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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.

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

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QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for shipments of tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A).

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the respondents, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., or the Vermont Truck & Bus Association, Inc., has a parent corporation and no publicly held company owns 10% or more of the stock of any of the respondents.

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MISCELLANEOUS

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the land, * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Relevant portions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) and the Airline Deregulation Act, 49 U.S.C. §§ 14501 and 41713, and the Maine Tobacco Delivery law are set forth at App., *infra*, 1a-14a.

INTRODUCTION

Each year, commercial motor and air carriers move *billions* of packages, worth more than $6 trillion, in interstate and intrastate commerce. Every segment of our economy depends on commercial carriers' reliable transportation and delivery services to deliver packages that have unyielding, time-critical deadlines in an extraordinarily wide variety of commercial transactions, *e.g.*, closing documents for a house purchase; a contractor's bid; promotional materials for a one-day trade-show; a book retailer's order of the about-to-be-released Harry Potter book; an out-of-stock part needed by a service company to repair a car; a high school senior's college applications; and, of course, pleadings and briefs for filing in courts across the country. Our private lives, too, have come to rely on these services—the last-minute birthday gift to an out-of-town family member; the catalogue delivery of just-ordered clothes; homemade cookies to an armed services member; and the new computer purchased online.

The successful development of a national cargo transportation industry that can handle this massive volume of shipments is due in large part to Congress's

mandate in the Federal Aviation Administration Authorization Act (FAAAA) that the services of cargo carriers not be subject to an inefficient patchwork of state laws. Cargo carriers rely on that mandate to implement extensive, integrated transportation and package-handling networks that use uniform procedures and processes that do not vary merely because a truck or airplane crosses a state line. These uniform procedures allow carriers to focus on what they do best—moving billions of packages each year across the country to their ultimate destinations, often in a remarkable period of less than 24 hours—and to do it without disruptions from a multiplicity of state laws that would require special transportation services or restricted delivery service for particular types of goods shipped to particular States.

Petitioner, the Attorney General of Maine, ignores the far-reaching disruption of cargo carrier service that would result from his legal position that FAAAA preemption should be narrowed to apply solely to state laws enacted for the purpose of economic regulation. If his arguments prevail, any number of States will impose different standards on any number of different products that they deem unhealthy or unsafe. That would require carriers to comply with the divergent laws of a multitude of States for numerous different categories of goods and that is precisely what Congress intended to prevent. Forcing carriers to stop at each State's border to determine whether and how they can provide their transportation and delivery services for particular goods would fundamentally, and impermissibly, disrupt the timely and cost-effective flow of packages to our businesses and homes.

Petitioner attempts to overcome federal preemption in this case with the claim that Maine's laws are necessary to prevent the sale of tobacco to minors. But this case does not challenge in any way Maine's laws that prohibit such sale, that require the licensing of tobacco retailers, or that require retailers to confirm that purchasers of tobacco are of legal age to do so. Indeed, the court of appeals upheld the legality of Maine's prohibition on the knowing transportation or delivery of tobacco products from

unlicensed retailers to anyone other than a licensed retailer or distributor.

What the FAAAA does not permit, however, is Maine's regulation of the transportation and delivery services of cargo carriers to require them to create new services and to police shipments by entities who are not licensed as Maine tobacco retailers in a manner that substantially disrupts their entire transportation and delivery service networks.

STATEMENT

A. STATUTORY AND FACTUAL BACKGROUND

1. The Federal Aviation Administration Authorization Act Of 1994 (FAAAA). For more than one hundred years, Congress has exercised its power under the Commerce Clause to impose virtually exclusive and uniform federal regulation over the interstate transportation of goods by cargo carriers. Congress established the Interstate Commerce Commission (ICC) in 1887 to regulate railroads, then placed motor carriers under the jurisdiction of the ICC with the Motor Carrier Act of 1935, Pub. L. No. 74-255, § 217, 49 Stat. 543, 560-561. In 1938, Congress enacted the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 403(a), 52 Stat. 973, 992, giving the Civil Aeronautics Authority virtually exclusive jurisdiction over air commerce.

In 1978, Congress enacted the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, § 105(a)(1), 92 Stat. 1705, 1708, to deregulate the airline industry through removal of substantial federal regulations and restrictions that were impeding the domestic airline industry. At the same time, Congress expressly preempted all state laws "relating to rates, routes, or services of any air carrier." *Ibid.* Congress did so to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

Two years after enactment of the ADA, Congress initiated federal deregulation of the motor carrier industry

with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. By 1994, Congress determined that the benefits to carriers and consumers of deregulation were being impeded by ongoing state regulation of motor carriers' *intrastate* transportation of property. Congress explained that "[t]he sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 103-677, at 87 (1994). Congress specifically identified state law restrictions on the "*types* of commodities carried" as a problematic form of state regulation that interfered with motor carriers' ability to provide uniform services. *Id.* at 86 (emphasis added).

Congress thus enacted the preemption provisions of the FAAAA in order to invalidate state laws that are related to the price, route, or service of motor, air, and intermodal (*i.e.*, combined air and ground transportation) carriers, thereby freeing carriers from the "patchwork of regulation" of the several States. *Id.* at 87. In doing so, Congress made explicit findings that the States' regulation of *intrastate* transportation of property by motor carriers "imposed an unreasonable burden on *interstate* commerce and impeded the free flow of trade, traffic, and transportation of interstate commerce" across the Nation. Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569, 1605 (1994) (emphasis added).

The FAAAA preemption provisions use language almost identical to that used in the ADA. The FAAAA specifies that "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 any motor carrier," 49 U.S.C. § 14501(c), or "of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting any property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement)." *Id.* § 41713(b)(4)(A). Congress intended that "all of the affected carriers" receive the same federal protection from state regulation that Congress had afforded air carriers since 1978 through the

ADA, including specifically the "broad preemption interpretation adopted by the United States Supreme Court" when it interpreted the ADA's express preemption provision in *Morales*, which was a then-recent ruling from this Court. H.R. Conf. Rep. No. 103-677, at 83.

2. The Maine Tobacco Delivery Law. In 2003, Maine enacted "An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors," 2003 Me. Laws 444 (Maine Tobacco Delivery Law).

The statute expanded Maine's regulation of tobacco reporting and licensing requirements in order to bring otherwise untaxed tobacco sales within its taxing authority. *See* 22 Me. Rev. Stat. § 1555-C(4). The provisions were summarized as "clarif[ying] the collection of taxes with regard to the delivery sales of cigarettes." Pet. App. 39 & n.25 (quoting L.D. 1236, Summary for the Original Legislative Document (121st Me. Legis. 2003)). Testimony in support of the Maine law explained that the State was "losing tremendous tax revenues as a result of these tax-free sales by unlicensed companies."[1]

A key component of Maine's effort to expand licensing (and thus taxing) is Section 1555-D, entitled "Illegal delivery of tobacco products," which is one of two provisions at issue before this Court. Section 1555-D states that a person "may not knowingly transport or cause to be delivered to a person in [Maine] a tobacco product purchased from a person who is not licensed as a tobacco retailer in [Maine]" unless the recipient, itself, is a Maine-licensed tobacco retailer or distributor. 22 Me. Rev. Stat. § 1555-D. The statute further declares that a person is "deemed to know" that a package contains a tobacco product if the package is marked "to indicate that the contents are tobacco products," *ibid*. and *id*. at § 1555-C(3)(B). The statute also deems a person to know that a package

[1] Pet. App. 3 (quoting Testimony of Rep. Glen Cummings Before the Joint Standing Comm. on Health & Human Servs. (Apr. 29, 2003)).

contains a tobacco product if the person "receives the package from a person listed as an unlicensed tobacco retailer" by the Attorney General, even if the package is not marked as containing tobacco. *Id.* § 1555-D.

In order to implement this provision, the Maine Attorney General is required by the statute to maintain two lists: One of known "*unlicensed* retailers" of tobacco (whose shipments may not be lawfully transported or delivered except to licensees); and the other of "*licensed* retailers" of tobacco in Maine (who are the only authorized recipients of tobacco shipped from unlicensed retailers). *Id*. § 1555-D(1) (emphasis added).

Although the Attorney General's list of "unlicensed retailers" is confidential under 22 Me. Rev. Stat. § 1555-D(1), and a delivery service that receives the list must maintain its confidentiality, *ibid*., that list currently is posted on the Maine Attorney General's "Tobacco Delivery Compliance Page" website, *available at* http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 7, 2007). The posted list contains more than 400 different names, addresses, and email addresses, including entities from numerous foreign countries. *Ibid*. The list of Maine "licensed retailers" is public and contains approximately 2600 companies. *Ibid.*; J.A. 50.

The other provision of the Maine Tobacco Delivery Law that is at issue here is Section 1555-C(3)(C), entitled "Delivery sales of tobacco products." 22 Me. Rev. Stat. § 1555-C(3)(C). It governs the delivery of tobacco to Maine consumers from licensed tobacco retailers through the use of any "person * * * who is engaged in the commercial delivery of letters, packages, or other containers," which means any commercial cargo carrier. *Id.* §§ 1551(1-B)(B), 1555(1-C). Section 1555-C(3)(C) requires that a licensed retailer shipping tobacco to a consumer must use a carrier that imposes the following requirements: "(1) The purchaser must be the addressee; (2) The addressee must be of legal age to purchase tobacco products [18 years of age in Maine] 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 the addressee is of legal age to purchase tobacco products." *Id.* §§ 1555-C(3)(C), 1555-B(2); *see also id.* § 1551(1-B) (defining "delivery sale" to mean sale only to consumer).

The Maine Tobacco Delivery Law also imposes a host of requirements on retailers of tobacco to prevent sales to minors, which respondents do not dispute are within the State's authority to enact or enforce, such as requiring that retailers verify the age of tobacco buyers, including Internet sales. *Id.* §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4).

