No. _____

In The
Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

REDACTED

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QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

The petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case decided on May 19, 2006.

OPINIONS BELOW

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

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, and entered a final amended judgment on June 29, 2005. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on May 19, 2006. The district court entered its second amended judgment on June 29, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this case is whether Maine's "Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" ("Maine Act"), which regulates retailers and deliverers of tobacco products in order to protect children, is preempted by the Federal Aviation Administration Authorization Act

of 1994 ("FAAAA"), Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The first FAAAA preemption provision states:

> (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).

49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), captioned "Matters not covered," provides that 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. . . .

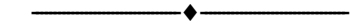
49 U.S.C. § 41713(b)(4)(B).

The second preemption provision states:

> (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 . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). Paragraph (2), captioned "Matters not covered," exempts from preemption the same areas set forth above for air carriers, and also certain types of towing rates. 49 U.S.C. § 14501(c)(2). Paragraph (3), captioned "State standard transportation practices," exempts from preemption state regulation related to certain uniform liability rules, bills of lading, and credit rules and certain antitrust laws if such regulation "is no more burdensome than compliance with" federal law, and the carrier requests that the law apply to it. 49 U.S.C. § 14501(c)(3).

The pertinent provisions of the Maine Law, in particular 22 Me. Rev. Stat. Ann. §§ 1555-C(3)(C) and 1555-D, are reproduced at App. 100, and immediately discussed below.



STATEMENT

This case presents the issue of whether Congress has preempted the states from controlling the delivery of dangerous substances, here tobacco, where a carrier such as United Parcel Service ("UPS") is used as the conduit for illegal transactions.

1. The Maine Tobacco Delivery Law. The Maine law at issue here is strongly rooted in the State's traditional police powers to protect the health of its children. Maine, like other states, has historically regulated the transport and delivery of various substances in order to protect the public. These laws range from limiting the sale and delivery of fireworks and explosives, to prohibiting the delivery of liquor, drugs and handguns to minors, to regulating the transportation of plants and wild animals.[1]

[1] *See, e.g.,* 28-A Me. Rev. Stat. Ann. §§ 2073, 2077, originally enacted in 1987, Me. Pub. L. 1987, c. 45, § A, 4 (liquor transportation provisions); former 12 Me. Rev. Stat. Ann. § 7534, originally enacted in 1979, Me. Pub. L. 1979, c. 420, § 1 ("Any common carrier accepting any wild animal or wild bird for transportation shall" check the hunter's license, affix tags and identification, and make returns to the commissioner); 8 Me. Rev. Stat. Ann. §§ 221, *et seq.*, enacted by Me. Pub. L. 1985, c. 23, § 2 (prohibiting possession, sale or transport "in any conveyance" of fireworks "except as permitted by" state regulations); 17-A Me. Rev. Stat. Ann. § 1001(1)(B), enacted by Me. Pub. L. 1975, c. 499, § 1 (prohibiting transport or sale of explosives without a permit); 28-A Me. Rev. Stat. Ann. § 2081, enacted by Me. Pub. L. 1987, c. 45, § A, 4 (prohibiting furnishing, delivering, or giving liquor to a minor); 7 Me. Rev. Stat. Ann. § 3981, enacted by Me. Pub. L. 1987, c. 383, § 3 (regulating periods of confinement and conditions for transportation of animals); 12 Me. Rev. Stat. Ann. §§ 8305-06, originally enacted by Me. Pub. L. 1979, c. 545, § 3 (prohibiting and regulating shipment of plants and trees); 17-A Me. Rev. Stat. Ann. § 1118 (transporting scheduled drugs); 17-A Me. Rev. Stat. Ann. § 554-B(2) (transferring handgun to minor).

It is illegal in Maine for a minor to "purchase, possess or use cigarettes, cigarette paper or any other tobacco product." 22 Me. Rev. Stat. Ann. § 1555-B(5-A). A person "may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age" and may not sell "to any person under 27 years of age unless the seller first verifies that person's age by means of reliable photographic identification containing the person's date of birth." *Id.* at § 1555-B(1) & (2).

