No. 19-1306

IN THE
Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,
Petitioner,

v.

STATE OF NEW YORK and 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

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QUESTIONS PRESENTED

1. The Prevent All Cigarette Trafficking Act prohibits common carriers like petitioner United Parcel Service, Inc. (UPS) from delivering packages for certain cigarette sellers, but exempts carriers from both the federal prohibition and state cigarette delivery bans if the carrier is "subject to" a "settlement agreement relating to tobacco product deliveries to consumers" with the New York Attorney General, and the agreement is "honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(A)-(B), (e)(5)(C)(ii). Did UPS forfeit this exemption when it failed to comply with the relevant settlement agreement and delivered millions of illegal cigarettes to consumers across the country?

2. The Contraband Cigarette Trafficking Act makes it "unlawful for any person knowingly to ship, transport, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco." 18 U.S.C. § 2342(a). The term "contraband cigarettes" is defined to mean "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of the applicable State or local cigarettes taxes." *Id.* § 2341(2). Can separate shipments totaling millions of untaxed cigarettes be aggregated to satisfy the act's 10,000-cigarette threshold?

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INTRODUCTION

This case arises from petitioner United Parcel Service's (UPS) unlawful shipments of millions of untaxed cigarettes between 2010 and 2015. After an extensive bench trial, the district court found UPS liable for its persistent, extensive, and knowing violations of two federal statutes, a state law, and a prior settlement agreement with the Attorney General of New York—all of which were designed to combat the widespread evasion of cigarette taxation. In the decision below, the Second Circuit affirmed each of the district court's key liability determinations but reduced the award of damages and penalties.

UPS's petition presents no issue warranting certiorari. UPS does not, and cannot, contest the detailed factual findings below about its sweeping violations of numerous prohibitions on shipping cigarettes directly to consumers. Instead, it objects to the Second Circuit's holdings on two discrete legal issues. Neither issue warrants this Court's review.

First, UPS concedes that its objection to the Second Circuit's interpretation of the Prevent All Cigarette Trafficking (PACT) Act exemption implicates no circuit split. This issue also has no recurring or long-term importance because the exemption applies only to three common carriers, and none of them (including UPS) seem likely to test the exemption's boundaries going forward. And the Second Circuit's conclusion that UPS could not rely on the exemption was correct in any event: the exemption applies only if UPS "honored" a settlement agreement with the New York Attorney General "throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers," but the district court found

(and the Second Circuit agreed) that UPS had instead engaged in "wholesale noncompliance" with that settlement agreement.

Second, the court of appeals' Contraband Cigarette Trafficking Act (CCTA) holding also implicates no circuit split—indeed, every lower court to consider the issue has agreed that multiple shipments of cigarettes may be aggregated for purposes of the CCTA's 10,000-cigarette threshold. Even if there were some dispute at the margins, this case would be a poor vehicle to address this issue, given the sheer quantity of cigarettes that UPS shipped—including many that were suspiciously capped at exactly 10,000 cigarettes.

This Court should accordingly deny certiorari.

STATEMENT

A. The Twin Purposes of Cigarette Taxes and the Harms of Cigarette Tax Evasion

The harmful effects of cigarette smoking and the associated public health costs are enormous. Cigarette smoking is the leading cause of preventable death in the United States, killing almost half a million people annually—or roughly 1,300 people a day.[1] In New York alone, smoking kills nearly 30,000 people per year and causes serious illness in another 750,000. Smoking also costs the State approximately $10.4

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[1] Ctrs. for Disease Control & Prevention, *Fast Facts Smoking & Tobacco Use* (last reviewed May 21, 2020) (internet). For sources available on the internet, full URLs appear in the table of authorities. All websites were last visited on August 2, 2020.

billion annually in health care expenses and billions of dollars more in lost productivity.[2]

The State and City of New York—like the federal government, every other State, and the District of Columbia—impose excise taxes on cigarettes.[3] *See* N.Y. Tax Law § 471(1); 20 N.Y.C.R.R. § 74.1(a)(2) (state tax of $4.35 per pack); N.Y.C. Admin. Code § 11-1302(e) (city tax of $1.50 per pack). These taxes serve two important aims. First, cigarette excise taxes deter cigarette usage by making cigarettes more expensive and thus reducing demand.[4] Second, they allow the State and City to recoup a portion of the health care costs of cigarette use.[5] These "public policy goals, obviously, can be achieved only insofar as the taxes are actually paid." (Pet. App. 9a.)

To facilitate the collection of cigarette excise taxes, state law requires the taxes to be prepaid by state-licensed stamping agents, who buy and affix tax

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[2] *See* N.Y. State Dep't of Health, *Information About Tobacco Use, Smoking, and Secondhand Smoke* (rev. June 2018) (internet).

[3] *See* Office of the Surgeon General, U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking—50 Years of Progress* 788 (2014) (internet); RTI Int'l, *2014 Independent Evaluation Report of the New York Tobacco Control Program* 22-23 (2014) (internet) (hereafter, "RTI, *Report*").

[4] *See* Office of the Surgeon General, *The Health Consequences of Smoking*, *supra*, at 788; RTI, *Report*, *supra*, at 22-23.

[5] *See, e.g.*, N.Y. State Assembly Ways & Means Comm., *New York State Economic & Revenue Report: Fiscal Years 2018-19 and 2019-20*, at 158 (Feb. 2019) (internet) (estimating that New York collected approximately $1.113 billion in cigarette and tobacco taxes for the 2018 state fiscal year).

stamps on each pack of cigarettes. The agents then incorporate the value of the tax into the sale price and pass the cost down the chain to consumers. *See* N.Y. Tax Law § 471(2); 20 N.Y.C.R.R. §§ 74.2-74.3; N.Y.C. Admin. Code § 11-1302(g)-(h). Under this regime, "it is immediately apparent that the tax has not been paid on cigarettes not bearing stamps." (Pet. App. 10a.)