3. The Burdens Of The Maine Tobacco Delivery Law Imposed On Carrier Price, Routes and Services. In the district court proceedings, respondents introduced evidence regarding one of their members, UPS, which is the nation's largest commercial carrier, to demonstrate the burdens imposed by the Maine Tobacco Delivery Law.

a. At that time, UPS delivered approximately 13.6 million packages per day (3 billion packages per year). In Maine alone, UPS delivered approximately 65,000 packages per day, or 16 million per year. J.A. 42. To handle this massive volume and meet its guaranteed delivery times, UPS engages in extensive planning and coordination among its more than 1,700 operating facilities, 350,000 employees, 269 aircraft (as well as 313 chartered aircraft), and 88,000 vehicles that reach almost every address in the United States. J.A. 43, 45.

UPS has an Industrial Engineering Department that "design[s] UPS operations in a manner that makes them produce the highest levels of service to [its] customers in the most efficient manner possible and at the lowest possible cost." J.A. 42. It "conducts time and motion studies to determine the most efficient way to perform UPS's services with the greatest speed, and with the highest comfort for and lowest risk to our employees." *Ibid*. UPS analyzes tasks as mundane as where drivers place their ignition keys when they are delivering packages "in order to devise approved methods to minimize the time spent locating the key when returning

to the vehicle." *Ibid*. Shaving "even a second off" the time it takes to complete "a process that is repeated millions of times each day" "produces a material cumulative benefit to the overall efficiency of UPS's operations." *Ibid*.

UPS's transportation and distribution networks are based upon uniformity, *i.e.*, "repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to consignees, for all packages, regardless of their destination." J.A. 45. "Uniformity of operations and processes and efficiency keep down UPS's overall costs, and therefore affect the prices that UPS charges," *ibid*., and helps UPS compete with the United States Postal Service, "which has its parcel business subsidized by its monopoly on first class mail." J.A. 46, 67-69.

As part of its uniform processes, "UPS shipping records and systems" do not ask UPS's regular pick-up customers to identify the contents of packages traveling within the United States (except where the shipper indicates that the package contains hazardous materials as defined by the nationally uniform standards established by the United States Department of Transportation under the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101 *et seq*.). J.A. 44.[2] Shippers generally pack their own packages and UPS's shipping contracts require shippers to ensure that their packages do not violate any law. J.A. 44, 45. When UPS employees load packages onto

[2] UPS's regular pick-up customers include the thousands of independently-owned shipping centers that serve their own customers by shipping packages for them using the shipping centers' UPS accounts. These shipping centers may ask their customers about package contents to ensure that the shipping centers do not ship a package that would violate their shipping contracts with UPS. Customers who ship packages at a UPS customer counter may be asked about package contents to ensure that the package complies with UPS's terms and conditions of service. Although UPS has the right to open and inspect packages, inspection happens infrequently such as when there is reason to suspect violation of hazardous materials procedures or a risk to UPS employees, customers, or the general public. J.A. 43-44.

a delivery truck, they "do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally uniform identifying sticker." J.A. 47.

To meet its delivery deadlines, UPS must avoid even minor delays because a disruption at any point in UPS's operations can affect the delivery of thousands of packages in transit. For example, no delivery truck can leave a UPS operating center until the entire sorting and loading process is complete for all delivery vehicles. A delay of just a few minutes in sorting and loading can cause UPS to miss guaranteed delivery commitments for every package on every truck loaded at that facility. J.A. 48, 67-69.

b. Sections 1555-D and 1555-C(3)(C) of the Maine Tobacco Delivery Law impose substantial burdens that disrupt UPS's uniform services for transporting and delivering goods *of any kind* in Maine.

First, because carriers are presumed under Section 1555-D to know that a package shipped by anyone on the Maine Attorney General's list of "unlicensed retailers" is a package containing tobacco, UPS can be held liable if it delivers *any* package from such a shipper to a recipient who is not a Maine-licensed tobacco retailer or distributor, even if the package is not marked as containing tobacco.

Accordingly, to avoid violation of Section 1555-D, UPS must determine if any of the 65,000 packages that it delivers to Maine *each day* was shipped by any of the several hundred entities on the "unlicensed retailer" list, and UPS must prevent delivery of any such packages to any unlicensed recipient. J.A. 60; *see* http://www.maine.gov/ag/tobacco/delivery_compliance.html (last visited October 7, 2007).

UPS determined that it could not reasonably identify such packages at their points of origin into UPS's system because listed "unlicensed retailers" could include retailers in other States and countries. J.A. 60. Implementing special procedures in all 50 States and abroad for all

packages destined for Maine would have disrupted UPS's worldwide system (and would not have been fully effective). J.A. 59-60.

UPS determined that identification of such packages at an arrival point in Maine before delivery in Maine would also severely disrupt UPS's system because UPS's procedures for streamlining package handling require that employees who load delivery trucks *not* read or consider shipper information. J.A. 49, 73-74, 83-84. Requiring employees to read shippers' names and addresses on 65,000 packages each day and to check those names and addresses against a list of several hundred companies and addresses on the "unlicensed retailer" list "would have slowed all UPS deliveries in Maine to a near standstill." J.A. 60.

Ultimately, UPS determined that it was not operationally feasible to incur the extraordinary burdens it would face to attempt to compare every shipper name to the "unlicensed retailer" list to identify all packages shipped to Maine from such entities. Thus, UPS abandoned all deliveries of any tobacco products to any recipient in Maine other than an entity that is a Maine-licensed retailer or distributor, which are the only entities who can receive tobacco shipments lawfully from unlicensed retailers, even though the deliveries to other recipients would have been lawful if the shipper was a licensee. J.A. 60-61. UPS notified customers known or believed to be shippers of tobacco products that "UPS would no longer accept any tobacco product shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers." J.A. 61. UPS also amended its terms and conditions to state that "UPS only accepts shipments of tobacco products to recipients in the State of Maine who are licensed tobacco distributors or tobacco retailers." Pet. C.A. Sur-Reply Br., Addendum A (Feb. 2, 2006).

Second, Section 1555-C(3)(C) imposed substantial burdens that contributed to UPS's decision to abandon

deliveries of tobacco products to anyone other than a licensed retailer or distributor. J.A. 60-61. Section 1555-C(3)(C) requires that, for tobacco shipments to consumers, licensed retailers must use carriers that require that *the addressee* sign for the package in person and that the driver check a government-issued photo identification and the age of the addressee. J.A. 54-55. But UPS's standard practice permits delivery to persons such as mail room attendants, receptionists, or family members at the delivery address, and does not mandate checking age identification. J.A. 56.[3]

The addressee-signature and identification requirements of the Maine statute for consumer deliveries "would considerably expand the amount of time that a UPS delivery person would have to spend at a delivery stop." J.A. 56. The addressee in many cases would not be available immediately (or at all) to come to the delivery area to sign for a package, particularly if the delivery is at a work address. Increasing the time at delivery stops while waiting for an addressee, and having to make multiple delivery attempts for packages when the addressee is not available, would threaten the timely delivery of other packages on the same route. J.A. 56-58, 84-86. Drivers would have to spend more time at delivery stops and/or UPS would have to use more drivers per package, on modified routes, thereby raising operating costs and prices, which was not practical. J.A. 56-59.

Third, *even after* UPS prohibited shipments of tobacco products to non-licensees, UPS still had to take additional burdensome steps to minimize the risk of violating Section

[3] UPS offers a service known as Delivery Confirmation Adult Signature Required (DCASR), which cost $2.75 in 2004 and requires an adult who is 21 years of age or older to sign for the package upon delivery, but does not require that it be the addressee who signs for the package. J.A. 51-56, 78-80. This service utilizes "smart" labels on the package which, when scanned, informs an employee through a clipboard computer of the special delivery requirements. J.A. 52. This service is uniformly administered and does not include 50 different handling requirements for 50 different States for a limitless number of products, which would be required under petitioner's legal position.

1555-D if shippers did not comply with UPS's prohibition and Maine law. Although UPS could not compare the name and address of every shipper on 65,000 packages daily to the "unlicensed retailer" list, UPS still had its employees read the shipper names to determine whether any name, itself, indicated that the shipper *might* be a tobacco retailer (*i.e.*, because the name contained a word like "smoke" or "cigars"), which meant it *might* be on the "unlicensed retailers" list. Also, UPS still had to attempt to identify and isolate from among the 65,000 packages that it delivers to Maine each day, any package that bore any marking suggesting that it contained tobacco. That is because UPS is deemed under Section 1555-D to know that a package it is delivering contains tobacco not only if the shipper is on the "unlicensed retailer" list, but also if the package is marked on any one of five sides as containing tobacco. *See* Pet. for Cert. 6 n.2 (subsequent Maine regulations, 10-144-203 Me. Code R. §§ 10(c)(2), 11, did not require examination of one side of packages, *i.e.*, the bottom, for tobacco markings); C.A. Jt. App. Vol. II 98, para. 96 (petitioner's admission that Maine's regulations still required UPS "to conduct five-sided visual scans of all packages to be delivered in Maine to search for and read text that might be a marking" made in "accordance with Section 1555-C(3)(B).").

Thus, UPS instructed its employees who load delivery trucks to depart from standard procedures, which do not require them to determine the contents of packages, do not require that they visually scan the package to search for or read text that is not on the label or on a nationally uniform sticker, and do not require them to read the shipper's name (or in most cases, even to read the addressee's name). J.A. 49. Instead, UPS instructed those employees in Maine to read the names of the shipper and the full text on every package (including the addressee name which also might include terms suggestive of tobacco contents) to determine whether any of those features could impute to UPS knowledge that the package contained tobacco products. J.A. 48-49.

Packages with markings of tobacco or shipper names that suggested they *might* be on the "unlicensed list" then

had to be taken to other UPS personnel who had to research whether the addressee was on Maine's list of more than 2,600 "licensed retailers," which would mean that the package could lawfully be delivered. J.A. 49-50, 74. If the addressee was not on the list, the package required additional handling, transportation and delivery services to return the package to the sender. Or, if the shipper was in Maine, such a return-to-sender delivery itself would violate Section 1555-D if the shipper was on the "unlicensed retailer" list, so UPS had to contact the shipper and require that the shipper retrieve the package from UPS or otherwise dispose of the package. J.A. 50, 75-76.[4]

Thus, even after abandoning lawful deliveries from Maine-licensees to non-licensees, UPS still faced disruptions and costs due to additional sorting, handling, transportation, and delivery services, which added significantly to the time and cost for processing and sorting *all* packages that UPS delivers in Maine. J.A. 49-50. UPS also incurred burdens and costs to provide special training for approximately 600 Maine employees to perform the additional tasks and special handling, as well as to provide and periodically update the Attorney General's "licensed retailer" list to its Maine operating centers. J.A. 61-63.

