No. 06-457

In the Supreme Court of the United States

G. STEVEN ROWE, ATTORNEY GENERAL OF THE STATE OF MAINE, PETITIONER

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The Federal Aviation Administration Authorization Act of 1994 (FAAA Act) provides, with certain exceptions inapplicable here, that "a State * * * may not enact or enforce a law * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). See also 49 U.S.C. 41713(b)(4)(A). The questions presented in this case are:

1. Whether the FAAA Act preempts a state law that requires a seller of tobacco products to use only delivery services that will take statutorily prescribed actions to ensure that the purchaser is not a minor.

2. Whether the FAAA Act preempts a state law that effectively requires a delivery service to change its package-processing procedures in order to avoid being deemed to have knowledge that a package contains tobacco products.

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INTEREST OF THE UNITED STATES

This case concerns whether the preemption provisions of the Federal Aviation Administration Authorization Act of 1994 preempt a Maine law regulating the delivery of tobacco products. The United States shares Maine's goal of reducing youth tobacco use, but also has an interest in the fulfillment of the FAAA Act's purpose to eliminate the burdens of state regulation of motor carrier services.

STATEMENT

1. In the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the airline industry, adopting instead a policy of "maximum reliance on competitive market forces." ADA § 3(a), 92 Stat. 1706. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales* v. *TWA*, 504 U.S. 374, 378 (1992), as well as to "prevent conflicts and inconsistent regulation[]," H.R. Rep. No. 1211, 95th Cong., 2d Sess. 15 (1978), the ADA also preempted any state laws "relating to rates, routes, or services of any air carrier." ADA § 4(a), 92 Stat. 1708 (49 U.S.C. 41713(b)(1)). In *Morales*, this Court recognized that the ADA's preemption language was "conspicuous for its breadth." 504 U.S. at 384.

In 1994, Congress extended to motor carriers "the identical intrastate preemption of prices, routes and services as that originally contained in" the ADA for airlines. H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 82, 83 (1994) (H. Rep. 677). The FAAA Act contains two preemption provisions modeled on the ADA—one for air carriers and affiliated motor carriers, and the other for unaffiliated motor carriers. Each provides that "a State * * * may not enact or enforce a law * * * related to a price, route, or service" of a carrier respecting property transportation. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A).

The "[g]eneral rule" of preemption applies "[e]xcept as provided" in specified provisions. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A). Among the "[m]atters not covered" by the

preemption provision are a State's "safety regulatory authority * * * with respect to motor vehicles"; authority "to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo"; and certain motor carrier insurance requirements. 49 U.S.C. 14501(c)(2)(A), 41713(b)(4)(B)(i). The transportation of household goods and certain tow-truck regulations are also excluded. 49 U.S.C. 14501(c)(2)(B) and (C), 41713(b)(4)(B)(ii).

Although States are permitted to regulate in those areas, other provisions of federal law limit such state regulation. For example, whereas Sections 14501(c)(2)(A) and 41713(b)(4)(B)(i) permit States to adopt motor vehicle safety regulations, another section provides that "[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this Section may not be enforced." 49 U.S.C. 31141(a).[1]

2. The State of Maine has, for some time, made it unlawful for "[a] person" to "sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Rev. Stat. Ann. § 1555-B(2) (West Supp. 2006) (22 Me. Stat.); *id.* § 1555 (Supp. 1996). A person who violates that provision is subject to civil fines. 22 Me. Stat. § 1555-B(8). Prior to 2003, the State permitted the retail sale of tobacco products "only in a direct, face-to-face exchange in which the purchaser may be clearly identified and through the mail under procedures approved by the [State] to provide reliable verification that the purchaser is not a minor." *Id.* § 1555-B(1) (Supp. 1997). 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 ch. 444 (Tobacco Delivery

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[1] See also 49 U.S.C. 5112(a)(2) and (b)(1) (States authorized to designate hazardous material routes pursuant to "regulation standards" prescribed by the Secretary); 49 U.S.C. 31111(b) (prohibiting States from setting motor vehicle length limitations below federal floor); 49 U.S.C. 31113(a)(1) (prohibiting States from "impos[ing] a vehicle width limitation of more or less than 102 inches on a commercial motor vehicle").

Law). That law permits a licensed tobacco retailer to make "delivery sales" of tobacco products directly to consumers pursuant to orders by telephone or the internet, provided that the retailer takes certain measures to ensure that such sales are not to minors. See 22 Me. Stat. § 1555-C(1), (2) and (3).

Section 1555-C sets out the "requirements [that] apply to delivery sales of tobacco products within the State." The retailer must provide the delivery service with the age of the purchaser, and clearly mark the outside of the package with the retailer's name and license number and indicate that it contains tobacco. 22 Me. Stat. § 1555-C(3)(A) and (B). The statute further requires that the tobacco retailer "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.

Id. § 1555-C(3)(C). The statute also requires the retailer to provide "delivery instructions" informing the delivery service of the subsection's requirements and that "state law requires compliance with the requirements." *Id.* § 1555-C(3)(D). The statute provides for fines, injunctions, and forfeiture in the case of violations. *Id.* § 1555-C(3)(E), (F), (7) and (8).

Section 1555-D addresses the "[i]llegal delivery of tobacco products." Its first sentence provides 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 delivery is to a licensed tobacco distributor or retailer. 22 Me. Stat. § 1555-D. The second sentence provides that "[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(3)(B)] or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General." *Ibid.* (emphasis added). The statute requires the Attorney General to provide confidential "lists of licensed tobacco retailers and known unlicensed tobacco retailers" to delivery services. *Id.* § 1555-D(1).

3. Respondents, non-profit trade associations of motor carriers, brought suit against petitioner, seeking to enjoin enforcement of several provisions of the State's Tobacco Delivery Law. The district court held both Section 1555-C(3)(C) and the second sentence of Section 1555-D preempted under the FAAA Act. Pet. App. 54-66.

4. The First Circuit affirmed. It rejected petitioner's contention that the FAAA Act preempts only state laws that impose traditional economic regulation on carriers, such as entry controls and tariff filing requirements, not laws that protect public health and welfare pursuant to a state's traditional police power. The court concluded that—given the broad statutory text, the Act's structure, the overall legislative history, and the focus of this Court's decisions in *Morales* and *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), on the effect that a state law has on carrier operations—the Act is not so limited. Pet. App. 14-21.