Despite the State's and City's substantial collection efforts, cigarette tax evasion remains a widespread problem. According to one recent study, approximately sixty percent of cigarettes consumed in New York were subject to tax evasion, costing the State billions in lost revenue.[6]

The sale of cigarettes on Native American reservations poses unique problems for the State's and City's efforts to collect cigarette excise taxes. *See Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 159-62 (2d Cir. 2011). Federal law prohibits New York from imposing taxes on the sale of cigarettes to tribal members on their own reservation for personal uses, *see Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-81 (1976), but New York can and does levy taxes on the sale of cigarettes from reservation sellers to nontribal members, *see Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 64 (1994) (authorizing collection of taxes); N.Y. Tax Law § 471(1) (imposing tax). Historically, non–Native American New Yorkers (among others) have sought to purchase cigarettes from reservation retailers to avoid paying

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[6] *See* RTI, *Report*, *supra*, at 25.

the relevant excise taxes. *See Oneida Nation*, 645 F.3d at 158-59.[7]

B. Legal Background

The trafficking of untaxed cigarettes has long garnered the attention of state and federal lawmakers, who have enacted a variety of measures over the years to reduce cigarette tax evasion. The result is a multilayered scheme of mutually reinforcing state and federal obligations regulating all participants in the distribution chain—including common carriers, like petitioner UPS, that deliver cigarettes for a profit.

1. New York's Public Health Law § 1399-*ll* and the State's Assurance of Discontinuance with UPS

In 2000, in response to the alarming level of sales of unstamped cigarettes by online and mail-order cigarette retailers, New York's Legislature enacted Public Health Law (PHL) § 1399-*ll*. Ch. 262, § 2, 2000 N.Y. Laws 2905, 2906. Among other prohibitions, the statute makes it "unlawful for any common or contract carrier"—such as UPS—"to knowingly transport cigarettes to any person in this state" not "reasonably believed by such carrier" to be a statutorily authorized recipient—i.e., licensed resellers or government agents. PHL § 1399-*ll*(2). "[I]f cigarettes are transported to a home or residence," the law "presume[s]" the carrier's knowledge that the delivery was unauthorized. *Id.* A shipper or carrier that violates PHL § 1399-*ll* is subject to civil penalties. *See id.* § 1399-*ll*(6).

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[7] *See also* Pub. Health & Tobacco Policy Ctr., *Tax Evasion in New York* 2, 5 (2017) (internet).

In the years after PHL § 1399-*ll*'s enactment, the State determined that UPS had repeatedly violated the statute's requirements by, among other things, shipping cigarettes directly to consumers. In October 2005, "in lieu of commencing a civil action against UPS," the State and UPS entered into an Assurance of Discontinuance (AOD) "in settlement of" UPS's potential PHL § 1399-*ll* violations. (Pet. App. 491a-492a.)

Under the terms of the AOD, UPS agreed to abide by multiple requirements designed to halt its shipment of cigarettes to consumers. In particular, UPS promised to adhere to an internal policy prohibiting the shipment of cigarettes to individual purchasers and unlicensed resellers. (Pet. App. 491a, 494a.) UPS further agreed to adhere to a detailed set of policies and procedures that would ensure its compliance with PHL § 1399-*ll*. For example, UPS agreed to train its employees on the strict prohibition on delivering cigarettes to consumers. (Pet. App. 491a-502a.) It also promised to "audit shippers where there is a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers, in order to determine whether the shippers are in fact doing so." (Pet. App. 496a.) If UPS determined that a shipper was engaged in cigarette shipments in violation of law or its cigarette policy, the AOD required UPS to follow a tiered disciplinary process to halt those shipments, up to and including termination of services. (Pet. App. 497a-501a.) UPS agreed "to pay to the State of New York a stipulated

penalty of $1,000 for each and every violation" of the AOD.[8] (Pet. App. 504a.)

2. The federal Contraband Cigarette Trafficking Act (CCTA)

The federal government has long recognized the deleterious effects of cigarette tax evasion, given the "large scale loss of revenue by the States" from cross-border shipments from jurisdictions with higher tax rates to jurisdictions with lower tax rates. S. Rep. No. 95-962, at 9 (1978). Congress also recognized that cigarettes were being diverted "through tax-free outlets," including "Indian reservations." *Id.* at 6.

In response to these concerns, Congress in 1978 enacted the Contraband Cigarette Trafficking Act (CCTA), which 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 Act defines "contraband cigarettes" to mean "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found."[9] *Id.* § 2341(2). Violators are subject to fine, imprisonment, or both. *See id.* § 2344(a)-(b).

In 2006, Congress "enhance[d] the provisions of the CCTA to enable law enforcement to prosecute

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[8] The New York Attorney General entered into similar settlement agreements with the two other largest common carriers, DHL Holdings USA, Inc. and Federal Express Corporation. (*See* Pet. App. 97a n.40, 378a.)

[9] The quantity threshold for contraband cigarettes was originally 60,000, but it was lowered to 10,000 in 2006. *See* Pub. L. No. 109-177, § 121(f), 120 Stat. 192, 221 (2006).

more of these schemes." 151 Cong. Rec. 16,978 (July 21, 2005); *see* Pub. L. No. 109-177, § 121(f), 120 Stat. 192, 223 (2006). As relevant here, Congress granted States and localities authority to bring federal actions to seek "appropriate relief for violations" of the CCTA, including (but not limited to) "civil penalties, money damages, and injunctive or other equitable relief." 18 U.S.C. § 2346(b)(2).

