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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

UPS's petition for a writ of certiorari should be granted.

ARGUMENT

The briefs in opposition confirm that review is warranted on each of the questions presented—to resolve a circuit split and to restore the integrity of Congress's comprehensive scheme of tobacco regulation.

First, in concluding that the CCTA permits aggregation of disparate shipments to meet the 10,000-cigarette threshold, the Second Circuit deviated from the general rule that aggregation is *not* permitted unless Congress expressly provides otherwise. The text of the CCTA—which refers to "a quantity" of cigarettes in the "possession" of unauthorized individuals—includes no such express authorization. 18 U.S.C. § 2341(2). New York responds that the decisions on the other side of the split involved "possession" offenses, but so does this one: The CCTA defines the quantity threshold in terms of the "possession" of more than 10,000 cigarettes. The circuit split on the aggregation issue warrants the Court's resolution.

Second, in creating a federal scheme of tobacco regulation, Congress exempted UPS *by name* from the PACT Act, and preempted state law, in deference to an alternative liability regime. But the Second Circuit upended that scheme and subjected UPS to liability under state and federal law *in addition* to the AOD, making UPS more liable than an ordinary common carrier—and it did so on the basis of just a handful of third-party shippers who violated UPS's policies and represent a miniscule fraction of UPS's profits and customers. Congress made the policy decision

that the three major common carriers should be subject to contractual *or* statutory liability. The Second Circuit made them subject to *both*, so far overstepping its role as to warrant the Court's exercise of its supervisory authority.

I. THE CCTA QUESTION WARRANTS REVIEW

The Second Circuit's allowance of aggregation under the CCTA creates a circuit split and is inconsistent with the text and purpose of the statute.

A. The Circuits Are Split On Aggregation

Four federal courts of appeals have recognized and applied a general rule that "where 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), *reinstated in relevant part en banc*, 729 F.3d 753 (7th Cir. 2013); *see also United States* v. *Rowe*, 919 F.3d 752, 760 (3d Cir. 2019); *United States* v. *Winston*, 37 F.3d 235, 240 (6th Cir. 1994); *United States* v. *Russell*, 908 F.2d 405, 407 (8th Cir. 1990). In this case, the Second Circuit *inverted* this rule, presuming that aggregation is permitted unless the statute expressly provides otherwise. Pet. App. 69a, 71a. The decision below therefore creates a clear circuit split in need of clarification and resolution by this Court.

The State and City (collectively, "New York") disagree on whether the cases establish a general rule against aggregation. *Compare* State Opp'n 24 ("[N]one of the cases UPS cites support any such 'general rule'"), *with* City Opp'n 11 (arguing that the cases establish a "'general' but not absolute rule"). While the City is right, this confusion itself demonstrates the need for clarity. A clear presumption or general

rule would guide courts and litigants confronted with similar aggregation issues under other statutory schemes.

New York objects that the cases on the other side of the split involve quantity thresholds for statutes criminalizing "possession" of contraband, and that the CCTA "involv[es] different offense conduct." State Opp'n 24–25; City Opp'n 11–12. That is incorrect: The CCTA defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes . . . which are *in the possession* of any person other than" specified exempt entities. 18 U.S.C. § 2341(2) (emphasis added). While Section 2342(a) refers also to the "transport[ation]" of contraband cigarettes, by statutory definition, there can be no transportation of "contraband cigarettes"—and no violation of the CCTA—without proof of possession of more than 10,000 cigarettes. UPS pointed this out in its Petition (*see*, *e.g.*, Pet. 16), but New York repeatedly elides this statutory language when quoting the definition of "contraband cigarettes" (*see*, *e.g.*, State Opp'n i, 23, 27; City Opp'n 7).

In any event, even if the CCTA's "possession" requirement were disregarded, New York's arguments would fail. New York ignores the Third Circuit's decision in *Rowe*, in which that court applied the anti-aggregation principle to both possession *and* distribution. *See Rowe*, 919 F.3d at 760 (the government cannot "combine weights from multiple distributions and discontinuous possession during the indictment period"). New York also fails to explain why statutes criminalizing "possession" should be treated any differently from one that criminalizes possession *and* transportation. If anything, the rule applies with more force to such conduct: transportation refers to a

discrete action, whereas possession can be a continuing offense for as long as the defendant possesses the quantity. *See ibid.*; *United States* v. *Zidell*, 323 F.3d 412, 422 (6th Cir. 2003) (collecting cases).

New York points to other decisions in which aggregation was permitted (State Opp'n 26), but the first (also from the Second Circuit) involved conspiracy charges, and the court was careful to note "the conceptual distinction between conspiratorial and substantive liability." *United States* v. *Pressley*, 469 F.3d 63, 66 (2d Cir. 2006). That distinction is entirely in line with how other courts of appeals have addressed quantity thresholds for conspiracy purposes. *See Winston*, 37 F.3d at 241 n.10. New York's other case, *Schaffer* v. *United States*, 362 U.S. 511 (1960), held only that a particular statute authorized aggregation of the value of various shipments because that statute "define[d] 'value' in terms of that aggregate" and the legislative history "ma[de] clear that the value may be computed on a 'series of transactions.'" *Id.* at 517. Yet, while Congress can *expressly* permit aggregation, it plainly has not done so in the CCTA.

