No. 06-457

In The Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR PETITIONER

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.

2. Whether the Federal Aviation Administration Authorization Act of 1994 preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

PARTIES TO THE PROCEEDING

Petitioner G. Steven Rowe is the Attorney General of the State of Maine, acting in his official capacity. Respondents New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck and Bus Association, Inc., are trade associations of businesses engaged in the commercial delivery of packages containing property.

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BRIEF FOR PETITIONER

Petitioner G. Steven Rowe respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 448 F.3d 66. Pet. App. 1. The district court's opinions are reported at 377 F. Supp. 2d 197, 324 F. Supp. 2d 231, and 301 F. Supp. 2d 38. Pet. App. 31, 73, and 86.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2006. This Court granted certiorari on June 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

2. In 1992, Congress enacted the Synar Amendment, so-called, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 323, 394, which conditions state eligibility for the receipt of certain federal funds upon the state having in effect and

enforcing "a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. §§ 300x-26(a)(1) & (b)(1). The Synar Amendment is reproduced at App. 1, *infra*.

3. The Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605, preempts certain state laws regarding the transport of property by air or motor carriers, 49 U.S.C. §§ 14501(c), 41713(b)(4)(A) & (B). The FAAAA is reproduced at App. 2, *infra*.

4. Maine bans the sale or furnishing of tobacco to children. 22 Me. Rev. Stat. §§ 1555-B(1) & (2). In pursuit of that goal, Maine's Tobacco Delivery Law regulates retailers who ship tobacco products by means of delivery sale and persons who transport and deliver tobacco products in Maine. *Id.* at §§ 1555-C(3), 1555-D. These statutes are reproduced at App. 6, *infra*.

STATEMENT OF CASE

Maine has the sovereign power to protect the health of its children. This case provides the first opportunity for the Court to consider whether the FAAAA preempts a state's exercise of such power, here implementing a ban on the sale and distribution of tobacco to children pursuant to and in full conformance with a clear congressional policy that the State do so. The import and reasoning of the court of appeals' decision is that Maine cannot enact a law controlling how a retailer may ship tobacco or any other dangerous substance into this State, and that Maine cannot use the only actual evidence available to enforce a

ban on the delivery of tobacco or any other dangerous substance or contraband. When Congress enacted the FAAAA, it did not intend to preempt these types of public health delivery laws, and they do not interfere with the objectives of the FAAAA. The court of appeals' decision therefore should be reversed.

I. Statutory Framework.

A. The Synar Amendment and State Regulation of Tobacco.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Federal Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000). There is no comprehensive federal tobacco law dealing with youth access to tobacco products. Instead, "there is an established congressional policy that supports" state laws prohibiting tobacco sales to minors; "Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 552 (2001). In 1992 Congress enacted the Synar Amendment, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 323, 394, codified at 42 U.S.C. §§ 300x-26(a)(1) & (b)(1), which specifically encourages states to pass laws making it "unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." *See Lorillard,* 533 U.S. at 571.

The Synar Amendment does not limit the discretion of or dictate how each state may accomplish this, and does not prescribe uniform regulation by the states. In adopting

rules implementing the Synar Amendment, the federal Department of Health and Human Services chose to "allow the States flexibility to determine which strategies are most appropriate for meeting the compliance target and enforcement requirements of the law and the regulation." *Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants*, 61 Fed. Reg. 1492, 1495 (1996); *see also* 45 C.F.R. § 96.130.

B. The Federal Aviation Administration Authorization Act of 1994.

In 1978, Congress enacted the Airline Deregulation Act ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705, which largely deregulated domestic air transport, and included a preemption clause to ensure that states not "undo federal deregulation with regulation of their own."[1] *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 378 (1992). Because the reach of the ADA had been found to preempt state economic regulation of the transport of property by air carriers, *Federal Express Corp. v. California Public*

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[1] The preemption provision of the ADA read in pertinent part:

> No State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier. . . .

Former 49 U.S.C. § 1305(a)(1). Reenacting Title 49 of the U.S. Code in July of 1994, Congress revised this clause to read:

> [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . .

49 U.S.C. § 41713(b)(1). "Congress intended the revision to make no substantive change. Pub. L. 103-272, § 1(a), 108 Stat. 745." *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 223 n.1 (1995).

Utilities Commission, 936 F.2d 1075, 1078 (9th Cir. 1991), *cert. denied,* 504 U.S. 979 (1992), but not motor carriers, just two years after the Synar Amendment Congress enacted the FAAAA to extend to motor carriers that same level of preemption. H.R. Conf. Rep. No. 103-677, at 83, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1759. The conferees intended no change in the substantive law, and aimed to apply the "identical" preemption under the ADA uniformly to air and motor carriers. *Id.*

In its findings, Congress explained that "certain aspects of the State regulatory process should be preempted." Pub. L. No. 103-305, Title VI, § 601(a)(1) & (2), 108 Stat. 1569, 1605. Congress enacted two preemption provisions, while retaining the general air carrier preemption section found at section 41713(b)(1). The first read that "[e]xcept as provided in subparagraph (B), a State . . . may not enact or enforce a law . . . related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle." Pub. L. No. 103-305, Title VI, § 601(b)(1), 108 Stat. 1569, 1605, codified at 49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), entitled "Matters not covered," provided that preemption would not restrict state regulations covering safety, hazardous cargo, insurance or household goods. *Id.*, codified at 49 U.S.C. § 41713(b)(4)(B).

In order to accomplish the goal of placing air and ground carriers on the same economic footing, Congress enacted another subsection entitled, "Preemption of State *Economic* Regulation of Motor Carriers." Pub. L. No. 103-305, Title VI, § 601(c), 108 Stat. 1569, 1606 (emphasis added). This new subsection is identical in effect to that covering air carriers, proscribing states from enacting or enforcing laws "related to a price, route, or service of any

motor carrier . . . with respect to the transportation of property." *Id.,* originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). The exemptions from preemption for motor carriers included the same list of matters exempted for air carriers. *Id.,* originally codified at 49 U.S.C. § 11501(h)(2), now codified at 49 U.S.C. § 14501(c)(2).[2]

C. The Maine Tobacco Delivery Law.

According to the American Lung Association, Maine leads the nation in tobacco control, and received perfect grades the last two years for, *inter alia*, restriction of youth access. *American Lung Association – State of Tobacco Control: 2006*, at 94-95.[3] As early as 1983, Maine enacted a ban on the sale or furnishing of tobacco to children. Me. Pub. L. 1983, c. 239, now codified at 22 Me. Rev. Stat. § 1555-B(1) & (2) (a person "may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age," and may not sell "to any person under 27 years of age unless

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[2] Congress also included on the list of exemptions for motor carriers certain "State standard transportation practices" regarding uniform liability, bills of lading, credit rules and antitrust laws if the carrier requests that the state law apply to it. Pub. L. No. 103-305, Title VI, § 601(c), 108 Stat. 1596, 1606, originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3).

Just one year after its enactment, section 11501(h) was recodified at 49 U.S.C. § 14501(c), adding state regulation of nonconsensual tow rates to the list of exemptions. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 899. The tow rate exemption is now found at section 14501(c)(2)(C).

[3] This report is available at: <http://www.mainelung.org/Topics/documents/Full_Report.pdf> (visited August 19, 2007).

the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth").

There is no dispute that Internet and telephone tobacco retail transactions are a serious problem. Pet. App. 3, 40. By means of delivery services, enterprising retailers seek to avoid over-the-counter age verification requirements by selling tobacco products to minors and delivering the tobacco not over-the-counter but rather over-the-doorstep using third-party carriers such as UPS. In response to this dangerous practice, in 2003 the Maine Legislature passed "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," Me. Pub. L. 2003, c. 444. Pet. App. 3.

The Act requires retailers engaged in delivery sales of tobacco to Maine citizens to obtain a retail license from the Maine Department of Health and Human Services just as over-the-counter retailers must. 22 Me. Rev. Stat. §§ 1551-A, 1555-C(1). Similarly, the Act requires the Internet or telephone tobacco retailer to obtain age verification at the time of the order just as over-the-counter retailers must do for persons under 27 years of age. *Id.* at §§ 1555-B(2), 1555-C(2).

At an over-the-counter sale, the clerk sees, verifies the age of, and hands the tobacco over to the purchasing customer. The order, payment and "delivery" over-the-counter happens in person and at the same time, allowing the clerk to make sure that the customer to whom she is furnishing tobacco is not a child. In delivery sales, the order and payment are separated in both time and location from "delivery." In order to ensure that the same sort of

safeguards that protect children apply in delivery sales, the Maine Legislature enacted section 1555-C(3)(C), which calls for tobacco retailers to utilize a delivery service that requires (1) the purchaser to be the addressee, (2) the addressee to be of legal age to purchase tobacco products and sign for the package, and, (3) if the addressee is under 27 years old, to present a valid identification showing proof of age.[4] The purpose is to have the retailer ensure that the same sort of age verification safeguards are used when tobacco is handed over-the-doorstep as are used when it is handed over-the-counter. The addressee-signature provisions require delivery retailers to ensure the over-the-doorstep delivery is to the purchaser, thus preventing, *inter alia,* efforts by children to purchase tobacco. These provisions regulate retailers, *not carriers*. Tobacco products shipped in violation of these requirements are contraband, subject to forfeiture. *Id.* at § 1555-C(7).

