregated to satisfy the 10,000-cigarette threshold.

2. The Prevent All Cigarette Trafficking Act of 2009 exempts UPS by name if its tobacco-delivery agreement with New York is "honored" nationwide. 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The second question presented is whether substantial compliance is a prerequisite to this statutory exemption.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are set forth in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioner has no parent corporation and no publicly held company owns more than 10% of its outstanding stock.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *The State of New York et al.* v. *United Parcel Service, Inc.*, No. 15-cv-1136 (KBF) (S.D.N.Y.).
- *The State of New York et al.* v. *United Parcel Service, Inc.*, Nos. 17-1993-cv, 17-2107-cv, 17-2111-cv (2d Cir.) (judgment entered Nov. 7, 2019, petition for rehearing denied Dec. 19, 2019).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Parcel Service, Inc. ("UPS") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–114a) is reported at 942 F.3d 554. The district court's opinion on liability (Pet. App. 115a–351a) is reported at 253 F. Supp. 3d 583. The district court's opinion on damages and penalties (Pet. App. 352a–75a) is unreported but available at 2017 WL 2303525.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2019. Pet. App. 1a. A timely petition for rehearing was denied on December 19, 2019. Pet. App. 450a. On February 13, 2020, Justice Ginsburg extended the deadline to file a petition for a writ of certiorari to May 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Contraband Cigarette Trafficking Act (Pet. App. 476a–83a), the Prevent All Cigarette Trafficking Act of 2009 (Pet. App. 454a–75a), New York's Public Health Law (Pet. App. 484a–86a), and the Assurance of Discontinuance between UPS and the Attorney General of New York (Pet. App. 487a–509a) are reproduced in the Appendix.

STATEMENT

This petition involves the construction of two words—"quantity" and "honored"—in different federal statutes imposing liability on common carriers that deliver untaxed cigarettes. Nearly $100 million in damages and penalties turns on the construction of these two words.

The Contraband Cigarette Trafficking Act (the "CCTA") prohibits the knowing transportation of "a quantity" of more than 10,000 untaxed cigarettes in the "possession" of unauthorized persons. 18 U.S.C. § 2341(2). Separately, the Prevent All Cigarette Trafficking Act of 2009 (the "PACT Act"), which restricts cigarette deliveries by common carriers, exempts UPS *by name* from its restrictions—and preempts state laws covering the same subject—if a settlement agreement between UPS and the Attorney General of New York "is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(B)(i)–(ii).

Respondents the State of New York and the City of New York (collectively, "New York") sued UPS under these two statutes (and on other theories). The district court ruled that, under the CCTA, multiple shipments of cigarettes could be aggregated to satisfy the 10,000-cigarette threshold. Pet. App. 439a–40a. A divided panel of the Second Circuit affirmed that ruling, and almost $20 million in damages based on it. Pet. App. 68a–72a, 99a. In addition, the district court ruled that UPS had not "honored" the settlement agreement "nationwide" because it had not complied with one of the AOD's requirements as to twenty shippers in New York—about 0.00125% of UPS's domestic customers. Pet. App. 395a–425a. The divided panel

affirmed that ruling, and almost $80 million in penalties based on it. Pet. App. 46a–62a, 99a.

1. Congress enacted the CCTA in 1978 "with the aim of reducing evasion of state cigarette taxes." *Att'y Gen. of Can.* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 129 (2d Cir. 2001). The CCTA makes it unlawful for any person "knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). The statutory phrase "contraband cigarettes" is defined as "a quantity in excess of 10,000 cigarettes" that does not bear tax stamps required by state law "in the possession of any person other than" specific authorized persons. *Id.* § 2341(2). In addition to imposing criminal penalties, the CCTA permits state and local governments to seek relief for violations of the CCTA in the form of "civil penalties, money damages, and injunctive or other equitable relief." *Id.* § 2346(b)(2).

In 2000, New York enacted its own statute in an attempt to prevent consumers from avoiding New York's high cigarette taxes. *See* N.Y. Pub. Health Law § 1399-*ll*(1)–(2) (the "PHL"). The PHL prohibits common carriers from "knowingly transport[ing] cigarettes to any person in [New York] reasonably believed by such carrier to be" unauthorized to receive them, with deliveries to "a home or residence" presumed to be unlawful. *Ibid.* Violators of the PHL are subject to criminal penalties and a civil penalty of not more than $5,000 for each knowing violation. *Id.* § 1399-*ll*(5).

UPS, a common carrier operating nationwide, adopted a number of robust changes to its tobacco delivery policies and procedures to ensure compliance with the PHL. Pet. App. 142a–43a. The New York Attorney General, however, was not satisfied that

UPS's new policies were adequate. In October 2005, to resolve this disagreement, UPS and the New York Attorney General entered into a contract known as the Assurance of Discontinuance (the "AOD"). Pet. App. 14a, 487a–509a. Through the AOD, UPS agreed not to knowingly transport untaxed cigarettes to New York consumers. In addition, UPS agreed to take additional steps to identify cigarette shippers, notify cigarette shippers of its tobacco policies, audit suspected cigarette shippers under specified circumstances, and impose progressive disciplinary measures on shippers that failed to comply with UPS's policies. Pet. App. 495–501a. UPS further undertook internal compliance obligations, such as employee training, responding to inquiries from the New York Attorney General, and verifying compliance upon request. Pet. App. 501a–04a. The AOD provides for a stipulated penalty "of $1,000 for each and every violation" of the AOD. Pet. App. 504a. In periodic reports submitted to the New York Attorney General, UPS "confirmed that it would give nationwide effect to the AOD." *New York* v. *United Parcel Serv., Inc.*, 160 F. Supp. 3d 629, 651 (S.D.N.Y. 2016).