Fourth, even after taking all of these steps, UPS still bore the risk of being held liable for violation of Section 1555-D if a shipper violated Maine law and UPS's prohibition, but went undetected. For example, UPS would be liable if an "unlicensed retailer" shipped an unmarked package to someone other than a licensee and UPS's procedures failed to intercept the package because it did not bear any marking suggesting that the delivery would be unlawful. J.A. 60, 72.[5]

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[4] Petitioner erroneously asserts that UPS incurred costs for researching the addressee on only 33 packages. Pet. 11. The record establishes that UPS incurred costs for researching addressees on every package that was believed to contain tobacco products and that, *after this research*, 33 of the packages that were believed to contain tobacco products were found to be undeliverable. *See* J.A. 96, 117.

[5] Petitioner mischaracterizes the agreement that UPS entered into with the State of New York as a result of New York's regulation of

(Continued on following page)

B. PROCEEDINGS BELOW

1. Respondents are three trade associations whose members include motor and air carriers that transport goods in interstate and intrastate commerce. They brought the instant suit in the United States District Court for the District of Maine against petitioner in his official capacity as Attorney General of Maine, and requested an injunction against various provisions of the Maine law. Pet. App. 33-34. The parties filed cross-motions for summary judgment on respondents' as-applied challenge to the Maine law.

The district court ruled that the FAAAA preempts the Maine provisions at issue and enjoined their enforcement. *Id*. at 67-70, 72. The court emphasized that, "[i]f there is to be regulation in this area, it will have to come from the federal government." *Id*. at 32.

Based upon the record below, the district court found that "to comply with the Maine statute, UPS must use delivery services for Maine packages that vary from its nationally and internationally uniform services. This lack of uniformity affects the price of UPS' services and interferes with the orderly flow of packages by jeopardizing the speed, reliability and efficiency of delivery." *Id*. at 51-52 (footnotes

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cigarette deliveries by carriers. Pet. Br. 15. The agreement itself (at ¶ 15) demonstrates that UPS implemented a business decision to limit its shipments of cigarettes to licensed tobacco businesses and to cease shipments of cigarettes to consumers *before* entering into the agreement. <www.oag.state.ny.us/press/2005/oct/9tiupsaodfinal.oct.pdf> (last visited Oct. 9, 2007). That UPS made a business decision to implement a uniform, national policy regarding cigarette deliveries—even though that required UPS to abandon lawful commerce—is proof of the burdens on UPS's delivery services imposed by the evolving patchwork of state regulation of carriers' deliveries, including the threat of civil and/or criminal liability. The agreement reveals that, despite UPS's pre-existing extensive efforts to ensure compliance with the New York law and its own policies prohibiting shipments of cigarettes in violation of that law, it still faced liability if shippers tendered non-complying packages, thereby demonstrating the dramatic burdens that a carrier faces even after attempting to tailor its services to comply with state regulation. *Id*. at ¶¶ 8-12.

omitted). The district court also observed that there is no uniform rule for state regulation of tobacco deliveries so that regulations vary from State to State, *id.* at 40-42, and that the "growing complexity those laws will present to the market of interstate delivery demonstrates why Congress preempted individual state regulation in favor of a uniform federal approach." *Id*. at 60-61.

The court applied the standard articulated in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), regarding whether a challenged state law is related to a rate, route or service of a carrier and thus preempted. Pet. App. at 52. The court concluded that the FAAAA preempts Section 1555-D because Section 1555-D both "expressly references" and imposes a "forbidden significant effect" on carrier services by requiring a carrier to "examine every package it receives with a Maine destination address to try to determine if the package contains tobacco products" and to "consult the Maine Attorney General's lists of Maine-licensed and known unlicensed tobacco retailers before deliver[ing] packages containing tobacco products." *Id*. at 55-56.

The court found that the FAAAA also preempts Section 1555-C(3)(C) because that provision has a "forbidden significant effect" on carriers' services. *Id*. at 63. The court found that, in order to make the necessary guarantees for a tobacco delivery to a consumer, a carrier would have to provide a Maine-specific service, and that these conditions alter a carrier's "delivery practices for packages" and can delay deliveries of such packages and other packages. *Id*. at 64-65.

2. The court of appeals affirmed the district court's conclusion that the FAAAA preempts the provisions of Sections 1555-D and 1555-C(3)(C) that are now at issue before this Court. *Id*. at 1-30.

The court of appeals rejected the petitioner's claim that the FAAAA preempts a state law only if the state law imposes "traditional economic regulation," such as "entry and commodity controls, tariff filing requirements, and price ceilings," and that the FAAAA does not preempt laws enacted pursuant to a State's police powers to protect

health or safety. *Id*. at 12-13. The court reasoned that "an exclusion from preemption for police-power enactments would surely 'swallow the rule of preemption,' as most state laws are enacted pursuant to this authority." *Id*. at 17-18 (quoting *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9, 14 (1st Cir. 2004)). Taking into account the broad language of the FAAAA, the structure of the FAAAA exceptions, the weight of the legislative history, including its express approval of the broad preemption standard in *Morales* for the parallel provision in the ADA, and this Court's subsequent interpretation of the same ADA provision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-228 (1995), the court of appeals also concluded that the FAAAA is not limited to preemption of only state economic regulation. Pet. App. 14-21.

The court applied the *Morales* preemption standard and held that the FAAAA *does not* preempt the first part of Section 1555-D, which is the generally applicable prohibition against the knowing delivery of tobacco products from unlicensed shippers to unlicensed recipients. *Id*. at 24-27. But the court held that the FAAAA *does* preempt the second part of Section 1555-D, which imputes to a carrier the knowledge that a package contains tobacco if the package bears a marking to indicate that it contains tobacco or if the shipper is on the "unlicensed retailers" list maintained by the Attorney General. The court emphasized that the second part of Section 1555-D requires a carrier to "specially inspect every package destined for delivery in Maine," *id*. at 27, segregate any that are suspected of containing tobacco, and "research whether the addressee is a Maine-licensed retailer or distributor who can receive the package." *Id.* at 28. The court ruled that this part of Section 1555-D is preempted because it "has the effect of forcing UPS to change its uniform package-processing procedures," and "prescribe[s] how carriers must operate." *Ibid*.

The court of appeals also held that the FAAAA preempts Section 1555-C(3)(C) because that provision "expressly references a carrier's service of providing timely delivery of packages" and "prescribes the method by which a carrier operating in Maine must deliver packages in a

way that would affect the ability of a carrier to meet package-delivery deadlines" because it requires searching for the actual addressee, multiple delivery attempts if that addressee cannot be located at the time of delivery, obtaining that addressee's signature, and verifying that addressee's age. *Id*. at 23. The court rejected the argument that Section 1555-C(3)(C) is not preempted because it regulates only tobacco retailers rather than carriers, ruling that such an argument "reads the broad phrase 'related to' out of the statute." *Ibid.*

SUMMARY OF ARGUMENT

I. A. The Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts "any" law that a State enacts or enforces that is "related to" a price, route, or service of a motor, air, or intermodal carrier of cargo. 49 U.S.C. §§ 14501(c), 41713(b)(4)(A). The FAAAA preempts the provisions of the Maine Tobacco Delivery Law at issue here because they are related to the services of cargo carriers. Although the State certainly can (and does) regulate the retailers and buyers of tobacco products to guard against sales to minors, the FAAAA preempts States from making carriers the enforcer of state licensing laws or dictating the services that carriers must offer.

By using the terms "any" and "related to" in the FAAAA, Congress enacted a preemption provision of substantial breadth. And Congress did so specifically to support the efficiency and cost-effectiveness of the nation's cargo transportation networks, which are critical to businesses and individuals across the country. Congress modeled the FAAAA preemption provisions on the preemption provision of the Airline Deregulation Act of 1978 (ADA), so that the FAAAA's preemption would have the same effect as that of the ADA. As such, this dispute is controlled by the Court's construction of the relevant statutory text in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), where the Court held that state law is preempted by the ADA if the state law has a "forbidden significant effect" on, or expressly references, a carrier's rates, routes, or services.

There is no merit to petitioner's suggestion that this Court should abandon *Morales* and apply the Court's subsequent case law interpreting the Employee Retirement Income Security Act (ERISA). Congress could not anticipate, and did not intend to adopt, any subsequent developments in ERISA law that might alter the *Morales* analysis outside of the transportation context. Nor can petitioner rely on a presumption against preemption, which was key to the ERISA case law but which does not apply in the same manner in this area of traditional federal regulation of cargo carriers.

B. Under the *Morales* tests for ADA preemption that Congress endorsed for the FAAAA, or even under the ERISA case law on which petitioner erroneously relies, the Maine provisions are preempted. Both provisions at issue here, Sections 1555-D and 1555-C(3)(C), expressly reference carrier delivery services and have a "forbidden significant effect" on carrier services and preemption of these provisions is consistent with the objective of the FAAAA.

The express reference to carrier services is clear in Section 1555-D. Section 1555-D prohibits the knowing delivery of a tobacco product if it is from an unlicensed shipper to an unlicensed recipient and deems a person to have knowingly delivered a tobacco product if (1) the package is marked to indicate that it contains tobacco, or (2) the shipper of the package is on the Attorney General's list of "unlicensed retailers," even if the package is not marked as containing tobacco. 22 Me. Rev. Stat. § 1555-D. This provision adversely affects the timeliness and cost-effectiveness of carriers' transportation and delivery services because it requires carriers to identify and isolate all packages for which they are deemed to have knowledge of tobacco contents. It requires carriers to then take steps to determine either that each such package is deliverable because the shipper or addressee is on the "licensed retailer" list, or that it is undeliverable, in which case the carrier must return the undeliverable package, require the shipper to pick it up, or dispose of it.