Internet and telephone sales of tobacco products have become a serious problem. By means of delivery services, enterprising retailers seek to avoid over-the-counter age verification requirements by selling the tobacco products to minors and delivering them not over-the-counter, but rather through third-party carriers such as UPS. In response to this dangerous practice, in 2003 the Maine Legislature passed "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," Me. Pub. L. 2003, c. 444.

The Act requires a person who engages in the sale of tobacco products by means of delivery to take a number of steps to ensure that tobacco products do not reach the hands of minors. Retailers engaged in delivery sales of tobacco to Maine citizens must obtain a retail license from the Maine Department of Human Services (22 Me. Rev. Stat. Ann. § 1555-C(1)), just as over-the-counter retailers must (*Id.* at § 1551-A). Similarly, the Act requires the internet or telephone tobacco retailer to obtain age verification (*Id.* at § 1555-C(2)), just as age verification for persons under 27 years of age is called for in over-the-counter sales (*Id.* at § 1555-B(2)).

The Act requires the retailer to "clearly mark the outside of the package . . . to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the . . . retailer." *Id.* at § 1555-C(3)(B).[2] Section 1555-C(3)(C) applies only to retailers who ship tobacco products, not to the carriers, and calls for tobacco retailers to "utilize a delivery service that imposes" requirements that the addressee be of legal age to purchase tobacco products and sign for the package, the purchaser be the addressee, and, if the addressee is under 27 years old, present a valid identification showing proof of age.[3] Tobacco products shipped in violation of these requirements are contraband, subject to forfeiture. *Id.* at 1555-C(7).

Section 1555-D of the Act applies to carriers and, in pertinent part, provides:

> 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

[2] Maine adopted rules for the enforcement of this law that require, *inter alia,* the retailer to mark the label side of the package with a tobacco marking, and does not require a carrier to look at the bottom of a package for tobacco markings. 10-144 -203 Me. Code. R. §§ 10(C)(2), 11.

[3] Section 1555-C(3)(A) requires the tobacco retailer, prior to shipping, to provide to the delivery service the age of the purchaser.

> receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this section.

Transgressions are civil violations punishable by fines of from $50 to $1500, and the Attorney General may enforce the law by seeking injunctive relief. *Id.* at § 1555-D(2) & (3). Maine maintains a list of licensed and known unlicensed retailers, provides the list to delivery services, and reliance on that list is an affirmative defense. *Id.* at § 1555-D(3) & (4). These provisions ensure that a carrier is not delivering contraband tobacco.

2. The Federal Aviation Administration Authorization Act of 1994. The FAAAA was intended to preempt the states from engaging in economic regulation in order (1) to eliminate non-uniform "[s]tate economic regulation of motor carrier operations [that] causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtails the expansion of markets"; and (2) to "level the playing field" between air carriers and motor carriers. H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60. "The problem to which the congressional conferees attended was 'state *economic* regulation.'" *City of Columbus v. Ours Garage and Wrecking Service, Inc.,* 536 U.S. 424, 440 (2002) (emphasis in original). There is no hint that Congress intended to preempt state public health laws regulating the delivery of dangerous substances.

The pertinent preemption provisions were enacted as Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605. Congress found that state regulation of intrastate transportation of property imposed unreasonable burdens on and impeded the free flow of interstate commerce and placed an unreasonable

cost on American consumers, and, therefore, "*certain aspects* of the State regulatory process should be preempted." Pub. L. No. 103-305, § 601(a)(1) & (2) (emphasis added).

Section 41713(b) of Title 49 was amended to add a "[g]eneral rule" that "[e]xcept as provided in subparagraph (B)," a state could not enact or enforce a law "related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle." Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(A). Subparagraph (B), entitled "Matters not covered," provided that preemption would not cover state regulation of safety, hazardous cargo, insurance or household goods. Pub. L. No. 103-305, § 601(b)(1), codified at 49 U.S.C. § 41713(b)(4)(B).