In 2010, Congress recognized two gaps in the regulation of tobacco deliveries. First, the United States Postal Service was not subject to state laws regulating the delivery of tobacco products, and thus federal intervention was needed. *See* 156 Cong. Rec. H1534 (daily ed. Mar. 17, 2010) (statement of Rep. Weiner). Second, state laws regulating the private carriage of tobacco products had been held preempted by the Federal Aviation and Administration Authorization Act of 1994. *See Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368–69 (2008). Although the three primary com-

mercial carriers—UPS, FedEx, and DHL—were parties to tobacco-delivery agreements with New York, smaller common carriers were not.

The PACT Act addresses both of these gaps. First, it prohibits outright the use of the United States Postal Service to transport cigarettes by mail. *See* 18 U.S.C. § 1716E. Second, it *permits* shipment of cigarettes through common carriers, but imposes certain shipping, labeling, and recordkeeping requirements on "delivery sellers." *See* 15 U.S.C. § 376a(a)–(d). The Act further requires the U.S. Attorney General to create a list of delivery sellers of cigarettes who have failed to register with the federal government and distribute the list to common carriers like UPS. *See id.* § 376a(e)(1). Common carriers are prohibited from "knowingly complet[ing] . . . a delivery of any package for any person whose name and address are on the list." *Id.* § 376a(e)(2). The U.S. Attorney General is tasked with enforcement of the PACT Act (*id.* § 378(b)), although States also have standing to pursue claims under the Act (*id.* § 378(c)(1)(A)).

Congress was well aware, however, that UPS, FedEx, and DHL were already subject to tobacco-delivery agreements they had entered into with the Attorney General of New York. The sponsor of the bill expressly acknowledged those agreements, observing:

> [I]t is already by agreement that UPS, FedEx, DHL, the major common carriers have said, You know what? We think it's wrong to be facilitating this by making deliveries for Internet tobacco companies, so we're not going to do it. They've agreed to it. It's in place in all 50 States.

156 Cong. Rec. H1534 (statement of Rep. Weiner). The PACT Act was therefore drafted after "careful[] negotiat[ion] with the common carriers, including UPS, to ensure that it [would] not place any unreasonable burdens on those businesses." 155 Cong. Rec. S5853 (daily ed. May 21, 2009) (statement of Sen. Kohl). To that end, and "[i]n recognition of UPS and other common carriers' agreements to not deliver cigarettes to individual consumers on a nationwide basis, pursuant to agreements with the State of New York, [the Act] *exempted them from the bill provided this agreement remains in effect*." *Ibid.* (emphasis added).

The PACT Act accordingly exempts from its requirements any "common carrier that . . . is subject to a settlement agreement" with state regulators. 15 U.S.C. § 376a(e)(3)(A)(i). The statute defines such a settlement agreement as a settlement "relating to tobacco product deliveries to consumers," and "includes" the "Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005 . . . if [it] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." *Id.* § 376a(e)(3)(B). Such an agreement also "includes" any "other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers." *Id.* § 376a(e)(3)(B)(ii)(II).

Congress took additional steps to ensure that common carriers subject to such agreements are not unduly burdened by any further restrictions on their operations. The PACT Act therefore preempts state laws covering the same topic with respect to the com-

mon carriers (including UPS) qualifying for the exemption in Section 376a(e)(3). *See* 15 U.S.C. § 376a(e)(5)(C)(ii). Thus, not only does the statute establish UPS's exemption from the PACT Act's requirements, it also shields UPS from comparable state laws, such as the PHL.

2. New York initiated this lawsuit in February 2015 after an investigation into deliveries allegedly containing untaxed cigarettes made by UPS from a limited number of Native American reservations in New York to individual consumers. Pet. App. 121a. New York brought claims under the AOD, the PACT Act, the PHL, the CCTA, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968. Pet. App. 121a–22a.

UPS filed a motion to dismiss the CCTA claims, arguing that there were no allegations that any individual shipment of untaxed cigarettes exceeded 10,000 cigarettes. New York contended it could satisfy the 10,000-cigarette threshold by aggregating multiple shipments of cigarettes. The district court agreed with New York, summarily holding that the CCTA "imposes no single transaction requirement." Pet. App. 439a.

UPS argued also that it could not be held liable under the PACT Act or the PHL by virtue of the AOD exemption in the PACT Act (and the corresponding state preemption provision); rather, UPS's liability was to be measured by only the AOD because the AOD was effective during the relevant period. In denying summary judgment, the district court ruled that UPS would lose the protection of the PACT Act exemption if New York "could present evidence creating an inference that the effectiveness of UPS's policies is so compromised that these policies are not in fact in place."

Pet. App. 424a. Although the district court recognized that New York had "failed, at this time, to raise a genuine issue of material fact" as to the applicability of the PACT Act exemption, it denied UPS's motion for summary judgment and gave New York "an opportunity to make a supplemental factual submission" under this newly articulated standard. Pet. App. 424a, 426a.

