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13 *Federal Express Corporation and*  
14 *FedEx Corporate Services, Inc.*

15 UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 UNITED STATES OF AMERICA, ) **No. CR 14-380 (CRB)**  
19 )  
20 Plaintiff, ) **FEDEX DEFENDANTS' MOTION TO**  
21 ) **DISMISS THE INDICTMENT PURSUANT**  
22 ) **TO THE COMMON CARRIER**  
23 ) **EXEMPTIONS IN TITLE 21 OF THE**  
24 ) **UNITED STATES CODE**  
25 v. )  
26 FEDEX CORPORATION, FEDERAL )  
27 EXPRESS CORPORATION, and FEDEX )  
28 CORPORATE SERVICES, INC., )  
Defendants. )  
)

Date: May 13, 2015  
Time: 2:00 p.m.  
Hon. Charles R. Breyer

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1 **I. INTRODUCTION**

2 This Court has several times observed that the trial of this case would raise the  
3 crucial questions “What did FedEx know? What were they told? What did they do?  
4 What did they say?” 9/25/2014 Tx (Docket #53) at 5:8-12 & 22-24; *see also* 1/21/2015  
5 Tx (Docket #69) at 8:20-23, 9:24-10:3, 11:20-12:16. The evidence at trial would show  
6 that FedEx did not act with the knowledge or specific intent that would be required for  
7 conviction. But a trial is not necessary, and this prosecution should end now.  
8 Exemptions that have long been a part of the Controlled Substances Act (“CSA”) and  
9 the Food, Drug and Cosmetic Act (“FDCA”) expressly make common carriers like  
10 FedEx immune from criminal liability for the conduct alleged in the superseding  
11 indictment (“indictment”), and the charges must be therefore be dismissed under  
12 Federal Rule of Criminal Procedure 12(b).  
13  
14

15 The indictment charges FedEx with transporting prescription pharmaceuticals  
16 that, according to the government, had been dispensed pursuant to prescriptions issued  
17 by doctors in violation of federal law. Based fundamentally on the government’s  
18 assertion that some of FedEx’s more than 180,000 employees supposedly knew that  
19 certain customers were shipping improperly-prescribed medications, the indictment  
20 claims that FedEx entered into conspiracies with two online pharmacy “organizations” to  
21 violate the CSA, the FDCA, and the federal money laundering statutes.  
22  
23

24 The distribution of controlled substances by manufacturers, wholesalers,  
25 prescribers and dispensers is regulated by the Drug Enforcement Administration  
26 (“DEA”) as part of a “closed system” under the CSA. *See* H.R. Rep. No. 91-1444, 1970  
27 U.S.C.C.A.N. 4566; 116 Cong. Rec. 977-78. All manufacturers, wholesalers,  
28

1 prescribers and dispensers are required to register with the DEA, and registrants'  
2 activities are governed by a detailed series of regulations. See 21 U.S.C. §§ 801 *et*  
3 *seq.*; 21 C.F.R. §§ 1300.01 *et seq.* Prescription medications — both controlled and  
4 non-controlled — are also monitored by the Food and Drug Administration (“FDA”)  
5 pursuant to the FDCA. See 21 U.S.C. §§ 301 *et seq.*; 21 C.F.R. §§ 1.1 *et seq.* That  
6 agency oversees an equally thorough regulatory apparatus in the course of its job of  
7 “regulat[ing] drug manufacturing, marketing and distribution.” *Thompson v. Western*  
8 *States Medical Center*, 535 U.S. 357, 361 (2002).  
9

10  
11 FedEx is not a manufacturer, wholesaler, marketer, prescriber or dispenser of  
12 pharmaceuticals. It is a common carrier. Companies that are part of the  
13 pharmaceutical distribution chain, like hundreds of thousands of other business  
14 customers in the myriad and varied industries that comprise the American economy,  
15 often use common carriers like FedEx to transport their wares. But common carriers, as  
16 transporters for the public at large, cannot reasonably be expected to police whether  
17 any of the millions of packages tendered for shipment each day encloses a commodity  
18 that might somehow violate one among the thicket of federal, state and local laws and  
19 regulations that might apply to the shipment or shipper — including the complicated  
20 rules that apply to the prescription and dispensation of medications.  
21

22  
23 In order to avoid obstructing common carriers’ vital function of facilitating  
24 commerce, Congress wisely exempted common carriers that transport pharmaceutical  
25 shipments from the regulatory and enforcement schemes established by the CSA and  
26 FDCA. The CSA provides that

27  
28 [t]he following persons shall not be required to register and may lawfully  
possess any controlled substance or list I chemical under this title: . . . . (2)

1 A common or contract carrier or warehouseman, or an employee thereof,  
2 whose possession of the controlled substance or list I chemical is in the  
usual course of his business or employment.

3 21 U.S.C. § 822(c). The language of this provision is clear and unambiguous. It  
4 straightforwardly pronounces that a common carrier whose possession of controlled  
5 substances is in the usual course of business need not register with the DEA and,  
6 furthermore, may “*lawfully possess any controlled substance.*” Of course, a common  
7 carrier possessing a “controlled substance . . . in the usual course of [its] business” can  
8 only be doing one thing: transporting a package that contains the controlled substance.  
9 That is precisely what FedEx is accused of doing in this case, and § 822(c) makes its  
10 alleged conduct lawful.  
11

12  
13 Likewise, the FDCA provides that “carriers engaged in interstate commerce . . . .  
14 shall not be subject to the other provisions of this Act by reason of their receipt,  
15 carriage, holding or delivery of food, drugs, services, tobacco products, or cosmetics in  
16 the usual course of their business as carriers . . . .” 21 U.S.C. § 373(a). As with the  
17 CSA’s exemption, the text of § 373(a) is unequivocal. It states that a common carrier  
18 cannot be criminally responsible for violations of the FDCA if the charges arise from the  
19 carrier’s receipt, carriage or delivery of pharmaceuticals in the usual course of its  
20 business. Once again, however, that is precisely what the indictment alleges against  
21 FedEx.  
22

23  
24 The exemptions set out in 21 U.S.C. §§ 373(a) and 822(c) require dismissal for  
25 two related doctrinal reasons. First, the indictment is defective because the common  
26 carrier exemptions apply on the face of the indictment — even if the facts alleged  
27 therein are taken as true. Second, a conviction on the instant charges would violate the  
28

1 Fifth Amendment’s prohibition on imposing criminal liability in the absence of fair  
2 warning that the charged conduct was legally proscribed. The common carrier  
3 exemptions appear affirmatively to establish that common carriers may transport  
4 pharmaceuticals without being subject to criminal sanction, and no jurisprudence has  
5 suggested otherwise. In light of Title 21’s statutory scheme, no common carrier could  
6 reasonably have been expected to understand that it faced criminal liability for  
7 transporting prescription medications.  
8

## 9 **II. FACTS**

### 10 **A. FedEx, a Common Carrier**

11 A common carrier is

12 one who holds himself out to the public as engaged in the business of  
13 transportation of persons or property from place to place for compensation,  
14 offering his services to the public generally. The distinctive characteristic of  
15 a common carrier is that he undertakes to carry for all people indifferently,  
16 and hence is regarded in some respects as a public servant.

17 *Kieronski v. Wyandotte Terminal R.R. Co.*, 806 F.2d 107, 108 (6th Cir. 1986) (quoting  
18 *Kelly v. General Electric Co.*, 110 F. Supp. 4, 6 (E.D. Pa. 1953)); *see also New York*  
19 *Susquehanna & Western Railway Corp. v. Jackson*, 500 F.3d 238, 250 (3rd Cir. 2007);  
20 *National Ass’n of Regulatory Utility Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir.  
21 1976); *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430, 434 (9th Cir.  
22 1962). The indictment establishes that FedEx is not a manufacturer, wholesaler,  
23 prescriber or dispenser of prescription or controlled pharmaceuticals. Rather, FedEx is  
24 one of the world’s largest common carriers. See Indictment (Docket #28) ¶ 1 (asserting  
25 that during the time period covered by the indictment the FedEx defendants “were  
26 package delivery companies and providers of specialized transportation and logistics  
27  
28

1 services that delivered packages to persons located in the Northern District of California  
2 and throughout the United States”).

3           Indeed, because FedEx Express holds itself out to the public as engaged in the  
4 business of transporting packages by air from place to place, it is required to maintain  
5 — and does maintain — an Air Carrier Certificate issued by the Federal Aviation  
6 Administration that permits Express to “operate as an air carrier and conduct common  
7 carriage operations in accordance” with the Federal Aviation Act of 1958. See 49  
8 U.S.C. § 40102 (defining “air transportation” to mean the “transportation of passengers  
9 or property by aircraft as a common carrier for compensation” in interstate, intrastate or  
10 foreign commerce); 49 U.S.C. § 41101 (requiring air carriers who provide “air  
11 transportation” to obtain certificates issued by the FAA); FAA Advisory Circular 120-12A  
12 (Apr. 24, 1986) (“A carrier becomes a common carrier when it ‘holds itself out’ to the  
13 public, or to a segment of the public, as willing to furnish transportation within the limits  
14 of its facilities to any person who wants it.”); *Woolsey v. NTSB*, 993 F.2d 516, 523 (5th  
15 Cir. 1993) (affirming that the Advisory Circular’s definition comports with the common  
16 law as it applies to air carriers).