It is undisputed that the Second Circuit did not apply the presumption against aggregation here; nor did it find that Congress had expressly authorized aggregation. Instead, the court of appeals demanded affirmative textual evidence *prohibiting* aggregation—the exact opposite of the general rule applied in other circuits. (That several district courts have similarly misapplied the CCTA, *see* State Opp'n 24 n.13, is both unsurprising and irrelevant—all of those cases arose in the Second Circuit.) The Second Circuit's decision thus creates a split on an important principle of statutory interpretation that resonates far beyond the

precise facts of this case. That alone is reason to grant review.

B. The Second Circuit Misconstrued The CCTA

The Second Circuit was simply wrong to state that the CCTA "imposes no per-transaction requirement" (Pet. App. 69a)—the statute prohibits the transportation of "a quantity" (singular) in excess of 10,000 cigarettes "in the possession of any [unauthorized] person." 18 U.S.C. § 2341(2). The Seventh Circuit has concluded that nearly identical language—"a violation"—contemplates a single, non-continuous act. *See Spears*, 697 F.3d at 600. That language stands in contrast to a separate provision of the CCTA that refers to "*any* quantity" and expressly permits aggregation over a specified time period (one month). 18 U.S.C. § 2343(b) (emphasis added).

New York's attempt to defend the decision below, and distinguish Section 2343(b) (State Opp'n 28), gets it backward—if the Second Circuit's interpretation is correct, then the CCTA's criminal penalties would apply to anyone who transports 10,000 untaxed cigarettes over the course of four years for any number of shippers, but the CCTA's less onerous recordkeeping requirements would *not* apply to that same carrier unless the carrier reached the 10,000-cigarette threshold within a single month. *See* 18 U.S.C. § 2343(b). That would make no sense.

New York urges that UPS's interpretation would permit parties to evade liability simply by shipping no more than 10,000 cigarettes at a time. State Opp'n 29. Yet that is true of *any* statute that imposes a quantity threshold. It is Congress's job to draw lines

on tough issues, and it is not a court's "business to second-guess the Legislature's judgment when it comes to such matters." *FBI* v. *Abramson*, 456 U.S. 615, 640–41 (1982). The legislative history makes clear that Congress enacted the CCTA to target "large scale operations of interstate cigarette bootlegging" (S. Rep. No. 95-962, at 3 (1978)), and permitting aggregation would be inconsistent with Congress's intent to focus on "major traffickers" (*Russell*, 908 F.2d at 407). There are 10,000 cigarettes in a standard case of 50 cartons, and Congress extended liability only to those who possess or distribute more than that at one go.

The Second Circuit's decision also introduces numerous practical problems. Pet. 19–20. The court of appeals could not explain how to count aggregated quantities, or how to treat small shipments that are retroactively aggregated to meet the 10,000-cigarette threshold. Pet. App. 70a n.26. And New York now admits that the Second Circuit's interpretation permits aggregation across multiple *shippers* (State Opp'n 29–30), meaning even small shipments over time (four years, according to New York, although it does not explain why the statute of limitations would limit aggregation) for numerous shippers can serve as the basis for multi-million-dollar criminal and civil penalties. *See* Pet. App. 72a. Indeed, under the Second Circuit's interpretation, a consumer who brings a carton of untaxed cigarettes home from an Indian reservation every week for a year is a CCTA violator (200 cigarettes per carton times 52 weeks equals 10,400 cigarettes). This turns minor events into an ongoing course of conduct that, while not criminal at the time, may retroactively become felonious and subject a person or entity to millions of dollars in penalties. The rule of lenity augurs against such an approach.

These are not "policy-based objections," as New York contends (State Opp'n 29), but rather practical considerations relevant to statutory interpretation under the well settled rule that courts should favor a construction that "accords more coherence" to a statute than alternative readings. *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997); *see also Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (courts "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"). Precluding aggregation, and giving "a quantity" its plain meaning, avoids all of these problems.

New York nevertheless contends that review of the CCTA issue is not warranted because even if aggregation is not permissible, the district court could still assess *some* damages and/or penalties under the statute. State Opp'n 30–32; City Opp'n 13–14. But the judgment was entered, and affirmed, solely on an aggregation theory; if that construction is reversed, then there is no basis for the CCTA portion of the judgment. In any event, New York did not cross-petition for a writ of certiorari, and so this argument would have to be resolved by the courts below on remand from any decision of this Court. UPS's exposure would indisputably be lower (if not zero) if aggregation were out of the picture, and this Court should grant certiorari and make clear that the CCTA does not permit aggregation.

II. THE PACT ACT QUESTION WARRANTS REVIEW

Certiorari is independently warranted on the second question presented, because the Second Circuit overrode Congress's express exemption/preemption provision for UPS in contravention of the text and structure of the PACT Act.