The case proceeded to a bench trial, after which the district court issued its opinion on liability. The court found that UPS had knowingly transported untaxed cigarettes for seventeen shippers between 2010 and 2015, and that UPS had failed to audit twenty shippers it had reason to believe were shipping cigarettes in derogation of UPS's tobacco policies. Pet. App. 189a–90a. The court thus found UPS liable under the AOD for failing to audit those shippers. Pet. App. 261a, 264a–65a. The court also held that UPS was not entitled to the PACT Act exemption because of UPS's allegedly "widespread and persistent failure to honor the AOD." Pet. App. 273a. The court therefore held UPS liable under the PACT Act for delivering packages to shippers appearing on the Attorney General's prohibited-shipper list, and liable under the PHL for knowingly delivering cigarettes to statutorily unauthorized recipients. Pet. App. 290a–94a, 296a–97a. Finally, the district court held that UPS was liable under the CCTA for delivering untaxed cigarettes in multiple shipments that, in the aggregate, totaled more than 10,000. Pet. App. 299a–303a.

Following receipt of additional submissions by the parties, the district court issued its opinion on damages and penalties. The court imposed *four* tiers of penalties. First, the court imposed a $1,000 penalty

under the AOD for every package UPS shipped on behalf of a shipper it had reason to believe was selling cigarettes, totaling $80,468,000 in penalties owed to the State. Pet. App. 364a–65a. Second, the court imposed half of the maximum penalties available under the PACT Act for each package shipped for a shipper on the Attorney General's prohibited-shipper list, totaling $35,258,750 owed to the State and $43,091,250 to the City. Pet. App. 368a–69a. Third, the court imposed half of the maximum penalties available under the PHL for each shipment of cigarettes to an unauthorized purchaser, totaling $41,410,000 owed to the State and $37,345,000 to the City. Pet. App. 371a. Lastly, the court awarded New York compensatory damages under the CCTA in the form of 50% of the lost tax revenue, totaling $8,679,729 to the State and $720,885 to the City, plus nominal penalties. Pet. App. 373a. The total sum awarded against UPS was $246,975,614—nearly a quarter of a billion dollars.

3. The Second Circuit reversed in part and affirmed in part. The two liability issues presented in this petition were decided by a divided panel.

a. With respect to the CCTA's 10,000 cigarette threshold requirement, the majority held that "[t]he plain text of the CCTA's definition of 'contraband cigarettes' imposes no per-transaction requirement." Pet. App. 69a. The court asserted that if Congress had wanted to "signify a singular shipment," it could have done so expressly. *Ibid.* "It makes perfect sense," the court reasoned, "to say that a shipper who makes more than ten 1,000-cigarette deliveries has delivered 'a quantity' of more than 10,000 cigarettes." Pet. App. 69a–70a. In a footnote, the court acknowledged that "the aggregation principle creates certain puzzles or

anomalies," pointing out that aggregation could retroactively criminalize shipments of less than 10,000 cigarettes after subsequent shipments were aggregated, and that the CCTA offers no time period over which shipments may be aggregated. Pet. App. 70a n.26. The court dismissed those concerns on the ground that "this case does not present a close call." *Ibid.*

With respect to the exemption under the PACT Act, the same two-judge majority held that the district court had correctly found that UPS had not "honored" the AOD, because UPS had failed to substantially comply with the contractual requirements as to the twenty shippers addressed at trial. Pet. App. 61–62a. The majority opined that "the most reasonable interpretation of the exemption provision is that UPS's exemption remained in place to the extent that UPS itself 'lived up to' or 'fulfilled' its obligations under the AOD." Pet. App. 50a. The court therefore agreed "with the district court that UPS's wholesale noncompliance with the AOD means that it did not 'honor' the AOD and therefore forfeited its exemption." *Ibid.* At the same time, the court acknowledged that "the PACT Act does not define specifically how widespread or persistent violations would have to be to justify a conclusion that UPS was not 'honoring' the AOD nationwide." Pet. App. 56a. It elected not to grapple with that problem, however, because UPS's allegedly "flagrant and undisputed disregard of the AOD makes that question an easy one here." Pet. App. 57a.

b. Judge Jacobs dissented on these two issues.

With respect to the CCTA, Judge Jacobs explained that the statute does not permit aggregation of multiple shipments. The statute's language—"a quantity"—is "read naturally to reference a single shipment of more than 10,000 cigarettes." Pet. App. 110a.

That reading "fits the express purpose of the statute," which was "to address the serious problem of organized crime and other large scale operations of interstate cigarette bootlegging." *Ibid.* (quotation marks omitted). Judge Jacobs observed that "[i]f aggregation is permitted . . . , courts will be left to resolve difficult questions, starting with time period." *Ibid.*

As for the PACT Act, Judge Jacobs contended that UPS "'honors' the AOD so long as it subjects itself to the terms of the AOD throughout the nation." Pet. App. 104a. He relied on the legal definition of "to honor" as "to accept an obligation as valid." Pet. App. 105a. The majority's contrary interpretation, Judge Jacobs opined, is "unworkable." Pet. App. 106a. He explained that "if the applicability of the exemption were to turn on success of its interdiction measures, no one (courts, common carriers, states, or municipalities) could know whether the exemption is applicable until vexed questions were sorted out in litigation." *Ibid.* Finally, Judge Jacobs noted that the majority's interpretation permitting triplicative liability for the same underlying conduct was in conflict with its ruling that the district court impermissibly compounded penalties in violation of due process. Pet. App. 107a–08a.

c. The Second Circuit unanimously reduced the penalties under the AOD from more than $80 million to $20,000, reasoning that because New York had contended at trial only that UPS had violated the AOD by failing to audit suspect shippers—and in fact had "chose[n] to forego their right to seek penalties for UPS's violations of other provisions of the AOD"—the penalties were capped at the contractual maximum of $1,000 for each unaudited shipper. Pet. App. 68a & n.24. The court also held that the district court had

abused its discretion in imposing cumulative penalties on UPS under the PACT Act, the PHL, *and* the AOD. Pet. App. 90a–99a. The panel majority therefore vacated the penalty under the PACT Act, which, after other modifications to the CCTA damages not relevant here, resulted in the following judgment:

- $20,000 in penalties to the State under the AOD;
- $78,755,000 in penalties to the State and the City under the PHL;
- $18,798,228 in compensatory damages to the State and the City under the CCTA;
- $2,000 in nominal penalties to the State and the City under the CCTA.