The court next held that Section 1555-C(3)(C) is preempted under the FAAA Act for two reasons. First, it "expressly references a carrier's service of providing the timely delivery of packages." Pet. App. 23. Second, "[t]he statute prescribes the method by which a carrier operating in Maine must deliver packages containing tobacco products in a way that would affect the ability of the carrier to meet package-delivery deadlines." *Ibid.* In response to petitioner's contention that Section 1555-C(3)(C) regulates tobacco retailers rather than carriers, the court explained that that argument "would lead to the untenable result of permitting states to regulate carrier services indirectly by regulating shippers." *Id.* at 24.

The court of appeals held that the FAAA Act does not preempt the first sentence of Section 1555-D, which prohibits any person from knowingly delivering tobacco products from a retailer not licensed by the State because that part of Section 1555-D does not require carriers to "modify their delivery methods other than by declining to transport a product that Maine has legitimately banned" Pet. App. 26. However, the second sentence of Section 1555-D, which imputes knowledge of a package's tobacco contents to a carrier in certain circumstances, "has the effect of forcing [carriers] to change [their] uniform package-processing procedures" and "prescrib[es] how carriers must operate." *Id.* at 28. Thus, the court held that part of Section 1555-D to be preempted. *Ibid.*

SUMMARY OF ARGUMENT

The FAAA Act implements Congress's policy to deregulate the transportation industry, and its determination that the States should not fill the void. By using the same broad language in the FAAA Act as the ADA, Congress endorsed this Court's recognition in *Morales* of the ADA's sweeping preemptive effect. Petitioner relies on subsequent decisions interpreting similar language in the preemption provision of the Employee Retirement Income Security Act (ERISA), but those decisions do not undermine *Morales*. There are significant differences between ERISA, in which a pervasive federal regulatory scheme preempts the field, and the FAAA Act, which reflects Congress's policy to *de*regulate motor carriers. In any event, recent ERISA decisions continue to recognize that state regulations that have a direct, significant effect on central aspects of ERISA plans are preempted, while laws of general applicability with only a tenuous connection are not.

Maine's Tobacco Delivery Law has a significant, direct effect on a central feature of motor carriers' services—their ability efficiently to deliver millions of packages each day using uniform national procedures. Maine dictates particular methods, unique to Maine, for delivering packages containing

tobacco products. Most significantly, Maine requires a delivery service to obtain the signature of the package*'s addressee*, rather than another adult at the delivery address. The difference is critical; waiting for an addressee to come to the mail room (or to learn that he will not come) can delay hundreds of other packages. Moreover, by imputing to carriers knowledge of a package's tobacco contents whenever the shipper's name appears on a confidential list or the package is marked, Maine forces carriers to alter their otherwise uniform modes of operation to ensure that they do identify such packages. Although it may be efficient from Maine's perspective for it to impose the burden of detecting unlicensed tobacco sales on carriers, the FAAA Act does not permit it. If Maine can adopt its own method for tobacco deliveries, so too can other States, and for other products also. Such a patchwork of state regulation, preventing carriers from utilizing uniform, market-driven procedures, is precisely what the FAAA Act prohibits.

The FAAA Act does not preempt only economic regulation, nor does it contain a broad exception for state regulations motivated by public health and safety policies. Congress rejected a bill that would have had that limitation. Moreover, Congress enacted specific exceptions to the preemptive reach of the FAAA Act, but there is no general exception for health and safety rules. To engraft such a broad exception would dramatically undermine Congress's purposes. Whereas the federal government retains authority to protect uniformity with respect to the specified exceptions, there is no similar authority over state health and safety regulations generally.

ARGUMENT

I. THE FAAA ACT PREEMPTS STATE REGULATIONS THAT WOULD FRUSTRATE THE ABILITY OF MOTOR CARRIERS TO PROVIDE UNIFORM NATIONAL SERVICES

1. The FAAA Act marks an extension of Congress's policy of deregulation begun in the ADA with respect to the airline industry. Although there was a "movement toward deregula-

tion [of motor carriers] by some individual states," there remained a "patchwork of regulation" that "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." H. Rep. 677, at 87. The "sheer diversity" of state regulation was "a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* Congress intended instead that "[s]ervice options * * * be dictated by the marketplace[,] and not by an artificial regulatory structure." *Id.* at 88.

Those problems were highlighted by a Ninth Circuit ruling that Federal Express was entitled to the benefit of the ADA's preemption provision because it qualified as an air carrier for purposes of that statute. *Federal Express Corp.* v. *California Pub. Utils. Comm'n*, 936 F.2d 1075, 1077-1079 (1991), cert. denied, 504 U.S. 979 (1992). Federal Express's competitors, such as United Parcel Service, that did not qualify as air carriers remained subject to state regulation, "putting [them] at a competitive disadvantage." H. Rep. 677, at 87. The FAAA Act "level[ed] the playing field" by "extend[ing] to all affected carriers * * * the identical intrastate preemption of prices, routes and services as that originally contained" in the ADA. *Id.* at 82-83; see 49 U.S.C. 14501(c)(1), 41713(b)(4)(A).

Congress's use of the ADA's language reflects its agreement with "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H. Rep. 677, at 83. In *Morales*, the Court explained that "the key phrase * * * 'relating to' * * * express[es] a broad pre-emptive purpose." 504 U.S. at 383. The Court noted that, in construing the words "relate to" in ERISA, 29 U.S.C. 1144(a), it had held that "a state law 'relates to' an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan.'" *Morales*, 504 U.S. at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The Court adopted the same standard for the ADA: "State enforcement

actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Ibid.*

2. *Morales* rejected the argument that only state laws that actually prescribe rates, routes, or services are preempted. As the Court explained, such an interpretation would effectively rewrite the statute by substituting the word "*regulate*" for the phrase "relating to." 504 U.S. at 385. The Court also found unconvincing the argument that "only state laws specifically addressed to the airline industry are pre-empted." *Id.* at 386. Such an interpretation would "creat[e] an utterly irrational loophole." *Ibid.* The Court noted that, under ERISA, a state law "may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ibid.* (quoting *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)); see also *ibid.* (citing *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (state law mandating benefits in group insurance policies "relates to" an ERISA plan that purchases such policies)). Applying those principles, the Court held in *Morales* that guidelines issued by state attorneys general regarding airline fare advertising, which purported to enforce generally applicable consumer protection laws, 504 U.S. at 379, were preempted because the guidelines contained an "express reference" to airline fares, and because it was "clear as an economic matter" that the guidelines had "the forbidden significant effect" on airline fares, *id.* at 388.

Three years later, in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), the Court held, applying *Morales*, that the ADA precludes States from applying consumer fraud statutes to airline frequent flyer programs. The Court held that the States' use of those statutes "to guide and police the marketing practices of the airlines," conflicted with "the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *Id.* at 228. The Court distinguished such claims from

breach-of-contract actions for violating an airline's own frequent flyer program. *Id.* at 228-233. The latter merely holds an airline to its "self-imposed undertakings," "privately ordered obligations" that reflect the airline's own "business judgments * * * about its rates and services." *Id.* at 228-229.