3. The federal Prevent All Cigarette Trafficking (PACT) Act

Despite the CCTA and state laws such as PHL § 1139-*ll*, extensive illegal cigarette trafficking persisted. *See* S. Rep. No. 110-153, at 4 (2007). In 2010, Congress passed the Prevent All Cigarette Trafficking (PACT) Act to "create strong disincentives to illegal smuggling of tobacco products" and to "provide government enforcement officials with more effective enforcement tools." Pub. L. No. 111-154, § 1(c)(2)-(3), 124 Stat. 1087, 1088 (2010). To achieve these ends, the PACT Act bans the mailing of cigarettes through the U.S. Postal Service. 18 U.S.C. § 1716E(a)(1). The PACT Act also imposes restrictions on common carriers' ability to transport cigarettes. Among other things, it prohibits common carriers from delivering "any package" for cigarette sellers that fail to register with the U.S. Attorney General and have been placed by the Attorney General on the "Non-Compliant List," 15 U.S.C. § 376a(e)(2)(A), unless the carrier "knows" that the package "does not include cigarettes," *id.* § 376a(e)(2)(A)(i).

When enacting the PACT Act, Congress understood that the three largest carriers—DHL Holdings USA, Inc. (DHL), Federal Express Corporation (FedEx), and UPS—were already subject to restrictions on cigarette

deliveries under settlement agreements with the New York Attorney General. Relying on "testimony that these agreements were effective at stopping the illegal shipment of cigarettes[to] consumers," Congress provided a "limited exception" from the PACT Act's requirements, H.R. Rep. No. 110-836, at 24 (2008), to any common carrier that is "subject to" such an agreement—including "the [AOD] entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005," 15 U.S.C. § 376a(e)(3)(A)(i) & (e)(3)(B)(ii)(I). This narrow exemption is subject to a critical qualification: a carrier is excused from the PACT Act's distinct prohibitions and requirements only if the carrier's agreement "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 PACT Act provides a similar exemption, subject to the same qualification, from the enforcement of state statutory bans on cigarette shipments to consumers, like PHL § 1399-*ll*. *See id.* § 376a(e)(5)(C)(ii).

C. The District Court Proceedings

In February 2015, the State and City of New York filed this civil enforcement action against UPS based on evidence that it was delivering substantial quantities of untaxed cigarettes from shippers on New York Indian reservations to consumers in New York. Following a two-week bench trial, the district court found that UPS had violated the AOD, the PACT Act, PHL § 1399-*ll*, and the CCTA. (Pet. App. 247a-307a.)

1. The district court found that UPS engaged in systemic and widespread violations of state and federal laws prohibiting the delivery of cigarettes

UPS's petition nowhere mentions the district court's key—and largely uncontested—findings about its extensive violations of federal and state law. Far from shipping merely "twenty-five cigarettes a piece over five years for various shippers" (Pet. 20), as one of its hypotheticals suggests, UPS in fact knowingly transported tens of thousands of packages of untaxed cigarettes to consumers—containing millions of cigarettes—for seventeen shippers across four New York State Indian reservations between 2010 and 2015. (Pet. App. 192a-237a.) And many of UPS's shipments were executed in shipments of precisely 10,000 cigarettes—an obvious attempt by shippers to evade the CCTA's 10,000-cigarette threshold. (Pet. App. 227a, 230a-231a.)

This enormous volume was no accident. Rather, as the district court found, it was a direct result of UPS's corporate culture, which was "pervaded" by a "lack of commitment" to complying with the AOD that UPS had entered into with the New York Attorney General. (Pet. App. 138a.) For example, despite the AOD's express mandate that UPS train a broad range of executives and employees, UPS delivered "little actual training" on compliance with the AOD or other cigarette-related prohibitions. (Pet. App. 144a.) In addition, despite the AOD's requirement that UPS audit shippers whenever there was "a reasonable basis to believe that such shippers may be tendering Cigarettes for delivery to Individual Consumers" (Pet. App. 496a), UPS implemented no formal audit policies for cigarette shippers and provided no audit training

to its employees. Indeed, UPS often failed to conduct audits until it *actually discovered* impermissible cigarette shipments in fortuitous ways, such as when cigarettes fell out of a broken box. (*See* Pet. App. 162a, 164a; *see also* Pet. App. 201a-202a, 225a.)

UPS knew that it was regularly transporting illegal cigarettes to consumers, as the district court found. (*See* Pet. App. 138a-140a, 195a, 280a.) UPS's drivers and sales personnel saw advertisements on or near shippers' businesses indicating the sale of cigarettes, and UPS's employees even "saw cigarettes on display racks" during in-person visits to the shippers' stores. (Pet. App. 139a.) And UPS received frequent inquiries from purchasers regarding lost or damaged packages "of cigarettes shipped by the very shippers at issue here." (Pet. App. 138a.) Yet UPS rarely pursued corrective action against shippers that it knew were transporting cigarettes through UPS. (*See* Pet. App. 139a-140a.)

2. The district court held UPS liable for its disregard of federal and state law

The district court held UPS liable under the PACT Act. The court found that UPS had forfeited the Act's exemption, which applies only if UPS's AOD with the New York Attorney General "is honored throughout the United States to block illegal deliveries of cigarettes." 15 U.S.C. § 376a(e)(3)(B)(ii)(I). The court "easily" found that "UPS was not honoring the AOD" between December 1, 2010, and February 18, 2015, based on its "widespread and persistent" AOD violations over many years. (Pet. App. 272a-274a.) The court awarded $35,258,750 to the State and $43,091,250 to the City in PACT Act penalties, reflecting half of the maximum statutory penalty (i.e.,

$2,500) for each package delivered for a shipper on the Non-Compliant List. (Pet. App. 365a-369a; *see also* Pet. App. 179a, 289a-294a, 361a.) The court declined to award damages (i.e., lost tax revenue) under the PACT Act, finding that they would be duplicative with damages it was awarding under the CCTA. But the court noted that such damages would be $2,767,600.50 for the State and $546,937.50 for the City. (Pet. App. 367a.)

The court held that UPS had also violated the CCTA by knowingly transporting, in the aggregate, far more than 10,000 cigarettes that lacked evidence of payment of the required taxes. (Pet. App. 297a-303a). It ultimately awarded a total of $8,679,729 in damages to the State and $720,885 to the City under the CCTA, as well as nominal penalties of $1,000 each. (Pet. App. 371a-374a; *see* Pet. App. 323a-324a.)