The Second Circuit denied a timely petition for rehearing en banc. Pet. App. 450a–51a.

REASONS FOR GRANTING THE PETITION

This petition presents two questions that warrant resolution by this Court. The first involves a statutory phrase that appears in many federal statutes and has implications far beyond this case. The second concerns the construction of a statutory exemption that refers to UPS by name.

First, this case presents the question whether a plaintiff suing under the CCTA may satisfy the 10,000-cigarette threshold by aggregating multiple shipments from different shippers across an indefinite time period, even though Congress nowhere expressly authorized aggregation. The Second Circuit's decision is squarely at odds with a legion of court of appeals decisions that read threshold quantity requirements

in criminal possession statutes to preclude such aggregation. The court's novel rule presumptively *requires* such aggregation unless Congress has expressly negated it, and introduces a panoply of vexing questions—as the Second Circuit itself acknowledged. This question is a recurring one, and the decision below creates a clear split of authority. In this case, nearly $20 million turns on the answer.

Second, this case presents the question whether the word "honored" in the PACT Act requires a court to inquire into a carrier's level of compliance with a tobacco-delivery agreement at the individual shipper level. The PACT Act exempts by name the three primary commercial carriers (including UPS), and preempts all state laws covering the same subject matter (including the PHL). But the court of appeals rejected the framework Congress enacted to regulate cigarette trafficking nationwide and instead substituted its own vision as to what paradigm of liability should control. That interpretation presents a question of exceptional importance. In this case, nearly $80 million turns on the answer.

I. THE SECOND CIRCUIT'S ENDORSEMENT OF AGGREGATION CREATES A CONFLICT AMONG THE COURTS OF APPEALS AND HAS NO STATUTORY BASIS

The CCTA prohibits certain shipments of "a quantity in excess of 10,000 cigarettes" that are in the "possession" of unauthorized individuals. 18 U.S.C. § 2341(2). The court of appeals upheld the district court's imposition of liability under the CCTA solely on the ground that the statute permits the aggregation of cigarette quantities across a number of different shipments to satisfy the 10,000-cigarette thresh-

old. The court's decision is irreconcilable with the general anti-aggregation principles numerous courts of appeals have applied in interpreting parallel criminal statutes, and is inconsistent with the text and structure of the CCTA. Review is warranted to resolve that conflict.

A. The Second Circuit's Decision Is Irreconcilable With Decisions Of Other Courts Of Appeals

1. At least four federal courts of appeals have recognized a general rule precluding aggregation in statutes setting forth a threshold quantity: "[W]here a statute imposes a quantity threshold for a possession offense, the government must prove that the defendant possessed the minimum quantity *at a particular time*." *United States* v. *Spears*, 697 F.3d 592, 600 (7th Cir. 2012) (emphasis added), *reinstated in relevant part en banc*, 729 F.3d 753 (7th Cir. 2013).

The Eighth Circuit's decision in *United States* v. *Russell*, 908 F.2d 405 (8th Cir. 1990), is illustrative. There, the court addressed 18 U.S.C. § 1029(a)(3), which criminalizes the knowing "possess[ion]" of "fifteen or more devices which are counterfeit or unauthorized access devices," such as stolen credit cards. 908 F.2d at 406. Although the defendant had possessed a total of 41 stolen credit cards over a three-month period, he had never possessed more than fifteen at one time. *Id.* at 405. The government nevertheless contended the statutory quantity threshold was satisfied, insisting that while "'possession' must take place at a given time, . . . this does not limit possession to one instant in time." *Id.* at 406.

The Eighth Circuit rejected that argument, holding that "separate and distinct instances of possession

cannot be combined in order to meet the minimum numerical threshold." *Russell*, 908 F.2d at 407. As the court explained, Section 1029(a)(3) "does not mention any time period." *Ibid.* And "if Congress intended separate acts of possession to be aggregated, it could have easily stated '15 or more access devices during any 6 month, 12 month or any other time period.'" *Ibid.* The court therefore "refuse[d] to rewrite the statute to permit aggregation." *Ibid.*

Other courts of appeals apply the same rule. Thus, for example, in *Spears*, the Seventh Circuit held that 18 U.S.C. § 1028(a)(3)—which "makes it a crime to 'knowingly possess[ ] with intent to use unlawfully or transfer unlawfully five or more . . . false identification documents'"—requires proof that the defendant met this "quantity threshold" at "a particular time," not aggregated over multiple instances. 697 F.3d at 599–600 (alterations in original). Similarly, the Sixth Circuit has held that a statute imposing a higher sentence for persons convicted of "a violation of subsection (a) [regarding possession with intent to distribute] involving . . . 50 grams of cocaine base" does not permit the government to aggregate quantities across several incidents of possession. *United States* v. *Winston*, 37 F.3d 235, 240 (6th Cir. 1994) (quotation marks omitted) (citing 21 U.S.C. § 841(b)(1)(A)). And the Third Circuit has held that the government cannot "combine weights from multiple distributions and discontinuous possessions" of heroin to meet a 1,000-gram statutory threshold. *United States* v. *Rowe*, 919 F.3d 752, 760 (3d Cir. 2019) (citing 21 U.S.C. § 841(b)(1)(A)(i)).