17           Each day, FedEx Express transports over four million packages. These  
18 packages contain innumerable products and commodities, many of which are shipped  
19 by the millions of customers that have FedEx accounts. Customers may, and  
20 commonly do, set up FedEx accounts simply by filling out an online form. FedEx  
21 invoices its account holders and receives payment for its common carriage services.  
22 FedEx also offers a Collect on Delivery (“COD”) service, pursuant to which FedEx will,  
23 for a fee, collect payment for a shipment and then return it to the shipper through the  
24  
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1 FedEx Express network. Over the past decade or so, FedEx’s many customers  
2 included some online pharmacies, and some of those pharmacies used FedEx’s COD  
3 service.  
4

5 **B. The Charges in the Indictment**

6 The charges in the indictment relate to FedEx’s shipment of packages for two  
7 alleged online pharmacy networks — the so-called “Chhabra-Smoley Organization,” and  
8 a network of businesses and people associated with a pharmacy called Creative  
9 Pharmacy or Superior Drugs. The indictment’s charges are entirely predicated upon  
10 FedEx’s provision of common carrier services to some members of these networks and  
11 the acceptance of payment for those services.  
12

13 1. Controlled Substances Act Charges

14 Counts One and Thirteen allege that FedEx conspired with the Chhabra-Smoley  
15 and Superior Drugs networks “to distribute, and to possess with intent to distribute  
16 outside the usual course of professional practice and not for a legitimate medical  
17 purpose one or more controlled substances, knowing and intending that the distribution  
18 was outside the usual course of professional practice and not for a legitimate medical  
19 purpose . . . .,” all in violation of 21 U.S.C. §§ 841 and 846. Indictment (Docket #28) ¶¶  
20 23 & 71. The indictment asserts that certain FedEx employees knew that people and  
21 businesses associated with the online pharmacy networks previously had been the  
22 subject of law enforcement action, that “the purpose of the [networks] was to provide  
23 controlled substances to consumers without the need for a face-to-face meeting with . . .  
24 a physician,” and that such practices violated the law. *Id.* ¶¶ 37-39, 83 & 85. The  
25 indictment further alleges that FedEx “departed from its usual business practices” in  
26  
27  
28

1 shipping the online pharmacy networks' packages because (1) "[a]ccording to FEDEX's  
2 Service Guide and Tariff . . . FEDEX did not ship contraband, including illegal drugs . . .  
3 ."; (2) the company applied an "Online Pharmacy Credit Policy," which imposed  
4 restricted credit terms on online pharmacy customers; and (3) the company designated  
5 online pharmacy accounts to the Sales department's "catchall" account, which caused  
6 the revenue to be disregarded in calculating salespeople's compensation. *Id.* ¶¶ 39 &  
7 84; see also *id.* ¶¶ 9-16 (discussing the credit and sales policies).

9  
10 Counts Two through Ten and Fourteen and Fifteen allege that FedEx shipped  
11 eleven specific packages containing controlled substances in violation of 21 U.S.C.  
12 § 841. The government claims that the company allegedly possessed with intent to  
13 distribute and distributed the controlled substances "outside the usual course of  
14 professional practice and not for a legitimate medical purpose . . . , knowing and  
15 intending that the distribution and possession with intent to distribute was outside the  
16 usual course of professional practice and not for a legitimate purpose . . . ." *Id.* ¶¶ 41-  
17 42, 89-89.

## 19 2. Misbranding Charges

20 Counts Eleven and Sixteen charge that FedEx conspired with the Chhabra-  
21 Smoley and Superior Drugs networks to ship prescription drugs in violation of the  
22 FDCA. The counts allege that FedEx conspired to distribute prescription drugs "without  
23 valid prescriptions from licensed practitioners, which caused the drugs to be  
24 misbranded while held for sale after their shipment in interstate commerce, and did so  
25 with the intent to defraud and mislead as to a material matter," all in violation of 21  
26 U.S.C. §§ 331, 333 and 353. Indictment (Docket #28) ¶¶ 43-61, 90-106. Counts  
27  
28

1 Eleven and Sixteen allege a number of charged “Overt Acts,” which include assertions  
2 that FedEx transported specified packages for entities affiliated with the Chhabra-  
3 Smoley and Superior Drugs networks and that those packages contained invalidly  
4 prescribed medications, including in some cases controlled substances. *Id.* ¶¶ 48-61,  
5 95-106.  
6

7 3. Money Laundering Charges

8 Counts Twelve, Seventeen and Eighteen allege that FedEx joined conspiracies  
9 to launder money in violation of 18 U.S.C. § 1956.  
10

11 Counts Twelve and Seventeen are similar: both arise from FedEx’s receipt of  
12 payments for its transportation services. *Id.* ¶¶ 65-69, 109-113. These counts assert  
13 that FedEx conspired with the Chhabra-Smoley and Superior Drugs networks to  
14 “conduct a financial transaction involving the proceeds of a specified activity, knowing  
15 that the property involved in the financial transaction represented proceeds of some  
16 form of unlawful activity, and intending to promote the carrying on of the specified  
17 unlawful activity.” Indictment (Docket #28) ¶¶ 63 & 108. The purported “specified  
18 activity” alleged in Counts Twelve and Seventeen is “the possession with intent to  
19 distribute and distribution of controlled substances outside the usual course of  
20 professional practice and not for a legitimate medical purpose, knowing and intending  
21 that the possession with intent to distribute and distribution was outside the usual  
22 course of professional practice and not for a legitimate medical purpose” in violation of  
23 21 U.S.C. § 841. *Id.*  
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25

26 Count Eighteen relates to FedEx’s COD service. It alleges that FedEx conspired  
27 with entities affiliated with the Superior Drugs network to “conduct a financial transaction  
28

1 involving the proceeds of a specified activity, knowing that the property involved in the  
2 financial transaction represented proceeds of some form of unlawful activity, and  
3 intending to promote the carrying on of the specified unlawful activity.” *Id.* ¶ 115. It  
4 asserts that FedEx “delivered and attempted to deliver packages from Superior  
5 containing controlled substances for which FedEx had agreed to collect payment, in the  
6 form of checks and money orders, from the recipients using FEDEX’s cash-on-delivery  
7 (COD) service.” *Id.* ¶ 116. Count Eighteen further alleges that FedEx

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10 knew that the money orders and checks were intended as payment for  
11 controlled substances that FEDEX had delivered and attempted to deliver  
12 from Superior to consumers. FEDEX further knew that those orders had  
13 been placed by customers after filling out an online questionnaire with no  
14 contact between the prescribing physician and patient and were thus  
15 distributed outside the usual course of professional practice and not for a  
16 legitimate medical purpose and were not based on valid prescriptions.

17 *Id.* ¶ 119.

### 18 **III. THIS MOTION CAN BE RESOLVED WITHOUT A TRIAL ON THE MERITS**

19 Federal Rule of Criminal Procedure 12 (as amended effective December 1,  
20 2014) generally provides that “[a] party may raise by pretrial motion any defense,  
21 objection, or request that the court can determine without a trial on the merits.” Rule  
22 12(b)(1). Rule 12(b)(3) sets out several categories of motion that must be raised before  
23 trial if the motion “can be determined without a trial on the merits,” including motions  
24 asserting “a defect in the indictment.” Rule 12(b)(3) & (b)(3)(B).

25 “A pretrial motion is generally ‘capable of determination’ before trial if it involves  
26 questions of law rather than fact.” *United States v. Shortt Accountancy Corp.*, 785 F.2d  
27 1448, 1452 (9th Cir. 1986); *see also United States v. Nukida*, 8 F.3d 665, 669 (9th Cir.  
28

1 1993).<sup>1</sup> Likewise, a defense is “capable of determination’ if trial of the facts surrounding  
2 the commission of the alleged offense would be of no assistance in determining the  
3 validity of the offense.” *United States v. Covington*, 395 U.S. 57, 60 (1969). “[A] district  
4 court may make preliminary findings of fact necessary to decide the questions of law  
5 presented by pre-trial motions so long as the court’s findings on the motion do not  
6 invade the province of the ultimate finder of fact.” *Shortt*, 785 F.2d 1452 (quoting *United*  
7 *States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976)). “Under this standard, the district  
8 court must decide the issue raised in the pretrial motion before trial if it is ‘entirely  
9 segregable’ from the evidence to be presented at trial.” *Id.* (quoting *United States v.*  
10 *Barletta*, 644 F.2d 50, 57-58 (1st Cir. 1981)). But “[i]f the pretrial claim is ‘substantially  
11 founded upon and intertwined with’ evidence concerning the alleged offense, the motion  
12 falls within the province of the ultimate finder of fact and must be deferred.” *Id.* (quoting  
13 *United States v. Williams*, 644 F.2d 950, 952-53 (2nd Cir. 1981)).

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17 As suggested by the above authorities, an exemption to liability may be litigated  
18 before trial if it raises primarily a question of law or may be resolved without delving  
19 substantially into the circumstances of the alleged offense. *Covington*, 395 U.S. at 60;  
20 see also *United States v. Smith*, 866 F.2d 1092, 1098 (9th Cir. 1989). Here, the  
21 indictment frames a pure question of law. As discussed in more detail in Part IV, *infra*,

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26 <sup>1</sup> The former version of Rule 12(b) was phrased slightly differently than it is today: it  
27 permitted any defense “which is capable of determination without the trial of the general  
28 issue” to be raised by pretrial motion. See, e.g., *Shortt*, 785 F.2d at 1452. The updated  
phrasing was not intended as a substantive change to the rule, see Rule 12, Advisory  
Committee Notes on 1987, 2002 & 2014 Amendments, and thus the cited cases remain  
authoritative.