To ensure the fulfillment of the tobacco-retailer licensing requirement, section 1555-D of the Act proscribes the "knowing" delivery of tobacco products unless the sender or recipient has a Maine license. The provision applies to any person transporting or delivering tobacco products in Maine, a category that includes but is not limited to carriers covered by the FAAAA, such as UPS. A separate provision of the Act requires the delivery sale retailer to "clearly mark the outside of the package . . . to

[4] Section 1555-C(3)(A) requires the tobacco retailer, prior to shipping, to provide to the delivery service the age of the purchaser. Respondents unsuccessfully challenged this provision below. Pet. App. 66. However, as recognized by the district court, without the preempted provisions, this section serves no purpose. *Id.*

indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the . . . retailer." *Id.* at § 1555-C(3)(B). Maine adopted rules for the enforcement of this law that require, *inter alia,* the retailer to mark the label side of the package with a tobacco marking, and do not require a delivery service to look at the bottom of a package for tobacco markings. 10-144-203 Me. Code. R. §§ 10(C)(2), 11. The second sentence of section 1555-D provides that a "person is deemed to know a package contains tobacco if the package" is marked in that fashion or if it is received "from a person listed as an unlicensed tobacco retailer by the Attorney General." Maine maintains a list of licensed and known unlicensed retailers, and provides the list to delivery services. Reliance on that list is an affirmative defense. 22 Me. Rev. Stat. § 1555-D(3) & (4). Transgressions are civil violations punishable by fines of $50 to $1500, and the Attorney General may enforce the law by seeking injunctive relief. *Id.* at § 1555-D(2) & (3).

II. Operative Facts.

Respondents are non-profit trade associations whose members are engaged in the commercial delivery of packages containing property. Before the district court, Respondents proceeded on the theory that Maine's law was preempted so long as a *single* carrier did not provide the services contemplated by the law. Respondents relied entirely upon the experience of UPS to meet their burden of demonstrating the unlawful effects of the law, and presented no evidence regarding other carriers or the industry as a whole.

UPS uses a "hub-and-spoke" system, which consists of an extensive network of sorting facilities throughout the country that generally works as follows: the person or entity shipping the package provides delivery information on UPS's shipping form or though an electronic shipping system; the package enters UPS's system through a driver pick-up (including pick-ups from the shipper, an outlet such as a UPS Store or a UPS drop box), or through UPS's customer counter; the driver brings the package to a local operating center; the package is unloaded and placed on conveyor belts for sorters to separate based on delivery location and the delivery time commitment; feeder vehicles and, in some cases, airplanes and trains take the package from the centralized hub to another hub for further sorting, and ultimately to a local center for delivery; and at the local center the package is further sorted and loaded onto a vehicle for delivery based on the recipient's address.[5] The driver who delivers the package checks specific delivery information, such as the need for age verification or a signature, on a hand-held computer device (a "DIAD").[6]

Ordinarily, and prior to the Maine Act, all sides of the exterior of packages were visually scanned at many stages through the distribution process for, *inter alia,* labels, signs of damage, improper packaging, leakage, prohibited contents and hazardous waste markings by various UPS employees such as sorters, presorters and drivers.[7] *See,*

[5] Joint Appendix (JA) 68-69, 100-02.

[6] JA 101-02; *Meisel Dep.,* at 142:4-18, 208:8-12; *George Dep.,* at 76:14-77:11.

[7] JA 98-100; *Meisel Dep.,* at 213:13-270:10 and Exhibit 13 (JA 32-38). Respondents generally qualified or disputed that UPS's

(Continued on following page)

e.g., Meisel Dep. Exhibit 13 (JA 32-38) (reproducing a package showing UPS workers who typically "visually scan" each side).

UPS previously implemented written procedures and policies relating to the delivery of substances such as alcohol and handguns, which, *inter alia,* require that the shipper and/or recipient be licensed.[8] In response to the Maine Act, UPS instructed certain of its employees in Maine to look for markings indicating that a package contained tobacco products.[9] According to UPS, the preloaders and drivers were instructed to treat any such package as non-deliverable, and to give that package to a designated employee who assesses how to proceed, including returning the package to the sender or disposing of the package.[10] At the same time, however, UPS continued to deliver tobacco to licensed entities in Maine.[11]

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employees in fact looked at all sides of a package during the sorting and delivery processes, suggesting at times that UPS employees only looked at labels. JA 111-13. A review of the deposition testimony, however, does not support Respondents' objections and qualifications. *Meisel Dep.,* at 31:5-20, 49:1-7 ("Additionally, [the UPS loader] may be looking for additional markings on the exterior of the package to ensure that the package is meeting requirements."), 54:17-18 ("[The preloader] would also be looking for markings on the package."), 68:11-18, 101:15-102:5, 103:21-104:17, 213:13-270:10, Exhibit 13 (JA 34, 36, 37); *George Dep.,* at 70:3-72:4 ("Q. And would [the UPS counter clerk] look at all sides of the box? A. They should when they are inspecting the packaging, yes."); *Butler Dep.,* at 35:13-36: 22.

[8] JA 107-08; *see also* UPS, *Terms and Conditions of Contract,* at 25, <http://www.ups-scs.com/tools/terms/air_tc.pdf> (visited August 19, 2007).

[9] JA 104-05.

[10] *Id.*

[11] JA 92-93.

A UPS employee estimated that it takes a preloader an additional two seconds to visually scan (*i.e.,* look at) the label of a package for tobacco indicia.[12] Based upon this estimate, the UPS employee provided a cost figure for Maine, amounting to approximately $0.009, or less than one cent, per package.[13] UPS claims it did no other study or analysis to quantify what additional time a driver would spend complying with the Maine Act, or what the effect of the Maine Act is on its package sorting or delivery rate. Pet. App. 28 n.14, 51-52 nn.54-55, 65 n.92.[14]

UPS delivers approximately 65,000 packages per day in Maine. During a five-month period, UPS intercepted a total of 33 packages that its workers believed contained tobacco products destined for Maine consumers.[15] UPS alleged that it costs approximately $2.00 in personnel time to deal with each such package.[16] Thus, according to UPS, for a five month period in 2003 there was an additional $66 in costs to UPS to comply with the Maine Act. UPS's total revenue in 2003 was $33.5 billion.[17]

As noted, at the time of each and every delivery, the UPS driver checks and enters delivery information on a hand-held computer device ("DIAD").[18] According to UPS,

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[12] JA 104; *Butler Dep.,* at 5:18-7:17, 88:2-89:7, Exhibit 8.

[13] JA 108; *Butler Dep.* at 88:24-89:25, 91:10-92:1, Exhibit 8.

[14] *See also* JA 105, 107; *Meisel Dep*., at 149:8-151:8 ("You asked me a question on have we [UPS] studied what the cost would be to a driver, no, we haven't studied it."), 194:13-22.

[15] JA 106.

[16] *Id.*

[17] JA 105.

[18] JA 101-02; *Meisel Dep.,* at 142:4-18, 208:8-12; *George Dep.,* at 76:14-77:11.

its computer system "is probably capable of doing pretty much anything."[19] It is the second largest computer system in the world.[20] The DIAD has the capability and does provide relevant prompts or "alerts" regarding each package when delivered.[21] These "alerts" inform the driver, *inter alia,* whether a signature or adult confirmation is required.[22] UPS has the capability to flag specific delivery addresses or specific consignees to generate an alert, and the DIAD can be programmed to generate a prompt for a particular shipper to direct the driver's behavior.[23]

UPS offers a delivery-confirmation, adult-signature-required service for an additional fee of as much as $2.75.[24] When a driver delivers a package pursuant to its delivery-confirmation or adult-signature-required service, she receives a prompt on her DIAD to have her verify the age of the person receiving the package or obtain a signature.[25] This service is profitable.[26] Under UPS's preexisting standard operating procedures, if any delivery (be it general, "signature required," or "adult signature required") cannot be made for whatever reason after three attempts, the UPS delivery person leaves a notice at the

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[19] JA 106; *Meisel Dep.,* at 274:12-275:10.

[20] *Transcript of Proceedings of March 29, 2004,* at 21-22 (U.S.D.Ct.).

[21] JA 101.

[22] *Id.*

[23] JA 101-02.

[24] JA 102; *Meisel Dep.,* at 176:14-17, 179:15-25. *See also* UPS, *Delivery Confirmation,* <http://www.ups.com/content/us/en/shipping/time/service/value_added/delivery.html> (visited August 19, 2007).

[25] JA 102.

[26] *Id.; Meisel Dep.,* at 179:15-25.

place of delivery and returns the package to the local UPS facility for pickup by the recipient within five days.[27]

Respondents asserted that section 1555-C(3)(C), which requires a retailer to use a carrier with an *addressee*-signature and age-verification service, would require UPS to change its preexisting *recipient*-signature and age-verification service delivery procedures. UPS's website does not distinguish between a "recipient" and an "addressee" for purposes of this service.[28] According to UPS, a service requiring an addressee's signature would take extra time but UPS nowhere quantified what the additional cost would be per package, assuming there was a difference between the two. Nor did Respondents present any evidence that other carriers did not already or would not provide an addressee-signature and age-verification service.

The State provided UPS with an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers, but UPS asserts it has not researched whether any of its regular shippers are on the state list of unlicensed tobacco retailers.[29] As noted, however, UPS stated it continued to deliver tobacco to licensed entities in Maine

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[27] *George Dep.,* at 59-60; *Butler Dep.,* 84-86. There is no extra charge for this return procedure, which appears to be built into the cost of standard, recipient signature, and adult-recipient-signature services. UPS, *Learn About the UPS InfoNotice,* <http://www.ups.com/content/us/en/tracking/help/tracking/infonotice.html> (visited August 19, 2007).

[28] According to UPS's website, the recipient is the person or entity that the shipper places on the label. UPS, *How to Prepare for Shipping*, <http://www.ups.com/content/us/en/resources/prepare/guidelines/prepare_package4.html> (visited August 19, 2007).

[29] JA 106.

after the Act became law. UPS has over 4,000 employees in the technology and information systems area but claims it did no study of the capability of the system regarding compliance with the Maine Act.[30]

During the pendency of the appeal before the First Circuit (and apparently in response to unfavorable FAAAA and Commerce Clause decisions elsewhere),[31] UPS entered into a settlement with New York to comply with that state's "Unlawful Shipment of Cigarettes Law," N.Y. Pub. Health Law, § 1399-*ll,* by stopping delivery nationwide of cigarettes to consumers. *Assurance of Discontinuance*.[32] UPS agreed, *inter alia*, to impose measures to ensure that employees "actively look[ ] for indications that a package contains Cigarettes," and to instruct employees not to deliver cigarette packages to consumers. *Id.,* at ¶¶ 35, 36. UPS also agreed to: require its shippers to be licensed by applicable law in order to ship tobacco products, incorporate into its computer system information about cigarette retailers, and accept shipments of cigarettes for delivery only to recipients who are licensed. *Id.; Report Regarding UPS's Compliance with the Assurance of Discontinuance*,

[30] JA 105, 107.