The district court found that UPS had violated PHL § 1399-*ll* by knowingly delivering cigarettes to statutorily unauthorized recipients—i.e., anyone other than government agents or licensed resellers. In light of the other damages and penalties it awarded in the case, the court awarded only half of the maximum penalty under PHL § 1399-*ll*, totaling $41,410,000 for the State and $37,345,000 for the City. (Pet. App. 369a-371a; *see* Pet. App. 294a-297a.)

Finally, the district court found that UPS had committed multiple violations of the AOD it had entered into with the New York Attorney General, including requirements regarding (a) compliance with PHL § 1399-*ll*; (b) shipper audits; (c) upkeep of UPS's tobacco database; (d) shipper discipline; (e) employee training, and (f) shipment of cigarettes to individual consumers. (Pet. App. 261a-262a.) To avoid duplicative

recovery, the State sought penalties for only one type of AOD violation—the audit requirement. (Pet. App. 248a, 264a.) For UPS's repeated violation of that provision, the district court awarded the State $80,468,000, reflecting a $1,000 penalty for each package delivered for any of the twenty shippers that UPS had unreasonably failed to audit. (Pet. App. 363a-365a.)

The district court declined to enter injunctive relief based, in part, on its finding that UPS had increased its efforts to comply with the AOD following the lawsuit and that, as of February 2015, "UPS had put its non-compliance largely behind it." (Pet. App. 167a; *see* Pet. App. 350a.).

D. Proceedings in the Court of Appeals

The Second Circuit affirmed the district court's liability findings but reduced the overall damages award.

As relevant here, the court agreed that UPS was not entitled to the PACT Act statutory exemption—and was thus liable for violations of both the PACT Act and PHL § 1399-*ll*—because it did not "honor the AOD 'throughout the United States'" during the relevant period. (Pet. App. 62a; *see* Pet. App. 47a.) As the court concluded, "[t]he most natural reading of the plain language of the exemption provision—and indeed, the reading initially adopted by *both* sides in litigating UPS's original motion to dismiss the complaint—is that a party 'honors' an agreement by complying with it." (Pet. App. 48a.) Given the district court's meticulous and largely undisputed findings of "UPS's wholesale noncompliance with the AOD," the Second Circuit

found that UPS "did not 'honor' the AOD and therefore forfeited its exemption." (Pet. App. 50a.)

The Second Circuit rejected UPS's contention that it was entitled to the PACT Act exemption so long as it accepted its obligations under the AOD as valid, regardless of whether it was in fact complying with the AOD (Pet. 51a)—an argument that "boils down to a simple proposition: that the mere existence of the AOD, and UPS's adoption of a cigarette policy, shield it from other liability regardless of whether UPS takes any steps to comply with them." (Pet. App. 53a-54a.) As the court explained, such a reading would "render[] much of the language in the exemption provision superfluous," by disregarding the clause requiring the AOD to be "honored . . . *to block illegal deliveries to consumers*." (Pet. App. 55a (emphasis added) (quoting § 376a(e)(3)(B)(ii)(I)).) The court further reasoned that "[t]reating the AOD's mere existence as an exemption from the PACT Act's compliance obligations would also thwart the statute's goal of blocking cigarette trafficking nationwide." (Pet. App. 55a.)

Although the Second Circuit agreed with the district court that UPS could be liable under both the PACT Act and PHL § 1399-*ll*, it ultimately concluded that awarding penalties under both provisions was unreasonable. Accordingly, it vacated the $78.4 million penalty award under the PACT Act and affirmed only the $78 million in PHL § 1399-*ll* penalties. (Pet. App. 98a.)

Turning to the CCTA, the Second Circuit rejected UPS's contention that the district court improperly aggregated separate shipments to meet the CCTA's 10,000-cigarette threshold. *See* 18 U.S.C. § 2341(2). As the court explained, the "plain text of the CCTA's

definition of 'contraband cigarettes' imposes no per-transaction requirement." (Pet. App. 69a.) By contrast, "Congress included single-transaction or specific time-frame qualifiers in other CCTA provisions," making clear that that the omission of a similar qualifier in the CCTA's definition of "contraband cigarettes" was intentional and designed to permit aggregation. (Pet. App. 71a.)

Finally, regarding the AOD, the court rejected UPS's contention that it was not subject to any penalties for violations of the AOD's audit requirements. But the court disagreed with the district court's decision to treat each unaudited package of cigarettes as a separate violation. The court thus reduced the State's award for AOD penalties from $80,468,000 to $20,000. (Pet. App. 68a.)

Judge Jacobs dissented on two issues. First, while acknowledging that the applicability of the PACT Act exemption was "a close question" (Pet. App. 104a), the dissent would have concluded that a carrier is entitled to the exemption "by subjecting itself to the AOD's penalty provision" throughout the nation—meaning the carrier (i) recognizes its obligations nationwide *and* (ii) permits all fifty States to enforce the AOD's terms. (*See* Pet. App. 106a.) Second, with respect to the CCTA, the dissent would have held that the statute did not permit aggregation of different cigarette shipments to reach the statute's 10,000-cigarette threshold. (Pet. App. 109a-110a.)

UPS sought rehearing en banc, which the full court denied. (Pet. App. 450a-451a.)

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Interpretation of the PACT Act Exemption Does Not Warrant Certiorari.