1 even assuming that all of the factual averments in the indictment are true,<sup>2</sup> the common  
2 carrier exemptions preclude criminal liability.<sup>3</sup>

3 Likewise, the question whether a statute or statutory scheme provided fair  
4 warning that a defendant's conduct was subject to criminal sanction is legal in nature,  
5 and subject to pretrial resolution under Rule 12. See, e.g., *United States v. Wittich*, No.  
6 14-35, 2014 U.S. Dist. LEXIS 145784 at \*32-33 (E.D. La. Oct. 10, 2014) ("Whether a  
7 criminal statute is unconstitutionally vague is a question of law. Therefore, it is proper  
8 for the Court to consider" a pretrial motion to dismiss (internal quotation marks and  
9 citation omitted)); *United States v. Hernandez*, No. 07-60027-CR-ZLOCH/Snow, 2007  
10 U.S. Dist. LEXIS 74373 (S.D. Fla. Oct. 4, 2007) (resolving before trial online pharmacy  
11 defendants' claims concerning the constitutionality of applying the CSA to their alleged  
12 conduct); *United States v. Trikha*, No. 06-CR-30098-DRH, 2007 U.S. Dist. LEXIS 43554  
13 at \*8-15 (S.D. Ill. Jun. 15, 2007) (resolving before trial the defendants' vagueness  
14 arguments); *United States v. Roberts*, No. 01 Cr. 410 (RWS), 2002 U.S. Dist. LEXIS  
15 16778 (S.D.N.Y. Sept. 9, 2002) (granting a pretrial motion that argued the CSA was  
16 unconstitutionally vague as applied), *overruled on other grounds by* 363 F.3d 118 (2nd  
17 Cir. 2004) (finding the statute not vague as applied, but without questioning the district  
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23 <sup>2</sup> They are not.

24 <sup>3</sup> As the indictment itself demonstrates that FedEx is a common carrier, if the case were  
25 to proceed to trial, the government would have the burden of proving beyond a  
26 reasonable doubt that the common carrier exemptions were inapplicable. *United States*  
27 *v. Black*, 512 F.2d 864, 867 (9th Cir. 1975); see also *United States v. Murray*, 618 F.2d  
28 892, 901 (2d Cir. 1980); *United States v. Rosenberg*, 515 F.2d 190, 198-99 (9th Cir.  
1975). But the case need not proceed to trial because the indictment establishes as a  
matter of law that under Title 21's common carrier exemptions, FedEx cannot be held  
liable for the charged crimes.

1 court's pretrial resolution of the issue).<sup>4</sup> Accordingly, FedEx's motion to dismiss the  
2 indictment for lack of fair warning is appropriately resolved before trial.

3 **IV. 21 U.S.C. §§ 373(a) AND 822(c) EXEMPT FEDEX FROM LIABILITY FOR ANY**  
4 **OF THE CHARGED CRIMES**

5 The CSA expressly provides that common carriers may "lawfully" possess  
6 controlled substances, 21 U.S.C. § 822(c)(2), and the FDCA provides that carriers "shall  
7 not be subject to the other provisions of th[e] Act by reasons of their receipt, carriage,  
8 holding or delivery" of pharmaceuticals, 21 U.S.C. § 373(a). These exemptions are not  
9 boundless — the law provides protection only for common carriers possessing a  
10 controlled substance "in the usual course of [their] business," see 21 U.S.C. §§ 373(a) &  
11 822(c)(2) — but they fully apply in the context of the allegations in the indictment.

12 FedEx cannot be liable for any of the charges against it, as the indictment itself  
13 establishes that each count seeks to punish this common carrier for its possession of  
14 prescription pharmaceuticals in the usual course of its business.  
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19 <sup>4</sup> *United States v. Lewis*, 368 F.3d 1102 (9th Cir. 2004) is not to the contrary. In *Lewis*,  
20 the court wrote that a defendant's motion to dismiss the indictment against him on fair  
21 warning grounds would properly be decided at trial. *Id.* at 1106. But the *Lewis* court's  
22 discussion is not authoritative here for several reasons. First, the discussion was  
23 *dictum*: the true issue before the court was whether the defendant could take an  
24 interlocutory appeal from the denial of his motion. *Id.* at 1104-05. Second, the court's  
25 discussion relied crucially on a factual determination that Lewis's motion "goes directly  
26 to the underlying merits; the evidence he seeks to introduce regarding his fair warning  
27 defense goes the heart of his criminal liability." *Id.* at 1106. This may have been true  
28 because Lewis was charged with violating 18 U.S.C. § 242, a crime which, under  
Supreme Court jurisprudence, specifically incorporates constitutional fair warning  
principles into its elements. See *United States v. Lanier*, 520 U.S. 259, 267-71 (1997);  
*Screws v. United States*, 325 U.S. 91, 96, 103 (1945) (plurality opinion). In any event,  
the *Lewis* court did not articulate the factual bases for its determination that the  
defendant's fair warning motion was inextricably intertwined with the trial facts, and thus  
the case cannot stand for any broader principle about the circumstances in which Rule  
12 might or might not permit pretrial resolution of a fair warning argument.

1           **A. History and Context of the Common Carrier Exemptions**

2           The history of §§ 373(a) and 822(c) and the presence of similar provisions in  
3 other federal statutes demonstrate Congress’s intent to establish a regulatory scheme in  
4 which common carriers serve in their traditional role as a conduit for economic activity,  
5 and play no part in ensuring compliance with the laws and regulations governing the  
6 manufacture, distribution, prescription and dispensing of controlled substances.  
7

8           In enacting the CSA, Congress created

9           a comprehensive regime to combat the international and interstate traffic in  
10 illicit drugs. The main objectives of the CSA were to conquer drug abuse  
11 and to control the legitimate and illegitimate traffic in controlled substances.  
12 Congress was particularly concerned with the need to prevent the diversion  
of drugs from legitimate to illicit channels.

13 *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005) (footnotes omitted). “To effectuate these  
14 goals, Congress devised a closed regulatory system” governing manufacturers,  
15 distributors and dispensers of controlled substances, and “[t]he CSA and its  
16 implementing regulations set forth strict requirements regarding registration, labeling  
17 and packaging, production quotas, drug security, and recordkeeping.” *Id.* at 13; see  
18 also H.R. Rep. No. 91-1444 at 598, 1970 U.S.C.C.A.N. 4566 (1970). Yet, as discussed  
19 throughout this motion, Congress not only declined to include common carriers as part  
20 of the closed system, but in fact went a step further and determined that common  
21 carriers should affirmatively be exempted from the law’s requirements. See H.R. Rep.  
22 No. 91-1444 at 630-31, 1970 U.S.C.C.A.N. 4566 (1970); 21 U.S.C. § 822(c)(2).  
23

24           The FDCA establishes a parallel regulatory scheme for prescription drugs. See  
25 *Western States Medical Center*, 535 U.S. at 361; 21 U.S.C. §§ 301 *et seq.*; 21 C.F.R.  
26 §§ 1.1 *et seq.* 21 U.S.C. § 331(a) prohibits introducing a “misbranded” drug into  
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1 interstate commerce; a drug is “misbranded” unless dispensed upon a “prescription of a  
2 practitioner licensed by law to administer such drug.” 21 U.S.C. § 353(b)(1)(C). The  
3 FDCA created the FDA, which is authorized to enforce the law. 21 U.S.C. § 393. In  
4 enacting the FDCA, Congress again determined that common carriers should be  
5 exempt from the law’s provisions, including those related to misbranding. 21 U.S.C.  
6 § 373(a); 52 Stat. 1040, 1057, 75 P.L. 717, § 703 (1938). Indeed, the FDA itself  
7 explicitly recognizes that “[t]he proviso in section 703 of the Federal Food, Drug, and  
8 Cosmetic Act, grants *immunity from prosecution* to carriers by reason of their receipt,  
9 carriage, holding, or delivery of products subject to the Act in their usual course of  
10 business as carriers.” FDA Compliance Guide § 100.500 (1989) (emphasis added). It  
11 is difficult to imagine a clearer pronouncement that FedEx cannot be liable under the  
12 FDCA for the acts charged in the indictment.  
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16 1. The Common Carrier Exemptions in Title 21 are a Century Old