Section 1555-C(3)(C) also expressly references carrier services and imposes a "forbidden significant effect" on the services of carriers because it dictates *what* specific delivery services a carrier must offer in order to provide delivery service for licensed retailers to consumers for certain packages in Maine. This provision requires a carrier to provide addressee-specific delivery and to check government-issued photo identification of the addressee for age confirmation. The FAAAA preempts such State laws that dictate what services a carrier must provide in order to enter or remain in a particular market.

The forbidden effects of these Maine provisions are so significant that UPS prohibited shipments of tobacco products to Maine except to Maine licensees and, thus, abandoned a legal segment of the interstate and intrastate transportation market of tobacco from licensed retailers to consumers. Even after that restriction of its services, UPS still incurred burdens in giving special handling to all of the 65,000 packages it delivers in Maine each day in order to minimize the risks of delivering to a consumer any package that UPS could be deemed to know contained tobacco either because the shipper was on the "unlicensed retailer" list or the package bore markings indicating it contained tobacco.

The preempted nature of the provisions is most obvious when one considers what the effect would be if several (or perhaps 50) States enacted similar laws regulating a variety of commodities. That patchwork of varying requirements on the transportation and delivery services of carriers would be cost prohibitive and would bring the cargo carrier industry to a standstill, which is precisely what Congress intended the FAAAA preemption provisions to prevent. Thus, preemption of the Maine law is entirely consistent with Congress's purpose in enacting the FAAAA and meets even petitioner's ERISA standard.

II. A. Unable to rebut the Maine Tobacco Delivery Law's reference to and significant burdens on carriers' service, the Maine Attorney General urges this Court to create an exception to FAAAA preemption. He wants the

Court to impose a limitation, nowhere mentioned in the statutory text, so that the FAAAA is read to preempt only economic regulation and not any regulation that was enacted, even in part, pursuant to a State's police power to protect health or safety. But if Congress had intended to preempt only "economic" state laws, it would have preempted only state laws that "'*regulate* rates, routes, and services.'" *Morales*, 504 U.S. at 385. And Congress would have had no need to enact the FAAAA's savings clauses to save from preemption certain specific areas of state law that would fall within petitioner's health or safety rubric.

Petitioner's argument for a health and safety exception to the FAAAA would require this Court to examine a State's motive in enacting a challenged state law, rather than the law's effect. This Court has repeatedly rejected such an inquiry as part of federal preemption. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). Preemption turns not on whether federal and state laws "are aimed at distinct and different evils" but whether they "operate on the same object," which, in the instant dispute, is a carrier's services. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

B. Petitioner's unsupported assertion that Maine will not be able to protect its citizens from the health problems of tobacco is not true. Numerous provisions of the Maine law—*e.g.*, requiring *retailers* to obtain age verification from purchasers—are unaffected by the ruling in this case.

C. There is no merit to petitioner's repeated contention that the Synar Amendment supports a non-preemption ruling here. The Synar Amendment vested the Secretary of Health and Human Services with discretion to award grants to States that have a law that makes it unlawful for a "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). Nothing in that provision either authorizes or mandates States to regulate the manner in

which a *cargo carrier* provides transportation or delivery services.

D. Finally, apparently after scouring all the laws of the 50 States for examples of any law involving dangerous goods or contraband that Maine could claim might be preempted if the First Circuit's judgment is affirmed, Maine and its *amici* have identified only 20 or so such laws. Many of these laws are likely *not* preempted by the FAAAA under the decision below because they merely make unlawful the knowing transportation of some good, or are saved by some other provision of *federal* law. In all events, Maine has failed to demonstrate that any of these laws has ever been enforced against a carrier, making those laws of no assistance in the instant case.

ARGUMENT

I. THE FAAAA EXPRESSLY PREEMPTS SECTIONS 1555-D AND 1555-C(3)(C)

To determine whether a state law is preempted, this Court must start, and in this case may end, with the text of the statute itself. *See, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). It is the plain wording of a statute that "necessarily contains the best evidence of Congress' pre-emptive intent." *Ibid.* Thus, unlike petitioner, we rely on the text of the FAAAA.

A. The FAAAA's Text Demonstrates That Congress Intended Broadly To Preempt "Any" State Regulation "Related To" The Price, Route, Or Service Of A Carrier

The FAAAA contains two identically-worded express preemption clauses, which state that:

> a State, political subdivision of 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 [a carrier].

49 U.S.C. § 14501(c) (applying to "any motor carrier * * * or any motor private carrier, broker, or freight forwarder with respect to the transportation of property"); *id.* § 41713(b)(4)(A) (applying to "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").

By using the terms "any" and "related to," the language of the FAAAA preemption provisions conveys enormous breadth and confirms that Congress intended this law to broadly preempt state laws. The term "any" when "[r]ead naturally * * * has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). And the "related to" language does not say anything about limiting the scope of preemption to only laws that were enacted with an exclusively economic purpose. Indeed, such a distinction would "simply read[ ] the words 'related to' out of the statute." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992).

In any event, this is not an issue of first impression, nor did Congress intend it to be so.

1. The Court's interpretation of the broad, near-identical text of the Airline Deregulation Act established a clear legal test that applies to the FAAAA

Congress deliberately modeled the preemption provisions of the FAAAA in 1994 on the preemption provisions of the Airline Deregulation Act of 1978 (ADA), so that the FAAAA's preemption provision would have the same effect as the ADA preemption provision. Both statutes employ indistinguishable language with respect to the preemption of state laws.[6] The only difference is

[6] The ADA applies only to air carriers and the FAAAA applies to motor carriers and air and intermodal carriers when they transport

(Continued on following page)

that, when originally enacted, the ADA used the terms "relating" to "rates" while the FAAAA uses the terms "related" to "price"; the provisions now use identical terms.[7]

At the time Congress enacted the FAAAA, this Court already had determined the scope of the ADA's preemption provision based on its text, in the 1992 decision in *Morales v. Trans World Airlines*, 504 U.S. at 378. The *Morales* Court reasoned that the "key phrase" in the ADA's preemption provision is the term "relating to," and that "[t]he ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' *Black's Law Dictionary* 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383; *see also id.* at 384 (explaining that "relating to" is language that has a "broad scope" and an "expansive sweep"). The Court reasoned that, if Congress had intended to preempt only laws that directly regulated air carriers, "it would have forbidden the States to '*regulate* rates, routes, and services'" and not used the broader language of "relating to." *Id*. at 385.

To give effect to this provision, the Court held that a state law is one "relating to" a carrier's "rates, routes, or services," and thus is preempted, "'if it has a connection with, or reference to, such a plan.'" *Id.* at 384 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court concluded that it did not matter that a state law "is not specifically designed to affect" the carrier, because a

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property. That confirms Congress's intended parallel construction of the ADA and FAAAA because it addressed a subset of air carrier transportation—involving carriage of property—in a new FAAAA preemption provision, 49 U.S.C. § 41713(b)(4)(A).

[7] At the time of *Morales*, the ADA preempted any state law "relating to rates, routes, or services of any air carrier." ADA, § 4(a), Pub. L. No. 95-504, 92 Stat. 1705, 1707-1708. The current version uses the phrase "related to a price, route, or service of any air carrier." 49 U.S.C. § 41713(b)(1).

state law is preempted even if "the effect is only indirect." *Id.* at 386 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). Accordingly, the Court held that state regulation is preempted if it has a "forbidden significant effect" on carrier rates, routes, or services. *Id.* at 388.

Petitioner argues that *Morales* did not mean what it said because "[t]he Court cautioned that it was not '[s]ett[ing] out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines.'" Pet. Br. 27 (quoting *Morales*, 504 U.S. at 390) (second brackets in original). But for the same reasons that the Court's cautionary note did not defeat preemption of fare advertising guidelines in *Morales*, 504 U.S. at 390, it also does not defeat preemption here. Respondents seek to invalidate state regulation of carriers' services, not the State's general prohibition against the sale or furnishing of tobacco to minors. Indeed, the ruling below upheld the State's prohibition against knowing transportation or delivery of tobacco from an unlicensed shipper to anyone other than a licensee.[8] Moreover, petitioner acknowledges that, even where generally-applicable state law prohibitions against gambling or the like are at issue, the *Morales* Court explained that preemption would require an analysis on a "case-by-case basis," Pet. Br. 27, and thus concedes that the Court did not hold that such laws were immune from preemption.

Applying the *Morales* legal test, this Court has twice held that the ADA preempts enforcement of generally applicable state consumer protection laws, once in *Morales* itself, in the context of enforcing guidelines for advertising airline fares, *id*. at 384, and once in the context of holding carriers liable for modifications of their frequent flier

[8] Petitioner asserts that it is "conceded" that States can ban retailers entirely from shipping contraband items," Pet. Br. 38, but no such ban is before this Court and, depending on the particular state law, it could be subject to constitutional or statutory challenges, including under the FAAAA.

programs, *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In neither case did the state laws at issue directly regulate rates, routes, or services, but in each case the state law had the effect of requiring any airline that operated within the State's jurisdiction to modify some conduct connected to its prices or services (advertising or frequent flier programs).

Wolens does not suggest that this Court has abandoned the legal test or holding of *Morales* for the ADA, as petitioner claims. *Id.* at 28-29. Rather, this Court in *Wolens* "adhere[d] to [its] holding in *Morales*," and explained that the ADA neither "demand[s] only minimal preemption" nor "mandate[s] total preemption," which otherwise would have included routine breach-of-contract claims. *Wolens*, 513 U.S. at 234. As petitioner acknowledges, preemption depends upon whether a state regulation's connection to the price, route, or service of a carrier is "'tenuous, remote or peripheral,'" Pet. Br. 28 (quoting *Morales*, 504 U.S. at 390), which is precisely what the *Morales* interpretation of the "relating to" text examined.

2. Congress intended the text of the FAAAA to bear the interpretation given that language in *Morales*

a. By using the same preemptive language of the ADA when enacting the FAAAA, Congress plainly intended that the *Morales* standard apply to the FAAAA.