The PACT Act provides a narrow exemption from its compliance obligations and from state delivery bans such as PHL § 1399-*ll*(2) for common carriers like UPS that are "subject to" one of several specifically identified settlement agreements with the New York Attorney General. But that exemption applies only if the "agreement[] is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers." 15 U.S.C. § 376a(e)(3)(A)(i) & (e)(3)(B)(ii)(I) (PACT ACT compliance); § 376a(e)(5)(C)(ii) (state law preemption). The Second Circuit found that UPS's "wholesale noncompliance with the AOD" here foreclosed it from relying on this exemption. (Pet. App. 50a.) That holding represents a correct and straightforward interpretation of the PACT Act exemption that does not warrant certiorari because it implicates no circuit split; presents a narrow legal question that is unlikely to recur; and is based on the district court's findings of UPS's egregious violations here.

A. UPS Identifies No Circuit Split or Issue of Recurring Significance.

UPS concedes that it seeks mere "error correction" of the Second Circuit's PACT Act holding. (Pet. 21.) It could hardly contend otherwise. The Second Circuit's interpretation of the PACT Act conflicts with no other circuit decision or decision of this Court. And it raises no issue of broader or longer-term significance. The PACT Act exemption applies only to three common

carriers: UPS, FedEx, and DHL. *See* 15 U.S.C. § 376a(e)(3)(A)(i), (e)(3)(B)(ii)(I) & (e)(5)(C)(ii). And even for those three, the question of whether "wholesale noncompliance" (Pet. App. 50a) precludes reliance on the exemption is not likely to recur: DHL closed its domestic shipping business in 2008; FedEx recently entered a new settlement agreement with the New York Attorney General that terminated FedEx's prior settlement and thus renders FedEx ineligible to invoke the exemption at issue here;[10] and as a result of this litigation, as the district court found, UPS came into substantial compliance with the AOD as of February 2015. (*See* Pet. App. 97a, 166a.)

Unable to identify a recurring issue of general significance, UPS instead contends that the question presented merits the Court's review because the Second Circuit's decision "subverts Congress's carefully constructed framework for addressing" carrier liability for unlawful cigarette deliveries. (Pet. 28-29.) But that argument simply restates UPS's disagreement with the Second Circuit's PACT Act holding; it does not establish that the question presented here is of exceptional importance. To the contrary, the sole consequence of the decision below is to hold UPS liable for repeatedly violating its AOD obligations and shipping millions of cigarettes from known cigarette sellers to consumers in violation of both federal and state law. That liability finding and associated penalty award are of great significance to the State and City of New York. But they raise no recurring legal issue of

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[10] *See* Order for Dismissal and Retention of Jurisdiction, Ex. A at 15, *City of New York v. FedEx Ground Package Sys., Inc.*, No. 13-cv-09173 (S.D.N.Y. Jan. 15, 2019), ECF No. 631.

exceptional importance warranting this Court's further review.

B. The Second Circuit Correctly Interpreted the PACT Act.

This Court should also decline UPS's request for error correction because the Second Circuit did not err. The court correctly held that UPS's "wholesale noncompliance with the AOD" (Pet. App. 50) precluded it from invoking a PACT Act exemption, which is available only if UPS "honored [the AOD] throughout the United States to block illegal deliveries of cigarettes." 15 U.S.C. § 376a(e)(3)(B)(ii)(I) (PACT Act compliance); § 376a(e)(5)(C)(ii) (state-law preemption).

1. The Second Circuit's decision faithfully applies the text of the statute. *See Milner v. Department of Navy*, 562 U.S. 562, 569 (2011). In common parlance, to honor an agreement is to abide by it: to "honor" means "to live up to," *Merriam Webster's Collegiate Dictionary* 597 (11th ed. 2003); or to "fulfill (an obligation) or keep (an agreement)," *New Oxford American Dictionary* (3d ed. Online 2015). Based on this plain meaning, the Second Circuit correctly recognized that UPS could "honor" the AOD only insofar as it "'lived up to' or 'fulfilled' its obligations under the AOD." (Pet. App. 50a.)

UPS contends that "honored" means only to "accept as valid," such that it is entitled to invoke the exemption so long as it "accepts [the AOD] as operative nationwide." (Pet. 23.) But that interpretation comports with no commonsense understanding of the

term "honor."[11] A check is not "honored" when a bank accepts a check but refuses to pay it, any more than the AOD was "honored" when UPS executed the agreement but then failed to comply with it.

UPS's interpretation would also render much of the language in the exemption superfluous. The exemption applies if (1) a common carrier is "subject" to an AOD with the New York Attorney General, 15 U.S.C. § 376a(e)(3)(A)(i); *and* (2) that AOD "is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers," § 376a(e)(3)(B)(ii)(I). If Congress had intended this exemption to turn solely on the AOD's mere acceptance by UPS, then it would have included just the first requirement. But "[b]y specifying that the exemption applies if the AOD is honored in such a way as to '*block illegal deliveries of cigarettes . . . to consumers*,' Congress clearly signaled that 'honoring' the agreement involves compliance." (Pet. App. 56a (emphasis added).) UPS's interpretation wrongly treats the "honored" requirement itself as mere "surplusage." *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997).

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[11] Neither of the statutes UPS cites (Pet. 23) supports its argument. One statute, 15 U.S.C. § 1681a, merely uses the term "honored" in the context of defining the term "firm offer of credit." But "honored" in that context requires performance—i.e., payment—not merely acknowledgement of the credit agreement. *See* U.C.C. § 5-102(8) (Uniform Law Comm'n 1995) (Westlaw) (to "honor" a letter of credit "means performance of the issuer's undertaking in the letter of credit or deliver an item of value," which occurs "upon payment"). The other statute, 48 U.S.C. § 1921d(o), describes the circumstances under which the United States must "honor" the judgments of certain international courts. There too, the only logical meaning of "honor" is that courts *give effect* to such judgments.

2. Other provisions of the PACT Act confirm that Congress intended to exempt common carriers from liability only if they actually prevent unlawful cigarette deliveries. For example, in addition to the provision at issue here, the PACT Act contains a parallel exemption for a common carrier subject to "any other active agreement"—besides the specified New York AODs—"that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers." 15 U.S.C. § 376a(e)(3)(B)(ii)(II). The requirement that these other agreements "operate[] . . . to ensure" no cigarette deliveries parallels the requirement that UPS's AOD is "honored . . . to block illegal deliveries of cigarettes." In each case, the exemption requires effective compliance that achieves the objectives of the PACT Act—halting unlawful cigarette deliveries—and thus justifies excusing the common carrier from the PACT Act's procedures.