In order to accomplish the goal of placing air and ground carriers on the same economic plane, as part of the FAAAA Congress enacted a new subsection entitled "Preemption of State *Economic* Regulation of Motor Carriers." Pub. L. No. 103-305, § 601(c) (emphasis added). This new subsection proscribed states from enacting or enforcing laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(1), now codified at 49 U.S.C. § 14501(c)(1). The exemptions from preemption for motor carriers included the same matters exempted for air carriers – state regulation of safety, hazardous cargo, insurance or household goods. Pub.

L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(2), now codified at 49 U.S.C. § 14501(c)(2).[4]

The exceptions came about due to Congress' paying specific attention to the American Trucking Association's position that there be no preemption of state "non-economic factors," and the conferees intended to implement that approach. H.R. Conf. Rep. No. 103-677, at 88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1760; *City of Columbus,* 536 U.S. at 440-41. In particular, the conferees added the specific exceptions to preemption in an effort to make clear that the intent was "to preempt *economic* regulation by the States"; and the conferees explained that those specific exceptions "were not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60 (emphasis added). Non-uniform regulation in non-preempted areas was expected and permitted. *City of Columbus,* 536 U.S. at 441.

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[4] Congress also included an additional exemption from preemption for motor carriers for certain "State standard transportation practices" regarding uniform liability, bills of lading, credit rules and antitrust laws if the carrier requests that the state law apply to it. Pub. L. No. 103-305, § 601(c), originally codified at 49 U.S.C. § 11501(h)(3), now codified at 49 U.S.C. § 14501(c)(3).

Just one year after its enactment, § 11501(h) was recodified at 49 U.S.C. § 14501(c), with an added exemption for state regulation of nonconsensual tow rates – by the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. The tow rate exemption is now found at section 14501(c)(2)(C).

3. Operative Facts. The three respondents-plaintiffs are non-profit trade associations whose members are "engaged in the commercial delivery of packages containing property." In their challenge to the Maine Act, the Associations relied entirely upon the experience and facts of UPS.

Ordinarily, and prior to the enactment of this law, all sides of the exterior of packages are visually scanned at many stages through the distribution process[5] for, *inter alia,* labels, signs of damage, improper packaging, leakage, handguns, prohibited contents and hazardous waste markings by various UPS employees such as sorters, presorters and drivers. UPS has implemented written procedures and policies relating to the delivery of substances such as alcohol and handguns.

In response to the Maine Act, UPS instructed certain of its employees in Maine to look for markings indicating

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

that a package contained tobacco products. The preloaders and drivers were instructed to treat any such package as non-deliverable, and to give that package to a designated employee who assesses how to proceed, including returning the package to the sender or disposing of the package.

A UPS employee estimated that it takes a preloader approximately an additional two seconds to visually scan the label of a package for tobacco indicia. Based upon this estimate, the UPS employee provided a cost figure for Maine, amounting to approximately $0.009, or less than one cent, per package. UPS did no other study or analysis to determine whether a driver spends any additional time to comply with the Maine Act, or what the effect of the Maine Act is on its package sorting rate. UPS delivers approximately 65,000 packages per day in Maine.

During a five-month period, UPS intercepted a total of thirty-three packages that its workers believed contained tobacco products destined for Maine consumers. UPS estimates that it costs approximately $2.00 in personnel time to deal with each such package. Thus, according to UPS, for a five month period there was an additional $66 in costs to UPS to comply with Maine's law. UPS's total revenue in 2003 was $33.5 billion.

UPS's computer systems, according to UPS, can do "pretty much anything." It is the second largest computer system in the world. At the time of each and every delivery, the UPS driver checks and enters delivery information on a hand-held computer device ("DIAD"). The DIAD has the capability and does provide relevant prompts or "alerts" regarding each package when delivered. These "alerts" inform the driver, *inter alia,* whether a signature or adult confirmation is required. UPS has the capability

to flag specific delivery addresses or specific consignees to generate an alert, [redacted] [REDACTED] [redacted] UPS offers a delivery confirmation, adult signature-required service, for an additional fee of either $1.75 or $2.75. When a driver delivers such a package, she receives a prompt on her DIAD to have her verify the age of the person receiving the package or obtain a signature. [redacted] [REDACTED]

The State provided to UPS an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers, but UPS has not researched whether any of its regular shippers are on the state list of known unlicensed tobacco retailers. UPS has over 4,000 employees in the technology and information systems area but did no study of the capability of the system regarding compliance with the Maine law.