3. Petitioner urges the Court not to "rely on the expansive character of [the ADA's] literal language," which the Court applied in *Morales* and *Wolens*, and the Conference Report endorsed. Pet. Br. 29. Petitioner urges the Court instead to apply the assertedly narrower standard of preemption that the Court has developed in subsequent ERISA decisions, which eschew the broad literal meaning of "related to" in favor of looking to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 23 (quoting *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (*Travelers*)). But the later ERISA cases should not be read as having narrowed the broad reading that the Court gave to the ADA in *Morales* and *Wolens*. The Court's reliance on ERISA precedents in *Morales* is not a sufficient basis for interpreting the two statutes in lock step in light of differences in statutory text and regulatory context.

a. Because there are significant distinctions between ERISA and the ADA and FAAA Act, it is not clear that the Court's more recent ERISA decisions are easily transferred to the FAAA Act. Apart from the "related to" language, ERISA's preemption provision, 29 U.S.C. 1144(a), is phrased differently from the ADA or FAAA Act. Section 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan described in" ERISA. *Ibid.* The statute's reference to federal law "supersed[ing]" state law reflects Congress's intent "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," *i.e.*, federal ERISA law. *Ingersoll-Rand*, 498 U.S. at 142. Thus, Section 1144(a) represents a kind of express field preemption, in which ERISA's

"scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indeed, four Members of this Court have stated that ERISA pre-emption should be analyzed under principles of "field pre-emption." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 153 (2001) (Scalia, J., joined by Ginsburg, J., concurring); *ibid.* (Breyer, J., joined by Stevens, J., dissenting).

The ADA and FAAA Act's preemption provisions differ from ERISA's in both their text and purpose. The ADA and FAAA Act were adopted as part of the *deregulation* of transportation industries, in order "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. Thus, the ADA and FAAA Act do not state, as ERISA does, that some comprehensive federal regulatory scheme "supersede[s]" state regulations related to the object of that federal regulation. Rather, the ADA and FAAA Act provide in clear and direct terms that "a State * * * may not enact or enforce a law * * * related to a price, route, or service" of a carrier. 49 U.S.C. 14501(c)(1), 41713(b)(1), 41713(b)(4)(A). Because ERISA's preemption of state law corresponds to a field-occupying federal scheme, it is appropriate to "look * * * to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers*, 514 U.S. at 656. Because the FAAA Act reflects Congress's policy to *de*regulate motor carriers so that "[s]ervice options will be dictated by the marketplace[,] and not by an artificial regulatory structure," H. Rep. 677, at 88, the Court should continue to give effect to the "broad pre-emptive purpose" that the Court recognized in *Morales*, 504 U.S. at 383.

b. To the extent the Court looks to ERISA cases in interpreting the ADA and FAAA Act's preemption provisions, the more recent ERISA cases do not erect as high a hurdle for establishing preemption as petitioner maintains. Rather, the Court continues to find state laws preempted if they affect, in

a way that is not tenuous, remote, or peripheral, ERISA plans' ability to operate nationally in a uniform manner.

State regulations may "relate to" ERISA, and thus be pre-empted, in numerous ways. A state law that "acts immediately and exclusively upon ERISA plans * * * or where the existence of ERISA plans is essential to the law's operation[,] * * * that 'reference' will result in pre-emption." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997). Such a law is preempted without regard to its impact. For example, in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), the Court held preempted a state law that barred garnishment of "[f]unds or benefits of [an] * * * employee benefit plan or program subject to" ERISA, even though the law gave *greater* protection to ERISA benefits. *Id.* at 828 (quoting Ga. Code Ann. § 18-4-22.1 (1982)). Alternatively, "[a] law that does not refer to ERISA plans may yet be pre-empted if it has a 'connection with' ERISA plans." *Dillingham*, 519 U.S. at 325. To determine whether such a "forbidden connection" exists, the Court considers both "the objectives of the ERISA statute" and "the nature of the effect of the state law on ERISA plans." *Ibid.* (citing *Travelers*, 514 U.S. at 656, 658-659).

In assessing the "nature of the effect of the state law," the Court has found preemption where a state statute interferes with "a central matter of plan administration," such as the payment of benefits. *Egelhoff*, 532 U.S. at 148. In *Egelhoff*, the Court held preempted as applied to ERISA benefits a Washington statute that "provides that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce." *Id.* at 143. The Court explained that the statute "interferes with nationally uniform plan administration," which was "[o]ne of the principal goals of ERISA." *Id.* at 148. While the Court noted that "all state laws create some potential for a lack of uniformity," those, like Washington's, that "affect[] an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the

burden that ERISA pre-emption was intended to avoid.'" *Id.* at 150 (quoting *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987)). See also *FMC Corp.* v. *Holliday*, 498 U.S. 52, 60 (1990) (holding Pennsylvania's antisubrogation statute pre-empted because "[t]o require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans").

On the other hand, where the challenge is to "generally applicable laws regulating 'areas where ERISA has nothing to say,'" the Court has upheld the laws "notwithstanding their incidental effect on ERISA plans." *Egelhoff*, 532 U.S. at 147-148 (quoting *Dillingham*, 519 U.S. at 330). The cases principally relied upon by petitioner fall into that category. *Travelers*, for example, upheld a surcharge to hospital patients covered by commercial insurance, but not those covered by Blue Cross, even though the differential could "have an indirect economic effect on choices made by insurance buyers, including ERISA plans." 514 U.S. at 659. The Court noted that ERISA does not preempt "laws of general applicability" that have "only a tenuous, remote, or peripheral connection with covered plans." *Id.* at 661 (quoting *District of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)). See *Dillingham*, 519 U.S. at 330, 332 (upholding California's prevailing wage law because it was "quite remote from the areas with which ERISA is expressly concerned," and its effect on ERISA plans was only indirect, "provid[ing] some measure of economic incentive to comport with the State's requirements" if they wanted to provide apprentices to public works projects); *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 (1997) (New York tax on hospitals not preempted as applied to a hospital run by an ERISA plan because its effect would have been the same, albeit indirect, if the plan had bought services from independent hospitals, and the Court refused to read ERISA as preempting "[a]ny state tax, or other law, that increases the costs of providing benefits to covered employees").

