No. 19A_____

IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Applicant,

v.

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

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEANNE E. MAYNARD
MORRISON & FOERSTER, LLP
2000 Pennsylvanian Avenue, N.W.
Suite 6000
Washington, D.C. 20006
(202) 887-1500

MARK A. PERRY
Counsel of Record
SHANNON U. HAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Applicant United Parcel Service, Inc.

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TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to this Court's Rule 13.5, United Parcel Service, Inc. ("UPS") respectfully requests a 60-day extension of time, to and including May 18, 2020, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The court of appeals entered its judgment on November 7, 2019. *New York v. United Parcel Serv., Inc.*, 942 F.3d 554 (2d Cir. 2019) (Nos. 17-1993; 17-2107; 17-2111). UPS's timely petition for rehearing was denied on December 19, 2019. Unless extended, the 90-day deadline for filing a petition for a writ of certiorari would be March 18, 2020. Under this Court's Rules 13.5 and 30.2, this application is timely filed. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

A copy of the court of appeals' majority opinion is attached as Appendix A; the dissenting opinion is attached as Appendix B; and the order denying rehearing and rehearing en banc is attached as Appendix C.

1. UPS provides here only the background needed to understand the two questions that it currently intends to include in its certiorari petition.

a. In 2005, UPS entered into an Assurance of Discontinuance ("AOD") with the New York Attorney General to resolve a lawsuit brought under New York Public Health Law § 1399-*ll* (the "PHL"), which generally prohibits the transportation of cigarettes to consumers. At that time, federal law preempted such state restrictions. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368–69 (2008).

In 2010, Congress enacted the Prevent All Cigarette Trafficking Act ("PACT Act"), 15 U.S.C. § 375 *et seq.*, to generally prohibit the Postal Service and other common carriers from delivering cigarettes, and (with limited exceptions) to prevent private carriers from delivering shipments of any kind for shippers on a "non-compliant list" to be compiled by the Attorney General. The PACT Act, however, exempts private carriers from these requirements (and preempts analogous state laws) if they have entered into a qualifying settlement agreement with the State of New York. UPS's AOD, which is explicitly named in the statute, qualifies UPS for the exemption if the AOD "is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." *Id.* § 376a(e)(3)(B)(ii)(I).

The district court adopted two different, and incompatible, constructions of the "honored" clause. The court first determined that it applies if the AOD is *in effect*, with no assessment of UPS's compliance with the AOD; later, the court reversed course and determined that a *compliance inquiry* is required. *New York v. UPS*, 131 F. Supp. 3d 132, 140–41 (S.D.N.Y. 2015); *New York v. UPS*, 179 F. Supp. 3d 282, 294, 306 (S.D.N.Y. 2016). On appeal, UPS advocated for the first construction, and New York advanced the second. In a divided opinion, the Second Circuit concluded that "a party 'honors' an agreement by complying with it." App. A at 54. It determined 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." App. A at 57. Based on the district court's findings regarding UPS's non-compliance with the AOD with respect to 20 shippers in New

York (out of millions nationwide), the majority ruled that the "honored" clause was not satisfied and thus UPS was liable for $78.8 million in penalties under the PHL. The majority conceded, though, that its interpretation "gives rise to potential liability under three sources: the AOD, the PACT Act, and the PHL." App. A at 61 n.18. The dissenting judge, in contrast, agreed with UPS that it could be "subjected to *either* (i) the AOD or (ii) the PACT Act and local state laws," because the "common-sense result" contemplated by the "honored" clause is to "ensure the imposition of one penalty or another, not to stack penalty upon penalty." App. B at 8. Under that approach, the $78.8 million in PHL penalties would be preempted.

b. The Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 *et seq.*, makes it illegal "for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." *Id.* § 2342(a). The CCTA defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes" (*id*. § 2341(2)), and authorizes state and local governments to recover "money damages" among other relief (*id.* § 2346(b)(2)). At trial, New York did not prove that UPS knowingly transported any single shipment of 10,000 or more cigarettes. Rather, New York maintained—and the district court agreed—that numerous smaller shipments could be aggregated to meet the statutory threshold.