During the pendency of the appeal, UPS entered into an agreement to comply with New York's "Unlawful Shipment of Cigarettes Law," N.Y. Pub. Health Law, § 1399-*ll.* UPS agreed, *inter alia*, to impose measures to ensure that employees "actively" look for indications that a package contains cigarettes, and to instruct preloaders and drivers not to load for delivery or deliver cigarette packages to consumers. UPS's policy is to "require its shippers to be licensed by applicable law in order to ship tobacco products," and to accept shipments of cigarettes for delivery only to recipients who are licensed by applicable federal or state law to receive cigarette deliveries.

4. Proceedings Below. On October 10, 2003, the Associations commenced this action in the United States

District Court for the District of Maine to challenge sections 1555-C(3)(A) and (C) and 1555-D of the Maine Act as preempted facially and as-applied by the FAAAA. The Associations immediately filed a motion for summary judgment that those provisions were facially preempted. On February 6, 2004, the district court denied plaintiffs' motion, holding the challenged portions of the Maine Act were not facially preempted by the FAAAA. (App. 86). The court allowed the Associations to proceed on the as-applied challenge.

The Attorney General then filed a motion for summary judgment on the facial challenge for the reasons set forth in the court's first decision. On June 30, 2004, the district court granted summary judgment for the Attorney General on "all counts as to any facial FAAAA preemption challenges to" the Maine Act. (App. 73).

Cross-motions for summary judgment were filed, and, on May 27, 2005, the district court issued its ruling in favor of the Associations and against the Attorney General that sections 1555-C(3)(C) and 1555-D were preempted by the FAAAA both facially, thus reversing its prior rulings, and as applied. (App. 31).

The Attorney General appealed. On May 19, 2006, the First Circuit issued its decision effectively affirming the lower court's decision.[6] (App. 1). The First Circuit held that

[6] Below, the Attorney General sought dismissal of the action on the grounds of mootness and lack of associational standing. The appeals court rejected those positions (App. 7-12). In particular, the First Circuit reasoned the matter was not moot because the New York agreement dealt only with cigarettes, while Maine's law covers all tobacco products. The Attorney General no longer presses these arguments.

the FAAAA "preempts state police-power enactments" to the extent they have "the effect of forcing [a carrier] to change its uniform package-processing procedures," and the purpose of the state law is irrelevant to the preemption inquiry. (App. 17-18, 28). The court reasoned that the "related to" language of the FAAAA's preemption provisions as well as the FAAAA's structure and legislative history support a broad preemptive effect, and that the Attorney General's view would "swallow the rule of preemption" because most state laws are enacted pursuant to the states' police powers. (App. 14-21). The appeals court also found that the conferees' specific reference to *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), required adherence to a broad view of preemption, and the court refused to apply subsequent Supreme Court interpretation of similar "relate to" preemption language in ERISA, indicating it was for the Supreme Court and not the First Circuit to do so. (App. 14-16, 20).

The appeals court found that section 1555-C(3)(C) – which requires tobacco retailers to use a delivery service that provides delivery directly to the purchaser, a signature, and age verification – is "related to" a carrier's service due to the potential for delay if a carrier chose to provide such options. (App. 23). Although the provision applies only to retailers, the court reasoned it indirectly regulated carriers by "employing [the state's] coercive powers to police the method by which carriers provide services in the state." (App. 24).

Section 1555-D precludes carriers from *knowingly* delivering tobacco products to children. The First Circuit found that so much of section 1555-D that proscribed "knowing" delivery of tobacco for an unlicensed retailer was not preempted. (App. 26). However, the appeals court

went on to conclude that section 1555-D was preempted to the extent it charged carriers with knowledge that a package contains tobacco products if the package is so marked or if the shipper appears on the Attorney General's list of licensed or known unlicensed retailers. (*Id.* at 27-28). These provisions were found to be preempted because they require the carrier "to change its uniform package-processing procedures" by inspecting every package destined for delivery in Maine and segregating the packages that contain tobacco to research whether the addressee is a Maine-licensed retailer or distributor who can receive the package. (*Id.*) The First Circuit conceded there was "potential tension" in its decision – Maine hypothetically could prosecute a carrier for "knowing delivery" of contraband tobacco, but Maine could not impute knowledge "based on a failure to read labels or consult lists – an imputation which would amount to prescribing how carriers must operate." (*Id.* at 28-29). Of course, these are the identified means to prove "knowing" delivery of tobacco. The court admitted that "as a practical matter, [it] may be difficult to prove" a case against a carrier. (*Id.* at 29).