II. MAINE'S TOBACCO DELIVERY LAW OPERATES IN A DIRECT WAY ON THE HANDLING AND DELIVERY OF PARCELS, CORE ASPECTS OF CARRIERS' SERVICES

The court of appeals correctly held that the challenged provisions of Maine's Tobacco Delivery Law are preempted under the foregoing principles. That law has a "significant effect," *Morales*, 504 U.S. at 388, on the manner in which parcels containing tobacco are delivered, a matter "central" to the services a carrier provides. *Egelhoff*, 532 U.S. at 148. That effect is not, as petitioner contends, "related to" a carrier's service in some merely theoretical sense at "the furthest stretch of [the phrase's] indeterminacy." Pet. Br. 23 (quoting *Travelers*, 514 U.S. at 655). Nor is it "tenuous, remote or peripheral." *Id.* at 28 (quoting *Morales*, 504 U.S. at 390). Rather, the challenged provisions "relate to" a carrier's service in a very direct way, specifying the manner in which a carrier is to deliver packages containing tobacco and the kind of receipt it must obtain, and imputing to carriers knowledge of a package's contents. Disparate state laws specifying distinct procedures for delivering packages on the basis of their contents threaten precisely the kind of "patchwork of regulation," precluding national carriers from "conduct[ing] a standard way of doing business," that Congress sought to preempt. H. Rep. 677, at 87; *Egelhoff*, 532 U.S. at 150.

A. Section 1555-C(3)(C)

1. The court of appeals held that the FAAA Act preempts Section 1555-C(3)(C) of the Tobacco Delivery Law, which requires a tobacco retailer to use a "delivery service" that, in turn, "imposes" several "requirements." The delivery service must require that the addressee be the purchaser, must require that the addressee sign for the package and be of legal age to purchase tobacco, and, if the addressee is under age 27, must verify, by obtaining government-issued photo identification, that the addressee is of legal age. 22 Me. Stat. § 1555-C(3)(C). The "requirements" of Section 1555-C(3)(C)—in

particular, that the carrier obtain the addressee's (*i.e.*, the purchaser's) signature—have a "forbidden significant effect" on motor carrier operations. *Morales*, 504 U.S. at 388.[2]

As the court of appeals observed, "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age," as a consequence of Section 1555-C(3)(C), "all could affect timely deliveries." Pet. App. 23. When a carrier contracts to deliver a package at a workplace, the named addressee "and the delivery area will [sometimes] be located in different buildings, or on different floors of the same building," or "might otherwise be unavailable to come to the delivery area." J.A. 57. "In some instances, it could take several minutes just to determine that the [addressee] is not even available to sign, in which case the process would have to be repeated the next day." *Ibid.* Some types of workers "rarely (if ever) would be available to sign for such a package at a fixed address," and the carrier "might have to make repeated, futile attempts to deliver." *Ibid.* The purchaser could not solve the problem by having the package shipped to a home address, because another adult who was at home could not sign for it, nor could the purchaser designate another adult as the addressee, because that too would violate the statute. Moreover, the statute's impact is not limited to tobacco packages; it affects all the other packages that are

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[2] Petitioner contends (Br. 43-44 & nn.47, 48) that *De Buono* adopted a new "acute * * * economic effects" standard for ERISA preemption. That is not so. The Court has only twice used the "acute * * * economic effects" phrase, *De Buono*, 520 U.S. at 816 n.16; *Travelers*, 514 U.S. at 668, and in each instance it was noting that even a law of general applicability that only indirectly impacts ERISA plans by increasing costs to the plan could be preempted if the law's effects were "so acute 'as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *De Buono*, 520 U.S. at 816 n.16 (quoting *Travelers*, 514 U.S. at 668). The Court did not suggest that an "acute" effect is a prerequisite to preemption where, as here, a law's effect on carriers is more direct.

delayed while a driver waits to see if the addressee is able to sign in person. J.A. 58.

The identified impacts of Section 1555-C(3)(C) on the timeliness of delivery and manner of receipt constitute a "significant effect," *Morales*, 504 U.S. at 388, that relates to "a central matter of" a carrier's services, *Egelhoff*, 532 U.S. at 148. Indeed, federal law lists "receipt," "delivery," and "handling" among the "services" included within the definition of "transportation" for purposes of the Department of Transportation's statutes. 49 U.S.C. 13102(23)(B). United Parcel Service (UPS), for example, "guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will * * * provide a full refund or credit of the shipping charges." J.A. 48.[3]

2. Although Section 1555-C(3)(C) is directed in the first instance at tobacco retailers, mandating that they "utilize a delivery service that imposes the [specified] requirements," preemption under the FAAA Act is not limited to statutes that "actually prescrib[e] rates, routes, or services." *Morales*, 504 U.S. at 385. Rather, a state law may be preempted as "related to" motor carrier prices, routes, or services even if the effect thereon is "only indirect." *Id.* at 386. Thus, as the court of appeals ruled, the Act may preempt laws that "limit

[3] Although Section 1555-C(3)(C) uses the term "delivery service," that does not result in preemption under the "reference to" test because it applies to some delivery services that are not covered by the FAAA Act. See *Dillingham*, 519 U.S. at 325. The Tobacco Delivery Law defines "delivery service" as "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 Me. Stat. § 1551(1-C). That definition encompasses transportation services not covered by the FAAA Act, such as local couriers using small vans or bicycles. See Pub. L. No. 109-59, Tit. IV, §§ 4142(a), 4202(b), 119 Stat. 1747, 1751 (49 U.S.C. 13102(12) and (14) (Supp. V 2005)); 49 U.S.C. 31132(1)(A) and (B).

While the fact that the Tobacco Delivery Law can, in theory, apply without reference to motor carrier services means that it is not preempted under the *per se* rule, that does not mean that it is saved from preemption under the "connection with" test. *Morales* rejected the notion that "only state laws specifically addressed to the airline industry are preempted." 504 U.S. at 386.

retailers to hiring only those carriers that comply with the state-imposed mandates." Pet. App. 24.