[31] *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (State law banning delivery of cigarettes to consumers did not violate Commerce Clause); *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004) (State law banning delivery of cigarettes to consumers not preempted by the FAAAA); *Ward v. New York,* 291 F. Supp. 2d 188 (W.D. N.Y. 2003) (same).

[32] Found at <http://www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (visited August 19, 2007).

at ¶¶ 1, 8, 10.[33] FedEx and DHL have entered into similar agreements with New York.[34]

III. Proceedings Below.

Respondents commenced this action in the United States District Court for the District of Maine to challenge sections 1555-C(3)(A) and (C) and 1555-D of the Maine Act as preempted facially and as applied by the FAAAA. The district court initially denied Respondents' and granted the State's motion for summary judgment on the facial challenge, Pet. App 73, 86, but then reversed its course and ruled that section 1555-C(3)(C) and 1555-D were preempted by the FAAAA both facially and as applied. Pet. App. 31.

The First Circuit affirmed.[35] Pet. App. 1. The court of appeals broadly held that the FAAAA "preempts state police-power enactments" to the extent they have "the effect of forcing [a carrier] to change its uniform package-processing procedures," and that the purpose of the state law is irrelevant to the preemption inquiry. Pet. App. 17-18, 21, 28. It gave a broad reading to the FAAAA based upon its interpretation of *Morales v. Trans World Airlines,*

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[33] Reproduced in the addendum to the Attorney General's Reply Brief before the First Circuit, at A-21-A-26.

[34] Those agreements can be found at: <http://www.oag.state.ny.us/press/2006/feb/FedEx%20-%20Executed%20AOC.pdf> (visited August 19, 2007); and <http://www.oag.state.ny.us/press/2005/jul/dhlaogfinal.pdf> (visited August 19, 2007).

[35] Below, the Attorney General sought dismissal of the action on the grounds of mootness and lack of associational standing. The court of appeals rejected those positions. Pet. App. 7-12. The Attorney General no longer presses these arguments.

Inc., 504 U.S. 374, 378 (1992), and specifically declined to apply this Court's approach towards interpreting similar preemption language under ERISA. *Id.* at 16, 19-21.

The court of appeals found section 1555-C(3)(C) was preempted because it "references" carrier services and is "related to" a carrier's service due to the potential for delay if a carrier chose to provide such options. Pet. App. 23. Although the provision applies only to retailers, the court reasoned it indirectly regulated carriers by "employing [the state's] coercive powers to police the method by which carriers provide services in the state." Pet. App. 24. According to the court of appeals, Maine's only option was to entirely ban retailers from shipping tobacco into Maine. *Id.* at 26-27.

The First Circuit found that so much of section 1555-D that proscribed "knowing" delivery of tobacco for an unlicensed retailer was not preempted. Pet. App. 26. Yet, the court of appeals went on to conclude that the second sentence of section 1555-D was preempted insofar as it charged carriers with knowledge that a package contains tobacco products based on tobacco markings and labels. *Id.* at 27-28. According to the First Circuit, Maine could theoretically implement a ban and prosecute a carrier for "knowing delivery" of contraband tobacco, but Maine could not impute knowledge "based on a failure to read labels or consult lists, an imputation which would amount to prescribing how carriers must operate" because to do so would require a carrier to inspect the package and, thereby, change its uniform practices. *Id.* at 28-29. The court of appeals conceded there was "potential tension" in its decision because "as a practical matter, [it] may be difficult to prove" a case against a carrier if knowledge cannot be imputed from information on the outside of the

package. *Id.* In reality, without use of such evidence, it is not possible to enforce a ban on delivery of contraband against a carrier.

SUMMARY OF THE ARGUMENT

Maine has the sovereign authority to protect its children by regulating how dangerous substances may be delivered in the state. That authority is preempted only if the congressional intent to do so is clear and manifest. No one reasonably believes that state bans on the delivery of tobacco or other dangerous substances to children or on the delivery of contraband is preempted by the FAAAA language "related to." Although such bans literally are "related to . . . service[s]" of a carrier, there is no support in the FAAAA or common sense for such a result. The dispute here is over the subsidiary laws that implement state public health bans: laws requiring retailers to use a delivery service that has age verification and signature options that duplicate the safeguards at over-the-counter sales, and laws that make clear that a delivery service can be prosecuted using markings and labels on the package which is the best, if not only, evidence available. While the same reasons that make clear that a ban is not preempted apply fully to the implementing legislation, the court of appeals, Respondents, and the United States abandon them. Instead, they apply an overly-broad if not literal reading of "related to," relying upon a crabbed view of prior ADA cases and ignoring the stated objectives of the FAAAA, to produce an impractical and problematic result.

The preemptive language "related to," of course, is unhelpful and relatively meaningless, as this Court's

ERISA cases tell us. This is particularly so because the consequences of applying it as the court of appeals did prevent effective implementation of the ban on furnishing tobacco to children by means of delivery sales. The court of appeals' heavy reliance upon *Morales* is misplaced because it involved clear, direct economic regulation of airlines. Most importantly, the Court cautioned against reading too much into that case, and specifically stopped short of applying ADA preemption to gambling, prostitution and obscenity – all public health in nature. Therefore, the Court finds itself very much at the same place regarding the FAAAA as it did with ERISA when it decided *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co*., 514 U.S. 645 (1995). Just as in the ERISA cases, resort must be had to the objectives of the underlying statute. Consideration of those objectives leads to the conclusion that public health delivery laws, particularly regarding youth access to tobacco, are not preempted by the FAAAA.

The FAAAA was intended only to apply to motor carriers the same level of preemption previously enjoyed by air carriers – freedom from state economic regulations that interfered with competition for markets. At the time, there were myriad state public health delivery laws banning and controlling the delivery of everything from alcohol to wild animals. There is no suggestion anywhere that this was the type of state law Congress intended to supercede. A proposal to eliminate them would never have passed, particularly regarding tobacco in light of the Synar Amendment which specifically encouraged states to enact and enforce laws to stop the sale and distribution of tobacco to minors.

Just as a ban on the delivery of tobacco to minors does not interfere with the objectives of the FAAAA, so section 1555-C(3)(C) does not either and therefore has no "connection with" carrier services. It is similar to public health laws on the books at the time of the FAAAA, and there is no suggestion such laws were to be preempted. Similar to a ban preventing delivery of illegal narcotics or certain dangerous items, a law requiring retailers to deliver such items in a particular fashion does not skew competition. Any carrier can openly compete for the legal tobacco delivery market or not. Because section 1555-C(3)(C) does not apply to carriers, it has no "reference to" their services; and, in any case, whatever effects there may be apply to all delivery services, of which carriers are but a subset. Finally, because Congress would not have preempted tobacco delivery laws if such a proposal had been made, resort to the "acute," indirect effects inquiry is unnecessary. Under that inquiry, moreover, section 1555-C(3)(C)'s effects are not so acute as to force a carrier to compete or not for the legal tobacco delivery market.

As to section 1555-D, the First Circuit upheld that portion of the provision that banned motor carriers from knowingly delivering contraband tobacco, and Respondents did not cross-petition from that holding. Accordingly, Respondents must concede that that part of section 1555-D is not preempted by the FAAAA. But the best and only manner to enforce that ban is to take the person who violated it – the delivery service – to court. And the best, and so far only identified, evidence to prove a case of delivery of unlicensed tobacco or tobacco to a child is the markings or labels on the package. The second part of section 1555-D identifies the ordinary evidence from which a delivery service discerns that a package contains tobacco

or is unlicensed. The court of appeals' decision prevents Maine from using that sort of evidence because it would require UPS to change its uniform procedures in order to look for and do something about a package with tobacco markings or labels on it before delivering contraband. Neither the appeals court, Respondents, nor the United States address this practical problem, which has the effect of immunizing carriers from state public health delivery laws.

Congress did not evince any intent to prevent the longstanding use of such evidence against those who illegally deliver contraband. Imputing knowledge has no "connection with" carrier services because it does not interfere with the objectives of the FAAAA to promote competition among carriers – it applies to all delivery services equally. And, because this provision applies to all delivery services of which carriers are a subset, likewise it has no "reference to" carrier services. Finally, Respondents failed to carry their heavy burden of proof that the Maine Act has an indirect, acute prohibited effect on them. The indirect effect on carriers is to prevent them from delivering contraband and dangerous substances to children, which by no account can be considered prohibited under the FAAAA.

ARGUMENT

I. THE COURT SHOULD LOOK BEYOND THE "RELATED TO" LANGUAGE OF THE FAAAA TO ITS OBJECTIVES IN ORDER TO DETERMINE IF CONGRESS INTENDED TO PREEMPT STATE LAWS BANNING THE SALE AND DELIVERY OF DANGEROUS SUBSTANCES AND STATE LAWS THAT IMPLEMENT THEM.

A. The ERISA Cases Teach That The Term "Related To" In A Preemption Provision Cannot Be Literally Applied, But Must Instead Be Construed Based On The "[O]bjectives of the . . . [S]tatute."

Controlling the sale and distribution of tobacco to ensure it does not end up in the hands of children is established federal and state policy, endorsed at every level and by every branch of government. All 50 States make it unlawful to sell tobacco products to minors. These bans naturally apply to sales by all means – whether face-to-face at a retail outlet, through the U.S. mail, or through a carrier covered by the FAAAA. It could not be otherwise. The terrible impact on a child's health is the same whether the child is furnished the tobacco over-the-counter in face-to-face sales or over-the-doorstep from a delivery person as a part of Internet or telephone sales. Yet it is certainly possible to view those state laws as "related to" a carrier's "service." State bans on shipping tobacco to minors (and contraband such as illegal narcotics to anyone), and those laws that implement such bans, prevent carriers such as UPS from delivering certain types of goods or require them to be shipped in only a particular fashion. These laws eliminate a specific "service" the carriers might otherwise

have provided – delivery of contraband tobacco – and therefore literally are "related to" carrier services.