This Court has repeatedly held that Congress is expected to know this Court's case law "when it import[s] the key phrase" of a statute into another statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006); *see also Communications Workers of Am. v. Beck*, 487 U.S. 735, 746-747 (1988). And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well." *Merrill Lynch*, 547 U.S. at 85 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

This case presents the paradigmatic scenario for this rule of statutory construction because, in addition to the parallel language in the FAAAA and the ADA, the Conference Report on the FAAAA expressly stated that Congress intended its use of the language from the ADA to incorporate "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83 (1994). Congress explained that "[t]he central purpose" of the FAAAA "[wa]s to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the *identical intrastate preemption of prices, routes and services*." *Ibid.* (emphasis added). Congress went so far as to explain that the FAAAA "is intended to function in the exact same manner with respect to its preemptive effects" as the ADA. *Id.* at 85.

Petitioner attempts to read the legislative history to dictate that *Morales* not apply, Pet. Br. 29-30, but his reliance upon certain legislative citations to *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992), a pre-*Morales* decision, is misplaced. Pet. Br. 29-30. Unlike Congress's affirmative embrace of *Morales* for its "broad preemption *interpretation*," H.R. Conf. Rep. No. 103-677, at 83 (emphasis added), the citations to *Federal Express* were only for the anomalous *result* that decision created. *Id*. at 87. *Federal Express* held that the ADA's use of the term "air carrier" encompassed an air carrier's trucking operations so that Federal Express benefited from ADA preemption regardless of whether it transported goods by plane or truck. *See Federal Express*, 936 F.2d at 1078-1079. With that context understood, petitioner's citation of stray legislative history discussing that case is of no relevance here. Pet. Br. 30. Congress's enactment of the FAAAA provision that applies to intermodal carriers, 49 U.S.C. § 41713(b)(4)(A), did in fact codify the Ninth Circuit's expansion of the *scope* of the ADA, but the legislative history says nothing about the Ninth Circuit's standard. *See Garcia v. United States*, 469 U.S. 70, 78

(1984) (rejecting out of context reliance upon legislative history).

3. This Court's subsequent ERISA decisions are irrelevant to interpretation of the FAAAA's text

Petitioner contends that recent developments regarding the Employee Retirement Income Security Act of 1974 (ERISA) supercede the standard for ADA preemption articulated in *Morales*, reaffirmed in *Wolens*, and endorsed by Congress in enacting the FAAAA.

Petitioner is mistaken. Congress chose the text of the FAAAA based on this Court's existing interpretation of near-identical language in the preemption provision of the ADA in *Morales*. Congress could not have anticipated, and did not intend to adopt, any subsequent developments in ERISA law to the extent they altered the *Morales* standard. It is Congress's understanding of the legal standard that it intended to incorporate in the text it chose at the time it enacted the statute that governs, not whether Congress correctly predicted the direction of future cases interpreting an unrelated statute. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976).

Moreover, this Court's ERISA cases rest in part on the understanding that ERISA occupies a field that otherwise would fall squarely within a State's police powers. In that context, an overly broad application of the "related to" standard might "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

That presumption does not apply in the same manner with respect to the FAAAA, which reflects congressional legislation in a field of longstanding federal presence (and, even if it did, Congress has expressed a "clear and manifest" intent to preempt state regulation such as

Maine's).[9] Although States once maintained authority to regulate *intrastate* transportation, Congress's authority over the *interstate* transportation of goods has long been recognized by this Court as plenary. The FAAAA was an exercise of Congress's authority over the interstate transportation of goods, which it found was being impeded by State regulation of intrastate transportation. Congress's extension of its prohibition against state regulation of the transportation of goods to intrastate commerce in light of that problem, reflected an incremental expansion in a field where congressional authority already dominated. For more than 100 years, Congress has exclusively regulated the interstate transportation of cargo, whether by rail, motor, or air carriage. *See* pages 3-4, *supra*; Br. of the Am. Trucking Ass'n & Chamber of Commerce of the United States as *Amici Curiae* in Support of Respondents 19-22 (Am. Trucking Ass'n Br.). Since the enactment of the Interstate Commerce Act in 1887, "the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation." *Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 110 (1914). Accordingly, Congress long has possessed a "significant federal presence" in the field of interstate transportation, *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-506 (1913), which precludes application of the presumption against preemption, *United States v. Locke*, 529 U.S. 89, 108 (2000) (holding that the presumption against preemption does not apply "in an area where there has been a history

[9] Nowhere has the Court held that Congress cannot preempt state law merely because doing so would interfere with traditional state police powers. Congress preempted state regulation such as the Maine provisions at issue because the text of the FAAAA expresses a "clear and manifest" intent to preempt a State's police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151-152 (2001) (explaining that this Court has "not hesitated" to overcome the presumption against preemption "in areas of traditional state regulation such as family law").

of significant federal presence"); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (presumption applies only to "a field which the States have traditionally occupied").

B. The FAAAA Preempts Sections 1555-D And 1555-C(3)(C) Because They Explicitly Reference, Have A Substantial And Onerous Effect On, And Thus Are Related To, A Carrier's Service

1. Sections 1555-D and 1555-C(3)(C) explicitly reference services of carriers

a. Section 1555-D expressly references transportation and delivery services of carriers when it prohibits the knowing transportation or delivery of tobacco products from an unlicensed retailer (unless delivered to a licensed retailer), and deems a person to "know" that a package contains tobacco if it is received from a listed "unlicensed retailer" or is marked as containing tobacco. 22 Me. Rev. Stat. § 1555-D. The statute mandates that the State provide lists of licensed and unlicensed tobacco retailers to carriers (which are referred to as "delivery service[s]" in the statute) and to no other entities; indeed, carriers must keep confidential the "unlicensed retailer" list that they receive. *Id*. § 1555-D(1). Any argument that this provision does not explicitly reference the services of carriers is thus without merit.

b. Likewise, Section 1555-C(3)(C) explicitly references the services of carriers when it states that, for shipments to consumers, a tobacco shipper can use only a carrier that provides detailed delivery services that are specified in the statute. Section 1555-C(3)(C) dictates the scope of the carrier's delivery service and dictates the precise method by which that delivery must be made, which includes addressee-specific signature and age confirmation through government-issued photo identification.

These references in the Maine laws to the services of carriers render them indistinguishable from those preempted in *Morales*, because "every one of the" delivery

requirements "bears a 'reference to'" carrier delivery services. *Morales*, 504 U.S. at 388. It would be nonsensical to conclude that these express directives as to what delivery services carriers must offer and how deliveries must be made are not "related to" the "service" of the carriers who make those deliveries. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).

2. Sections 1555-D and 1555-C(3)(C) Have A "Forbidden Significant Effect" On The "Price, Route, Or Service" Of A Carrier

a. Section 1555-D imposes a forbidden significant effect on carrier transportation and delivery services because it deems a carrier to know that a package contains tobacco if it is shipped by an entity on the State's "unlicensed retailer" list of hundreds of entities, or bears a marking that indicates that it contains tobacco. That provision means that a carrier must somehow isolate such packages from among all the packages delivered in Maine (65,000 per day by UPS alone). J.A. 59-60, 74. And, in addition to that Herculean task, the carrier then also must provide special handling for all such isolated packages, including researching each of them to determine whether it can be lawfully delivered because either the shipper or the addressee is on the "licensed retailer" list of more than 2,600 entities. If the package is not deliverable, the carrier must provide additional services to return the package to the shipper, have the shipper pick up the package, or destroy it. *See* pages 9-13, *supra* (discussing burden evidence); *see also* J.A. 50, 74-76.

These burdens on carrier transportation and delivery services are very significant because they mean that a carrier such as UPS cannot apply its otherwise uniform package-handling procedures that are critical to its timely and cost-effective delivery services for all packages. J.A. 67-70. Indeed, the burden on UPS of the threshold requirement that it identify all packages shipped to Maine by anyone on the "unlicensed retailer" is so great that it

would bring UPS's operations in Maine to a near standstill. J.A. 60-61. UPS thus had to abandon the lawful delivery of tobacco products from licensed shippers to consumers in Maine. UPS notified its customers that it would accept tobacco products for shipment in Maine only to Maine licensees and amended its terms and conditions accordingly. *See* page 10, *supra*.

Even after changing its service in Maine, UPS still had to attempt to minimize its risk of liability under the statute through various alterations in its services aimed at identifying any packages that are shipped through UPS in violation of the Maine law and UPS's prohibition against shipping tobacco products to unlicensed recipients in Maine. UPS had to alter its uniform procedures to require its Maine employees to read the shipper's name (something they generally do not do) to determine whether the name, itself, indicated that the shipper *might* be a tobacco retailer (*i.e.,* because the name contained a word like "smoke" or "cigars"), and that meant that it *might* be on the "unlicensed retailers" list. Also, UPS still had to attempt to identify and isolate from among the 65,000 packages that it delivered to Maine each day, any package that bore a marking suggesting that it contained tobacco, which required reading text on the box (including the addressee name which could indicate tobacco contents). These additional steps required additional time, imposed higher costs, and required additional training of 600 UPS employees in Maine. J.A. 50, 61-63, 72, 95.[10]

Petitioner attempts to diminish the burden on carriers by contending that UPS already had its employees visually scan the sides of every box before imposition of the Maine requirements. Pet. Br. 48-49. That argument is misleading because it ignores that UPS employees previously looked at the sides of a package only to examine

[10] Petitioner concedes that it cost $2 per each package researched to determine "whether the addressee is a licensed retailer or distributor." J.A. 96. Thus, UPS incurs a $2 cost for *any* package that is *suspected* of containing tobacco. *Ibid*.

the integrity of the box (*e.g.*, to confirm it was sealed and not damaged) and to look for nationally-uniform stickers (such as for hazardous materials), not to read whatever text might appear on the package to determine what the package might contain. J.A. 49. In any event, that argument focuses on only one of the burdens Section 1555-D imposes, and petitioner fatally ignores the burden of having to check the shipper information on each of the 65,000 packages delivered to Maine daily against the State's "unlicensed retailer" list.

b. Section 1555-C(3)(C) also has a forbidden significant effect on carriers' service because it dictates *what* delivery services a carrier must provide to certain packages within the State. Section 1555-C(3)(C) mandates that, for shipments to consumers, a licensed tobacco shipper must use a delivery service that requires signature by the addressee and confirmation of the age of the addressee, including through government-issued photo identification.