Moreover, it is not at all clear that the Tobacco Delivery Law does not directly regulate carriers in addition to retailers. Section 1555-C(3)(D) requires the retailer to provide "delivery instructions" that inform the delivery service of the subsection's requirements and that "state law requires compliance with the requirements." 22 Me. Stat. § 1555-C(3)(D). Thus, it appears that Maine "requires compliance" by the delivery service itself with the statute's requirements regarding addressee signature and age verification. The broad language of Section 1555-C(3)(E), which subjects to penalty "[a] person who violates this subsection," also suggests that the subsection applies to persons other than retailers.[4]

Tellingly, the brief of the *amici* States supporting petitioner characterize the Tobacco Delivery Law as "*requiring carriers to comply* with simple delivery and age-verification requirements when a package is labeled as 'tobacco.'" Cal. Br. 1 (emphasis added). Those States contend that direct regulation of the carriers' delivery methods is "the most effective method" because unscrupulous on-line retailers "do not enforce age restrictions." *Ibid.* While it may be true that regulating a relatively few, law-abiding carriers is more effective than pursuing the wrongdoers themselves, that is no basis for disregarding the FAAA Act's preemption provisions. Indeed, the perceived efficiencies of regulating carriers rather than

[4] The placement of the knowledge-imputation provision in the second sentence of Section 1555-D suggests that it is of relevance to the prohibition set forth in the first sentence of that Section, which refers only to the State's tobacco *licensing* requirements, not the provisions that prohibit furnishing tobacco to minors. The State contends, however, that the imputed-knowledge provision "furthers public health objectives, and has nothing to do with the economic regulation of carriers." Pet. Br. 47. That suggests that the imputed-knowledge provision is intended to facilitate enforcement against delivery services of the provisions in Section 1555-C(3)(C). If so, that is further evidence that the requirements of Section 1555-C(3)(C) are made directly applicable to delivery services by Section 1555-C(3)(D).

certain classes of difficult-to-regulate shippers may be precisely why Congress deemed the preemption provision necessary to protect Congress's chosen policy of deregulation.

But, even if the addressee-signature requirements cannot be enforced directly against the carrier, a State cannot avoid the preemptive effect of the FAAA Act simply by directing retailers "to hir[e] only those carriers that comply with the state-imposed mandates. Either way, the state is employing its coercive power to police the method by which carriers provide services in the state." Pet. App. 24. The States could not, for example, avoid the holding in *Morales* by prohibiting airline ticket purchasers from buying tickets from airlines that failed to follow the Attorney Generals' guidelines regarding marketing. See, *e.g.*, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

3. That is not to say that the FAAA Act would preempt a state law requiring shippers to utilize a particular service that is already widely offered by carriers, such as UPS's "Delivery Confirmation Adult Signature Required" (DCASR) service. See J.A. 51-53. Where such a service is widely available, a state law requiring retailers to utilize that already commercially available service in a particular class of sales—and that did so, not as a "guise" to regulate motor carrier services as such (see H. Rep. 677, at 84), but in an effort to further health, safety, or similar purposes independent of the transportation industry—would not have a "forbidden significant effect" on carrier services. *Morales*, 504 U.S. at 388; cf. *Wolens*, 513 U.S. at 228-230, 233 (ADA does not preempt state-law breach-of-contract action to enforce agreement the airline voluntarily undertook). The fact that carriers had made an independent commercial decision to offer the particular service would show that, as Congress intended, the carriers' "[s]ervice options [were] dictated by the marketplace[,] and not by an artificial regulatory structure." H. Rep. 677, at

88.[5] Moreover, such a law would not frustrate Congress's goal of allowing "national and regional carriers" to develop "a standard way of doing business" without navigating a "patchwork of regulation" at the State level. *Id.* at 87.[6]

The particular service that Maine has prescribed by statute differs in significant respects from the adult-signature-required services that are available in the marketplace. See Pet. App. 22-23, 64-65. As noted, the requirement that the package be signed for by *the addressee* has dramatically different effects on how a carrier conducts its business. See *id.* at 22-23; J.A. 53-59. Indeed, faced with the choice of develop-

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[5] While such a state law might have some effect on the relative volumes of different carrier services, it would require no modification in carrier services or package-delivery procedures. And, while the increase in market demand for such a service might "alter[] the incentives" of carriers that had not competed for that segment of the market before, the state law would "not dictate the choices" of those carriers, *Dillingham*, 519 U.S. at 334; the market would.

[6] At least one federal law makes reference to an adult-signature-required service. In response to greater restrictions on air travel, Congress passed a law specifically allowing interstate shipment of wine if, among other things, the container "is marked to require an adult's signature upon delivery." 27 U.S.C. 124(a)(3) (Supp. V 2005). This Court likewise referred to such a service in *Granholm* v. *Heald*, 544 U.S. 460 (2005). There, the Court struck down state statutes that prevented out-of-state wineries from shipping directly to consumers. The Court noted that there were other steps States could take to prevent minors from obtaining wine by mail: "For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package." *Id.* at 491. Section 3(c) of that model bill states: "All Wine Direct Shipper Licensees shall * * * [e]nsure that all containers of wine shipped directly to a resident in this state are conspicuously labeled with the words 'CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.'" *Model Direct Wine Shipment Bill* (visited Oct. 10, 2007) <http://www.wineinstitute.org/programs/shipwine/Model_Direct_Shipping_Bill.pdf>. Unlike Section 1555-C(3)(C), neither the federal statute nor the model bill requires that the *addressee* sign for the package.

ing a service that complied with the Maine statute and ceasing delivery of tobacco products, UPS chose the latter. J.A. 61.[7]

Petitioner argues (Br. 45) that the effect of Maine's statute should be measured by the difference in cost between providing a Section 1555-C(3)(C)-compliant service and the adult-signature service that is already commercially available. But that argument miscomprehends the nature of Congress's interest in preempting state laws relating to carrier services. It is not the fact (if true) that Maine's tobacco-specific delivery procedures could be complied with for an additional 25 cents, and New York's for 20 cents, and California's for 35 cents. Rather, it is the fact that each State's tobacco-delivery requirements could be different. And, if petitioner were correct, each State could impose a different set of requirements for each of any number of commodities that the State decides to regulate in the interest of public health and safety. Thus, rather than a handful of different services that a carrier provides to all shippers across the nation, carriers would have to provide multiple item-specific services for each of the fifty States. A bill of lading that sought to list all of the distinct services might run many pages. The "'tailoring of [services] to the peculiarities of the law of each jurisdiction' is exactly the burden [the preemption provision] seeks to eliminate." *Egelhoff*, 532 U.S. at 151. And even a relatively unburdensome patchwork of differing state regulations is a far cry from the national deregulatory policy favored by Congress and implemented through the preemption provision.