17 The common carrier exemptions embedded in Title 21 are not new. These laws  
18 date at least as far back as 1914, when Congress enacted the Harrison Narcotics Tax  
19 Act, 63 Pub. L. No. 223, 38 Stat. 785, to regulate the production and distribution of  
20 opiates. The Harrison Act made it unlawful for persons not registered under the  
21 provisions of the Act to possess opiates, but excepted “common carriers engaged in  
22 transporting such drugs.” 63 Pub. L. No. 233, § 8, 38 Stat. 785, 789. The FDCA  
23 exemption appeared in in essentially its present form when that statute was first  
24 enacted in 1938. 52 Stat. 1040, 1057, 75 P.L. 717, § 703. A common carrier  
25 exemption likewise appeared in the regulatory scheme enacted as part of the Drug  
26 Abuse Control Amendments of 1965. See 89 P.L. 74, § 511(b), 79 Stat. 226, 229  
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1 (prohibiting the sale, delivery or disposition of certain medications by unregistered  
2 entities, but excepting “a common or contract carrier . . . whose possession of [the  
3 medication] is in the usual course of his business”). Eventually Congress enacted the  
4 Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II of which is the  
5 CSA, to synthesize the various federal narcotics laws. H.R. Rep. No. 91-1444 at 598,  
6 1970 U.S. Code, Cong. & Admin. News 4566 (1970) (“Since 1914 the Congress has  
7 enacted more than 50 pieces of legislation relating to control and diversion, from  
8 legitimate channels, of those drugs referred to as narcotics and dangerous drugs . . . .  
9 This bill collects and conforms these diverse laws in one piece of legislation . . . .”). The  
10  
11 CSA’s common carrier exemption was there at the law’s inception. *See Raich*, 545 U.S.  
12 at 12 n.1; 91 P.L. 513, § 302, 84 Stat. 1236, 1253. This statutory evolution reveals  
13 Congress’s consistent judgment that while certain pharmaceuticals must be carefully  
14 regulated, the responsibility for ensuring compliance with the regulations should be  
15 allocated to the government and to manufacturers, wholesalers and medical  
16 professionals — not to common carriers.  
17  
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19 2. Title 21’s Common Carrier Exemptions are Part of a Broader  
20 Legislative Scheme to Protect Common Carriage

21 Nor are the common carrier exemptions in Title 21 unique. Rather, §§ 373(a)  
22 and 822(c) are part of a broader scheme enshrined in the United States Code that  
23 implements the pragmatic rule that common carriers should be free to carry out their  
24 vital societal function without fear that they will be criminally liable for the contents of  
25 packages tendered for carriage, or for the failures of persons participating in the  
26 regulated industries to comply with the specific requirements imposed on those  
27 industries. Congress has often enacted common carrier exemptions when, as with the  
28

1 CSA and FDCA, it has imposed regulatory requirements on the distribution of particular  
2 types of goods and allocated responsibility for ensuring compliance to a federal agency  
3 and to the members of the regulated industry. See, e.g., 15 U.S.C. § 68a(a) (exemption  
4 embodied in Federal Trade Commission Act regulatory scheme, enforced by the FTC,  
5 governing the distribution of wool products); 15 U.S.C. § 69(a)(f) (exemption embodied  
6 in Federal Trade Commission Act regulatory scheme, enforced by the FTC, governing  
7 the distribution of fur products); 15 U.S.C. § 70(a)(d) (exemption embodied in Federal  
8 Trade Commission Act regulatory scheme, enforced by the FTC, governing the  
9 distribution of textile fiber products); 15 U.S.C. § 1200 (exemption embodied in Federal  
10 Trade Commission Act regulatory scheme, enforced by the FTC, governing the  
11 distribution of flammable fabrics); 15 U.S.C. § 1271 (exemption contained in statutes  
12 regulating the distribution of hazardous materials under the oversight of the Consumer  
13 Product Safety Commission); 18 U.S.C. § 1953(a) (exemption embodied in rules  
14 governing the interstate transportation of wagering paraphernalia); 29 U.S.C.  
15 § 215(a)(1) (exemption embodied in Fair Labor Standards Act rules, enforced by the  
16 Department of Labor, governing the distribution of goods produced in violation of labor  
17 standards). In fact, similar, though more particular, exemptions for common carriers  
18 appear elsewhere in the CSA itself. See 21 U.S.C. §§ 828(b)(2) & 957(b)(1)(B).

19 The indictment in this case flouts Congress's consistent intent to exclude  
20 common carriers from participation in the regulatory schemes governing the distribution  
21 of goods, particularly pharmaceuticals.<sup>5</sup> In order to effectuate this Congressional intent,  
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28 <sup>5</sup> Of course, air carriers that engage in common carriage are not unregulated — they  
are subject to extensive regulation by the federal government under the Federal  
Aviation Act of 1958. See 49 U.S.C. §§ 40101 *et seq.*; 14 C.F.R. §§ 1.1 *et seq.*

1 the indictment must be dismissed.

2 **B. FedEx Acted in the Usual Course of a Common Carrier’s Business**

3 Congress clearly did not intend to give all people who transport a package  
4 blanket immunity from the drug laws, which is why it established a condition on the  
5 exemptions enshrined in §§ 373(a) and 822(c)(2). The exemptions, as with similar  
6 provisions discussed above, apply only in circumstances in which a common carrier  
7 possesses a prescription drug in the “usual course of [its] business.” This means that  
8 the protection applies in this case only if FedEx was acting *as a common carrier* —  
9 transporting goods for the general public — when it possessed the pharmaceuticals in  
10 question. Under the allegations in the indictment, FedEx was plainly acting in that role  
11 throughout the period of the charges, including when it transported online pharmacies’  
12 shipments. The exemptions therefore apply.

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16 **1. The “Usual Course of Business” Means Carrying Out the Normal Duties of a Common Carrier**

17 The phrase “usual course of business” is not defined in either the CSA or the  
18 FDCA. Nonetheless, agency interpretation, jurisprudence and common sense compel a  
19 straightforward reading: an entity acting in the “usual course of [its] business” is carrying  
20 out the normal duties of a business in the relevant industry. Accordingly, a common  
21 carrier acting in the usual course of its business is carrying out the normal duties of a  
22 common carrier.  
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25 The FDA has adopted this sensible reading. In Compliance Policy Guide  
26 § 100.500 (1989), the FDA wrote:

27 The proviso in section 703 of the Federal Food, Drug, and Cosmetic Act  
28 [codified at 21 U.S.C. § 373], grants immunity from prosecution to carriers  
by reason of their receipt, carriage, holding, or delivery of products subject

1 to the Act in their usual course of business as carriers. The immunity does  
2 not extend to operations or functions which are outside *the normal duties of*  
3 *a carrier*.

4 (Emphasis added). Thus, the agency understands the term “usual course of business”  
5 to mean that the carrier in question is conducting the normal duties of a carrier — the  
6 receipt, carriage, holding or delivery of products. The FDA’s interpretation of its own  
7 enabling statute is entitled to considerable deference. *E.M. v. Pajaro Valley Unified*  
8 *Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1173-74 (9th Cir. 2014); *see also*,  
9 *e.g., Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 880 (2011);  
10 *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); *Capistrano Unified Sch.*  
11 *Dist. v. Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995). Especially here, where no  
12 compelling alternative reading presents itself, the Court should defer to the FDA’s  
13 construction of the FDCA.  
14

15 The DEA has issued no similar interpretation of the CSA’s common carrier  
16 exemption. Nonetheless, § 822(c)(2)’s “usual course of business” term must logically  
17 have the same meaning as the similar term in § 373(a). Under established principles of  
18 statutory construction, a court should look to “the language of related or similar statutes  
19 to aid in interpretation” of an undefined term. *United States v. LKAV*, 712 F.3d 436, 440  
20 (9th Cir. 2013). The FDCA’s and CSA’s common carrier exemptions are both similar  
21 and related. The provisions have the same apparent purpose, employ much the same  
22 language, and have a closely intertwined statutory history: as discussed, the CSA was  
23 expressly intended to conform and incorporate previously-enacted narcotics laws, which  
24 included the FDCA. See H.R. Rep. No. 91-1444 at 598, 1970 U.S. Code, Cong. &  
25 Admin. News 4566 (1970). The CSA’s exemption should therefore be read in the same  
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1 manner as the FDCA's: a common carrier is operating in the ordinary course of  
2 business when it is carrying out the normal duties of a carrier.

3 Other predecessor statutes support this conclusion. The 1914 Harrison Act  
4 referred expressly to "common carriers engaged in transporting" regulated medications,  
5 63 Pub. L. No. 223, § 8, 38 Stat. 785, 789, and thus it plainly intended to protect carriers  
6 engaged in the business of transporting packages. The Drug Abuse Control  
7 Amendments of 1965 exempted common carriers "whose possession [of certain  
8 pharmaceuticals] is in the usual course of his business or employment *as such*," 89 P.L.  
9 74, § 511(b)(2), 79 Stat. 226, 229 (emphasis added), again demonstrating that  
10 Congress was focused on the carrier's conduct of the business of transportation. As the  
11 CSA was designed to incorporate and conform to these prior laws, its common carrier  
12 provision should be read as continuing those laws' exemption for businesses engaged  
13 in the normal duties of a common carrier — i.e., transporting the public's packages for  
14 compensation.  
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18 Cases support the same construction. In *First National Bank of Manitowoc v.*  
19 *Cincinnati Ins. Co.*, 485 F.3d 791 (7th Cir. 2007), the court considered an insurance  
20 policy that covered only losses incurred "in the usual course of business." One question  
21 for the court was whether the plaintiff bank was acting in the usual course of its  
22 business at the time it incurred the losses in question. *Id.* at 975, 977-79. The  
23 defendant insurer argued that the "usual course of business" phrase meant "consistent  
24 with sound business practices," but the court rejected a construction that imposed such  
25 normative requirements:  
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28 On its face, the phrase does not suggest a duty of care but, rather, a certain  
category of acts — i.e., those usually conducted in the banking business.