The ERISA preemption cases beginning with *Travelers*, however, teach that the term "relate to" cannot be read literally. In *Travelers*, the Court recognized that the term "relate to" is "unhelpful" and "frustrating," and cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." 514 U.S. at 655, 656; *see also California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316, 325 (1997); *id*. at 335 (Scalia, J., concurring). Instead, the Court reasoned that it had to "go beyond the unhelpful text and the frustrating difficulty of defining [ERISA's] key term, and look instead at the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656.

B. The FAAAA's "Related to" Provision Should Likewise Be Construed Based On The "[O]bjectives of the . . . [S]tatute."

The same common sense applies to the FAAAA. At the time of the enactment of the FAAAA, Maine, like other states, had numerous and longstanding bans and controls on the delivery of various substances, from alcohol to wild animals.[36] A literal reading of "related to" effectively

[36] *See, e.g.,* 28-A Me. Rev. Stat. §§ 2073, 2077, 2081, originally enacted in 1987, Me. Pub. L. 1987, c. 45, § A, 4 (liquor transportation provisions, and prohibiting furnishing, delivering, or giving liquor to a minor); former 12 Me. Rev. Stat. § 12351, originally enacted in 1979, Me. Pub. L. 1979, c. 420, § 1 ("Any common carrier accepting wild animal or wild bird for transportation shall" check the hunter's license,

(Continued on following page)

eliminates all of them to the extent the contraband is delivered by carriers covered by the FAAAA. A ban on the delivery of tobacco (or any of the myriad other bans on the sale and delivery of contraband)[37] literally is "related to" a carrier's "service" because it prevents a carrier from delivering a particular item in Maine.

Inquiry beyond the words "related to" is particularly called for here because the federal government does not regulate the sale and distribution of tobacco by means of delivery sales or otherwise. Rather, in enacting the Synar Amendment, Congress explicitly encouraged the states to use their public health powers to pass laws against the sale and distribution of tobacco to children without any limitations or directives regarding uniformity. It cannot be seriously contended that Congress, just two years after enacting the Synar Amendment, intended to create a vast loophole by preempting all state laws that make it illegal to deliver tobacco to minors via carriers covered by the FAAAA. The regulatory void created by the strict reading of "related to" by the court of appeals is at the very least "unsettling," demanding inquiry into the objectives behind those words. *Travelers,* 514 U.S. at 655; *United States v.*

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affix tags and identification, and make returns to the commissioner); 8 Me. Rev. Stat. §§ 221, *et seq.*, enacted by Me. Pub. L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 17-A Me. Rev. Stat. § 1001(1)(B), enacted by Me. Pub. L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 7 Me. Rev. Stat. § 3981, enacted by Me. Pub. L. 1987, c. 383, § 3 (regulating periods of confinement and conditions for transportation of animals); 12 Me. Rev. Stat. §§ 8305-06, originally enacted by Me. Pub. L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees).

[37] *Id.; see also* 17-A Me. Rev. Stat. § 1118 (transporting scheduled drugs); 17-A Me. Rev. Stat. § 554-B(2) (transferring handgun to minor).

American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940) (plain meaning of a statute is not applied when the results are absurd or "plainly at variance with the policy of the legislation as a whole.")

Finally, as explained in *Travelers*, a literal reading of the term "related to" would "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655. That concern holds particular force here, because the Maine Act and the Synar Amendment have a "common purpose" in preventing youth access to tobacco. Accordingly, the Maine Act is protected by a particularly strong presumption against preemption. *See Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 666 (2003) (the presumption "has special force when it appears . . . that the two governments are pursuing 'common purposes,'" quoting *New York State Dept. of Social Servs. v. Dublino,* 413 U.S. 405, 421 (1973)). Of course, that is on top of this Court's general recognition that "the historic police powers of the State include the regulation of matters of health," so that "Respondents . . . bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund,* 520 U.S. 806, 814 (1997) (internal citation and quotation marks omitted); *see also City of Columbus v. Ours Garage and Wrecking Service, Inc.,* 536 U.S. 424, 438 (2002) (applying the presumption in an FAAAA preemption case). All told, this Court should apply a methodology similar to this Court's approach to ERISA's "relate to"

preemption provision to the FAAAA's "related to" preemption provision.[38]

C. *Morales* and the Conferees' Reference Thereto Do Not Require The Court To Forego Consideration Of The Objectives Of The FAAAA.

The First Circuit held that the logic of the ERISA cases beginning with *Travelers* was inapposite to FAAAA preemption because "'the conferees [did] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales* [*v. TWA*, 504 U.S. 374 (1992)].'" Pet. App. 15 (quoting H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755). According to the court of appeals, any post-*Morales* refinement in the meaning of the term "relate to" is irrelevant because Congress fossilized *Morales* into the bedrock of the FAAAA. Pet. App. 15-20. This reasoning misreads *Morales* as well as the conferees' intent when referring to it.

1. In *Morales,* the Court applied ERISA's two-pronged "reference to" and "connection with" methodology to assess whether the ADA preempted state guidelines applying state unfair trade practices laws to airfare

[38] Not surprisingly, then, lower courts other than the First Circuit have looked beyond the words "related to" when applying the FAAAA's preemption provisions. *See Ace Auto Body & Towing, Ltd. v. City of New York,* 171 F.3d 765 (2d Cir. 1999); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-88 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999); *Ward,* 291 F. Supp. 2d at 208-11; *Robertson v. State of Washington Liquor Control Board,* 10 P.3d 1079 (Wash. Ct. App. 2000).

advertising. Although established pursuant to the states' police powers, the guidelines were economic in nature, directly regulating how airlines could advertise their prices and services, and were not in any way public health laws. The guidelines were found to have a "reference" to airfares for the obvious reason that they rested entirely upon airfares and "establish[ed] binding requirements as to how tickets may be marketed if they are to be sold at given prices." 504 U.S. at 388. Additionally, under the "connection with" prong, the Court found "as an economic matter that the state restrictions on fare advertising have the forbidden significant effect upon fares" because the guidelines had "a significant impact upon the airlines' ability to market their product." *Id.* at 388-90. *Morales,* therefore, presents a clear case involving economic guidelines requiring all airlines to market virtually all of their prices and services in a particular fashion, directly contravening the objectives of the ADA.

Most importantly, rather than foreclosing further refinement of preemption analysis under the ADA on a case-by-case basis, *Morales* expected and predicted it. The Court cautioned that it was not "set[ting] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relate to' rates; the connection would obviously be far more tenuous." 504 U.S. at 390. Under *Morales,* a state would be free to regulate the delivery of gambling or obscene material to children, and tobacco as well. The Court's "broad" interpretation of

the ADA's preemption provision, therefore specifically stopped short of encompassing public health laws.

> To adapt to this case our language in *Shaw*[*v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983)], "some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect. 463 U.S. at 100, n. 21. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

504 U.S. at 390. Thus, the Court was not establishing a boundless preemptive scope to the ADA, and foretold that where the line would be drawn as to what is "tenuous, remote or peripheral" would depend upon the state law before it.

The Court reiterated its cautionary sentiment against boundless preemption in *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995), which dealt with, *inter alia*, state economic laws regulating frequent flier miles, clearly covered by the ADA. The Court emphasized that in *Morales* "much more" than the mere "relating to" language "account[ed] for the ADA's preemption of the state regulation in question." *Wolens*, 513 U.S. at 224. In particular, stated the *Wolens* Court, *Morales* emphasized that false advertising by airlines is regulated by the federal Department of Transportation, *id.*, a situation much different than the one before the Court here where there is no federal regulation of delivery sales of tobacco. The *Wolens* Court concluded that, "while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" *Id.*

at 234-35 (citations omitted); *see also Mendonca,* 152 F.3d at 1188-89.

The Court here is presented very much with the same situation as in *Travelers.* In the prior decisions on preemption under the ADA, "it had not been necessary to rely on the expansive character of [the statute's] literal language in order to find pre-emption." *De Buono,* 520 U.S. at 813. The Court now has the opportunity for the first time to assess Congress' preemption objectives under the ADA's companion in a case involving state public health instead of economic laws, and involving a subject matter (preventing children's access to tobacco) that Congress has left to the states. The Court should use the ERISA cases as a guide.

2. The conferees' reference to *Morales*, of course, is sandwiched between numerous statements that the problem the FAAAA was intended to resolve was state *economic* regulations that impact the "level playing field," with no mention of public health laws. H.R. Conf. Rep. No. 103-677, at 82, 83, 84, 87, 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754, 1755, 1756, 1759, 1760. The import of the reference to *Morales* is further clarified by the conferees' reliance upon another decision in their report. In particular, the conferees explained the need for the FAAAA arose out of the divergent state treatment of air carriers and motor carriers, referring to *Federal Express Corp. v. California Public Utilities Commission,* 936 F.2d 1075. H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. There, the Ninth Circuit found that regulations of the California Public Utilities Commission were preempted by the ADA as applied to air carriers. That court explained that the broad preemptive language of the ADA "should be understood as allowing the state to

act in an area of non-economic regulation" because "despite the very broad and apparently all-inclusive language of the statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range." 936 F.2d at 1078. The ADA is "[i]nterpreted in terms of its purpose and in the context of other laws." *Id.* And, according to the federal Department of Transportation in its testimony on the bill that became the FAAAA: "Such a legislative solution would codify in law the Ninth Circuit FedEx decision, with one major difference. It would make that regulatory reform available to a much broader class of carriers." H.R. Subcomm. on Surface Trans. of the Pub. Works & Trans. Comm., *Hearing on State Motor Carrier Laws* (July 20, 1994) ("*House Hearing*") (Testimony of Frank E. Kreusi, Asst. Sec'y, D.O.T.)[39]

II. THE OBJECTIVES OF THE FAAAA WERE TO PREEMPT STATES' ECONOMIC REGULATION OF MOTOR CARRIERS AND TO PLACE THEM ON A "LEVEL PLAYING FIELD" WITH AIR CARRIERS, NOT TO PREEMPT STATES FROM BANNING OR REGULATING THE SHIPMENT OF DANGEROUS SUBSTANCES AND CONTRABAND.