A. The Second Circuit Misconstrued The PACT Act

UPS is entitled to the PACT Act exemption if the AOD is "honored" throughout the United States. 15 U.S.C. § 376a(e)(3)(A)–(B). The statute does not say "complied with," "substantially complied with," "enforced," "implemented," "fulfilled," or any of the other numerous words Congress could have chosen to make the statute mean what New York and the Second Circuit now believe it should. The purpose of the exemption was to make UPS, FedEx, and DHL subject to *one* layer of liability, set forth in their respective settlement agreements. The effect of the Second Circuit's decision is to make these carriers subject to *three* layers of liability, under federal law, state law, and the terms of the agreements. The only meaning of "honored" in this context that comports with the plain text and common sense is to "accept an obligation as valid." Pet. App. 105a. There is no dispute that UPS has done so with respect to the AOD. *See New York* v. *United Parcel Serv., Inc.*, 160 F. Supp. 3d 629, 651 (S.D.N.Y. 2016).

The infirmity in the Second Circuit's reading is laid bare by the fact that both it and New York admit that *full* compliance is not necessary, just something beyond "wholesale noncompliance." State Opp'n 18; City Opp'n 14; Pet. App. 50a. But that distinction appears nowhere in the statute. Instead, it is a fiction invented by New York and the court of appeals in an attempt to justify their reading, because it obviously cannot be the case that a single violation of the AOD nullifies the PACT Act exemption. That New York must literally read non-existent words into the statute to validate its interpretation serves only to expose the complete rewrite undertaken by the Second Circuit.

See Lamie v. *U.S. Tr.*, 540 U.S. 526, 538 (2004); *see also* Pet. 25–26.

New York further contends that the AOD exemption must require substantial compliance because two other exemptions—for carriers that have subsequently entered into settlement agreements or that are implementing compliance policies voluntarily—appear to require actual prevention of illegal cigarette deliveries. State Opp'n 20 (citing 15 U.S.C. §§ 376a(e)(3)(A)(ii), 377(b)(3)(B)(i)). But New York misapprehends the import of those parallel exemptions. Pet. 23–24. They illustrate that if Congress wanted to condition an exemption on the implementation of effective cigarette shipment policies, it plainly knew how to say so. *See Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). For the AOD exemption, in contrast, it used the word "honored" instead of the clear language it used elsewhere.

Even more problematic for New York is Section 376a(e)(3)(B)(ii)(II), which provides that any tobacco delivery settlement agreement *other* than the enumerated settlements entitles a carrier to the exemption if 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." New York incorrectly assumes, without explanation, that this provision also requires actual compliance (State Opp'n 20), but there is no textual basis for that conclusion. Thus, properly framed, if the Second Circuit's interpretation of "honored" were correct, then that would mean carriers who later enter into a settlement agreement are actually *better off* than those carriers operating under the tobacco settlement agreements

specifically listed in the statute, because only the latter group would have to establish actual compliance. That turns the entire statutory framework on its head. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statutes should be construed into "an harmonious whole" (quotation marks omitted)).

B. The Error Here Is Fundamental

Although this is a case of error correction (Pet. 21–22), the Second Circuit made an error not just of statutory interpretation, but of fundamental judicial power. The Second Circuit's rewriting of the statute renders the AOD exemption a nullity, erasing Congress's comprehensive framework for regulating the shipment of cigarettes nationwide. That judicial arrogation of legislative authority warrants review regardless of the likelihood that future cases will again raise the same statutory question.

In the PACT Act provision at issue, Congress addressed UPS and two other carriers *by name*. And the PACT Act's sponsor in the Senate specifically referenced UPS and the AOD, 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). It is highly unusual for Congress to specify individual corporations in defining the reach of its statutes. Contrary to New York's caricature (City Opp'n 14–15), UPS's point is not that this unusual statute automatically warrants certiorari; rather, the Second Circuit's decision to entirely undo Congress's carefully crafted scheme of tobacco regulation is so extraordinary that this Court should exercise its supervisory authority to correct that error.

New York contends that UPS's real complaint is that the penalty is too large. City Opp'n 16. But the penalty *is* too large—Congress went out of its way to exempt UPS *by name* for the express purpose of ensuring the PACT Act would "not place any unreasonable burdens" on UPS, FedEx, and DHL. 155 Cong. Rec. S5853 (statement of Sen. Kohl). Rather than limiting UPS's liability as intended, the Second Circuit's interpretation imposes more burdens on UPS than on common carriers who did not enter into tobacco settlement agreements.

While New York tries to paint a picture of UPS's conduct as egregious (State Opp'n 10–11), it cannot deny that all of the shipments at issue in this case came from fewer than two dozen third-party shippers—about 0.00125% of UPS's domestic customers—located on or near a handful of Indian reservations in upstate New York. Pet. App. 189a–90a. It is those shippers (and/or their wholesalers or customers) who were responsible for paying taxes on the cigarettes—not UPS. And all told, UPS made only about $475,000 in profits from every package carried for these shippers during the relevant period (Pet. App. 95a), compared to the $78 million in penalties the courts below imposed under the PACT Act and state law.

The PACT Act's exemption recognizes the realities of these transactions and therefore limits the liability of common carriers. The Second Circuit turned that limitation into a basis for triplicative liability. This abrogation of legislative judgment is in need of review and correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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