B. Section 1555-D

1. The first sentence of Section 1555-D provides that a "person" may not "knowingly transport" or cause to be delivered to a person in Maine a tobacco product purchased from

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[7] Federal Express and DHL also appear to offer services like DCASR, but not like the one envisioned by Maine. See http://www.fedex.com/us/services/options/signatureoptions.html; http://www.dhl-usa.com/USSvcs/ValueAddSrvc.asp?nav+USServices/DDeliveryServices/SpecialServices.

a person who is not licensed as a tobacco retailer in the State, unless the delivery is to a licensed tobacco distributor or retailer. Thus, it is a violation of that provision to transport tobacco products from an unlicensed retailer to an individual purchaser, irrespective of his or her age. The court of appeals held that that prohibition is not preempted by the FAAA Act. It reasoned that tobacco products purchased by a consumer from an unlicensed retailer are contraband, Pet. App. 25 (citing 22 Me. Stat. § 1555-C(7)), and, like the laws prohibiting prostitution and gambling referred to in *Morales*, laws barring transportation or delivery of contraband (including, *e.g.*, illegal drugs) regulate primary conduct and have only a "tenuous, remote, or peripheral" relation to carrier services. Pet. App. 25-26 (quoting *Morales*, 504 U.S. at 390). As the court of appeals noted, the first sentence of Section 1555-D requires that carriers and other persons in the State not act as knowing accomplices in the illegal sale of tobacco products. "It does not, however, require that carriers modify their delivery methods other than by declining to transport a product that Maine has legitimately banned." *Id.* at 26. Respondents have not challenged that holding.

2. The second sentence of Section 1555-D, however, goes further, and the court of appeals correctly found it preempted. That provision imputes to a person knowledge that a package contains tobacco products "if the package is marked in accordance with the requirements of [Section 1555-C(3)(B)]," or if the seller is "listed as an unlicensed tobacco retailer" on a list maintained by the Maine Attorney General. 22 Me. Stat. § 1555-D. The Attorney General must provide to "delivery service[s]" separate "lists of licensed tobacco retailers and known unlicensed tobacco retailers." *Id.* § 1555-D(1).

In order to avoid imputed knowledge of package contents, carriers are, in effect, forced to change package-processing procedures that are otherwise uniform across the nation. For "*every* package destined for delivery in Maine," the carrier "must specially inspect" the package to determine whether it

"is marked as containing tobacco or if the seller's name appears on the Attorney General's list" of unlicensed retailers. Pet. App. 27 (emphasis added). If any packages are so marked, or the shipper is on the list of unlicensed tobacco retailers, the carrier "must segregate the packages * * * and research whether the *addressee* is a Maine-licensed retailer or distributor who can [lawfully] receive the package." *Id.* at 27-28 (emphasis added). A carrier is obliged to ascertain certain information about both the shipper and the recipient of the package—information for which the carrier would ordinarily have no need for purposes of providing delivery service. As the court of appeals correctly concluded, the "imputation" mandated by Section 1555-D therefore "amount[s] to prescribing how carriers must operate." *Id.* at 28.

Moreover, unlike the first sentence of Section 1555-D, which applies generally to any person who "knowingly transport[s]" tobacco from an unlicensed retailer (other than to a licensed distributor or retailer), the second sentence of Section 1555-D appears to apply only to delivery services, because it imputes knowledge based on the way a package is marked under the "delivery service" provisions in Section 1555-C(3)(B) or on information contained in confidential lists that the Attorney General provides only to delivery services. See 22 Me. Stat. § 1555-D. Even though, as noted above, see note 3, *supra*, the phrase "delivery service" is broader than "motor carriers" and thus the statute is not preempted under the *per se* "reference to" test, it is certainly relevant to the determination whether a law operates "in connection with" a carrier's service that it directly regulates a class that is only slightly broader than the class protected by federal law.

3. Petitioner argues that, even if carriers are required to modify their package handling procedures in response to Section 1555-D, the effect is "*de minimis*" because those steps would be "similar to what UPS appears to be doing to comply with its settlement with New York," in which UPS (as well as Federal Express and DHL) agreed not to ship cigarettes to

individual customers in the United States at all, and not to accept shipments of tobacco products unless the recipient is licensed by applicable law. See Pet. Br. 15-16, 49. But a consent decree is not a unilaterally imposed state law. Agreeing not to ship cigarettes knowingly to unlicensed recipients, *id.* at 15, is similar to the rule of general applicability in the first sentence of Section 1555-D, which the court of appeals upheld. That is quite different from being forced, under threat that knowledge will be imputed to the carrier by operation of law, to undertake *affirmative* steps to identify packages from *un*licenced shippers who are attempting to evade detection (a requirement that would entail review of *every* package destined for delivery in Maine).

Petitioner contends that the imputed-knowledge provision of Section 1555-D "simply identifies [the] evidence" on which the State would rely in enforcing its restrictions on the delivery of tobacco products. Pet. Br. 46. But as we have shown, the provision does much more; it effectively requires carriers to alter their package processing and distribution procedures. In addition, imputing knowledge on the basis of certain factors establishes an irrebuttable presumption of knowledge in the specified circumstances. Such a presumption is a substantive rule of liability, not merely a rule of evidence. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 119-121 (1989). Thus, the State has legislated a standard of conduct to which carriers must conform in order to avoid liability: for every package to be delivered in Maine, motor carriers must scrutinize the package for a "Tobacco Products" label and cross-check the shipper against the Attorney General's lists. Indeed, because an individual delivery person is subject to penalty under Section 1555-D(2)(A), independent of the employer's liability under Section 1555-D(2)(B), it would seem that each delivery

person must personally inspect each package and cross-check the shipper against the list, or risk individual liability.[8]

Finally, petitioner's suggestion that the Tobacco Delivery Law cannot be enforced effectively without the imputed-knowledge provision is unpersuasive. Petitioner has identified numerous other provisions of State law that restrict contraband, see, *e.g.*, 28-A Me. Stat. § 2081(1)(A) (prohibiting "knowingly" delivering liquor to a minor), yet none contains an imputed-knowledge provision like that in Section 1555-D. There is no reason to believe that the State's enforcement efforts respecting tobacco will be any less effective in the absence of Section 1555-D's imputed-knowledge provision.

III. THE PUBLIC HEALTH PURPOSES UNDERLYING MAINE'S TOBACCO DELIVERY LAW DO NOT SAVE IT FROM PREEMPTION UNDER THE FAAA ACT

Petitioner contends (Br. 32) that the FAAA Act's objective was limited to preempting "economic laws" and that the Tobacco Delivery Law should be upheld as falling instead into a category of non-preempted "public health laws." Petitioner is incorrect on both counts. The FAAA Act's omission of any "economic" limitation, and its inclusion of carrier "services" among the areas protected by the statute, demonstrate that Congress's concern was broader than "economic laws." In any event, Maine's law dictating the manner of delivery and form of receipt required for certain delivery sales constitute "economic" regulation. Petitioner's argument for an exception for state laws motivated by non-economic police-power concerns would introduce in unadministrable and atextual element to the preemption inquiry, and is inconsistent with

[8] Petitioner relies (Br. 9) on a Maine regulation under which a carrier is deemed not to know of a package's tobacco contents if it was marked only on the side opposite the address. See Pet. App. 56 n. 67 (discussing 10-144 Code Me. R. Ch. 203, § 11 (2005)). That provision does not, however, relieve the carrier of the practical need to search each of the other five sides of every package to ensure that knowledge of any tobacco contents will not be imputed to it pursuant to Sections 1555-D and 1555-C(3)(B). See Resp. C.A. App. II, 98.

the FAAA Act's sweeping preemptive language, its carve-out of specified areas of state regulation that remain subject to federal supervision, and the legislative history's endorsement of the "broad preemption interpretation" of the related ADA provision in *Morales*. See H. Rep. 677, at 83.