1. The objective of the FAAAA was to foster competition among all carriers for the business of transport of

[39] UPS testified that it was before the committee "because of" the *Federal Express* decision. *House Hearing* (Testimony of James A. Rogers, Vice Pres., Gov'tl Affairs, UPS), *supra.* Clearly, UPS knew the Ninth Circuit's opinion on state non-economic regulation, and said nothing to the committee suggesting that would be altered by the proposed law.

property by creating "as completely as possible the level playing field between air carriers . . . and motor carriers." H.R. Conf. Rep. No. 103-677, at 82 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754; *see also House Hearing* (Kreusi Testimony, D.O.T.), *supra.* Congress sought to accomplish that goal by preempting the states' economic regulation of motor carriers, so that the motor carriers would be treated exactly as the air carriers had been treated under the ADA. H.R. Conf. Rep. No. 103-677, at 82-85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-56.

Prior to the FAAAA, many states had a variety of economic entry and commodity controls that "related to. . . . service[s]," by protecting certain carriers and discouraging new applicants, therefore stifling competition. *Id.* at 86, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. In particular, as identified at the congressional hearings, these problematic economic laws included: entry controls which required a carrier to obtain a state license to deliver property in general as well as specific commodities; state approval in order to change a service offering; and state limits on the number of customers a carrier may service within a state.[40]

At bottom, "[t]he problem to which the congressional conferees [for the FAAAA] attended was 'state *economic*

[40] *House Hearing* (Rogers Testimony, UPS), (UPS "must . . . get state approval in order to change a service offering," and "could offer only those services that [the state] approved"); *id.* (Testimony of Larry S. Mulkey, Pres., Ryder Dedicated Logistics) (many states "limit the number of customers that we may serve at one time," or "require contract carriers to obtain separate authority for each customer that they serve.").

regulation.'" *City of Columbus,* 536 U.S. at 440 (emphasis in original); *see also Mendonca*, 152 F.3d at 1187. There is a clear distinction between the types of state laws that Congress intended to preempt and the ones at issue here: economic laws as opposed to public health laws. While both fall within a state's traditional police powers, the legislative history is overwhelmingly one-sided that the FAAAA was intended to preempt the former with no mention of the latter. The FAAAA's purpose was to preempt "the States' economic authority . . . 'not restrict' the preexisting and traditional police power over" safety, *City of Columbus,* 536 U.S. at 439, and logically public health as well. The proponents of the law as well as the conferees' report repeatedly and exclusively explained the problem was the various types of state "economic" laws limiting competition that regulated "intrastate prices, routes and services of motor carriers," typically "entry controls, tariff filing and price regulation, and types of commodities carried." [41] H.R. Conf. Rep. No. 103-677, at 86 (1994),

[41] *Proponents*: The proponents, in particular, the Administration, the American Trucking Association, and UPS, asked Congress only for preemption of state *economic* regulation. *House Hearing* (Kreusi Testimony, D.O.T.) (economic regulation to be preempted dealt with such matters as entry controls, tariffs and rates); *id.* (Rogers Testimony, UPS) (UPS testified in favor of preemption of state "economic regulation," such as rates and entry restrictions); Sen. Subcomm. of the Comm. On Commerce, Science & Trans., *Hearings on the Interstate Commerce Commission* (July 12, 1994) (Testimony of Thomas V. Donahue, Pres. and Chief Exec., American Trucking Assoc.) (testified in favor of the preemption of "state economic regulation," advocating that it would allow "states to continue to regulate non-rate or economic entry factors" and "non-economic aspects of state regulation").

Conferees: H.R. Conf. Rep. No. 103-677, at 82 (purpose is to level the playing field "with respect to intrastate economic trucking regulation"), 84 (states may not use non-preempted regulatory authority "as a guise for continued economic regulation"), 87 ("State

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reprinted in 1994 U.S.C.C.A.N. 1715, 1758. The conferees' reference to "types of commodities" was concerned with state laws requiring carriers to obtain specific licenses for particular commodities, which were sometimes limited to retard competition. That, of course, is not what we have here: any delivery service can deliver tobacco in Maine, and all delivery services must comply with the same laws when doing so. Certainly, there is no hint that Congress intended that contraband under state law suddenly would become a "commodity" beyond the states' regulatory authority.

To the extent Congress was concerned with a "patchwork" of state regulations, the concern was limited to economic laws. State nonuniformity for nonpreempted state regulations was permitted and expected. *See City of Columbus,* 536 U.S. at 441 ("State could, without affront to the statute, pass discrete, nonuniform safety regulations"). So long as a state's nonpreempted authority was not used "as a guise for continued economic regulation," H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, it was not preempted.

There is absolutely no suggestion in the legislative history that public health delivery laws in general or tobacco laws in particular would be preempted. As explained by the conferees, "[c]urrently [in 1994], 41 jurisdictions regulate, in varying degrees, intrastate prices, routes and services of motor carriers. The jurisdictions which do

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economic regulation . . . causes significant inefficiencies," and "preemption of State economic regulation could eventually yield $3-8 billion per year in savings"), 88 ("The purpose of this section is to preempt economic regulation by the States") (1994), *reprinted in* 1994 U.S.C.C.A.N. 1754, 1756, 1759, 1760.

not regulate are: . . . Maine. . . . .” H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758.[42] It is undisputed that at the time of the FAAAA's enactment Maine had a wide variety of public health laws restricting or banning deliveries of various items, *see* note 36, *supra,* and as understood and intended by the conferees, those types of laws therefore did not “regulate . . . prices, routes and services.” For obvious reasons, no one ever suggested that the FAAAA would grant immunity to a carrier from a state law that generally banned delivery of a dangerous substance or preempt a state law that regulated how such a substance could be delivered, because if anyone had, the FAAAA as written never would have passed.

2. Under the approach of the ERISA cases, being on the list of exemptions from preemption is not determinative. ERISA's preemption provision likewise contains specific exceptions (for the regulation of insurance and criminal laws), and likewise states that the preemption provision applies “[e]xcept as provided in” the subsection containing the exceptions. ERISA §§ 514(a), 514(b)(2), 514(b)(4), 29 U.S.C. § 1144(a), (b)(2), (b)(4). Nevertheless, this Court has not read those exceptions as meaning that every *other* category of state law that might “relate to” ERISA plans is preempted. None of the state laws upheld in *Travelers*, *De Buono*, and *Dillingham* fit within the

[42] The federal D.O.T. and representatives of the industry informed the committee that there were states with no problematic economic regulations. *House Hearing* (Kreusi Testimony, D.O.T.) (“Although nine States do not regulate trucking operations conducted wholly within their respective boundaries, 41 States do.”); *id.* (Mulkey Testimony, Ryder) (“41 states still have arcane laws regulating entry, rates and services for intrastate trucking.”).

exceptions. *De Buono,* 520 U.S. at 809 (state tax statute); *Dillingham,* 519 U.S. at 325 (state prevailing wage law); *Travelers,* 514 U.S. at 657-64 (state surcharge on bills of patients). The state laws were upheld because, based on Congress' objectives in enacting ERISA, they were "state law[s] that Congress understood would survive." *Travelers*, 514 U.S. at 656. With respect to the FAAAA preemption provision, the same is true of state contraband statutes.

In addition, the legislative history confirms that the conferees intended that the list of exceptions was not intended to be exclusive. The list was not proposed to diminish or expand the areas exempted under the ADA. H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755. It simply set forth some of the matters of the most but not exclusive concern, with the conferees specifically explaining: "This list is not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756 (emphasis added). The conferees reiterated that this list of exemptions was "partially identified." *Id.*[43]

[43] The conferees also advised that the law should not be read to allow state regulation of "prices, routes and services . . . through its unaffected authority to regulate matters *such as*" those on the list. H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756. The list came about in part from Congress' paying specific attention to the American Trucking Association's position accepting "preemption of state regulation of motor carrier rates and entry based on economic factors," so long as "that would allow [state] regulatory protection to continue for non-economic factors, *such as*" the matters contained in the list. *Id.* at 88, *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760 (emphasis added); *City of Columbus,* 536 U.S. at 440-41. By

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III. THE FAAAA DOES NOT PREEMPT MAINE FROM IMPLEMENTING ITS BAN ON FURNISHING TOBACCO TO MINORS BY REQUIRING RETAILERS OF TOBACCO TO USE A DELIVERY SERVICE THAT PROVIDES AGE VERIFICATION AND SIGNATURE SERVICES AND BY IMPUTING KNOWLEDGE OF TOBACCO DELIVERIES TO MOTOR CARRIERS FROM EVIDENCE ON THE OUTSIDE OF PACKAGES.

Looking "at the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive," *Travelers*, 514 U.S. at 656, the Maine Act is not preempted by the FAAAA because Congress' objectives never were to eliminate state public health delivery laws, particularly those safeguarding children from tobacco.

A. Section 1555-C(3)(C) Is Not Preempted By The FAAAA.

1. As a public health law whose purpose is to safeguard children, section 1555-C(3)(C) has no "connection with" carrier services under the FAAAA. First, in reaching its decision, the court of appeals concluded that the public health purpose of a state statute has no relevance. Pet. App. 19-20. To the contrary, the ERISA cases teach us that such a purpose is the key consideration to the preemption analysis. Just as there is "nothing in the language of [ERISA] or the context of its passage indicat[ing] that Congress chose to displace general health care regulation,

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repeatedly using the phrase "such as," the conferees understood the list was not exclusive.

which historically has been a matter of local concern," *Travelers,* 514 U.S. at 661, there too is nothing in the language or context of the FAAAA's passage suggesting Congress enacted that law to displace longstanding state laws regulating how retailers can ship dangerous substances, which historically also have been a matter of local concern. *See Dillingham,* 519 U.S. at 332 n.7 ("lack of positive indication that Congress harbored" intent to preempt a type of state law argues against preemption of such law). There is no dispute that Maine had substance delivery laws on the books when the FAAAA was enacted, yet the conferees singled out Maine as a state that had no problematic *economic* regulations to be preempted. Preempting state public health laws implementing a ban on the sale and distribution of tobacco is especially unfounded because the federal government does not regulate in this area, thus creating an unintended regulatory void. *See, e.g., Granholm v. Heald,* 544 U.S. 460, 490 (2005) (certain state laws struck down as violative of the Commerce Clause, but states can regulate shipping of alcohol by requiring use of age-verification delivery services); *Morales,* 504 U.S. at 390-91 (state laws against false airfare advertising struck down as preempted in part because federal agency had authority to deal with problem).