Petitioner concedes that offering that service would require modifications to UPS's prices, routes, and services, such as reengineering of tracking devices and information systems. J.A. 83-84. And respondents also provided evidence below that it was not economically feasible for UPS to offer that service. J.A. 55, 59.[11]

Although UPS offered a service of "Delivery Confirmation Adult Signature Required" (DCASR), that service differs dramatically from the Maine requirements. DCASR does not require that the person to whom UPS delivers the package be the addressee on the package.

[11] Petitioner derides the evidence from UPS on which the courts below relied because it is only *one* carrier. Pet. Br. 41. But UPS is one of the three major commercial carriers in the United States, with more than 13.6 million deliveries each day—and more than 3 billion packages annually, hardly inadequate carrier evidence. J.A. 42. And preemption applies if the state law is related to the price, route, or service of "*any* motor carrier" or "*an* air carrier," so evidence from a single carrier is sufficient (otherwise one competitor would have an advantage over the others and disrupt the competitive marketplace, Pet. App. 69). 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

Rather, it allows UPS to deliver such packages to mail room employees, receptionists, and family members, as long as an adult signs for the package. J.A. 53, 56, 84. UPS determined that alteration of its delivery services to comply with the requirement that the recipient be the specific person listed as addressee on the package and the requirement for age verification, would increase the time spent at delivery stops, thereby threatening the timely delivery of other packages on the same route and/or forcing UPS to use more drivers per package, on modified routes, which increases costs and prices. J.A. 56-59.[12]

Petitioner asserts that the effect on carrier services is tangential because there is no evidence that the state-mandated service could not be offered profitably. Pet. Br. 45 (speculating that the state-mandated service might be "profitably priced at $3.00 * * * , rather than $2.75 for the *present* service"). But that argument proves preemption because it concedes that Section 1555-C(3)(C) is related to and indeed will dictate carrier prices. *See* 49 U.S.C. §§ 14501(c), 41713(b)(4)(A) (preempting state regulation related to carrier "price").[13]

Petitioner's argument that Section 1555-C(3)(C) has only an indirect effect on carrier price, route, and service and does not require carriers to offer the services that shippers *must* use (Pet. Br. 40, 44) ignores the rulings in *Morales* and *Wolens*. Just as a carrier is not required to

[12] Petitioner suggests that UPS treats addressees and recipients the same on its website, and that, thus, UPS offers an addressee only service. Pet. Br. 14. This is simply not the case. J.A. 51-53; *see also* J.A. 84 (petitioner admitting that UPS does not offer a service requiring the addressee to sign for the package), 92 (same). Indeed, petitioner's only support for its proposition is a citation to general packaging guidelines on how to label packages. For obvious reasons, a package *must* bear the name of a recipient or addressee, but that fact alone does not preclude UPS from delivering the package to other individuals at that address.

[13] Whether or not UPS *could* offer a service complying with Section 1555-C(3)(C), Pet. Br. 12-13, 45, is immaterial because that would not mean that it is *economically* or *operationally* feasible for it to do so. The facts prove here that it is not. J.A. 59.

deliver tobacco products, neither were the carriers in *Morales required* to advertise nor were the carriers in *Wolens required* to offer a frequent flier program. But both cases held state laws preempted because the state regulation nevertheless related to the air carrier's "rate, route, or service." *Morales*, 504 U.S. at 386 (explaining that a state law may be preempted even if "the effect is only indirect") (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). A carrier's ability to transport and deliver lawful products certainly is at least equal to, if not more related to its services, than advertising or a frequent flyer program.

Moreover, this Court has rejected efforts by States to evade a prohibition on regulation in a particular area by attempting to regulate indirectly through restrictions on essential actors in that area. For example, in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), the Court held that a federal law that preempts state "standard[s] relating to the control of emissions from new motor vehicles," preempts not only state regulation of vehicle manufacturers, but also state restrictions on purchasers. *Id.* at 259 (quoting 42 U.S.C. § 7543(a)). That is because "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* at 255.

Petitioner's contention that Section 1555-C(3)(C) is not preempted because "[i]t neither forces UPS to enter nor prevents it from competing for the legal tobacco delivery market," Pet. Br. 44, is similar to the argument rejected by this Court in *Egelhoff v. Egelhoff* when the Court held that a state law was preempted under ERISA even though the state law that affected the relevant plan benefits allowed employers to "opt out" of the state law's effects. 532 U.S. 141, 150 (2001). The fact that some carriers may decide to comply with the state law (and offer the state-mandated service) while other carriers may decide to forgo tobacco deliveries means that the state regulation "dictate[d]" the choice facing the carrier. *Ibid.*

3. Even under petitioner's ERISA standard, preemption of Sections 1555-D and 1555-C(3)(C) is consistent with the objective of the FAAAA to prevent a 50-State patchwork

Petitioner's proffered ERISA standard does not govern the FAAAA for the reasons set forth above. *See* pages 27-28, *supra*. But, even if petitioner's ERISA standard were applied here, the FAAAA's preemption of Sections 1555-D and 1555-C(3)(C) is clear. This Court's ERISA precedents apply the same "reference to" or "forbidden significant effect" analysis as under *Morales*, but impose an additional gloss to ensure that preemption is consistent with the objective of the federal law. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997). That standard is easily met here.

a. Preemption of the Maine law is wholly consistent with Congress's purpose in enacting the FAAAA. Sections 1555-D and 1555-C(3)(C) are precisely "the type of law that Congress intended * * * to supercede." Pet. Br. 43 (citing ERISA decisions of *Dillingham* and *Travelers*) (quoting *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814, 816 n.16 (1997)). Congress expressly intended to free carriers from the effects of burdensome state regulation, including those regarding particular commodities, and had as a core purpose the establishment of a federal legal framework that would not allow the development of a patchwork of carrier regulation that varied from State to State. FAAAA, Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1569, 1605 (1994).

Petitioner's own *amici* demonstrate that the Maine Attorney General's view of the law would allow just such a patchwork of state laws related to a carriers' services that it was Congress's intent to prevent. The *amici* States note that the FAAAA threatens "the laws of 40 states that prohibit or severely restrict the transport and delivery of tobacco products." Brief of California, *et al*. as *Amicus Curiae* Supporting Petitioner (States' Br.) 5. And the

States concede that these laws "differ in the restrictions they impose." *Id.* at 12. Indeed, petitioner's position would allow an even more dramatic patchwork of inconsistent regulation of interstate carriers because it would allow each of the 50 States to adopt its own laws dictating the transportation and delivery services not just for packages containing tobacco, but for any number of different products. *See* Am. Trucking Ass'n Br. 14-15.

This Court has recognized the relevance of such state-by-state variation to preemption analysis in *Morales*, 504 U.S. at 389 (emphasizing that the requirement that the advertised fares include "taxes and surcharges [that] vary from State to State," meant that it "force[d] the airlines to create different ads in each market"). And, even in the ERISA context, the Court looks beyond the burden of complying with one State's law because such reasoning opens the door to all 50 States requiring compliance with their own peculiar requirements. *Egelhoff*, 532 U.S. at 151.

The patchwork result is particularly pertinent to cargo carriers governed by the FAAAA because, as petitioner acknowledges, uniformity and integrated services are essential to nationwide carriers but such "[u]niformity is impossible * * * if [carriers] are subject to different legal obligations in different States." *Id*. at 148; J.A. 68-69. Unless the FAAAA is given its broad preemptive scope, as intended by Congress, state regulation of carriers' prices, routes, and services will continue to proliferate. *See, e.g.*, *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004); *Witty v. Delta Air Lines*, 366 F.3d 380 (5th Cir. 2004).

b. There is no credence to petitioner's claim that Section 1555-D or 1555-C(3)(C) do not make "reference to" carrier price, route or service under the ERISA standard because those provisions apply to "more entities than those motor carriers covered by the FAAAA." Pet. Br. 42. In *Dillingham*, this Court explained that, under the "reference to" standard, a state law is preempted "where the existence of ERISA plans is essential to the law's

operation, as in [*District of Columbia v.*] *Greater Washington Bd. of Trade*[, 506 U.S. 125 (1992)]." *Dillingham*, 519 U.S. at 325. Sections 1555-D and 1555-C(3)(C) are preempted under the *Greater Washington* standard because a carrier's services are "essential" to their operation (and the mere fact that the Maine law expands its definition of a delivery service inconsequentially beyond carriers cannot be a means for States to defeat "reference to" preemption). Section 1555-C(3)(C) plainly mandates the existence of specific delivery services in order for the law to properly function, and Section 1555-D mandates that the State's lists of "licensed retailers" and "known unlicensed retailers" be provided to carriers (and only carriers) precisely because their services are essential to that provision's prohibition of deliveries from unlicensed retailers to unlicensed recipients. Accordingly, "[i]t makes no difference that" the Maine law also applies to others, outside the scope of the FAAAA, "once it is determined that the law in question relates to" a carrier's price, routes or service. *Greater Washington*, 506 U.S. at 131.

Sections 1555-D and 1555-C(3)(C) are far more than an "indirect economic influence" on carrier service under the ERISA standard, *Dillingham*, 519 U.S. at 329 (quoting *Travelers*, 514 U.S. at 659), as petitioner suggests. The Maine law "bind[s]" carriers to offering one type of service that is explicitly required by state regulation if they are lawfully to be used to carry tobacco products. *Ibid*. *Travelers* and *Dillingham* would be apposite only if the Maine law provided economic incentive (such as tax breaks) rather than creating a barrier to entry. *Travelers*, 514 U.S. at 658-659 (explaining that the state law made commercial insurance more expensive than Blue Cross/Blue Shield insurance, which influenced insurance purchasers, including ERISA plans).[14]

[14] Petitioner argues the "incentive" is the option to enter the tobacco delivery market. Pet. Br. 44. But that argument ignores the very authorities upon which petitioner relies. The result in *Travelers* would have been different if the state law mandated that ERISA plans

(Continued on following page)

II. PETITIONER'S ATTEMPTS TO RESTRICT FAAAA PREEMPTION ARE WITHOUT MERIT

A. Restriction Of FAAAA Preemption To "Economic Regulation" And Creation Of A Health And Safety Exception Is Contrary To The FAAAA's Savings Clauses And History And Would Be Unworkable

Unable to avoid the clear statutory text of the FAAAA and the Maine laws' obvious references to and burdens on carrier services, petitioner attempts to confine FAAAA preemption to "economic" regulation—*viz.*, state laws that actually "regulate" rather than are "related to" the price, route, or service of a carrier. Yet petitioner never establishes that the challenged provisions are not economic relations in that sense. Although petitioner repeatedly refers to the Maine Tobacco Delivery Law as an effort by the State to prevent the sale of tobacco to minors, he ignores the fact that the Maine statute was enacted to address problems related to the loss of tax revenue from tobacco sales by unlicensed retailers. *See* page 5, *supra*. In any event, however, FAAAA preemption is not limited only to "economic" regulation.