As these courts have recognized, Congress may expressly override this default presumption if it so chooses. *See, e.g.*, *Spears*, 697 F.3d at 601 n.4; *Russell*,

908 F.2d at 407. But unless Congress "specif[ies] that quantities may be aggregated over time," the rule in these circuits is clear: They cannot be. *Spears*, 697 F.3d at 601 n.4.

2. The Second Circuit's decision turns this rule on its head. While the CCTA also provides for civil liability, it is a criminal statute. *See* 18 U.S.C. § 2344. And it criminalizes a possession offense, the violation of which turns on proof that a certain quantity threshold is met: Unstamped cigarettes are deemed "contraband" only if they are in a "quantity in excess of 10,000" and "in the possession of any person" other than certain exempt individuals. *Id.* § 2341(2). Nowhere does the statute provide that this "quantity" requirement can be satisfied by multiple acts of possession over any given period. Under a straightforward application of the rule that governs in other circuits, that would be the end of the matter: Because the CCTA is a criminal statute that "imposes a quantity threshold for a possession offense," proof of that "minimum quantity *at a particular time*"—and not aggregated over some undetermined period of time—is required. *Spears*, 697 F.3d at 600 (emphasis added).

But the Second Circuit reached the opposite conclusion. The court held that "[r]eferring to 'a quantity' of something does not, in common parlance, preclude aggregation." Pet. App. 69a. Focusing on the CCTA's failure to expressly "impose[]" any "per-transaction requirement," the majority reasoned that if Congress had wanted to "signify a singular shipment," it could have done so. Pet. App. 69a, 71a. And because UPS had "shipped more than 10,000 unstamped cigarettes in the aggregate" (i.e., over a period of months and years), the court held that the threshold requirement was satisfied. Pet. App. 72a.

Thus, whereas other courts of appeals presume that aggregation is precluded unless Congress has expressly authorized it, the Second Circuit has now held that aggregation must be permitted unless Congress has expressly prohibited it. The decision below gives prosecutors and plaintiffs virtually unfettered discretion to combine unrelated incidents to satisfy statutory thresholds. This novel approach to quantity offenses cannot be reconciled with the contrary rule adopted in other circuits—only this Court can resolve that conflict.

B. The Second Circuit's Decision Is Unworkable And Contrary To The Text And Structure Of The Statute

The Second Circuit is on the wrong side of the split. Its new presumption in favor of aggregation is inconsistent with the language and purpose of quantity thresholds like the CCTA's.

1. The text and structure of the CCTA demonstrate the correctness of the anti-aggregation rule the Second Circuit rejected. The statute refers to "a quantity" of cigarettes in the "possession" of unauthorized individuals. 18 U.S.C. § 2341(2). This use of the singular—"a" quantity—contemplates a single act of transportation, possession, or sale. *See Spears*, 697 F.3d at 600. When Congress instead intends to permit aggregation over a specified time period, it says so explicitly. *See, e.g.*, 16 U.S.C. § 1611(a) (permitting aggregation of quantities of timber on an "annual[]" basis); 18 U.S.C. § 1029(a)(2) (permitting aggregation of fraudulent gains over "any one-year period"). Because Section 2341(2) of the CCTA contains no such express language, it should not be read to permit the threshold to be satisfied by combining disparate, unrelated shipments across multiple days, months, or even years.

In fact, another section of the CCTA demonstrates how Congress *could* have permitted aggregation under Section 2341(2). Section 2343(b) requires any person who "ships, sells, or distributes *any quantity* in excess of 10,000 cigarettes . . . *within a single month*" to submit a report to the Attorney General. 18 U.S.C. § 2343(b) (emphases added). In contrast to Section 2341(2), Section 2343(b) expressly contemplates that shipments over a specified period (there, a month) may be aggregated to satisfy the 10,000-cigarette threshold relevant to that provision. And the fact that Congress used such precise language there and prescribed no similar time period for Section 2341(2) indicates that Congress did not intend for shipments under Section 2341(2) to be aggregated. *See Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). Absent such express direction from Congress, courts should "refuse to rewrite the statute to permit aggregation." *Russell*, 908 F.2d at 407.

This reading also accords with common sense and the evident purpose of the CCTA (and statutes like it). The CCTA was enacted "to provide a timely solution to the serious problem of organized crime and other large scale operations of interstate cigarette bootlegging." S. Rep. No. 95-962, at 3 (1978). As the dissent pointed out, the majority's aggregation principle "would impose a penalty for shipping about one carton a month" for four years (Pet. App. 110a), even though the drafters of the CCTA intended to *exclude* "casual smuggler[s]" who "buy small quantities of cigarettes for themselves or their friends, and then transport these cigarettes into a higher-tax State" (S. Rep. No. 95-962, at 6). Permitting aggregation of multiple small shipments of cigarettes over an indefinite time

period contradicts Congress's manifest intent to "concentrate" federal resources on "*major* traffickers," rather than small-scale shippers. *Russell*, 908 F.2d at 407 (emphasis added).