1 Because the language of the [policy] is not standard in this respect, bond-  
2 specific case law provides little guidance. However, Wisconsin courts that  
3 have addressed this phrase in other contexts have understood it to mean  
4 actions normally taken by a bank. [¶] This is the interpretation the district  
5 court adopted in its well-reasoned opinion, and we agree. Because the  
6 Bank acted “upon the kinds of documents that it would normally act upon in  
7 its business, such as leases, checks, securities, etc., rather than documents  
8 outside that usual course,” the Bank acted in the usual course of business.

9 *Id.* at 978-79 (citations and footnote omitted); see also *Miller v. Carrington Mortg.*  
10 *Servs.*, No. C-12-2282 EMC, 2013 U.S. Dist. LEXIS 134389 at \*7-8 (N.D. Cal. Sept. 19,  
11 2013) (finding that under bankruptcy law the debtor’s sale of a loan was in the “ordinary  
12 course of business” because “it is common for banks to sell loans”); *Hanni v. American*  
13 *Airlines, Inc.*, No. C 08-00732 CW, 2010 U.S. Dist. LEXIS 3410 at \*40-41 (N.D. Cal.  
14 Jan. 15, 2010) (granting summary judgment on a conversion claim because “a common  
15 carrier incurs no liability for conversion in receiving and forwarding goods tendered in  
16 the usual course of business,” and the defendant airline “did nothing more than move  
17 Plaintiffs’ personal property from their point of origin to their destination” (quotation  
18 marks omitted)); *cf. also United States v. California*, 297 U.S. 175, 181 (1936)  
19 (“Whether a transportation agency is a common carrier depends not upon its corporate  
20 character or declared purposes, but upon what it does.”), *overruled on other grounds as*  
21 *stated in Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541 & n.6 (1985).

22 For all of these reasons, this Court should read the common carrier exemptions  
23 in the CSA and FDCA to apply when a common carrier transports pharmaceuticals in  
24 the course of fulfilling the normal duties of a common carrier.  
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1                   2.     FedEx Was Fulfilling the Normal Duties of a Common Carrier

2                   The normal duties of a common carrier are easily stated. As previously  
3 discussed, a common carrier is

4                   one who holds himself out to the public as engaged in the business of  
5 transportation of persons or property from place to place for compensation,  
6 offering his services to the public generally. The distinctive characteristic of  
7 a common carrier is that he undertakes to carry for all people indifferently,  
8 and hence is regarded in some respects as a public servant.

9                   *Kieronski*, 806 F.2d at 108 (quoting *Kelly*, 110 F. Supp. at 6); see also *Woolsey*, 993  
10 F.2d at 523. Accordingly, a common carrier acting in the usual course of its business —  
11 i.e., carrying out the normal duties of a common carrier — is a company that (a) is  
12 engaged in the business of transportation of property and (b) offers its services to the  
13 public generally.

14                  This means that the common carrier exemptions enshrined in Title 21 would not  
15 apply to an airline whose sole activity was flying controlled substances from Jamaica to  
16 Miami, since the airline would not in such an example be “offering [its] services to the  
17 public generally,” and consequently would not be acting as a common carrier. Likewise,  
18 if FedEx was to open a pharmaceutical-manufacturing plant, in that capacity it would not  
19 be acting as a common carrier because it would not be “engaged in the business of  
20 transportation of persons or property from place to place for compensation,” and it  
21 would be required to register with the DEA and comply with FDA rules. But here, as the  
22 government cannot seriously dispute, FedEx was at all times engaged in the business  
23 of transporting the public’s packages from place to place in exchange for compensation.  
24 The indictment specifically alleges that this was so. See Indictment (Docket #28) ¶ 1  
25 (asserting that during the time period covered by the indictment the FedEx defendants  
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1 “were package delivery companies and providers of specialized transportation and  
2 logistics services that delivered packages to persons located in the Northern District of  
3 California and throughout the United States”). Furthermore, FedEx Express is certified  
4 as a common carrier by the FAA, and was so certified for the entire period at issue.  
5

6 The gravamen of the government’s allegations against FedEx is that the  
7 company “shipped controlled substances and prescription drugs” for the Superior Drugs  
8 and Chhabra-Smoley online pharmacy networks. Indictment (Docket #28) ¶ 5; see also  
9 United States’ Opposition to Defendants’ Motion for a Bill of Particulars (Docket #63) at  
10 1 (“[T]he superseding indictment . . . charges [FedEx] with drug trafficking,  
11 pharmaceutical misbranding, and money laundering offenses related to [its] shipment of  
12 drugs for illegal Internet pharmacies”). As the Court observed at the most recent  
13 hearing in this matter: “I understand the government’s case. The Government says you  
14 [FedEx] knew that these drug shipments, however you want to characterize it, were  
15 issued without proper medical authorization and notwithstanding that, you delivered  
16 them. That’s their case.” 2/20/2015 Tx (Docket #85) at 4:19-23. But transporting such  
17 packages was part of the usual course of FedEx’s business as a common carrier: it was  
18 providing transportation services to the public.  
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22 The government seeks to avoid this self-evident conclusion by alleging that  
23 FedEx, in servicing online pharmacies generally and the Chhabra-Smoley and Superior  
24 Drugs networks’ accounts specifically, “departed from its usual business practices.”  
25 Indictment (Docket #28) ¶¶ 39 & 84.<sup>6</sup> This phrasing is curious, and may reflect a  
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27  
28 <sup>6</sup> The mere fact that the indictment alleges that FedEx was not acting in the usual  
course of its business does not save it from dismissal. That statement is a legal

1 misunderstanding by the government that explains why this prosecution was  
2 commenced in the first place despite Title 21's common carrier exemptions. Whether  
3 FedEx adhered to its own "usual business practices" is not the inquiry here, nor is it  
4 relevant to any other issue in the case. The question for purposes of analyzing the  
5 common carrier exemptions is whether FedEx was acting in the ordinary course of  
6 business *of a common carrier*.

8 The government's apparent misunderstanding finds expression in three  
9 assertions that form the basis of its effort to avoid the common carrier exemptions. The  
10 indictment alleges that:

- 12 • the Terms and Conditions in FedEx's *Service Guide* prohibited customers from  
13 shipping contraband using the company's system, and thus when FedEx  
14 permitted online pharmacies to ship pharmaceuticals that were not dispensed  
15 pursuant to a valid doctor-patient relationship, it was no longer acting in the usual  
16 course of its business;
- 18 • FedEx's Credit department applied restrictive credit policies to all accounts  
19 associated with the online pharmacy industry, including the Chhabra-Smoley and  
20 Superior Drugs networks' accounts; and
- 22 • the company's Sales group assigned to a special "catchall" category all accounts  
23 associated with the online pharmacy industry, including those accounts related to  
24 the Chhabra-Smoley and Superior Drugs networks, which resulted in those

26  
27 conclusion, and cannot overcome the specific factual allegations that establish on the  
28 face of the indictment that FedEx is exempt from liability under the law. *See, e.g.,*  
*United States v. Nosal*, No. C 08-0237 MHP, 2010 U.S. Dist. LEXIS 24359 at \*6 (N.D.  
Cal. Jan. 6, 2010), *aff'd* 676 F.3d 854 (9th Cir. 2012) (*en banc*).

1 accounts not affecting the yearly sales goals of account executives or their  
2 managers.

3 Indictment (Docket #28) ¶¶ 39 & 84. Leaving aside certain inaccuracies in these  
4 allegations, they avail the government nothing because they say nothing at all about  
5 whether FedEx, in servicing the online pharmacy accounts, was acting as a common  
6 carrier. The application of the common carrier exemptions does not depend on a fine  
7 parsing of the carrier's internal policies, but instead, as demonstrated above, on a  
8 determination whether the carrier (a) was engaged in the business of transportation of  
9 property and (b) offered its services to the public generally. As FedEx plainly satisfied  
10 those basic requirements, the exemptions apply in this case and the indictment must be  
11 dismissed.  
12  
13

14 The alleged fact that some online pharmacies may have violated the Terms and  
15 Conditions of FedEx's *Service Guide* is hardly unique or enlightening. Surely numerous  
16 customers violate FedEx's shipping rules every day of every year, but it does not follow  
17 that when FedEx ships such packages it is acting outside of the normal duties of a  
18 common carrier. The fact that FedEx has self-imposed rules and restrictions on the use  
19 of its network does not change the fact that the company is still operating as a common  
20 carrier if prohibited items are transported through that network — either knowingly or  
21 unknowingly.  
22

23  
24 The government's implicit contention appears to be that FedEx may define for  
25 itself the scope of the "usual course of business" of a common carrier. That cannot be  
26 correct. It would be an absurd and anomalous result if the application of 21 U.S.C.  
27 §§ 373(a) and 822(c)(2) turned on whether the common carrier in question had granted  
28

1 itself legal protection by drafting its terms of service to explicitly permit customers to  
2 ship improperly-prescribed pharmaceuticals. *Cf. United States v. Nosal*, 676 F.3d 854,  
3 860-63 (9th Cir. 2012) (*en banc*) (refusing to construe a statute in such a manner that  
4 criminal liability would turn on standards established by private entities). Rather, the  
5 common carrier exemptions are properly understood as reflecting Congress's judgment  
6 that, when a business acts in the vital and "quasi-public" role of a common carrier, see  
7 *National Ass'n of Regulatory Utility Comm'rs*, 533 F.2d at 608, the business becomes  
8 merely a conduit — akin somewhat to public infrastructure like a road — and sits  
9 entirely outside the regulated network of pharmaceutical distribution, at least in any way  
10 related to criminal or regulatory compliance.  
11