On appeal, the parties disputed whether shipments could be aggregated to meet the numerical threshold. The majority agreed with New York that the statutory term "a quantity" imposes "no per-transaction requirement," reasoning that because other CCTA provisions contain an explicit per-transaction requirement, Congress

acted intentionally in excluding such a requirement from the definition of contraband cigarettes. App. A at 79–81. Thus, multiple shipments could be aggregated to meet the statutory threshold. The dissent disagreed with the majority's reading of the CCTA, concluding that the CCTA's definition of "contraband cigarettes" does not permit aggregation of packages and, thus, that UPS faces no liability under the CCTA on the trial evidence. App. B at 13.

2. UPS intends to seek this Court's review of two important questions of federal law—on which two highly experienced Second Circuit jurists reached diametrically opposite conclusions—that should be settled by this Court.

a. Under the PACT Act, UPS is exempt from liability under federal law, and analogous state laws are preempted, if the AOD 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)(ii)(I), (e)(5)(C)(ii). The $78.8 million penalty can be upheld only if the panel's interpretation of a *single* word—"honored"— is correct as a matter of law. It is not.

Ignoring plain meaning, context, and statutory structure and history, the majority concluded that UPS had "honored" the AOD only if it had taken "reasonable steps to assure compliance" with the AOD. App. A at 64–65. That construction, if sustained, would prevent UPS (or regulatory authorities) from knowing "whether the exemption is applicable until vexed questions [of compliance with the AOD] were sorted out in litigation." App. B at 9. Given that the PACT Act prevents, with limited exceptions, private carriers from carrying packages of any kind for shippers on the

government's non-compliant list, the carriers have to know *in advance* whether or not they are exempt from this requirement. The plain language of the PACT Act—and common sense—persuaded the dissent that UPS "'honors' the AOD so long as it subjects itself to the terms of the AOD throughout the nation" (App. B at 6), as UPS undisputedly has.

If left uncorrected, the Second Circuit's decision will require carriers to apply an undefined standard to their conduct to avoid massive punitive exactions, including the threat of treble liability, which will thrust UPS and other carriers into a perpetual state of uncertainty as to whether it has satisfied the free-floating "reasonable steps" standard for compliance. But due process requires that UPS and other carriers be informed in advance of the conduct that can subject them to punishment under any one governmental enforcement regime, let alone three of them.

b. The CCTA criminalizes "transport[ing] . . . contraband cigarettes" (18 U.S.C. § 2342(a)), which is defined as "a quantity in excess of 10,000 cigarettes" (*id.* § 2341(2)). The panel was divided on whether "*a quantity*" of more than 10,000 cigarettes must be in a single transaction, as UPS contends, or whether multiple smaller transactions can be aggregated, as the district court ruled. Overriding the statute's text and history, the majority concluded that multiple transactions may be aggregated to satisfy the 10,000-cigarette threshold.

As Judge Jacobs pointed out in dissent, "a quantity" is a singular noun, "read naturally to reference a single shipment of more than 10,000 cigarettes." App. B at 13. By contrast, in another section of the CCTA, Congress specifically included

aggregation when it imposed a reporting requirement on any person "who engages in a delivery sale, and who ships, sells, or distributes *any* quantity in excess of 10,000 cigarettes . . . within a single month." 18 U.S.C. § 2343(b) (emphasis added). Had Congress intended to allow aggregation as to the threshold quantity, it could have defined "contraband cigarettes" as the transport of "*any* quantity" (instead of "*a* quantity") in excess of 10,000 cigarettes.

Aggregation of smaller shipments expands liability under the CCTA beyond what Congress intended. Congress adopted the quantity requirement to limit the statutory prohibition to "large scale operations of interstate cigarette bootlegging" rather than "casual smuggler[s]" of "small quantities of cigarettes for themselves or their friends." S. Rep. No. 95-962, at 3, 6 (1978). Yet the majority's interpretation would impose criminal liability on a casual consumer who purchases one carton of cigarettes every week for a year on a reservation and transports them to New York City. And that is true even though he would not be considered a felon *until* the last carton of cigarettes was transported and the aggregate total exceeded 10,000.