Second, Congress passed a law – the Synar Amendment – which encourages and reinforces state exercise of public health police powers to enact and enforce laws regulating how tobacco is sold and distributed. *See Dillingham,* 519 U.S. at 332 n.7; *Travelers,* 514 U.S. at 665-66. By passing the Synar Amendment, Congress clearly recognized that states have broad powers over the sale and delivery of tobacco products, and did not think that federal

laws, like the ADA that preceded it, which is the model of preemption upon which the FAAAA is founded, would preempt those powers. No one disputes that Internet and telephone sales of tobacco are a serious and growing public health problem which undermines the purposes of the Synar Amendment. Section 1555-C(3)(C) is "genuinely responsive" to that public health problem, and therefore should be upheld. *See City of Columbus,* 536 U.S. at 442 (state laws "genuinely responsive" to safety concerns not preempted).

The Synar Amendment broadly promotes state public health powers, and "all powers and duties incidental and necessary to make such legislation effective are included by implication." 2B N. Singer, Statutes and Statutory Construction, § 55:04, at 388 (6th ed. 2000). This precept, that the greater includes the lesser, applies with full force here. The power of a state to ban retailers entirely from shipping contraband items (which is conceded here) includes the lesser power to ban retailers from making such shipments except by a specified manner. There is no reason to conclude that a state cannot choose a lesser restriction allowing delivery retailers to continue to sell tobacco in Maine with particular safeguards.

The suggestion that delivery sales are outside the ambit of the Synar Amendment's directive to control how tobacco is "distribute[d]," U.S. Pet. Br. 16-17 & n.4, is nonsensical. There is nothing in the Synar Amendment remotely suggesting that Congress' encouragement of state regulation of sale and distribution of tobacco was limited to over-the-counter sales, or that delivery sales via the telephone, or for that matter any other means that inventive retailers may come up with, were somehow excluded. The undeniable fact is that delivery is critically necessary

to "distribute" tobacco. Equally undeniable is that a sale requires the seller to "transfer and deliver" the purchased item to the buyer. U.C.C., § 2-301 ("The obligation of the seller is to transfer and deliver. . . ."). The Maine Act regulates the "transfer and deliver[y]" of tobacco products sales.

The objectives of both the FAAAA and the Synar Amendment can be achieved here without doing damage to either: state economic laws aimed at and having the effect of impeding competition between carriers are preempted, while state public health laws such as section 1555-C(3)(C) which are genuinely responsive to the tobacco problem are not. The argument that the two statutes can be harmonized by preempting state laws regulating tobacco delivery sales because the states have effective nonpreempted means to protect children other than those at issue is unsubstantiated and not consistent.[44] Obviously, controlling how retailers ship tobacco and how delivery services hand it over-the-doorstep are the most effective means to deal with the problem. Neither Respondents nor the United States have shown otherwise or that their alternative approaches come close to the efficacy of the

[44] For example, on the one hand, Respondents assert that Maine can generally ban the knowing delivery of contraband, Resp. Pet. Br. 17, and the United States argues that Maine can enact general bans and general age verification requirements, U.S. Pet. Br., 10-11, 17-18. On the other hand, they then go on to argue that Maine cannot use evidence on the outside of a delivered package to impute knowledge of its contents in an enforcement action against a carrier. Resp. Pet. Br., 17; U.S. Pet. Br., 12-13. Therefore, the general laws which are presented as being effective would in reality be unenforceable.

Maine Act to deal with the burgeoning problem of delivery sales.[45]

Third, section 1555-C(3)(C) does not interfere with Congress' objectives in enacting the FAAAA – competition between carriers free from state economic regulations. *See Dillingham,* 519 U.S. at 325; *Travelers,* 514 U.S. at 657-64. Section 1555-C(3)(C) is an obligation on retailers; it does not require a carrier to charge a particular price, follow a particular route, or provide a particular service. As with the ERISA cases, because the state law neither requires nor binds the carriers to do anything, there is no preemption. *Dillingham,* 519 U.S. at 332; *Travelers,* 514 U.S. at 662.

Maine's law can perhaps be read to impede competition, but only competition for unfettered delivery of contraband tobacco or tobacco to children, the sort of "service" the FAAAA certainly did not intend to protect. The FAAAA was enacted to *promote* competition, and all the Maine law does is require a retailer to use a carrier that chooses to compete for the *legal* tobacco delivery market. State laws that merely give incentives to take certain actions that are nonbinding are not generally preempted. *Travelers*, 514 U.S. at 668; *see also De Buono,* 520 U.S. at 814 n.9, 815-16; *Dillingham*, 519 U.S. at 334.

The conclusion of the court of appeals, on the other hand, is anticompetitive. A single carrier – UPS – can

[45] The federal government, moreover, just two years after enacting the FAAAA, specifically "allow[ed] the States flexibility" regarding how to control youth access to tobacco. *Tobacco Regulation, supra*, 61 Fed. Reg. 1492, 1495. It thus is left up to each state to decide how to prevent children from getting tobacco products, without the need to prove which method works best.

foreclose competition for the legal tobacco delivery market in Maine by deciding it does not want to enter this market.[46] If the court of appeals is correct, then a single carrier can "preempt" for example state alcohol delivery laws relied upon by this Court in *Granholm,* because that carrier for its own business (and perhaps anticompetitive) reasons chooses not to provide the age verification services contemplated therein. This is little different than placing commodity and entry controls that the FAAAA was intended to prevent into the hands of one carrier.

The United States argues that this provision fails under the "connection with" prong because "the service . . . prescribed by [section 1555-C(3)(C)] is one that, as far as the record reflects, no carrier offers in the marketplace." U.S. Pet. Br. 12. The United States' reasoning is that if a single carrier already provided the exact service contemplated by this provision, that "independent commercial decision" would show that the statute had no "forbidden significant effect." *Id.* at 10-12. This argument is the exact opposite of the position of Respondents. Respondents chose to proceed on the theory that Maine's law was preempted so long as a *single* carrier did not provide the prescribed service, did not present evidence on the effect of Maine's law on carriers other than UPS, and objected to discovery on other carriers. Because Respondents have the heavy burden of demonstrating preemption, the lack of evidence in the record on the issue dooms Respondents' claim under this theory, not the Attorney General's defense. Most importantly, the FAAAA does not guarantee to any carrier

[46] UPS's testimony in support of the FAAAA that "[w]e are willing to compete," thus rings hollow. *See House Hearing* (Rogers Testimony, UPS), *supra.*

or the carrier industry the right to deliver dangerous substances without state controls, whether or not any carrier provides a service that conforms with Maine's public health delivery laws on the date they are enacted.

Finally, regarding arguments over a "patchwork" of state tobacco laws, nonuniform regulation in nonpreempted areas was expected. *See City of Columbus,* 536 U.S. at 441. Public health delivery laws were a patchwork in 1994, and neither the carriers nor conferees so much as hinted that was a problem to be solved by the FAAAA. In the end, the Respondents' concerns regarding nonuniformity of *state public health delivery laws*, be it for tobacco, alcohol or wild animals, is an issue they can present to Congress in the same manner they did in 1994 when they dealt with *state economic laws*.

2. The court of appeals found section 1555-C(3)(C) was preempted because it "references" carrier services. Pet. App. 23. Under ERISA case law, however, the "reference to" prong is very narrow. It only applies "[w]here a State's law acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation." *Dillingham,* 519 U.S. at 325. Section 1555-C(3)(C) obligates retailers, not carriers, and therefore does not immediately act upon a carrier. Moreover, the provision requires retailers to use a "delivery service" imposing certain requirements, and "[d]elivery service" is defined to include more entities than those motor carriers covered by the FAAAA. Specifically, it includes "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 Me. Rev. Stat. § 1551(1-C). By contrast, under the FAAAA, "motor carrier" is defined as "a person providing commercial motor

vehicle . . . transportation for compensation," and "commercial motor vehicle" is a self-propelled or towed vehicle with gross weight or rating of 10,001 pounds or being used to transport more than eight passengers for compensation. Pub. L. No. 109-59, Title IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (to be codified at 49 U.S.C. § 13102(14)); 49 U.S.C. §§ 31132(1)(A) & (B). Because Maine's law applies as well to vehicles and modes of transportation not meeting that definition – *e.g.,* delivery automobiles or small vans or a bicycle service – section 1555-C(3)(C) has no "reference to" carrier services. *See also* U.S. Pet. Br. 8-9 (using this analysis and reaching the same conclusion).

3. The court of appeals also found that this provision is preempted because it indirectly affects the timeliness and efficiency of UPS's services if UPS chooses to compete for this market. Pet. App. 23. Under ERISA analysis, the Court has explained that simply because a state law increases the costs of doing business does not alone mandate preemption. *De Buono,* 520 U.S. at 816. The Court has allowed that in certain extreme circumstances a state law having "acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers . . . might indeed be preempted." *Travelers,* 514 U.S. at 668.

The Court, however, need not engage in this inquiry here. The "acute" analysis is part of an effort to determine if a state law is the "type of law that Congress intended . . . to supercede." *De Buono,* 520 U.S. at 814, 816 n.16. The purpose of the inquiry is to determine whether Congress would have preempted a particular state law which has an indirect impact on congressional objectives if Congress had been aware of that impact. Here, no one can

reasonably believe that if the carrier industry had gone to Congress in 1994, just two years after the Synar Amendment, it could have persuaded Congress to preempt a state law requiring the retailer to use a delivery service providing the public health safeguards found in section 1555-C(3)(C).