A. Petitioner's effort to limit FAAA Act preemption to "states' economic regulation of motor carriers," Pet. Br. 31, seeks to supplant the statute's broad text with more limited language that Congress considered and rejected. As the Court observed in *Morales*, 504 U.S. at 385 n.2, when Congress considered the ADA, the Senate bill provided that "[n]o State shall enact any law, establish any standard *determining* routes, schedules, or rates, fares, or charges in tariffs of, *or otherwise promulgate economic regulations* for, any air carrier." S. Rep. No. 631, 95th Cong., 2d Sess. 171 (1978) (emphasis added). In place of that language, the conferees adopted the House's version, H.R. Conf. Rep. 1779, 95th Cong., 2d Sess. 94-95 (1978) (Conf. Rep. 1779), which preempted States from "enact[ing] or enforc[ing] *any* law, rule, regulation, standard or other provision having the force and effect of law *relating to* rates, routes, or *services* of any air carrier." ADA § 4(a), 92 Stat. 1708 (emphasis added).

The two ADA bills differed in at least three respects, each of which undermines petitioner's argument. First, Congress rejected the Senate's limited focus on state laws "determining" routes and rates in favor of the broader "relating to" language. See *Morales*, 504 U.S. at 385 n. 2. In addition, the House version preempted laws relating to carrier "services," while omitting the Senate's limiting, but hardly self-defining, descriptor "economic." Conf. Rep. 1779, at 4, 94-95. The latter two differences are related. Many carrier "services" are not "economic," at least in the narrow sense used by petitioner. Indeed, the breadth of the term "services" is reflected in the definition of "transportation," which encompasses "services" related to the movement of property, "including receipt, delivery, * * * [and] handling" of property. 49 U.S.C.

10102(28)(b) (1994). Plainly, petitioner cannot dispute that Maine's Tobacco Delivery Law "relates to * * * services" such as "receipt," "delivery" or "handling," of property. Equally clearly, the courts are not free to read into the statute an "economic" limitation if the effect would be to read out of the statute many of the kinds of "services" that are expressly included and protected under the plain text. Cf. *Morales*, 504 U.S. at 385 (rejecting argument that ADA "only pre-empts the States from actually *prescribing* rates, routes, or services" because it "simply reads the words 'relating to' out of the statute" (emphasis added)).

Neither do references in the FAAA Act's legislative history to "[s]tate economic regulation of motor carrier operations" as the Conferees' principal focus, H. Rep. 677, at 87, advance petitioner's argument. The legislative history makes clear, if the text's reference to "services" did not, that Congress was concerned about state regulations related to delivery. See, *e.g.*, *Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the House Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 103d Cong., 2d Sess. 123 (1994) (noting, among "services" offered, "next-day air, three-day select," and a paperless information system that allowed shippers to "get information on their delivery within minutes of delivery"). Petitioner also cites (Br. 29-30) the Ninth Circuit's pre-FAAA Act decision in *Federal Express* as allowing States "to act in an area of non-economic regulation." 936 F.2d at 1078. Significantly, however, the Ninth Circuit made that statement with respect to "general traffic laws" and "safety requirements for trucks on its highways." *Ibid.* Of more relevance here, the court recognized that a carrier's "terms of service" included such matters as "rules on claims," "bills of lading" and "freight bills," and that, while "not patently economic," those subjects were "as much protected from state intrusion as are the air carrier's rates." *Ibid.*

B. Petitioner's argument (Br. 24-25, 32-35) for a broad, nontextual exception to preemption for any state regulation related to "public health," *id.* at 32, would upset the statutory scheme by permitting States to adopt an inconsistent patchwork of regulations related to delivery services, as long as those regulations were motivated by health and safety concerns. But health-motivated regulation is no less likely than regulation motivated by other concerns to frustrate the policy to permit "national and regional carriers" to "conduct a standard way of doing business" that is "dictated by the marketplace[,] and not by an artificial regulatory structure." H. Rep. 677, at 87-88. Here, while Section 1555-C(3) may be motivated by the State's public health concern to curb youth smoking, it has chosen the regulation of carriers' delivery services to further that goal. The underlying purpose no more saves the Tobacco Delivery Law from preemption than would a similar purpose that motivated a State to mandate an increase in carriers' rates for tobacco deliveries, though such a law might also deter youth purchases.

The FAAA Act's explicit delineation of specific exceptions also precludes the general police powers exception envisioned by petitioner. Congress clearly considered traditional areas in which the States might exercise regulatory authority over carriers and specified which of those areas were not subject to preemption (motor vehicle safety, route controls for specified purposes, insurance requirements, and the transportation of household goods). 49 U.S.C. 14501(c)(2), 41713(b)(4)(B); see H. Rep. 677, at 84, 85. Petitioner does not contend that the Tobacco Delivery Law fits within any of those exceptions. When Congress creates exceptions in a statute, courts have no authority to create others; rather, "[t]he proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States* v. *Johnson*, 529 U.S. 53, 58 (2000). Moreover, the matters excluded are addressed in specific and readily-administrable terms. While Congress surely could have further ex-

empted a broad class of health-motivated or non-economic regulations, such a Congress presumably would have offered courts some more concrete guidance in delimiting the preemption scope. Petitioner's proposed atextual exception, by contrast, asks courts to embark on a vague purpose-bound inquiry without any textual guidance.

Relying on the caption given to the exceptions and a statement in the legislative history, petitioner contends that the list of "[m]atters not covered" by the preemption provisions was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." Pet. Br. 35 (quoting H. Rep. 677, at 84). But that statement in the Conference Report cannot be credited. It makes no sense to say, for example, that a law "impos[ing] highway route controls," 49 U.S.C. 14501(c)(2)(A), is not "related to a * * * route," or that a law "relating to the price of * * * motor vehicle transportation by a tow truck," 49 U.S.C. 14501(c)(2)(C), is not "related to a price," and would come within the general rule of preemption but for the respective exceptions. Moreover, treating the specified categories as merely examples of a general rule excluding all noneconomic regulation cannot be squared with the statutory text, which states that "*[e]xcept as provided in*" specified provisions, state regulations "related to a price, route, or service" of a carrier are preempted. 49 U.S.C. 14501(c)(1), 41713(b)(4)(A) (emphasis added).