REASONS FOR GRANTING WRIT

The First Circuit's decision has far-reaching and devastating effects on the states' ability to exercise their historic health-related police powers. The First Circuit held that the FAAAA preempts the exercise of the state's historic public health police powers whenever the state regulation directly or indirectly potentially affects a carrier's business. The decision forbids states from requiring retailers to use a carrier that provides age verification

and signature services, even though some carriers already provide these types of services. And the decision forbids states from imputing knowledge to a carrier from obvious tobacco markings on a package because it has "effects" on the "uniformity" of a carrier's procedures, even though the carriers already check the packages for a variety of other markings and for damage. These are the means to regulate delivery of dangerous substances, and the First Circuit has identified no others. The decision, thus, preempts countless state laws that have existed for decades, regulating the sale and delivery of substances, from tobacco to weapons to alcohol. *See* note 1, *supra*.

It is beyond debate that unregulated access by children to tobacco products is a serious public health problem – tobacco addicts, sickens and kills. Regulation of children's access to tobacco traditionally and specifically is intended by Congress to be handled by the states. There is *no* federal program regulating delivery sales of tobacco by telephone and internet retailers. The appeals court decision effectively leaves delivery sales of tobacco to children unregulated by any government, a result nowhere suggested by Congress or supported by common sense.

The First Circuit's decision is wrong and conflicts with decisions of this Court. The FAAAA was intended to preempt state *economic* regulation, *City of Columbus,* 536 U.S. at 432. There is no hint that Congress intended preemption of state public health regulations that may have an effect on the "uniformity," and potentially the "economics" or profitability, of carriers. The First Circuit's boundless reading of the "related to" language in the FAAAA preemption provisions swallows up state police powers, and the appeals court specifically refused to follow this Court's practical interpretation of similar language

found in other statutes such as ERISA. It should come as no surprise, therefore, that the First Circuit's decision also conflicts with the analysis of FAAAA preemption of other circuits. The Second and Ninth Circuit hold that the FAAAA does not preempt a state's exercise of its traditional police powers in noneconomic areas. This Court should grant certiorari and reverse the First Circuit's damaging decision.

I. THE COURT'S REVIEW IS NEEDED BECAUSE THE FIRST CIRCUIT'S DECISION PREVENTS THE STATES FROM REGULATING DELIVERY SALES OF DANGEROUS SUBSTANCES, INCLUDING IN PARTICULAR TOBACCO TO CHILDREN.

Tobacco is just one of many substances controlled by states to protect the public health and safety. Maine, like virtually all states, places controls and restrictions on the sale and delivery of tobacco as well as, *inter alia*, weapons, chemicals, and live animals.[7] State controls rely almost entirely upon requiring retailers to ship dangerous substances in a certain fashion or checking for identifying markings or labels on the outside of the package. By holding a state cannot require a retailer to ship dangerous substances in a particular fashion, such as requiring age verification, or impute knowledge to a carrier it is shipping

[7] *E.g.*, Ala. Code § 2-14-5 (barring transport of certain products related to bee keeping); Ariz. Rev. Stat. § 3-209 (barring the transport of quarantined produce); Ariz. Rev. Stat. § 13-3102 (barring transport of prohibited weapons); Cal. Bus. & Prof. Code § 17533.9 (barring transport of teargas); Cal. Fish & Game Code § 4800 (barring the transport of mountain lions); N.Y. Penal Law § 190.50 (barring transport of slot machines or other gambling devices). *See also* note 1, *supra.*

such substances from markings or labels, the First Circuit effectively prevents the states from controlling these substances. There is no other manner to effectively regulate delivery sales of dangerous substances to children. Certainly, the First Circuit does not identify any. The appeals court's decision prevents states from controlling the third-party delivery of such substances, a result having grave consequences for the public health and nowhere suggested by Congress.