In any event, Respondents have not carried the heavy burden of proof contemplated by this inquiry.[47] "Acute" means "sharp or severe effect," "extremely great or serious." Random House Unabridged Dictionary, 21 (2d ed. 1993). There has been no showing that section 1555-C(3)(C) would impose any "acute . . . economic effects" on UPS. It neither forces UPS to enter nor prevents it from competing for the legal tobacco delivery market.[48] The provision does not, of course, require UPS to do anything; it merely requires retailers – if they wish to deliver tobacco – to use an addressee-signature, adult-identification service. This might affect UPS because it gives the company an incentive to provide the service, if it was not already doing so. But this Court has made crystal clear that a state law does not have an "acute" effect within the meaning of a "relate to" preemption provision merely because it "provide[s] some measure of economic incentive to comport with the State's requirements." *Dillingham*, 514 U.S. at 332; *see also Travelers*, 514 U.S. at 659 ("An indirect economic influence . . . does not bind plan

[47] For that matter, to the extent the "significant forbidden effects" nomenclature used in *Morales* applies and suggests a more forgiving test, Respondents have not carried that burden either.

[48] Nor have Respondents shown, or attempted to show, that the legal tobacco delivery market is so critical to UPS's economic survival as to force UPS to provide this service.

administrators to any particular choice and thus function as a regulation of an ERISA plan itself. . . .").

Moreover, Respondents failed to show section 1555-C(3)(C) would impose significant, let alone acute, costs upon UPS that would prevent it from successfully competing. In particular, Respondents did not price the effect on UPS to provide an addressee-signature, age-verification service that retailers must use if they wish to ship tobacco. In particular, Respondents did not provide any costs for UPS of a *new* "adult-*addressee*-signature" delivery as compared to the *present* $2.75 "adult-*recipient*-signature" delivery, to the extent the two may be different. Respondents further presented no evidence quantifying the additional costs, if any, of utilizing UPS's preexisting procedures regarding failures of delivery when applied to the *new* service, nor what the cost would be to have pertinent information available on the DIAD at the time of delivery. Pet. App. at 28 n.14, 65 n.92; JA 105, 107; *see also* note 14, *supra*. Moreover, if the *new* service could be profitably priced at $3.00, for example, rather than $2.75 for the *present* service, that is not acute; it simply bears on the relative costs of competing carriers that may be passed on to their customers. *See Travelers,* 514 U.S. at 658-60 (upheld state surcharges which "are presumably passed on at least in part" to customers because they "simply bear[ ] on the costs of benefits and the relative costs of competing insurance to provide them.").

The court of appeals and the United States agree that in furtherance of Maine's public health responsibilities it can ban a retailer from shipping tobacco into Maine under the FAAAA. In such case, Maine would affect the market dramatically by stopping any delivery sales of tobacco in Maine – no retailer could use any carrier to deliver tobacco

to consumers in Maine, which is what New York has done for cigarettes. Section 1555-C(3)(C) is not so severe, and instead allows for a market for delivery sales of tobacco to develop. If such a market fails to develop, delivery services in Maine will be in the same situation as they would be under a total ban, which according to the court of appeals and the United States has no connection with carrier services and therefore is not preempted.

B. Section 1555-D Is Not Preempted By The FAAAA.

1. The court of appeals held that the first sentence of section 1555-D – which bans the *knowing* delivery of tobacco from an unlicensed retailer unless to a licensed distributor or retailer – survives preemption, Pet. App. 26, 29; and that no longer is in dispute. Resp. Pet. Br. 16-17. Normally, in order to enforce a ban or restriction on the *knowing* delivery of tobacco or any other substance, the state must put into evidence the package showing the markings or labels from which the fact-finder may discern whether the delivery service *knew* the package contained the problematic substance. *See, e.g.,* JA 32, 34, 36, 37. In response, the delivery service may present testimony that its employees did not see the markings or labels. Section 1555-D simply identifies that ordinary evidence so that the delivery person is deemed to know the package contains tobacco from the tobacco and markings.

The court of appeals found that use of this evidence was preempted because "imputing knowledge" forces a carrier to change its uniform practices by requiring its employees to actually look for these markings and do something if an employee saw them, *e.g.*, not deliver it if

unlicensed or not deliver it to a child. Pet. App. 28. But without use of such evidence against a carrier, it has effectively obtained immunity from any ban or regulation of tobacco, alcohol, firearms or gambling material, for the obvious reason that aside from the markings and labels there is no other evidence to be had. No wonder the court of appeals recognized the "tension" and "practical" difficulties of its decision. *Id.* at 28-29. Proper application of the FAAAA preemption provision eliminates the "tension" and "practical" difficulties, for it permits the imputation of this knowledge to carriers.

2. Because the evidentiary use of tobacco markings and labels furthers public health objectives, and has nothing to do with the economic regulation of carriers, it has no "connection with" carrier services and therefore is not preempted. The accepted power to *impose* the ban on knowing deliveries under the first part of section 1555-D includes the lesser and implied power to *enforce* it. Such evidence has been used for as long as there have been contraband delivery laws, long preceding the FAAAA or the ADA. There is nothing in the language or history of the FAAAA's passage suggesting Congress intended to prevent the states from continuing to use such evidence. Such evidence certainly is part and parcel of the broad power to ban the delivery of unlicensed tobacco, and to ban youth access to tobacco as encouraged by the Synar Amendment. That a state cannot use evidence of markings and labels to prosecute carriers for unlicensed delivery of substances such as tobacco, alcohol and fireworks or for handing them over to children is "unsettling," *Travelers,* 514 U.S. at 665, and patently absurd. *See, e.g., Nixon v. Missouri Municipal League,* 541 U.S. 125 (2004) (Court will not construe a statute in a manner that leads to absurd or futile results).

Maine most certainly does want to use this evidence to affect the marketplace – by preventing illegal and unhealthy transactions involving tobacco. Requiring any person including a carrier to take heed of the markings and labels simply accomplishes those congressionally supported goals. Obviously, use of such evidence is not a "guise" for economic regulation, and does not interfere with the primary objective of FAAAA preemption – competition between carriers. Such evidence can be used against any and all delivery services and carriers equally. All delivery services and carriers are treated the same.

3. Because the evidentiary use of such markings and labels applies to all persons delivering tobacco, and not just carriers, there is no "reference to" the services protected by the FAAAA. *Dillingham,* 519 U.S. at 325.

4. For the same reasons discussed above regarding section 1555-C(3)(C), it is unnecessary to inquire further with respect to section 1555-D under the acute, indirect effects analysis. Because Congress would never have preempted the use of this type of evidence to enforce state laws against those who knowingly deliver contraband tobacco, or other dangerous substances, the acute inquiry is not called for.

In any event, Respondents have not shown an acute prohibited effect on carrier services. The court of appeals found that any effect warranted preemption, Pet. App. 28, which goes well beyond this Court's reasoning. UPS employees prior to the Maine Act looked for a variety of markings and other information on the outside of its packages, so that all sides of the package normally were

"visually scanned" for a variety of reasons.[49] UPS already specially processes packages containing certain property – alcohol and firearms – to comply with applicable state laws.[50] Looking additionally for a tobacco marking cannot reasonably be found to have an acute, or even significant, impact on UPS, and Respondents presented no evidence it did. Indeed, UPS has now incorporated into its systems the same sort of processing regime to comply with its New York settlement agreement – *e.g.,* actively looking for indicia of cigarettes – that Respondents claim is needed to comply with Maine's law.

Similarly, the only evidence in the record is that it costs UPS less than a penny per package to "visually scan" the label for additional indicia of tobacco, including the retailer's name. Respondents presented no evidence regarding how much it costs UPS to check the list of unlicensed retailers with its sophisticated computer system, a process similar to what UPS appears to be doing to comply with its settlement with New York. UPS continued to deliver tobacco only to licensed Maine retailers and distributors after the Maine Act, without apparent acute disruption. In addition, the cost to a multibillion dollar enterprise such as UPS of as much as $2 per package to process only 33 suspected tobacco packages over a five month period is *de minimis*. In sum, Respondents have not shown such an effect as to prevent or foreclose UPS from competing.

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[49] JA 98-100; *Meisel Deposition,* at 213:13-270:10 and Exhibit 13 (JA 32-38); note 7, *supra.*

[50] JA 107-08; note 8, *supra.*

Moreover, if Maine simply banned tobacco deliveries to consumers, similar to the approach of New York, the carriers would have to process tobacco packages in essentially the same manner as they would under the Maine Act. The only effect on carriers that could be characterized as acute, or significant, is the loss of business to deliver unlicensed tobacco or to deliver tobacco to children. No one can reasonably argue this is protected conduct under the FAAAA. In the end, Respondents did not come close to meeting their heavy burden of demonstrating that evidentiary use of markings and labels to impute knowledge to a carrier that it is delivering contraband tobacco has a forbidden effect on UPS's services in a manner prohibited by the FAAAA.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8568
(207) 287-3145 (fax)
Counsel for Petitioner

APPENDIX

STATUTORY PROVISIONS INVOLVED

1992 Synar Amendment
42 U.S.C. § 300x-26

§ 300x-26. State law regarding sale of tobacco products to individuals under age of 18

(a) Relevant law.

(1) In general. Subject to paragraph (2), for fiscal year 1994 and subsequent fiscal years, the Secretary may make a grant under section 1921 only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.

* * *

(b) Enforcement.

(1) In general. For the first applicable fiscal year and for subsequent fiscal years, a funding agreement for a grant under section 1921 is that the State involved will enforce the law described in subsection (a) in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.

Federal Aviation Administration Act of 1994

49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) Motor carriers of property.

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the intrastate transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such

transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907), if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii. This subsection shall not apply with respect to the State of Hawaii.

(5) Limitation on statutory construction. Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

49 U.S.C. § 41713

§ 41713. Preemption of authority over prices, routes, and service

* * *

(b) Preemption.