12  
13         The indictment's allegations related to credit and payment terms and the  
14 administration of FedEx's employee compensation programs are similarly irrelevant, as  
15 these features do not undermine the conclusion that when FedEx allegedly picked up  
16 and delivered online pharmaceutical packages, the company was carrying out the  
17 duties of a common carrier: transporting the public's packages from place to place. To  
18 the contrary, the Credit and Sales policies were the actions of a large common carrier  
19 attempting to manage that business in an orderly way. Indeed, FedEx applies special  
20 policies to different types of customers in many circumstances: some customers need  
21 refrigerated shipping, others have special billing arrangements, and still others — like  
22 the U.S. government itself — require unique security or secrecy measures. None of the  
23 differences in FedEx's treatment of the online pharmacy industry demonstrates that the  
24 company was acting outside the usual course of its business as a common carrier.  
25  
26

27         Even accepting the truth of the factual allegations in the indictment, FedEx's  
28

1 transportation of packages for the Chhabra-Smoley and Superior Drugs networks was  
2 nonetheless part of the usual course of the company's business as a common carrier.  
3 Consequently, the §§ 373(a) and 822(c)(2) exemptions apply, and the indictment must  
4 be dismissed.  
5

6 **C. The Common Carrier Exemptions Apply Regardless of FedEx's**  
7 **Alleged Knowledge**

8 The government might argue that the purported knowing nature of FedEx's  
9 alleged conduct somehow takes this case outside the protections of the common carrier  
10 exemptions enshrined in Title 21. But for three reasons such an argument would be  
11 wrong and illogical. Although FedEx's supposed knowledge would surely be a central  
12 issue at trial, the charges need not be tried because the common carrier exemptions  
13 apply regardless of FedEx's knowledge.  
14

15 First, and most importantly, the common carrier provisions at issue in this motion  
16 make no mention of any exclusion for carriers who act with knowledge — or any other  
17 limitation on their protections, for that matter, other than the requirement that the  
18 common carrier in question act within the usual course of business. Thus, in order for  
19 the exemptions to be defeated because FedEx supposedly had knowledge of the illegal  
20 nature of some online pharmacy shipments, this Court would have to read into  
21 §§ 373(a) and 822(c) a limitation that nowhere appears in the text of the statutes.  
22 Courts must avoid such judicial surgery in the absence of an unresolvable inconsistency  
23 in the law. *United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002); see also  
24 *Salinas v. United States*, 522 U.S. 52, 56 (1997) (refusing, in light of a criminal statute's  
25 "expansive, unqualified language," to read a limitation into the statute); *United States v.*  
26 *Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) ("Courts are not free to read into the language  
27  
28

1 what is not there, but rather should apply the statute as written.”); *Hercules, Inc. v. EPA*,  
2 938 F.2d 276, 280 (D.C. Cir. 1991) (rejecting a proposed construction of a statute  
3 “because it reads into the statute a drastic limitation that nowhere appears in the words  
4 Congress chose and that, in fact, directly contradicts the unrestricted character of those  
5 words”). No judicial re-writing is necessary here, and the Court should not engage in it.

7 Second, courts must construe a statute so as to effectuate its purposes. See  
8 *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Commissioner v.*  
9 *Brown*, 380 U.S. 563, 571 (1965) for the proposition that a law should not be read in a  
10 manner that would “thwart the obvious purpose of the statute”); *United States v. Petri*,  
11 731 F.3d 833, 839 (9th Cir. 2013) (“When interpreting a statute, words and phrases  
12 must not be read in isolation, but with an eye toward the ‘purpose and context of the  
13 statute.’” (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). It would run  
14 afoul of this precept to read the common carrier exemptions in such a way that they  
15 would not apply if the carrier in question acted knowingly.

18 As the FDA has recognized, the FDCA’s common carrier exemption is intended,  
19 at least in part, to “grant[ ] *immunity from prosecution* to carriers by reason of their  
20 receipt, carriage, holding, or delivery of products subject to the Act in their usual course  
21 of business as carriers.” FDA Compliance Guide § 100.500 (1989) (emphasis added).  
22 The same purpose undergirds the exemption that appears in the CSA. See Part IV.A,  
23 *supra*. But an exemption that did not apply if the carrier acted knowingly would fail to  
24 effectuate this purpose because it is already lawful for a person to possess prescriptions  
25 medications *unknowingly*. Knowledge is a necessary element, for example, of the  
26 crimes set out in 21 U.S.C. §§ 841 and 846. See *United States v. Suarez*, 682 F.3d  
27  
28

1 1214, 1219 (9th Cir. 2012); *United States v. Cain*, 130 F.3d 381, 382 (9th Cir. 1997);  
2 *United States v. Napoli*, No. 10-cr-642 (CRB), Docket #1056 at 25 (2012); Ninth Circuit  
3 Model Jury Instructions 9.18 & 9.19. Similarly, many FDCA violations already require  
4 knowledge as a necessary element. *See, e.g., United States v. Hiland*, 909 F.2d 1114,  
5 1128 (8th Cir. 1990); *United States v. Lovin*, No. 07-cr-2016-IEG, Docket #759 at  
6 Instruction No. 47 (S.D. Cal. Jul 10, 2009). In order for the common carrier exemptions  
7 to protect common carriers from criminal liability for carrying prescription  
8 pharmaceuticals, the exemptions must apply when carriers act knowingly.  
9

10  
11 Third, even if there were some ambiguity about whether the common carrier  
12 exemptions could be negated by a carrier's knowledge, pursuant to the rule of lenity  
13 such ambiguity would have to be resolved in FedEx's favor. *United States v.*  
14 *Wiltberger*, 5 Wheat. 76, 95, 18 U.S. 76 (1820); *United States v. Nader*, 542 F.3d 713,  
15 721 (9th Cir. 2008).  
16

17 Congress made its intent clear with the plain language of the common carrier  
18 exemptions. The application of the exemptions is not limited by a common carrier's  
19 supposed knowledge, but instead by a determination whether the carrier acted in the  
20 usual course of business as a carrier — that is, in the course of carrying the public's  
21 packages. Congress has determined that businesses so engaged should not be liable  
22 for violations of the CSA or FDCA that might otherwise arise from the transportation of  
23 pharmaceutical packages.  
24

25 **D. FedEx Cannot Be Liable for Distributing Controlled Substances in**  
26 **Violation of 21 U.S.C. § 841**

27 Counts Two through Ten and Fourteen and Fifteen charge FedEx with  
28 possessing with intent to distribute and distributing controlled substances in violation of

1 21 U.S.C. § 841. The charges must be dismissed because liability is precluded by the  
2 exemption contained in § 822(c)(2).

3 While § 822(c)(2) on its face refers to “possession” of controlled substances, it  
4 would make no sense to cabin its application solely to cases involving simple  
5 possession. The provision seeks to exempt a common carrier from liability under Title  
6 21 when it acts in “the usual course of [its] business” — and a common carrier acting in  
7 the usual course of its business is, by definition, engaged in *transporting* a package  
8 from one location to another. The exemption must be construed to cover this conduct,  
9 or else it would be rendered meaningless. See *Dolan*, 546 U.S. at 486; *Trans Alaska*  
10 *Pipeline Rate Cases*, 436 U.S. at 643; *Petri*, 731 F.3d at 839.

13 The historical development of the common carrier exemptions contained in Title  
14 21 provides additional evidence that the word “possess” should be read broadly. The  
15 CSA’s predecessor statutes made clear that the exemption should apply to a common  
16 carrier’s transportation and final delivery of prescription pharmaceuticals. The 1914  
17 Harrison Act’s version of the exemption referred expressly to “common carriers  
18 engaged in transporting” the regulated medications. 63 Pub. L. No. 223, § 8, 38 Stat.  
19 785, 789. The FDCA, passed in 1938, likewise referred (and still refers) to the “receipt,  
20 carriage, holding, or delivery of food, drugs, devices, tobacco products, or cosmetics in  
21 the usual course of business as carriers.” 52 Stat. 1040, 1057, 75 P.L. 717, § 703  
22 (codified at 21 U.S.C. § 373(a)). Similarly, the Drug Abuse Control Amendments of  
23 1965 exempted common carriers “whose possession [of certain pharmaceuticals] is in  
24 the usual course of his business or employment as such” from the general rule that  
25 unregistered persons may not “sell, deliver, or otherwise dispose” of regulated  
26  
27  
28

1 medications. 89 P.L. 74, § 511(b)(2), 79 Stat. 226, 229. The CSA’s provisions derive  
2 from these prior laws, see H.R. Rep. No. 91-1444 at 598, 1970 U.S. Code, Cong. &  
3 Admin. News 4566 (1970) (“Since 1914 the Congress has enacted more than 50 pieces  
4 of legislation relating to control and diversion, from legitimate channels, of those drugs  
5 referred to as narcotics and dangerous drugs . . . . This bill collects and conforms these  
6 diverse laws in one piece of legislation . . . .”), and demonstrate that Congress intended  
7 to use “possess” to refer to a carrier’s possession of a controlled substance from the  
8 point of origin to its delivery destination.  
9