UPS wrongly relies (Pet. 23-24) on two other provisions of the PACT Act that provide a liability exemption without an active AOD or similar agreement. Those exemptions too are triggered only if the carrier *actually prevents* illegal cigarette deliveries. Thus, a carrier with an inactive or terminated agreement can still invoke 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). Likewise, a carrier without an agreement is not subject to liability under the PACT Act if it "has implemented and enforces effective policies and practices for complying" with the PACT Act's requirements. *Id.* § 377(b)(3)(B)(i). Regardless of the difference in formulations, the language in each of

these provisions reflects Congress's focus on results—thus paralleling the interpretation of "honored" that the Second Circuit correctly reached.

3. UPS's contrary interpretation is at odds with the exemption's history and purpose. Congress enacted the exemption at issue here based in part on "testimony that [existing AODs] *were effective* at stopping the illegal shipment of cigarettes[to] consumers." H.R. Rep. No. 110-836, at 24 (emphasis added). But treating the AOD's mere acceptance by UPS as sufficient to exempt it from the PACT Act's compliance obligations would thwart the statute's goal of blocking cigarette trafficking nationwide. *See* Pub. L. No. 111-154, § 1(c)(4), 124 Stat. at 1088. In UPS's view, so long as it accepts the AOD with the New York Attorney General as valid, it does not have to comply with the PACT Act in any of the fifty States. UPS contends that this outcome is reasonable because its "*obligations* under the AOD apply regardless of where the deliveries are made." (Pet. 25.) But in the very same sentence, UPS acknowledges that its obligation to prevent unlawful deliveries outside of New York is essentially unenforceable because the "*remedies* available under the AOD apply only to deliveries made in New York." (Pet. 25.) Thus, the other forty-nine States would be unable to compel UPS to comply with the AOD's terms. And, according to UPS, the same exemption would also preclude other States from enforcing their own state-law cigarette delivery bans. *See* 15 U.S.C. § 376a(e)(5)(C)(ii). As the Second Circuit properly concluded, this outcome is nonsensical: "Congress could not have intended its narrowly drawn exemption to give common carriers like UPS free rein to engage in the very wrongdoing that the statute was meant to prohibit." (Pet. App. 55a-56a.)

UPS is thus wrong in contending (Pet. 28-29) that the Second Circuit's decision contravenes Congress's intent. Relying on a single floor statement from the PACT Act's Senate sponsor, UPS contends that Congress crafted the exemption to "*protect*" carriers from multiplicative liability under both the PACT Act and state delivery bans like PHL § 1399-*ll*. (Pet. 29-30.) But the Second Circuit's interpretation preserves the only protection that Congress enacted: namely, an exemption from both the PACT Act's compliance obligations and state-law delivery bans if UPS effectively halted unlawful cigarette deliveries due to its good faith efforts to comply with its AOD obligations. (*See* Pet. App. 46a-62a.) There is no indication in the legislative history that Congress intended an exemption premised on AOD compliance to apply to a common carrier engaged in "wholesale noncompliance with the AOD." (Pet. App. 50a.)

4. UPS complains (Pet. 27) that the Second Circuit's decision makes it difficult for carriers to know ex ante whether they must comply with the PACT Act's requirements, but this concern is exaggerated. UPS did not lose the PACT Act exemption here due to minor or immaterial AOD violations that were close to the line, but rather due to its near-total noncompliance with several of the AOD's key provisions. Moreover, since February 2015, UPS has claimed to be in compliance with the AOD and has not faced further PACT Act or PHL § 1399-*ll* liability. This recent history suggests that UPS knows how to comply with a negotiated agreement when it chooses to do so.

It is also no objection that, if there is a dispute about whether UPS has complied with the AOD—and therefore a dispute about whether the PACT Act exemption applies—a trial may be necessary to

resolve that dispute. (*See* Pet. 27.) As the Second Circuit reasoned, the PACT Act provides "an exemption from liability, not from litigation," and the availability of such a defense is often "dependent on facts that cannot be known until they are determined in litigation."[12] (Pet. App. 58a n.20.) The PACT Act thus "does not set UPS up for litigation from which it should be exempt." (Pet. App. 58a.)

II. The Second Circuit's CCTA Holding Also Does Not Warrant Certiorari.

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), and defines "contraband cigarettes" as "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes," § 2341(2). UPS does not dispute that it knowingly transported millions of untaxed cigarettes—often in repeated shipments of exactly 10,000 cigarettes. (*See* Pet. App. 299a-302a.) Based, in part, on that concession, the Second Circuit correctly held that UPS's massive deliveries could be aggregated to satisfy the CCTA's 10,000-cigarette threshold. (Pet. App. 72a.)

Certiorari is not warranted to review this holding. There is no division among the lower courts on the permissibility of aggregation under the CCTA. The decision below is correct. And a reversal of the decision below by this Court is unlikely to be outcome-determinative in this case.

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[12] Indeed, many of UPS's affirmative defenses in this case were not resolved until after trial. (*See* Pet. App. 307a-309a (unclean hands); 309a-310a (waiver); 310a-314a (estoppel).)

A. The Decision Below Does Not Implicate Any Circuit Conflict.

1. UPS does not contend that there is any division of authority among the lower courts regarding the use of aggregation to satisfy the 10,000-cigarette threshold under the CCTA's definition of "contraband cigarettes." Nor could it. No other circuit has addressed that question, and every district court to consider the issue has held that aggregation is permitted under the CCTA's plain text.[13]

UPS attempts to conjure up a more general division by claiming that the Second Circuit's decision conflicts with the decisions of four federal courts of appeals that have allegedly "recognized a general rule precluding aggregation in statutes setting forth a threshold quantity." (Pet. 14.) But none of the cases UPS cites support any such "general rule." Rather, the divergent outcomes in these cases stem from the distinct operation, language, and subject matter of the statutes at issue.