2. The Second Circuit's pro-aggregation rule also introduces myriad practical problems. Pet. App. 110a. For instance, over how long a period may a court "aggregate" various shipments of smaller quantities of cigarettes to satisfy the 10,000-cigarette threshold? A month? A year? Ten years? The court of appeals could not say. Instead, it dismissed this problem in a footnote by claiming "this case does not present a close call" (Pet. App. 70a n.26), suggesting that perhaps in a different case, the time period for aggregation *would* be capped at some arbitrary limit, even though the Second Circuit could not say what that limit would be. That approach leads to unpredictable and incongruent results. It has no basis in the statutory text, and certainly no place in the interpretation of the federal criminal laws—where clarity is paramount.

Other questions abound: What if a Manhattanite brings one carton a week (200 cigarettes) from New Jersey to New York—does she become a felon on her fiftieth trip? What if a carrier delivers "a quantity" of 100 cigarettes, and then delivers a second quantity of 11,000 cigarettes to the same address from the same shipper? Is that one violation of the CCTA, or two? Did the first delivery become retroactively criminal upon completion of the second? *See* Pet. App. 70a n.26. Whether the facts of this case implicate these hypotheticals is irrelevant—any way the court of appeals could attempt to answer them under its interpretation would result in either inconsistent application of the statute or irrational results.

Perhaps most perplexingly, the Second Circuit's interpretation appears to place no restrictions on the number of *shippers* whose deliveries may be aggregated to satisfy the threshold. In other words, under the court of appeals' interpretation, if UPS delivered twenty-five cigarettes a piece over five years for 500 *different* shippers, that would constitute the transportation of "contraband cigarettes." *See* Pet. App. 72a ("[W]e hold that the CCTA delivery prohibition contains no single-transaction requirement"). The notion that in promulgating a criminal statute to address the *trafficking* of contraband cigarettes, Congress envisioned aggregation of an indefinite number of shipments from an indefinite number of shippers across an indefinite time period is beyond the pale. *See United States* v. *Brown*, 333 U.S. 18, 25 (1948) (other canons of construction cannot "override common sense and evident statutory purpose").

C. This Issue Is Of National Importance

The Second Circuit's interpretation of the CCTA is clearly wrong, and it leads to results inconsistent with the apparent purpose of the statute. In essence, every package a carrier delivers containing untaxed cigarettes, in the court's view, becomes one phase of a continuing offense extending into perpetuity. That stands in stark contrast with how courts of appeals have long interpreted similar statutes involving threshold quantities. And it has severe consequences for every common carrier if shipping even small numbers of cigarettes that may eventually total 10,000 cigarettes exposes them to liability. That is not the framework Congress enacted.

The decision carries tremendous practical significance. By the Second Circuit's reasoning, any number of shipments of cigarettes over any time period (and,

apparently, from any number of shippers) may be aggregated to impose liability on common carriers. This implicates the nationwide operations of *all* common carriers—small shipments of cigarettes from multiple sources will slowly add up over time, suddenly erupting in a multimillion-dollar case ($20 million here) that has nothing to do with the "large scale operations of interstate cigarette bootlegging" the CCTA was designed to combat. S. Rep. No. 95-962, at 3.

Congress did not enact the CCTA so that plaintiffs and prosecutors could put each shipment of even a handful of cigarettes under a microscope for potential criminal liability. Yet that is what the Second Circuit's decision does. That erroneous and outlier interpretation of the law impedes common-carrier operations nationwide and warrants this Court's review.

II. THE SECOND CIRCUIT'S CONSTRUCTION OF THE PACT ACT NULLIFIES UPS'S EXPRESS EXEMPTION

Congress expressly exempted UPS from the PACT Act if the AOD is "honored" nationwide. Yet the Second Circuit stripped UPS of that exemption based on an interpretation of this one word that is inconsistent with the plain text, irreconcilable with the PACT Act's structure, and contrary to the statute's history and purpose. In the court of appeals' view, UPS has "honored" the AOD only if it has "lived up to or fulfilled its obligations under the agreement" with respect to every shipper of the millions served by UPS. Pet. App. 50a (quotation marks omitted). Because that erroneous interpretation disrupts Congress's carefully constructed framework for addressing an issue of nationwide importance, the Second Circuit's decision cannot be permitted to stand. UPS seeks error correction, to

be sure, but of a most exceptional sort: While Congress singled out UPS for statutory protection *by name*, the Second Circuit has nullified that express exemption.

A. The Second Circuit's Decision Ignores Plain Meaning, Context, and History

The PACT Act exempts from its scope any common carrier that "is subject to a settlement agreement . . . relating to tobacco product deliveries to consumers," "includ[ing] . . . the Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. . . . if [it] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(A)–(B). And for those common carriers, the statute preempts any state law (like the PHL) "prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences." *Id.* § 376a(e)(5)(C)(ii).

UPS is subject to one of the three named settlement agreements specified in the statute. And the AOD to which UPS is subject has, as it always has, nationwide effect and operation. *See New York* v. *United Parcel Serv., Inc.*, 160 F. Supp. 3d 629, 651 (S.D.N.Y. 2016). Under the plain meaning of the statute, UPS is not subject to additional penalties under the PACT Act (beyond those already set forth in the AOD), and certainly is not subject to a *third* layer of penalties under New York's PHL. The Second Circuit's contrary interpretation cannot withstand scrutiny.

1. The text and structure of the PACT Act make clear that UPS is within the exemption so long as the

AOD remains effective and applies nationwide. "Honored," in this context, means "operative."