10  
11 The necessity of broadly construing the term “possess” in the context of § 822(c)  
12 is further confirmed by another exemption established by the same provision. Section  
13 822(c)(1) makes lawful the possession of a controlled substance by “[a]n agent or  
14 employee of any registered manufacturer, distributor, or dispenser of any controlled  
15 substance or list I chemical if such agent or employee is acting in the usual course of  
16 his business or employment.” At least some employees of distributors and dispensers  
17 of controlled substances must necessarily be employed to distribute and dispense the  
18 medications, and it would make no sense if the exemption did not apply to their  
19 performance of their job duties.<sup>7</sup> If such employees’ “possess[ion] . . . in the usual  
20  
21

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22  
23 <sup>7</sup> A few cases have discussed the exemption set out in § 822(c)(1), but none of the  
24 cases rendered a holding on the issues presented here. In *Novelty, Inv. v. DEA*, 571  
25 F.3d 1176 (D.C. Cir. 2009) (per curiam), for example, one concurring judge and her  
26 dissenting colleague each noted the exemption and its potential application to the case,  
27 but the case involved a putative “sales agent” that would not ship or handle  
28 medications, and neither judge discussed the meaning of the term “possess” as it is  
used in § 822(c). *Id.* at 1185 n.17 (Henderson, J., concurring) & 1198 (Brown, J.,  
dissenting). In *United States v. Hill*, 589 F.2d 1344 (8th Cir. 1979), the defendant was a  
sales manager for the manufacturer of a controlled substance. The defendant was  
accused of diverting controlled substances through a scheme in which he would

1 course of . . . business” may include distribution and dispensation for purposes of  
2 subsection (c)(1), then the term must be read in the same manner when applied to  
3 common carriers under (c)(2). *Cf. Powerex Corp. v. Reliant Energy Services, Inc.*, 551  
4 U.S. 224, 232 (2007) (“A standard principle of statutory construction provides that  
5 identical words and phrases within the same statute should normally be given the same  
6 meaning.”). The term “possess,” by necessity, therefore relates to a common carrier’s  
7 possession of a controlled substance from the origin at which the package is tendered  
8 to the destination at which it is delivered.  
9

10  
11 Finally, as § 822(c)(2) acts to limit a defendant’s criminal liability, if the Court  
12 finds any ambiguity in its use of the term “possess,” under the rule of lenity it must  
13 construe the statute in the defendant’s favor. *Nader*, 542 F.3d at 721.

14 In short, the history and context of the exemption — and simple common sense  
15 — reveal that the Court should construe § 822(c)(2) to prohibit criminal liability for the  
16 possession and transportation of controlled substances by common carriers like FedEx.  
17 The common carrier exemption provides immunity from the indictment’s charges that  
18 FedEx distributed controlled substances in violation of the CSA. The counts alleging  
19 substantive violations of § 841 must be dismissed.  
20  
21

22  
23 “mistaken[ly]” cause shipments to be made to customers, then pick up the shipment but  
24 never return it to his employer. *Id.* at 1348. The defendant asserted at trial that his  
25 conduct was part of a practice called “sliding,” which involved transferring shipments  
26 among customers as an effort to provide special pricing, and claimed that he was  
27 exempt from liability under § 822(c) as an employee acting in the regular course of his  
28 business. *Id.* at 1348, 1350. The Court of Appeals affirmed his conviction, noting that  
the jury had been properly instructed that it must find the defendant not guilty “if it found  
that [he] acquired possession of the controlled substances in the usual course of his  
business,” and that sufficient evidence supported the jury’s conclusion that the defense  
did not apply. *Id.* at 1350. The *Hill* court did not purport to define the term “possess” as  
it is used in § 822(c).

1           **E.     FedEx Cannot Be Liable for Conspiring to Distribute Controlled**  
2           **Substances in Violation of 21 U.S.C. § 846**

3           Counts One and Thirteen charge FedEx with conspiring to distribute controlled  
4 substances in violation of 21 U.S.C. § 846. Again, § 822(c)(2) exempts FedEx from  
5 liability.

6           The crux of the conspiracy charges is that FedEx employees, allegedly knowing  
7 that the Chhabra-Smoley and Superior Drugs networks were distributing medications  
8 that were not validly prescribed, agreed to ship the networks' packages. FedEx denies  
9 these allegations, and if necessary will defeat them at trial. But even if the allegations  
10 are taken as true for purposes of this motion, the charges must be dismissed because  
11 § 822(c)(2)'s exemption must rationally apply to such conspiracy charges.  
12

13           As discussed, the exemption applies when a common carrier is engaged in its  
14 usual course of business by accepting packages from the public at large — regardless  
15 of the carrier's asserted knowledge. Conducting the business of transporting the  
16 public's packages by its very nature involves agreeing to carry packages for customers.  
17 Accordingly, in order for the CSA's exemption to have any effect and provide common  
18 carriers with any protection, it must extend to allegations that the carrier agreed to carry  
19 packages containing controlled substances. *Cf., e.g., Rehberg v. Paulk*, \_\_ U.S. \_\_,  
20 132 S. Ct. 1497, 1506-07 (2012) (finding that grand jury witnesses enjoy immunity from  
21 suit under 42 U.S.C. § 1983 for giving false testimony, and holding that "this rule may  
22 not be circumvented by claiming that a grand jury witness conspired to present false  
23 testimony . . . . We decline to endorse a rule of absolute immunity that is so easily  
24 frustrated."); *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 1999) (making a similar  
25 holding regarding witnesses' testimony at trial, and observing that permitting plaintiffs to  
26  
27  
28

1 circumvent a witness’s immunity by pleading a conspiracy would “eviscerate” the  
2 immunity rule). Counts One and Thirteen must be dismissed.

3 **F. FedEx Cannot Be Liable for Conspiring to Violate the Money**  
4 **Laundering Statutes**

5 Counts Twelve, Seventeen and Eighteen allege that FedEx conspired to launder  
6 money in violation of 18 U.S.C. § 1956. As with the other charges, the common carrier  
7 exemptions dictate that FedEx cannot be liable for the alleged violations.  
8

9 As previously explained, § 822(c)(2) is plainly intended to permit common  
10 carriers to carry out their business of shipping packages — including pharmaceutical  
11 packages — without criminal sanction. The statute affirmatively makes it “lawful[ ]” for  
12 common carriers to do this business. It would scuttle the intent of the provision to  
13 permit the government to circumvent the exemption’s protections by charging a  
14 common carrier with money laundering simply for accepting payment for the  
15 performance of its business.  
16

17 Yet that is precisely what the government has done in this case. Counts Twelve  
18 and Seventeen assert that FedEx received payments from the Chhabra-Smoley and  
19 Superior Drugs networks following its delivery of the networks’ shipments. Indictment  
20 (Docket #28) ¶¶ 62-69, 107-113. That, of course, is nothing more than the everyday  
21 conduct of FedEx’s business as a common carrier. FedEx charges for its services and  
22 receives payments from its customers, a practice that is entirely consistent with the core  
23 definition of a common carrier as one “engaged in the business of transportation of  
24 persons or property from place to place *for compensation . . .*” *Kieronski*, 806 F.2d at  
25 108 (emphasis added; quoting *Kelly*, 110 F. Supp. at 6); see also FAA Advisory Circular  
26 120-12A (Apr. 24, 1986).  
27  
28

1 Count Eighteen similarly alleges that FedEx delivered for the Superior Drugs  
2 network packages for which FedEx had agreed to collect COD payments from  
3 recipients, and subsequently returned the payment instruments to the Superior Drugs  
4 network. *Id.* ¶¶ 116-120. Again, this COD service was an entirely normal part of  
5 FedEx's business as a common carrier. Permitting the government to dodge  
6 § 822(c)(2) by charging that FedEx provided to a pharmaceutical shipper a  
7 transportation service that the company offers to the general public would eviscerate the  
8 point of the exemption.  
9

10  
11 The government may protest that it has alleged that FedEx received payments  
12 with knowledge that the online pharmacy networks had improperly prescribed the  
13 shipped medications. But, for the reasons discussed in Part IV.C, *supra*, such alleged  
14 knowledge cannot nullify the protections of the common carrier exemption. The money  
15 laundering counts cannot stand in the face of § 822(c)(2).  
16

17 **G. FedEx Cannot Be Liable for Conspiring to Violate the FDCA**

18 Finally, Counts Eleven and Sixteen charge that FedEx conspired with the  
19 Chhabra-Smoley and Superior Drugs networks to ship prescription drugs in violation of  
20 the FDCA's misbranding provisions. Like all the other charges, the FDCA charges must  
21 be dismissed.  
22

23 The FDCA's version of the common carrier exemption is arguably even clearer  
24 than the CSA's. Section 373(a) expressly provides that "carriers shall not be subject to  
25 the other provisions of this Act [21 U.S.C. §§ 301 *et seq.*] by reason of their receipt,  
26 carriage, holding, or delivery of food, drugs, devices, tobacco products, or cosmetics in  
27 the usual course of business as carriers," except in circumstances not applicable here.  
28

1 See § 373(a) & (b). Thus, the law affirmatively exempts a carrier from FDCA liability  
2 arising from its receipt, carriage or delivery of prescription pharmaceuticals, so long as it  
3 is acting in the usual course of its business “as [a] carrier[ ].” See *also* FDA Compliance  
4 Policy Guide § 100.500 (1989) (“The proviso in section 703 of the Federal Food, Drug,  
5 and Cosmetic Act, grants immunity from prosecution to carriers by reason of their  
6 receipt, carriage, holding, or delivery of products subject to the Act in their usual course  
7 of business as carriers.”).