For example, UPS points to two instances (Pet. 15-16) in which courts of appeals have held that aggregation cannot be used to satisfy a threshold quantity requirement in the context of a possession offense. But neither court purported to espouse a general anti-aggregation rule applicable to all criminal statutes. In *United States v. Russell*, the court held only that "there can be no aggregation of

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[13] *See City of New York v. FedEx Ground Package Sys., Inc.*, 91 F. Supp. 3d 512, 520 (S.D.N.Y. 2015); *City of New York v. LaserShip, Inc.*, 33 F. Supp. 3d 303, 313 (S.D.N.Y. 2014); *City of New York v. Gordon*, 1 F. Supp. 3d 94, 103-04 (S.D.N.Y. 2013); *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-cv-3966, 2009 WL 2612345, at *35 (E.D.N.Y. Aug. 25, 2009).

separate possessions" under 18 U.S.C. § 1029(a)(3), a statute that makes it unlawful to "knowingly and with intent to defraud possess[] fifteen or more devices which are counterfeit or unauthorized access devices." 908 F.2d 405, 407 (8th Cir. 1990). That statute-specific ruling was grounded in the fact that the violation involved a possession offense—an offense that the government conceded "must take place at a given time." *Id.* In *United States v. Spears*, the court relied on *Russell* to hold that aggregation was impermissible under 18 U.S.C. § 1028(a)(3), which makes it unlawful to "knowingly possess[] with intent to use unlawfully or transfer unlawfully five or more identification documents." *See* 697 F.3d 592, 600-01 (2012), *vacated on grant of reh'g*, 2013 WL 515786, *reinstated in relevant part*, 729 F.3d 753, 755 (7th Cir. 2013) (en banc). At most, these decisions reflect a narrow rule against aggregation for possession offenses based on the view that possession at different times constitutes different crimes. That limited rule has no bearing on the permissibility of aggregation under other statutes—like the CCTA—involving different offense conduct.

UPS also points (Pet. 15) to two cases holding aggregation impermissible under 21 U.S.C. § 841(b)(1)(A), which provides mandatory minimum sentences for certain controlled substance offenses based on drug quantity. But as the Sixth Circuit explained in *United States v. Winston*, that outcome is not premised on any general anti-aggregation principle but rather on the language of § 841(b)(1)(A) itself, which mandates minimum prison sentences for "*a violation*" involving a specified amount of drugs—language that has been construed to mean a "single violation" involving that amount. 37 F.3d 235, 240

(6th Cir. 1994). By contrast, the CCTA does not use the words "a violation" and does not establish minimum penalties.

2. While some courts have concluded that aggregation is not permitted for certain criminal statutes, aggregation has long been permitted under other statutes. For example, courts routinely permit the aggregation of drug quantities into a "single violation" under 21 U.S.C. § 841(b) in cases involving conspiracy charges. *See United States v. Pressley*, 469 F.3d 63, 65-66 (2d Cir. 2006). And this Court long ago held that the value of goods in separate shipments may be aggregated to reach a value threshold in a statute prohibiting the transport of stolen goods. *See Schaffer v. United States*, 362 U.S. 511, 517 (1960). The Second Circuit's ruling on aggregation under the CCTA is simply another statute-specific holding that does not implicate broader principles affecting other laws.

There is simply no reason to recognize or establish a uniform rule of law governing aggregation. The Second Circuit properly tethered its decision to the text and structure of the CCTA, without purporting to recognize any general aggregation rule applicable in other contexts. (*See* Pet. App. 69a-70a.) The decision thus does not conflict with decisions concerning other statutes, and there is no reason to believe that other courts will treat the decision as establishing a rule governing aggregation under other statutes.

B. The Second Circuit Correctly Construed the Plain Text of the CCTA.

This Court's review is not warranted for the additional reason that the Second Circuit's decision is correct.

1. The CCTA prohibits the shipment of "contraband cigarettes," which "means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes." 18 U.S.C. §§ 2341(2), 2342(a). As the Second Circuit observed, this language "imposes no per-transaction requirement." (Pet. App. 69a.) By contrast, Congress included express transactional limitations in other CCTA provisions. For example, in a separate record-keeping requirement, the statute provides that anyone who "distributes *any quantity* of cigarettes in excess of 10,000 *in a single transaction*" must maintain accurate records of such shipments. 18 U.S.C. § 2342(b) (emphasis added). That Congress included this single-transaction qualifier in § 2342(b) but not in § 2341(2) strongly suggests that aggregation is permissible to meet the CCTA's 10,000-cigarette threshold. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (presuming Congress acted intentionally in omitting terms included in other provisions of statute).

UPS contends that the CCTA's reference to "*a* quantity" of cigarettes, *see* 18 U.S.C. § 2341(2) (emphasis added), means that Congress intended to limit the threshold requirement to "a single act of transportation, possession, or sale." (Pet. 17.) But the phrase "a quantity" does not preclude aggregation. As the Second Circuit reasoned, "[i]t makes perfect sense to say that a shipper who makes more than ten 1,000-

cigarette deliveries has delivered 'a quantity' of more than 10,000 cigarettes, just as a child receives 'a quantity' of presents for her birthday comprising what she receives from each individual guest at her birthday party, through the mail, or during personal visits from other well-wishers before or after the day of the party." (Pet. App. 69a-70a.)