The clause providing that the AOD should be "honored" throughout the United States does not contemplate a stringent compliance-based inquiry; rather, "honored," in ordinary legal parlance, means only to "accept an obligation as valid." Pet. App. 105a; *cf. Honor*, Black's Law Dictionary (10th ed. 2014) (defining "honor" as "[t]o accept or pay (a negotiable instrument) when presented"). Indeed, that is how Congress has used the term in numerous statutes. *See, e.g.*, 15 U.S.C. § 1681a(*l*) ("any offer of credit or insurance to a consumer that will be honored"); 48 U.S.C. § 1921d(*o*) (providing that certain judgments not "be honored by the United States"). Because when Congress uses "terms of art," it legislates against the background of "legal tradition" and the "cluster of ideas that were attached to each" term (*Morissette* v. *United States*, 342 U.S. 246, 263 (1952)), that settled meaning should apply here. The AOD is "honored"—and therefore falls within the definition of a "settlement agreement relating to tobacco product deliveries to consumers"—so long as UPS accepts it as operative nationwide. It undisputedly does. *See United Parcel Serv., Inc.*, 160 F. Supp. 3d at 651.

If Congress had instead intended to impose a "compliance" requirement for the AOD exemption, it could have said so. In fact, it did say so with respect to two other provisions in the PACT Act. If the AOD is terminated or otherwise becomes inactive, UPS may nonetheless continue to take advantage of the exemption if it "is administering and enforcing policies and practices throughout the United States that are at least as stringent as the agreement." 15 U.S.C. § 376a(e)(3)(A)(ii). Similarly, a common carrier not

otherwise entitled to an exemption under Section 376a(e) is still immune from civil liability if it "has implemented and enforces effective policies and practices for complying with that section." *Id.* § 377(b)(3)(B)(i). Thus, where Congress wanted to condition liability on an examination of the actual business practices of a common carrier, "it knew how to say so." *Rubin*, 138 S. Ct. at 826. The fact that Congress used such unambiguous language in these provisions, yet imposed no such requirement in Section 376a(e)(3)(B)(ii)(I), is indicative of Congress's intent.

Moreover, requiring only that the AOD remain operative nationwide also comports with the legislative history. *See Bankamerica Corp.* v. *United States*, 462 U.S. 122, 133 (1983) ("If any doubt remains as to the meaning of the statute, that doubt is removed by the legislative history"). When the PACT Act was proposed, its sponsors—a New York representative among them—understood that in light of the agreements reached between the three primary commercial common carriers and the State of New York, "the only [common carrier] who would actually be covered by this in a real practical sense is the United States Postal Service." *Prevent All Cigarette Trafficking Act of 2007, and the Smuggled Tobacco Prevention Act of 2008: Hearing on H.R. 4081 & H.R. 3689 Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 9 (2008) (statement of Rep. Weiner).

The PACT Act's sponsor in the Senate specifically referenced UPS's AOD with the State of New York, explaining that the statute "exempted [UPS] from the bill provided this agreement *remains in effect*." 155 Cong. Rec. S5853 (daily ed. May 21, 2009) (statement

of Sen. Kohl) (emphasis added). The "honored" clause was therefore added to ensure only that the status quo at the time of the PACT Act's enactment would be maintained, not that UPS would be required to satisfy some new, undefined standard of compliance or else face a cascade of layered penalties.

Within that framework, it is plain that UPS is entitled to the PACT Act exemption as a matter of law. UPS is subject to the AOD, and that agreement is operative nationwide. While the *remedies* available under the AOD apply only to deliveries made in New York, the *obligations* under the AOD apply regardless of where the deliveries are made. Pet. App. 494a–502a. UPS is thus not subject to compounding penalties under the PACT Act or the PHL.

2. Discounting or disregarding the genesis and structure of the PACT Act exemption, the Second Circuit held that UPS would be entitled to the exemption only if UPS "substantially complies with the AOD" (i.e., "fulfills" its obligations). Pet. App. 61a. On the basis of the district court's findings that UPS had not done so with respect to just twenty shippers in New York (a minuscule fraction of UPS's accounts nationwide), the court affirmed (as modified) a judgment imposing penalties of nearly $80 million.

The Second Circuit's construction of the statute is untenable. The PACT Act says nothing about whether UPS has "fulfill[ed]" its obligations under the AOD. Rather, the statute says only that the AOD must be "honored"—that is, "accept[ed] . . . as valid." Pet. App. 105a. Worse still, recognizing that requiring *absolute* compliance would make no sense, the court of appeals limited its ruling to situations in which there is evidence of "wholesale noncompliance" with a specified settlement. Pet. App. 50a. Setting aside

that the Second Circuit's definition of "wholesale noncompliance" apparently is satisfied by evidence regarding just twenty shippers in a single State, the court's interpretation also literally writes new words into the statute, an exercise flatly prohibited by this Court. *See Lamie* v. *U.S. Tr.*, 540 U.S. 526, 538 (2004) (a court may not "read an absent word into the statute"). And it ignores that the AOD is *itself* enforceable if UPS fails to comply. Pet. App. 504a–05a. The PACT Act does not federalize enforcement of private contracts; it provides two *alternative* bases for liability: the AOD if it remains operative nationwide, or the PACT Act. In no circumstance does the PACT Act provide for liability under *both*.