1. The structure of the FAAAA, specifically its savings clauses, confirms that FAAAA preemption is not limited to economic regulation. The FAAAA provides for preemption of state law "[e]xcept as provided in" the "matters not covered" sections of the statute. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A). The FAAAA's saving clauses—*i.e.*, the "matters not covered" by the statute—explicitly exclude from preemption 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

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purchase insurance solely from Blue Cross/Blue Shield, even if the State of New York argued that it was merely offering an "incentive" for ERISA plans to provide hospital care benefits within the State.

> weight of the motor vehicle or the hazardous nature of the cargo," and
>
> - "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."

49 U.S.C. §§ 14501(c)(2)(A), 41713(b)(4)(B)(i).[15]

Each of these areas was, and is, the subject of a separate statutory grant of congressional authority to permit state regulation within the defined limits of an existing comprehensive federal regulatory scheme. *See* 49 U.S.C. § 5125 (transportation of hazardous cargo), *id*. at § 14504(2)(A)(ii) (minimum amounts of financial responsibility related to insurance), *id*. at §§ 31111-31113 (restrictions on size of motor vehicles), *id*. at § 30103(b) (motor vehicle safety standards), *id*. at §§ 31131-31147 (commercial motor vehicle safety); *see also* J.A. 16-19.

Consistent with the narrow scope of these savings clauses, this Court explained in *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), that the "matters not covered" in the FAAAA are "an *exception* to th[e] general rule" of preemption. *Id.* at 428 (emphasis added). The scope of the savings clauses are the "enumerated matters" that "are not covered by the preemption provision." *Id.* at 429.

Petitioner cites *Ours Garage* for the unremarkable conclusion that "State nonuniformity for nonpreempted state regulations was permitted and expected." Pet. Br. 33 (citing *Ours Garage*, 536 U.S. at 441). That permission for state laws is based not on an economic versus noneconomic distinction, but on Congress's "decision to enact both a general policy that furthers a particular goal" of

[15] FAAAA preemption also does not apply to the transportation of household goods, *see* 49 U.S.C. §§ 14501(c)(2)(B), 41713(b)(4)(B)(ii); *Flores-Galarza*, 385 F.3d at 14 (explaining that this exception applies to the specialized services offered by moving companies), and, with respect to motor carriers, certain state regulations relating to tow trucks, 49 U.S.C. § 14501(c)(2)(C).

preemption, as well as "a specific exception that might tend against that goal"—*i.e.*, the "matters not covered," *Ours Garage*, 536 U.S. at 440, where there is a federal overlay or touchstone for state regulation.

As a last resort, petitioner argues that the savings clauses are illustrative rather than exhaustive, suggesting that the Maine law could be shoehorned into the "matters not covered." Pet. Br. 35. But the preemption provisions explicitly apply "except as provided in" the "matters not covered" sections. Had Congress wanted to exempt goods related to public health and safety (such as tobacco), it would have done so, as it clearly knew how to craft exceptions from preemption, and in fact did so. *See United States v. Brockamp,* 519 U.S. 347, 352 (1997) ("explicit listing of exceptions" to running of limitations period demonstrates Congress's intent to preclude "courts [from] read[ing] other unmentioned, open-ended, 'equitable' exceptions into the statute"); *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. 269, 270 (1871) ("[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode"). Petitioner's reliance on the Conference Report (Pet. Br. 35, citing H.R. Conf. Rep. No. 103-677, at 84) is out of context and does not contradict our reading. That report indicated that its list was not an exclusive catalog of what specific types of state laws avoid preemption under some of the more broadly enumerated "matters not covered."

2. Congress's express findings at the time it enacted the FAAAA, which are notably absent from petitioner's brief, do not permit judicial restriction of FAAAA preemption to "economic" regulation. Congress found that the States' "regulation of intrastate transportation of property" "imposed an unreasonable burden on interstate commerce," impeded the free flow of interstate commerce, and imposed unreasonable costs on consumers. FAAAA, Pub. L. No. 103-305, § 601(a)(1), 108 Stat. 1569, 1605 (1994); *see* App., *infra*, 6a. These findings clearly confirm that Congress was concerned about the *effect* of state regulation on interstate carriers services. Congress's findings provide no support whatsoever to suggest that

Congress was concerned about whether the State's purpose underlying a challenged state law was economic or not.[16]

Petitioner's reliance on legislative history (Pet. Br. 30-34) cannot stand up to these findings. Petitioner relies solely on some references to state economic regulation that appear in the Conference Report and hearing testimony. It is not the law, however, that a federal statute cannot have effects beyond those enumerated in the legislative history. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Legislative history often focuses on the most blatant violations leading to the enactment of legislation, while the statute is drafted to eliminate the problem, now and in the future.

Indeed, the legislative history, like the express congressional findings, demonstrates that Congress was concerned with the *effect* of state laws on the price, route, or service of a carrier. The conferees explained that "[t]he sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of business." H.R. Conf. Rep. 103-677, at 87. In fact, a "typical" form of regulation that Congress intended to preempt was state law controls on the "types of commodities carried." *Id.* at 86. Section 1555-C(3)(C)'s requirement that a carrier must offer specific services to carry certain "types of commodities" is a close analog.

[16] Petitioner cites (Pet. Br. 5) the fact that one of the two FAAAA preemption provisions at one point contained the word "economic" in its title, but he fails to acknowledge that the word "economic" was removed from that provision just one year later in the ICC Termination Act of 1995, Pub. L. No. 104-88, ch. 145, § 14501(c), 109 Stat. 899.

3. In all events, petitioner's proffered preemption analysis, urging judicial determination of the purported purposes underlying a state law, has been repeatedly rejected by this Court. This Court has long held that federal preemption analysis turns not on whether a state law is "aimed at distinct and different evils" than those Congress intended to preempt, but instead whether the state and federal law "operate on the same object," which, in the instant dispute is a carrier's prices, routes, or services. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926).

The purpose of state laws has never been a touchstone of this Court's preemption analysis. For example, in determining whether a state law was preempted by the Occupational Safety and Health Act of 1970, which preempted all state "occupational safety and health standards *relating to* any occupational safety or health issue with respect to which a Federal standard has been promulgated," this Court held that the Court would not "rely solely on the [state] legislature's professed purpose [and] look as well to the effects of the law." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992).

Moreover, discerning the legislative purpose of state regulation is anything but an exact science. "Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act." *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2609 (2006) (plurality) (citation omitted). That task is "even more daunting" when "the actor is a legislature and the act is a composite of manifold choices." *Ibid.* Indeed, petitioner's approach "would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than [the interest prohibited by federal law]—that would be tangentially furthered by the proposed state law." *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

B. States Have Ample Means To Protect Their Citizens From Health And Safety Concerns

Petitioner decries preemption on the ground that it will leave Maine unable to protect minors from tobacco, Pet. Br. 19, 21, 36, 39-40, 50, and argues that nothing in the record demonstrates that Maine can enforce its laws against sales of tobacco to minors without Sections 1555-D and 1555-C(3)(C). But this argument fails to account for the other means Maine can use to regulate the sales of tobacco to consumers that are provided in the statute itself.

First, the State may continue to regulate retailers and buyers of tobacco products. Respondents do not challenge the portions of Maine law that require retailers involved in "delivery sales" (generally sales over Internet, by telephone, mail or cargo carrier) (1) to be licensed; (2) to obtain age verification from purchasers in the form of a copy of a valid government-issued document and to verify that information against a database of government records; (3) to obtain payment by credit card or check if a sale is the result of an Internet advertisement; (4) to mark packages as containing tobacco products; and (5) to report delivery sales to the Maine Bureau of Revenue Services. 22 Me. Rev. Stat. §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4). Respondents also do not challenge the provision of the Maine Tobacco Delivery Law that makes it unlawful to submit required information for a delivery sale in the name of another person. *Id*. § 1555-C(5). Nothing in the First Circuit's decision prevents enforcement of these requirements.

The State can readily enforce these types of regulations, for example, through review of tobacco retailers' websites to determine whether unlicensed retailers offer to sell tobacco products to Maine residents, and by sting operations to order tobacco products from such retailers to determine if they comply with the non-preempted state regulations. Indeed, the *amicus*

curiae brief submitted by various States reports that California conducted just such an investigation in which the State arranged for minors to visit web sites and to attempt to purchase tobacco products. States' Br. at 10.

Second, to the extent that petitioner believes that state regulation of carriers' transportation and delivery services is essential to combating delivery sales of tobacco products to minors, the decision below permits enforcement against carriers of Section 1555-D's prohibition against knowing delivery of tobacco products from unlicensed shippers to anyone other than a licensed retailer or distributor, so long as enforcement is based on evidence of actual knowledge and not on the imputed knowledge provision—a fact that petitioner repeatedly overlooks. And States have been capable of proving violations of such laws without Maine's statutorily-imputed knowledge of package contents. *See Robertson v. State of Washington Liquor Control Bd.*, 10 P.3d 1079, 1081 (Wash. Ct. App. 2000) (State demonstrated that a carrier transported contraband cigarettes in violation of state statute based upon the driver's having "personally hauled" those cigarettes).

C. The Synar Amendment Does Not Authorize States To Regulate Carriers

There is no merit to petitioner's repeated contention that the Synar Amendment has bearing on the instant case. Pet. Br. 24, 37-39. The Synar Amendment is a federal funding statute that vests the Secretary of Health and Human Services with discretionary authority to award grants to States that have "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." 42 U.S.C. § 300x-26(a)(1). Nothing in that provision authorizes States to regulate the manner in which a cargo carrier provides services.