Moreover, the areas in which Congress specified that States may undertake regulation for safety and related purposes are ones in which other Acts of Congress explicitly or impliedly allow for state regulation, but also generally imposed limits on the States' authority. See p. 2 & note 1, *supra*. Petitioner urges the Court to engraft a broader, nontextual exception for all state regulations that are motivated by health or safety concerns, but with no corresponding authority on the part of the Secretary of Transportation to pre-

empt such laws. That would dramatically alter the state-federal balance that Congress established.[9]

C. Petitioner erroneously suggests (Br. 25) that the Tobacco Delivery Law is saved because it shares a "common purpose[]" with federal law. *Ibid.* (quoting *PhRMA* v. *Walsh*, 538 U.S. 644, 666 (2003)). Petitioner relies (Br. 3-4, 24-25, 37-39) on the "Synar Amendment" to the ADAMHA Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 394, which provides that the Secretary of Health and Human Services (HHS) "may" award a grant to any State that "has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18." 42 U.S.C. 300x-26(a)(1); see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 552 (2001). Nothing in the Synar Amendment authorizes States to enact laws otherwise preempted by the FAAA Act in furtherance of that goal. The Amendment does not mandate any state laws related to the *transportation* of tobacco products.[10] Rather, HHS's regulation implementing the Synar Amendment focuses on restricting over-the-counter and vending machine sales. See 45 C.F.R. 96.130.[11] The court

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[9] Petitioner's reliance (Br. 31-32) on *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), is misplaced. That case concerned whether the authority expressly preserved to States in 49 U.S.C. 14501(c)(2)(A) could be delegated to municipalities. 536 U.S. at 428, 440. Nothing in *Ours Garage* suggests that the FAAA Act also contains an unwritten broad exemption for *all* state safety regulation.

[10] Contrary to petitioner's suggestion (Br. 38-39), the Synar Amendment's phrase "distributor of tobacco products" refers to a wholesaler, not a carrier transporting packages. That is also how Maine's Tobacco Delivery Law uses the term. See, *e.g.*, 22 Me. Stat. § 1555-D (distinguishing between "delivery service" and "distributor," the latter of which must be licensed).

[11] As petitioner notes (Br. 40 n.45), HHS has allowed the States "flexibility to determine which strategies are most appropriate for meeting the compliance target and enforcement requirements" of the Synar Amendment. 61 Fed. Reg. 1495 (1996). That statement affords flexibility to pursue lawful options; it does not override the FAAA Act's specific preemption provisions.

of appeals correctly concluded that the FAAA Act and Synar Amendment "can exist harmoniously because the states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12.

Moreover, the court of appeals' decision leaves in place another provision, which respondents did not even challenge, that prohibits all persons (including carriers) from providing tobacco products to minors. See 22 Me. Stat. § 1555-B(2) (Supp. 2006) ("A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age"); *id.* § 1551(2-A) (defining "[p]erson" as "an individual, corporation, partnership or unincorporated association"). Alternatively, Maine could ban outright all non-face-to-face sales of tobacco. Cal. Br. 13; see, *e.g.*, Md. Code Ann. Bus. Reg. § 16-222 (2004); *id.* § 16-223 (Supp. 2006); Ark. Code Ann. §§ 26-57-203 (LexisNexis Supp. 2005); *id.* § 26-57-215 (Michie 1997). See *Arkansas Tobacco Control Bd.* v. *Santa Fe Natural Tobacco Co.*, 199 S.W.3d 656 (Ark. 2004) (upholding, against Commerce Clause challenge, ban on non-face-to-face retail sales of cigarettes); *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2d Cir. 2003) (same). Such laws of general applicability, which do not dictate methods of delivery, do not have a "forbidden significant effect" on carrier services. See pp. 19- 20, *supra*.

D. Petitioner also argues (Br. 23-24, 34, 37) that Sections 1555-C(3)(C) and the second sentence of Section 1555-D should be upheld by analogy to statutes that prohibit the transportation of contraband. The court of appeals did uphold the first sentence of Section 1555-D by analogy to prohibitions on transporting contraband. See Pet. App. 25-26. But that rule cannot be extended to the other challenged provisions of the Tobacco Delivery Law. Those provisions define tobacco to be contraband not by reference to licensing laws, but by whether its is delivered consistent with Maine's delivery requirements. See 22 Me. Stat. 1555-C(7) ("[a]ny tobacco product sold * * * in a delivery sale that does not meet the re-

quirements of this section is deemed to be contraband"); *id.* § 1555-D(6) (same). Petitioner cannot bootstrap rules that impermissibly relate to carrier services by the simple *ipse dixit* of declaring sales in contravention of the delivery rules to be contraband.[12]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[12] Petitioner and his State *amici* identify a number of statutes that ban or regulate the transportation of various items, including tobacco, alcohol, animals, and hazardous materials. Pet. Br. 23-24 nn.36 & 37; Cal. Br. 12-13, 16, 18-19. Those statutes would, of course, have to be reviewed on their own terms. Some prohibit "knowing[]" delivery of alcohol or tobacco to a minor or transportation of unlicensed contraband, but do not prescribe particular delivery procedures, and would not be preempted for the same reasons that similar prohibitions in 22 Me. Stat. § 1555-B(2) and the first sentence of Section 1555-D are not. Other cited statutes require shippers to utilize an adult-signature-required delivery service like those commercially available and would not be preempted. See pp. 17-18 & note 6, *supra*. Yet others would have to be analyzed to determine whether a more specific federal statutory scheme that focuses directly on the safety of the product being transported expressly contemplates a role for state transportation regulations, as some do. See, *e.g.*, Pub. L. No. 109-59, § 7202, 119 Stat. 1911, 1912 (21 U.S.C. 350e(b) and (e) (Supp. V 2005)) (directing Secretary of HHS to issue regulations prescribing sanitary transportation practices for food and preempting state laws that conflict with such regulations); 49 U.S.C. 5125(b)(2) (authorizing States to adopt regulations regarding the transportation of hazardous materials that are "substantively the same as" regulations adopted by the Department of Transportation); see also *Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program of the National Conference on Interstate Milk Shipments* <http://www.cfsan.fda.gov/~ear/imsproc.html#memor> (establishing joint federal-state cooperative program under 42 U.S.C. 243(b) for regulation of milk safety, including transportation). Other state regulations may merely duplicate applicable federal standards, as 7 Me. Stat. § 3981 does 49 U.S.C. 80502 (standards for the humane transport of animals). Finally, some of the statutes may well suffer from the same or similar defects as Maine's and would be preempted, for the reasons set forth above.

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