The Second Circuit's error is further laid bare by Section 376a(e)(3)(B)(ii)(II), which provides that any tobacco delivery settlement agreement *other* than the specified settlements with New York also entitles a carrier to exemption under the PACT Act, so long as it is an "active agreement between a common carrier and a State that operates throughout the United States to ensure that no [illegal] deliveries of cigarettes or smokeless tobacco shall be made." That provision says nothing about the carrier fully or substantially complying with such an agreement. Thus, under the court of appeals' interpretation, common carriers that enter into a tobacco delivery settlement *after* the enactment of the PACT Act are better off than those common carriers, like UPS, that did so before the enactment of the PACT Act, because only the latter are subject to the Second Circuit's substantial-compliance requirement. The imposition of such an arbitrary and disparate regime is inconsistent with this Court's instruction that courts are to "inter-

pret [a] statute as a symmetrical and coherent regulatory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks omitted).

The Second Circuit's interpretation suffers from the additional defect that with such an amorphous standard for compliance, UPS "could only know after trial whether it had sufficiently 'honored' the AOD to qualify" for the exemption. Pet. App. 106a; *see also* Pet. App. 107a ("The statute provides no standard for deciding whether UPS honored the AOD in the way posited by the majority"). With no meaningful guidance as to how much compliance with the AOD is needed to sufficiently "honor[]" it to the Second Circuit's satisfaction, UPS is deprived of even the bare constitutional minimum of fair notice. *See FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required"). In particular, under the court of appeals' reading, entities like UPS are left uncertain as to whether they are subject to the primary obligation the PACT Act imposes on common carries: to refrain from delivering packages for specified shippers on the Act's regularly updated list. *See* 15 U.S.C. § 376a(e). UPS could face (as is it did here) the imposition of penalties for these and other even more technical provisions (*see, e.g., id.* § 376a(e)(4)(B) (recordkeeping requirement)), even though it had no idea prior to litigation it was even *subject* to those requirements. This perplexing approach is not what Congress intended.

The Second Circuit justified this vagueness on the ground that "[w]hatever ambiguities might exist at the margins" about UPS's compliance, the facts here made this an "easy" case. Pet. App. 57a (citing *Holder*

v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010)). But just because application of a particular interpretation of a statute would not be absurd (or unconstitutional) in *all* potential circumstances does not render that interpretation permissible, let alone tenable. And regardless, whatever the views of the court of appeals in hindsight, this was no "easy" case: It took more than two years to resolve and involved a full week of trial, thirty-eight witnesses, and more than 1,000 documents. The end result was to retroactively deprive UPS of statutory immunity based on its purported failure to audit roughly 0.00125% of its domestic customers. That is just the sort of scenario the exemption/preemption provision should be read to *avoid*, and not, as the court of appeals held, to mandate.

B. The Second Circuit's Decision Exposes Common Carriers To Multiplicative Liability

The Second Circuit's decision subverts Congress's carefully constructed framework for addressing a problem of nationwide significance. In inventing a new standard of substantial compliance, the court of appeals injected its own policy judgments into the law and rejected Congress's fact finding regarding the effect and efficacy of the AOD. And the court did so in the context of a statutory provision drafted with this specific common carrier in mind, all on the basis of a single word pulled out of context and repurposed to saddle UPS with triple liability, resulting in $80 million in penalties. This decision imposes liability on UPS under a statute that was never intended to apply to it in the first place. That is an issue of national importance that warrants review by this Court.

Congress made a judgment as to where to draw the line for liability, and the Second Circuit's decision abolishes it. When the PACT Act's exemption was drafted, Congress was aware that "[t]he three major common carriers—[UPS], FedEx, and DHL—all have such agreements with the New York State Attorney General's office." H.R. Rep. No. 110-836, at 24 (2008). The Crime, Terrorism and Homeland Security Subcommittee had "received testimony that these agreements were effective at stopping the illegal shipments of cigarettes . . . [t]o consumers." *Ibid.* Congress was thus fully apprised of all the facts relevant to the need for and proper scope of the exemption. Courts are not to "second-guess congressional determinations and policy judgments of this order." *Eldred* v. *Ashcroft*, 537 U.S. 186, 208 (2003).

But that is precisely what the Second Circuit's opinion does, undoing Congress's careful work. Congress sought to ensure that the statute would not unreasonably burden the three primary commercial common carriers, and that it would actually *protect* them from state laws that might do so. But in the court of appeals' view, when Congress found that the AOD and the other agreements "were effective at stopping the illegal shipments of cigarettes . . . [t]o consumers" (H.R. Rep. No. 110-836, at 24)—thus justifying the exemption—Congress was simply wrong. That judgment is beyond the province of the courts. In espousing its own view as to the proper scope of liability, the Second Circuit disrupted Congress's carefully prescribed framework for addressing a problem of national significance. The court's interpretation is contrary to Congress's design for addressing the unlawful shipment of cigarettes and undermines Congress's express desire to "not place any unreasonable

burdens on" common carriers. 155 Cong. Rec. S5853 (statement of Sen. Kohl).

This case is also exceptional in that it concerns a statute that calls out UPS (and two other common carriers) *by name*, and specifically addresses an exemption crafted for the express purpose of ensuring that UPS is not subject to an "unreasonable burden[]." 155 Cong. Rec. S5853 (statement of Sen. Kohl). It is a rare case that this Court is called upon to interpret a single word in a statute, giving rise to $80 million in penalties in the instant case and potentially more in others, in a statute identifying the litigant by name. This is that rare case. The Second Circuit's decision rewriting Congress's carefully crafted statute for addressing cigarette trafficking warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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