UPS also misplaces its reliance on 18 U.S.C. § 2343(b), which imposes reporting obligations on anyone who distributes "any quantity in excess of 10,000 cigarettes" in "a single month." UPS argues that because § 2343(b) provides for aggregation over a specified time period, Congress would have similarly specified a time period if it had intended to permit aggregation for the CCTA's delivery prohibition. (Pet. 18.) But the opposite inference is more likely: differences between the CCTA's recordkeeping requirements and its delivery prohibition warrant different treatment. The CCTA's recordkeeping requirements apply to anyone who ships or sells more than 10,000 cigarettes—whether lawful or unlawful—either in a single transaction, *see* 18 U.S.C. § 2343(a), or in a single month, *see id.* § 2343(b). Without specifying a transactional or time limit, § 2343's reporting requirements would reach many persons who could not possibly have violated the CCTA—a strange result for an obligation that was designed to aid in the investigation and prosecution of CCTA violations. *See* 151 Cong. Rec. 16,978 (pointing to § 2343(b) as one of several provisions meant to enhance CCTA enforcement). The CCTA's delivery prohibition, by contrast, is focused on preventing unlawful conduct—the delivery of untaxed, "contraband cigarettes." To capture the full gamut of unlawful conduct, Congress

sensibly felt no need to provide a short durational limit in defining the violation.

2. UPS's anti-aggregation arguments also run counter to the CCTA's purpose. A single-transaction requirement would allow parties to evade CCTA liability by the simple expedient of ensuring that any shipments comprise, at most, 10,000 cigarettes at a time. The trial evidence here established that UPS did exactly that, completing thousands of shipments in cases of fifty cartons—or exactly 10,000 cigarettes—each. (Pet. App. 301a.) Under UPS's theory, such deliberately calculated shipments of cigarettes, no matter how numerous in the aggregate, would fall entirely outside the scope of the CCTA. There is no indication that Congress intended its statutory prohibition to be so easily evaded.

3. UPS also asserts a host of policy-based objections to the Second Circuit's ruling (Pet. 19), but they do not overcome the force of the CCTA's plain text, and they are meritless in any event. *First*, UPS contends (Pet. 19) that the decision below is unworkable because there is no time limit on the period in which shipments may be aggregated. UPS is wrong. Shipments can be aggregated only up to four years—the statute of limitations governing the underlying violation. *See* 28 U.S.C. § 1658(a).

Second, UPS complains that the Second Circuit's decision "appears to place no restrictions on the number of *shippers* whose deliveries may be aggregated to satisfy the threshold." (Pet. 20.) But the number of shippers—or shipments for that matter—is simply not relevant. Because a violation occurs when a common carrier like UPS engages in the "transport" of unstamped cigarettes, *see* 18 U.S.C. § 2342(a), the

relevant question is the evasion caused by those shipments, not how many diverse shippers are involved.

Finally, UPS argues that there are difficult "hypothetical" questions raised by the decision below. (Pet. 20.) But none of these questions has much real world significance.[14] And they are irrelevant here because, as the court of appeals observed, "this case does not present a close call." (Pet. App. 70a n.26.) "UPS maintained accounts for shippers setting themselves up in business for the purpose of selling significantly more than 10,000 unstamped cigarettes, who then did indeed ship far more than 10,000 unstamped cigarettes on a regular and consistent basis over an extended but compact period of time." (Pet. App. 70a-71a n.26.) In the unlikely event that the questions UPS posits ever give rise to real-world conflicts, the lower courts will have ample opportunity to deal with them. They provide no basis for this Court's intervention now.

C. Reversal of the CCTA Holding Will Likely Not Affect the Outcome of the Case in Any Event.

Even if the question presented here were otherwise worthy of this Court's review, this case would be a poor vehicle for addressing it because it is unlikely that a reversal on the CCTA question would significantly alter the outcome of the case.

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[14] For example, UPS wonders when a Manhattanite who brings one carton a week from New Jersey to New York "become[s] a felon." (Pet. 19.) And UPS invokes the specter of an individual who purchases and transports one carton of unstamped cigarettes a month for four years. (Pet. 18.) These hypotheticals bear no resemblance to the facts of UPS's extensive violations here.

Even under UPS's theory, it would still be liable for at least some CCTA damages because, as the trial court expressly found, at least one shipper "shipped pallets of cigarettes via UPS in an amount greater than 10,000." (Pet. App. 301a.) Moreover, the district court awarded only nominal CCTA penalties in light of the substantial damages award, but it would be entitled to revisit that determination if the CCTA damages award were substantially reduced. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) (on remand district court "may consider and decide any matters left open by the mandate of this court").[15]

In addition, the district court could recalculate UPS's non-CCTA damages and penalties. For example, the trial court found that plaintiffs were entitled to damages under both the CCTA and the PACT Act, but it awarded only CCTA damages to avoid double counting. (*See* Pet. App. 361a, 373a.) In the absence of CCTA damages, the district court could reinstate plaintiffs' PACT Act damages. It could also increase PHL § 1399-*ll* penalties. Although the district court initially found the State and City were entitled to $82,820,000 and $74,690,000, respectively, for UPS's numerous violations of PHL § 1399-*ll*, the court ultimately reduced each award by fifty percent based on "the totality of the facts and circumstances,"

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[15] *See also, e.g.*, *Yankee Atomic Elec. Co. v. United States*, 679 F.3d 1354, 1360-62 (Fed. Cir. 2012) (on remand, district court may recalculate damages where an intervening precedent "changed the legal landscape for the calculation of damages on these issues"); *Phillips Petroleum Co. v. Oldland*, 187 F.2d 780, 782 (10th Cir. 1951) (on remand, district court could award interest on royalty payments for the first time when the court "had no occasion to consider the question" during the prior proceedings given its other rulings).

including the CCTA damages award. (Pet. App. 370a-371a.)

Given UPS's "high degree of culpability" in this case (Pet. App. 94a), and the Second Circuit's conclusion that damages and penalties of approximately $100 million are reasonable in light of that misconduct, there would thus be a strong basis for the district court to recalibrate its awards of damages and penalties if this Court were to vacate the CCTA award.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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