Indeed, the majority acknowledged that its approach leads to "line-drawing problem[s]" in scenarios "where shipments of unstamped cigarettes are spread out in time and space" such that it would not make sense to categorize them as "a quantity." App. A at 80 n.26. Unsurprisingly, the majority's opinion stands in direct conflict with other circuits' understanding of limiting aggregation principles for similar offenses. *See*, *e.g.*, *United States v. Lee*, 317 F.3d 26, 39 (1st Cir. 2003); *United States*

v. Winston, 37 F.3d 235, 240 (6th Cir. 1994); *United States v. Russell*, 908 F.2d 405, 407 (8th Cir. 1990).

3. UPS respectfully requests a 60-day extension of time within which to file its petition for a writ of certiorari. The issues in this case are important, and UPS wishes to present a petition that will be helpful to the Court in understanding the questions presented. Counsel of record has been and will continue to be engaged with the press of other matters in the federal courts, including serving as principal counsel in numerous pending federal appeals with near-term deadlines:

- Reply brief due February 24, 2020, in *Apple Inc. v. Voip-Pal.com, Inc.*, No. 18-1456 (Fed. Cir.);
- Reply brief due March 2, 2020, in *Duarte v. Barr*, No. 17-71087 (9th Cir.);
- Oral argument on March 3, 2020, in *Voip-Pal.com, Inc. v. Twitter, Inc.*, No. 19-1808 (Fed. Cir.);
- Oral argument on March 6, 2020, in *Biogen MA Inc. v. EMD Serono, Inc.*, No. 19-1133 (Fed. Cir.);
- Reply briefs due March 9, 2020, in *Comcast Cable Communications, LLC v. Promptu Systems Corp.*, No. 19-1947 and No. 19-2287 (Fed. Cir.);
- Response brief due April 6, 2020, in *Voip-Pal.com, Inc. v. Apple, Inc.*, No. 20-1241 (Fed. Cir.);
- Response brief due April 10, 2020, in *Anderson v. Edward D. Jones & Co.*, No. 19-17520 (9th Cir.); and

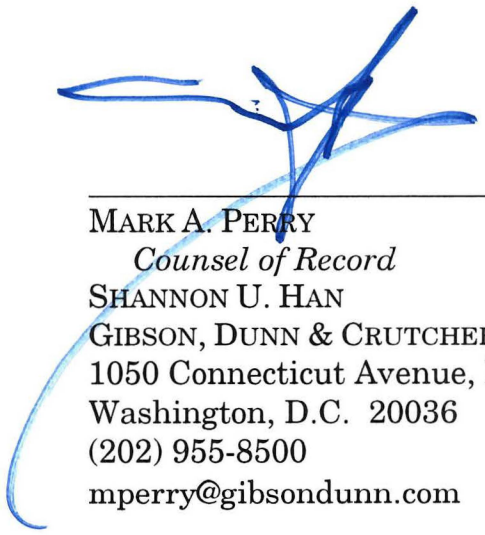
- Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit due April 16, 2020, in *Tillage v. Comcast Corporation*, No. 18-15288 (9th Cir.).

Given the scale and complexity of this litigation, the magnitude of the judgment, and the number of important issues that UPS needs to consider for its petition, additional time is necessary to coordinate among co-counsel, who are attorneys at a different law firm, as well as with in-house counsel.

New York would not be prejudiced by the requested extension. The Second Circuit has already stayed its mandate pending the filing and disposition of UPS's petition for a writ of certiorari, Order, *New York v. UPS*, No. 17-1993 (2d Cir. Jan. 3, 2020) (Doc. 316), and the judgment will continue to accrue interest at the statutory rate until paid.

Accordingly, UPS respectfully requests that its time to file a petition for a writ of certiorari be extended by 60 days, to and including May 18, 2020.

Respectfully submitted.



DEANNE E. MAYNARD
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, N.W.
Suite 6000
Washington, D.C. 20006
(202) 887-1500

MARK A. PERRY
Counsel of Record
SHANNON U. HAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Applicant United Parcel Service, Inc.

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