* * *

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.

(A) General rule. Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered. Subparagraph (A) –

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

MAINE STATUTES INVOLVED

22 Me. Rev. Stat. § 1555-A

§ 1555-A. Identification cards

A licensee may refuse to sell tobacco to any person who fails to display upon request an identification card issued under Title 29-A, section 1410 or a motor vehicle operator's license bearing the photograph of the operator and issued under Title 29-A.

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22 Me. Rev. Stat. § 1555-B

§ 1555-B. Sales of tobacco products

1. Retail sales. Tobacco products may be sold at retail only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the department to provide reliable verification that the purchaser is not a minor. For direct, face-to-face sales, employees who sell tobacco products must be at least 17 years of age. An employee who is at least 17 years of age but less than 21 years of age may sell tobacco products only in the presence of an employee who is at least 21 years of age and is in a supervisory capacity.

2. Sales to minors prohibited. A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age. Tobacco products may not be sold at retail to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth.

3. Sales through vending machines. Tobacco products may be sold through vending machines according to section 1553-A.

4. Wholesale sales. Tobacco products may be distributed at wholesale without a face-to-face exchange only in the normal course of trade and under procedures approved by the Bureau of Revenue Services to ensure that tobacco products are not provided to any person under 18 years of age.

5. REPEALED. Laws 2003, c. 452, § K-7, eff. July 1, 2004.

5-A. Possession and use of cigarettes, cigarette papers or tobacco products by minors prohibited. Except as provided in subsection 5-B, a person under 18 years of age may not:

A. Purchase, possess or use cigarettes, cigarette papers or any tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

5-B. Exception to possession by minor. A person under 18 years of age may transport or permit to be transported in a motor vehicle cigarettes, cigarette papers or tobacco products in the original sealed package in which they were placed by the manufacturer if the transportation is in the scope of that person's employment.

5-C. Use of false identification by minors prohibited. A person under 18 years of age may not:

A. Offer false identification in an attempt to purchase a tobacco product or to purchase, possess or use cigarettes, cigarette papers or any other tobacco product;

B. Violate paragraph A after having previously violated this subsection; or

C. Violate paragraph A after having previously violated this subsection 2 or more times.

6. Display of prohibition of sales to juveniles. A dealer or distributor of tobacco products shall post notice of this section prohibiting tobacco and cigarette paper sales to persons under 18 years of age. Notices must be publicly and conspicuously displayed in the dealer's or distributor's place of business in letters at least 3/8 inches in height. Signs required by this section may be provided at cost by the department.

7. Enforcement. Law enforcement officers shall enforce this section. A citizen may register a complaint under this section with the law enforcement agency having jurisdiction. The law enforcement agency may notify any establishment or individual subject to this section of a citizen complaint regarding that establishment's or individual's alleged violation of this section and shall keep a record of that notification.

8. Fines. Violations of this section are subject to fines according to this subsection.

A. A person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged for any one offense. Except pursuant to Title 15, section 3314, the fine may not be suspended.

A-1. An employer of a person who violates subsection 1, 2, 3 or 4 commits a civil violation for which a fine of not less than $50 and not more than $1,500, plus court costs, must be adjudged. The fine may not be suspended.

B. A person who violates subsection 5-A or 5-C commits a civil violation for which the following fines may be adjudged.

1) For a first offense, a fine of not less than $100 and not more than $300 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

2) For a 2nd offense, a fine of not less than $200 and not more than $500 may be imposed. The judge, as an alternative to or in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

3) For all subsequent offenses, a fine of $500 must be imposed and that fine may not be suspended. The judge, in addition to the fine permitted by this subparagraph, may assign the violator to perform specified work for the benefit of the State, the municipality or other public entity or a charitable institution.

C. A person who violates subsection 6 commits a civil violation for which a fine of not less than

$50 and not more than $200 may be adjudged for any one offense.

9. Distribution of fines. Fines and forfeitures collected pursuant to subchapter 1 and this subchapter must be credited as follows: one half to the General Fund and ½ to be deposited in a nonlapsing account of the Maine Criminal Justice Academy for the purpose of providing funds for training and recertification of part-time and full-time law enforcement officers.

10. Affirmative defense. It is an affirmative defense to prosecution for a violation of subsection 1, 2 or 4 that the defendant sold, furnished, gave away or offered to sell, furnish or give away a tobacco product to a person under 18 years of age in reasonable reliance upon a fraudulent proof of age presented by the purchaser.

11. Manner of displaying and offering for sale. Tobacco products may be displayed or offered for sale only in a manner that does not allow the purchaser direct access to the tobacco products. The requirements of this subsection do not apply to the display or offering for sale of tobacco products in multi-unit packages of 10 or more units, in tobacco specialty stores or in locations in which the presence of minors is generally prohibited. This requirement does not preempt a municipal ordinance that provides for more restrictive regulation of the sale of tobacco products.

22 Me. Rev. Stat. § 1555-C

§1555-C. Delivery sales of tobacco products

The following requirements apply to delivery sales of tobacco products within the State.

1. License required. It is unlawful for any person to accept an order for a delivery sale of tobacco products to a consumer in the State unless that person is licensed under this chapter as a tobacco retailer. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 2, 3 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

2. Requirements for accepting order for delivery sale. The following provisions apply to acceptance of an order for a delivery sale of tobacco products.

A. When accepting the first order for a delivery sale from a consumer, the tobacco retailer shall obtain the following information from the person placing the order:

(1) A copy of a valid government-issued document that provides the person's name, current address, photograph and date of birth; and

(2) An original written statement signed by the person documenting that the person:

(a) Is of legal age to purchase tobacco products in the State;

(b) Has made a choice whether to receive mailings from a tobacco retailer;

(c) Understands that providing false information may constitute a violation of law; and

(d) Understands that it is a violation of law to purchase tobacco products for subsequent resale or for delivery to persons who are under the legal age to purchase tobacco products.

B. If an order is made as a result of advertisement over the Internet, the tobacco retailer shall request the e-mail address of the purchaser and shall receive payment by credit card or check prior to shipping.

C. Prior to shipping the tobacco products, the tobacco retailer shall verify the information provided under paragraph A against a commercially available database derived solely from government records consisting of age and identity information, including date of birth.

D. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

E. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 3 or 4 commits a civil violation for which a fine of not less than

$1,000 and not more than $5,000 may be adjudged.

3. Requirements for shipping a delivery sale. The following provisions apply to a tobacco retailer shipping tobacco products pursuant to a delivery sale.

A. Prior to shipping, the tobacco retailer shall provide to the delivery service the age of the purchaser as provided under subsection 2, paragraph A and verified under subsection 2, paragraph C.

B. The tobacco retailer shall clearly mark the outside of the package of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer.

C. The tobacco retailer shall utilize a delivery service that imposes the following requirements:

(1) The purchaser must be the addressee;

(2) The addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) If the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

D. The delivery instructions must clearly indicate the requirements of this subsection and must declare that state law requires compliance with the requirements.

E. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

F. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 4 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

4. Reporting requirements. No later than the 10th day of each calendar month, a tobacco retailer that has made a delivery sale of tobacco products or shipped or delivered tobacco products into the State in a delivery sale in the previous calendar month shall file with the Department of Administrative and Financial Services, Bureau of Revenue Services a memorandum or a copy of each invoice that provides for each delivery sale the name and address of the purchaser and the brand or brands and quantity of tobacco products sold. A tobacco retailer that meets the requirements of 15 United States Code, Section 375 et seq. (1955) satisfies the requirements of this subsection. The following penalties apply to violations of this subsection.

A. A person who violates this subsection commits a civil violation for which a fine of not less than $50 and not more than $1,500 may be adjudged for each violation.

B. A person who violates this subsection after having been previously adjudicated as violating this subsection or subsection 1, 2 or 3 commits a civil violation for which a fine of not less than $1,000 and not more than $5,000 may be adjudged.

5. Unlawful ordering. It is unlawful to submit ordering information for tobacco products by delivery sale under subsection 2, paragraph A in the name of another person. A person who violates this subsection commits a civil violation for which a fine of not more than $10,000 may be adjudged.

6. Rulemaking. The department and the Department of Administrative and Financial Services shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

7. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.

8. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

22 Me. Rev. Stat. § 1555-D

§1555-D. Illegal delivery of tobacco products

A person may not knowingly transport or cause to be delivered to a person in this State a tobacco product purchased from a person who is not licensed as a tobacco retailer in this State, except that this provision does not apply to the transportation or delivery of tobacco products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of section 1555-C, subsection 3, paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

1. Lists. The Attorney General shall maintain lists of licensed tobacco retailers and known unlicensed tobacco retailers. The Attorney General shall provide to a delivery service lists of licensed tobacco retailers and known unlicensed tobacco retailers. The list of known unlicensed tobacco retailers is confidential. A delivery service that receives a list of known unlicensed tobacco retailers shall maintain the confidentiality of the list.

2. Penalty. The following penalties apply for violation of this section.

A. A person who violates this section commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

B. An employer of a person who, while working and within the scope of that person's employment, violates this section commits a civil violation for

which a fine of not less than $50 nor more than $1,500 may be adjudged for each violation. A fine imposed under this paragraph may not be suspended.

3. Enforcement. The Attorney General may bring an action to enforce this section in District Court or Superior Court and may seek injunctive relief, including a preliminary or final injunction, and fines, penalties and equitable relief and may seek to prevent or restrain actions in violation of this section by any person or any person controlling such person. In addition, a violation of this section is a violation of the Maine Unfair Trade Practices Act.

4. Affirmative defense. It is an affirmative defense to a prosecution under this section that a person who transported tobacco products or caused tobacco products to be delivered reasonably relied on licensing information provided by the Attorney General under this section.

5. Rulemaking. The department shall adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

6. Forfeiture. Any tobacco product sold or attempted to be sold in a delivery sale that does not meet the requirements of this section is deemed to be contraband and is subject to forfeiture in the same manner as and in accordance with the provisions of Title 36, section 4372-A.