9 For reasons similar to those discussed above, this broad provision must shield a  
10 common carrier from liability under a conspiracy theory, or else it would have no effect.  
11 A carrier receiving, carrying and delivering a pharmaceutical in every case “agrees” to  
12 take the shipment. If the government could skirt the exemption in § 373(a) by charging  
13 carriers with conspiracy, the exemption would be nullified.

15 Likewise, § 373(a) is clear that the protection applies to carriers acting “in the  
16 usual course of business *as carriers*.” For the reasons discussed above, even  
17 assuming the truth of the allegations set forth in the indictment, FedEx was performing  
18 the services of a common carrier when it took the pharmaceutical shipments that are  
19 the subject of the indictment. The charged conduct relates to FedEx’s pickup, carriage  
20 and delivery of customer packages.

22 Accordingly, under § 373(a) FedEx cannot be guilty of the crimes charged in  
23 Counts Eleven and Sixteen.

25 **V. A CONVICTION FOR ANY OF THE CHARGED OFFENSES WOULD OFFEND**  
26 **THE FIFTH AMENDMENT BY IMPOSING A CRIMINAL SANCTION IN THE**  
27 **ABSENCE OF FAIR WARNING THAT THE CHARGED CONDUCT VIOLATED**  
28 **THE CRIMINAL LAWS**

The indictment must also be dismissed for a second reason, which is a corollary

1 to the first. Sections 373(a) and 822(c)(2) make it lawful for a common carrier to  
2 possess prescription pharmaceuticals in the usual course of its business. For all of the  
3 reasons discussed above, the provisions make it appear that a common carrier may  
4 transport prescription pharmaceuticals without being subject to criminal repercussions,  
5 so long as the transportation occurs — as it unquestionably did in this case — as part of  
6 the carrier’s provision of services to the general public. Imposing penal sanctions for  
7 the alleged conduct set out in the indictment would therefore violate the Fifth  
8 Amendment’s requirement that potential defendants receive fair warning that their  
9 contemplated conduct runs afoul of the law.  
10  
11

12 “Our Constitution is designed to maximize individual freedoms within a  
13 framework of ordered liberty. Statutory limits on those freedoms are examined for . . .  
14 definiteness or certainty of expression.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).  
15 “The constitutional requirement of definiteness is violated by a criminal statute that fails  
16 to give a person of ordinary intelligence fair notice that his contemplated conduct is  
17 forbidden by the statute. The underlying principle is that no man shall be held criminally  
18 responsible for conduct which he could not reasonably understand to be proscribed.”  
19 *United States v. Harriss*, 347 U.S. 612, 617 (1954); see also *Marks v. United States*,  
20 430 U.S. 188, 194 (1977) (“[T]he notion that persons have a right to fair warning of that  
21 conduct which will give rise to criminal penalties . . . is fundamental to our concept of  
22 constitutional liberty.”); *Grayned v. Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we  
23 assume that man is free to steer between lawful and unlawful conduct, we insist that  
24 laws give the person of ordinary intelligence a reasonable opportunity to know what is  
25 prohibited, so that he may act accordingly.”).  
26  
27  
28

1 There are three related manifestations of the fair warning requirement.  
2 First, the vagueness doctrine bars enforcement of “a statute which either  
3 forbids or requires the doing of an act in terms so vague that men of  
4 common intelligence must necessarily guess at its meaning and differ as to  
5 its application.” Second, as a sort of “junior version of the vagueness  
6 doctrine,” the canon of strict construction of criminal statutes, or rule of  
7 lenity, ensures fair warning by so resolving ambiguity in a criminal statute  
8 as to apply it only to conduct clearly covered. Third, although clarity at the  
9 requisite level may be supplied by judicial gloss on an otherwise uncertain  
10 statute, due process bars courts from applying a novel construction of a  
11 criminal statute to conduct that neither the statute nor any prior judicial  
12 decision has fairly disclosed to be within its scope. In each of these guises,  
13 *the touchstone is whether the statute, either standing alone or as construed,*  
14 *made it reasonably clear at the relevant time that the defendant’s conduct*  
15 *was criminal.*

16 *United States v. Lanier*, 520 U.S. 259, 266 (1997) (emphasis added; citations omitted).

17 The fair warning inquiry is an objective one: a reviewing court asks not whether the  
18 defendant actually understood that the criminal statute would apply to him or her, but  
19 instead whether the statute provided reasonably clear notice to a common person.

20 *McBoyle v. United States*, 383 U.S. 25, 27 (1931) (“Although it is not likely that a  
21 criminal will carefully consider the text of the law before he murders or steals, it is  
22 reasonable that a fair warning should be given to the world in language that the  
23 common world will understand, of what the law intends to do if a certain line is  
24 passed.”); *see also Grayned*, 408 U.S. 108 (asking whether the statute gave fair notice  
25 to “a person of ordinary intelligence”); *Harriss*, 347 U.S. at 617 (same).

26 Ninth Circuit jurisprudence holds that the fair warning principles apply in the  
27 context of statutory exemptions. In *Hunt v. Los Angeles*, 638 F.3d 703 (9th Cir. 2011),  
28 the court considered a series of Los Angeles ordinances governing activities on a city  
boardwalk. One of the ordinances generally prohibited vending on the boardwalk, but  
permitted people to obtain permits for “public expression.” *Id.* at 707. Permit holders

1 were permitted to sell “merchandise constituting, carrying or making a religious, political,  
2 philosophical or ideological message or statement which is inextricably intertwined with  
3 the merchandise.” *Id.* Permit holders who violated the rules were subject to criminal  
4 penalties, and the plaintiff Hunt — a seller of shea butter — had been arrested for  
5 violating the ordinance. *Id.* at 708. The court found that the ordinance was  
6 unconstitutional because its exemptions allowing expression-related sales were too  
7 vague: the law failed to give fair warning of what conduct was proscribed and what  
8 conduct fell within the exemptions. *Id.* at 711-13.

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11 Similarly, in *Nunez v. San Diego*, 114 F.3d 935 (9th Cir. 1997), the court struck  
12 down as unconstitutionally vague a San Diego penal ordinance prohibiting “loitering.” In  
13 reaching its decision, the court found that “[t]he key to determining whether the San  
14 Diego ordinance is unconstitutionally vague is to determine the breadth of the  
15 ordinance’s basic proscription *in light of the enumerated exceptions.*” *Id.* at 940  
16 (emphasis added); *see also United States v. Farhane*, 634 F.3d 127, 142-44 (2d Cir.  
17 2011) (considering whether a statutory exemption contained in 18 U.S.C. § 2339A(b)(1)  
18 renders the statute unconstitutionally vague, but finding the statute not vague); *Planned*  
19 *Parenthood of Idaho v. Wasden*, 376 F.3d 908, 932-33 (9th Cir. 2004) (striking down an  
20 abortion statute in part because the criminal provision applying to doctors was subject to  
21 a vague exemption); *United States v. Clark*, 912 F.2d 1087, 1090 (9th Cir. 1990)  
22 (considering whether language in the exemption for Alaskan natives contained in 16  
23 U.S.C. § 1371 rendered the statute unconstitutionally vague, but ultimately determining  
24 that the exemption provided sufficient notice of the proscribed conduct).

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28 Here, in light of the exemptions set forth in §§ 373(a) and 822(c)(2), it was not

1 “reasonably clear at the relevant time that [FedEx’s alleged] conduct was criminal”  
2 under the CSA, FDCA or the money laundering statutes. *See Lanier*, 520 U.S. at 266.  
3 To the contrary, for all the reasons discussed in Part IV, *supra*, the common carrier  
4 exemptions appeared affirmatively to make FedEx’s conduct *legal*. Especially in the  
5 context of the historical protections against criminal liability afforded to common carriers  
6 transporting pharmaceuticals and other goods, the CSA and FDCA are not merely  
7 vague or unclear; rather, sections 373(a) and 822(c)(2) have operated — at least until  
8 this case — to proactively inform common carriers that they are not subject to  
9 prosecution merely for carrying pharmaceuticals, whether improperly prescribed or not.  
10  
11

12 To be sure, an otherwise-vague statute may be saved by judicial decisions giving  
13 the law more definite boundaries. *See, e.g., Grayned*, 408 U.S. at 110-12. But here  
14 there are no judicial decisions carefully interpreting §§ 373(a) or 822(c)(2), and certainly  
15 none that would have given fair warning to FedEx that its transportation of  
16 pharmaceuticals could give rise to criminal liability. Even if this Court were to interpret  
17 the exemptions in such a way as to permit criminal liability, retroactive application of that  
18 interpretation to FedEx’s conduct would violate due process. *See Marks*, 430 U.S. at  
19 191-92; *Clark v. Brown*, 450 F.3d 898, 911 (9th Cir. 2006); *Webster v. Woodford*, 369  
20 F.3d 1062, 1066-67, 1070-71 (9th Cir. 2004).  
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## 23 **VI. CONCLUSION**

24 For all of the foregoing reasons, all charges in the indictment must be dismissed.  
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