Petitioner argues that the term "distributor" encompasses carriers, but that term, in its ordinary meaning, refers to a wholesaler of tobacco products. Petitioner's unique interpretation contradicts the Secretary of Health and Human Services' construction of that term, which is entitled to considerable deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In promulgating regulations under the Synar Amendment, the Secretary explained that acceptable state laws would include "a tobacco sales or distribution licensing system similar to that used for alcoholic sales." Substance Abuse Prevention and Treatment Block Grants, 58 Fed. Reg. 45,156 (Aug. 26, 1993). That view of "distribution" is in accord with the definition of "distributor" in the Maine law itself, which requires *distributors* to be licensed by the State and defines the term "tobacco distributor" as separate and distinct from the defined term "delivery service." *Compare* 22 Me. Rev. Stat. § 1551(2-B), *with*, *id.* at § 1555(1-B).[17]

As a last resort, petitioner invokes the proposition that "'all powers and duties incidental and necessary to make such legislation effective are included by implication.'" Pet. Br. 38 (quoting 2B N. Singer, *Statutes and Statutory Construction*, § 55:04, at 388 (6th ed. 2000)). But that principle applies "[w]here a statute confers powers or duties in general terms"—an introductory clause that petitioner conveniently omits, Singer, *supra*, § 55:04, at 388. Here, the *duty* in the Synar Amendment is imposed upon the Secretary of Health and Human Services, not the States, to determine whether the States comply with the federal mandate. Petitioner, of course, can point to no regulation by the Secretary indicating that carriers should be regulated. *Id.* at § 55:04, at 390.

[17] Although no discord between the FAAAA and Synar Amendment exists, any conflict would require that the Secretary's construction of the Synar Amendment be used to harmonize the two laws. *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007).

D. State Statutes Regarding Other Products Do Not Advance Petitioner's Argument

Petitioner and his *amici* States apparently scoured the 50 state codes for examples of any law involving dangerous goods or contraband that Maine could claim might be preempted if the First Circuit's judgment is affirmed, but they found only 20 or so such laws. *See* Pet. Br. 23-24 nn.36-37; States' Br. 16 nn.12-17, 18-19 nn.18-24. We think it fair to assume that these laws are the best that exist to make petitioner's point. Petitioner provides no evidence that any of those statutes ever, in fact, has been enforced against carriers before or after enactment of the FAAAA. Indeed, many of these laws are likely not preempted by the First Circuit's construction of the FAAAA, which supports affirmance here.

First, at least a third of the laws cited by Maine and its *amici* fall outside the scope of the First Circuit's FAAAA preemption ruling because they make criminal only the "knowing" transportation of certain items. The First Circuit expressly held that the FAAAA does not preempt state statutes that prohibit conduct by persons with actual knowledge that what they are transporting is prohibited. Pet. App. 25-26.[18]

Second, four of the state statutes involve the transportation of game (*e.g.*, a wild animal or bird) by a carrier. Pet. Br. 23-24 n.36; States' Br. 16 nn.12-16 (citing laws from Arizona, Florida, Maine, and Vermont). When originally enacted, such laws appear to have been sanctioned by *federal law—i.e.*, the Lacey Act of 1900, ch.

[18] *See* Pet Br. 24 n.36 (citing 17-A Me. Rev. Stat. §§ 1001(1)(B), 1118, 554-B(2)); States' Br. 16 n.3 (citing Fla. Stat. Ann. § 372.16(3)); *id*. at 18 n.18 (citing McKinney's Agric. & Mkts. Law § 96-z-11); *id*. at 18 n.19 (citing Ariz. Rev. Stat. Ann. § 13-3502(2)). A state-of-mind requirement also exists in some of the cited statutes regulating transportation of liquor, *see* Pet. Br. 23 n.36, and, of course, Congress's authority to preempt state regulation of alcohol is subject to different analysis under the Twenty-First Amendment. U.S. Const. amend. XXI, § 2.

553, 31 Stat. 187, which made it unlawful for a common carrier to transport interstate "any dead birds or animals" from the State in which they were killed if state law prohibited their "export." 31 Stat. at 188, § 3.[19] By tying the federal crime to a state law prohibiting exportation, Congress apparently treated those laws as not preempted by other federal statutes.

Third, three of the state statutes regulate the transportation of fireworks or explosives. Pet. Br. 24 n.36; States' Br. 18 n.21 (citing law from Colorado). The two Maine statutes incorporate *federal* regulations issued under the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101 *et seq*.[20] The HMTA is a comprehensive federal scheme that regulates the "safe transportation * * * of hazardous material in intrastate, interstate, and foreign commerce," 49 U.S.C. § 5103(b), and includes many provisions that regulate motor carriers. The HMTA has a broad preemption provision regarding State adoption of standards that are not "substantively the same" as the detailed federal regulations, but federal law embraces a limited role for State adoption of the federal standards as their own. *See id*. § 5125(b)(2) (if the

[19] In the Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073, 16 U.S.C. § 3372(a)(2), Congress spoke in terms of "transport" rather than "export," but there has been no federal preemption litigation under either version of the statute that we can identify.

[20] The Maine law regulating the transportation of fireworks prohibits their transportation "except as permitted by the rules adopted by" the state public safety commissioner, 8 Me. Rev. Stat. § 225, which incorporate particular standards of the National Fire Protection Association, *see* 16-219-25 Me. Code R. § 2 (2006), which in turn provide that federal HMTA regulations apply. *See* National Fire Protection Association, NFPA 1124: Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles § 8.1, at 1124-32 (NFPA 2003). The Maine criminal statute governing the transportation of explosives likewise incorporates Maine regulations, *see* 17-A Me. Rev. Stat. § 1001, which in turn incorporate the federal regulations. *See* 16-219-31 Me. Code R. § 1 (2006) (incorporating NFPA Standard).

Department of Transportation has issued a regulation related to hazardous material, a State "may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as [the federal] provision"). The United States Department of Transportation, which has particular preemption authority under the statute, *id*. §§ 5125(e) & (f), "has long encouraged States to adopt and enforce the [federal regulations] as State law" in order "[t]o encourage the nationwide application of uniform requirements." Requirements on the Transfer and Storage of Hazardous Wastes, 60 Fed. Reg. 62,527, 62,530 (Dec. 6, 1995). Thus, the substantive requirements of the Maine laws that incorporate the federal standard may be preserved by the HMTA from FAAAA preemption.[21]

To be clear, there may be some other state statutes on the books somewhere that are preempted in whole or in part solely by the FAAAA (although the fact that neither petitioner nor its *amici* were able to identify more than a handful of modern statutes that may colorably be preempted confirms the reasonableness of the First Circuit's interpretation). But even in those situations in which state laws are no longer enforceable against carriers, the FAAAA does not create a lawless lacunae. Federal regulation imposing uniform requirements on carriers remains in effect. In addition to the federal statutes discussed above regarding the transportation of wildlife and hazardous materials such as fireworks and explosives, the federal government regulates the conduct of carriers on other matters cited by petitioner and his *amici* regarding transportation and delivery of firearms,

[21] By contrast, it appears that the Colorado law governing the packing and labeling of nitroglycerine cited by petitioner's *amicus*, States' Br. 18 n.21 (citing Colo. Rev. Stat. § 9-6-102), is not substantively the same as the federal regulations and would be preempted by the HMTA.

drugs, adulterated food, infested plants, and animals. *See* Pet. Br. 24 nn.36-37; States' Br. 16, 18-19.[22]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[22] *See, e.g.*, 18 U.S.C. § 922(f) (transportation of firearms and ammunition); 21 U.S.C. § 331(c) (delivery of adulterated or misbranded food, drug, device, or cosmetic); *id*. at § 610(c) (transportation of uninspected meat or adulterated or misbranded meat capable of use as human food); *id*. at § 458(a)(2) (same regarding poultry); *id.* at §§ 624, 463(a) (storage and handling of meat and poultry during transport); 7 U.S.C. §§ 7711, 7712 (movement of plants that would disseminate a plant pest); *id*. at § 8305 (movement of any "animal, article, or means of conveyance * * * to prevent the introduction or dissemination of any pest or disease of livestock"); 49 U.S.C. § 80502 (prohibiting carriers from confining animals in a vehicle for more than 28 consecutive hours without unloading for feeding, water, and rest); 7 U.S.C. § 2143(a)(4) (requiring humane treatment of certain animals during transportation).

APPENDIX A

The relevant provisions of the Airline Deregulation Act of 1978 and the Federal Aviation Administration Authorization Act of 1994 as codified in title 49 of the United States Code provide:

§ 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 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.

* * *

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

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—**(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 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 that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely

in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(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.

(C) Applicability of paragraph (1).— This paragraph shall not limit the applicability of paragraph (1).

APPENDIX B

The relevant provisions of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569, provide:

> § **601. Preemption of Intrastate Transportation of Property.**
>
> **(a) Findings.**—Congress finds and declares that—
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> **(1)** the regulation of intrastate transportation of property by the States has—
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> **(A)** imposed an unreasonable burden on interstate commerce;
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> **(B)** impeded the free flow of trade, traffic, and transportation of interstate commerce; and
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> **(C)** placed an unreasonable cost on the American consumers; and
>
> **(2)** certain aspects of the State regulatory process should be preempted.

APPENDIX C

MAINE STATUTES INVOLVED

The relevant provisions of An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 22 Me. Rev. Stat. § 1551 *et seq.*, provide:

§ 1551. Definitions

1-A. Consumer. "Consumer" means an individual who purchases, receives or possesses tobacco products for personal consumption and not for resale.

1-B. Delivery sale. "Delivery sale" means a sale of tobacco products to a consumer in this State when:

A. The purchaser submits the order for the sale by means of telephonic or other electronic method of voice transmission, the Internet or any delivery service; or

B. The tobacco products are delivered by use of a delivery service.

1-C. Delivery service. "Delivery service" means a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers.

* * *

2-A. Person. "Person" means an individual, corporation, partnership or unincorporated association.

* * *

§ 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. [5 M.R.S.A. § 8071, et seq.]

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.

§ 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.