"[T]obacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Federal Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000). Although there is *no* comprehensive federal tobacco delivery law, every state bans the sale of tobacco to children. Moreover, as this Court recognized in *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 552 (2001), "there is an established congressional policy that supports" state laws prohibiting cigarette sales to minors; "Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities." The *Lorillard* Court pointed to the 1992 Synar Amendment, Pub. L. No. 102-321, Title II, § 202, 106 Stat. 394, which conditions the receipt of federal block grant funding for substance abuse treatment activities on states' enactment and effective enforcement of laws covering the *sale* and *distribution* of tobacco by "any manufacturer, retailer, or distributor." The Synar Amendment specifically mandates that the states "reduce the extent to which tobacco products are available to individuals under the age of 18." 42 U.S.C. § 300x-26(a)(1) & (b)(1). While striking down certain aspects of the Federal Cigarette Labeling and Advertising Act, 15

U.S.C. § 1334(b), the Court approved of state laws that regulate the "sale and distribution of tobacco products" to children, and emphasized that "States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes." 533 U.S. at 552.

"The presumption against federal pre-emption of a state statute designed to foster public health, has special force when it appears . . . that the two governments are pursuing 'common purposes.'" *See Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 666 (2003) (citations omitted). There is no doubt that the federal and state governments have a common purpose in dealing with youth access to tobacco, and that Congress has left and encouraged that regulation to the states.

While the First Circuit stated that the "FAAAA 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," even that court recognized the "tension" and "practical" difficulties of its decision. (App. 28-29). By striking down the Maine law requiring telephone and internet retailers to use a carrier that provides age verification and signature services, the decision allows those retailers to avoid age verification requirements otherwise applicable to over-the-counter retailers. And the decision purports to allow states to prevent carriers from *knowingly* delivering tobacco, but prevents the states from imputing knowledge to the carriers from tobacco markings or labels on a package, the only identified means to proving *knowing* delivery. The appeals court's decision is unworkable and allows telephone and internet retailers to circumvent state law by utilizing carriers to deliver contraband to minors.

The First Circuit decision thus draws into question the underpinnings of this Court's recent holding in *Granholm v. Heald,* 544 U.S. 460 (2005). There, the Court struck down certain state laws regulating youth access to alcohol as discriminatory against out-of-state businesses under the Commerce Clause. In doing so, the Court explained that "the States can take less restrictive steps to minimize the risk that minors will order 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 490-91. These requirements are similar to those struck down by the First Circuit. It would be a curious result indeed if the sort of "less restrictive" state public health regulations relied upon in *Granholm* are, in fact, preempted under the FAAAA.

II. THE FIRST CIRCUIT'S PREEMPTION ANALYSIS IS INCORRECT AND NOT CONSISTENT WITH THIS COURT'S DECISIONS.

The First Circuit's decision conflicts with this Court's holdings which give a practical meaning to otherwise boundless "relate to" preemption language. This Court's approach honors the intent of Congress when considering the scope of its preemption of states' police powers. The First Circuit's decision, by contrast, rests upon a broad reading of "related to" that effectively swallows up state contraband delivery laws – even though Congress did not manifest any intent, let alone a clear one, to preempt states' health-related police powers. The First Circuit should have looked directly at the intent of Congress, as identified by this Court, that only state *economic* laws regulating carriers are preempted by the FAAAA. *See City*

of Columbus, 536 U.S. at 441. Congress did not intend to preempt any and all traditional state public health laws that happen to have some effect on the uniformity or economic profitability of carriers.

The FAAAA language that preempts state laws "related to a price, route, or service," 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), on its face is of the same limitless breadth as that found in ERISA that preempts state laws "insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a). But the Court has explained in the context of ERISA that the term "relate to" is "unhelpful" and "frustrating," requiring resort to the objectives of the federal legislation. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656 (1995). The term "relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Id.* at 655; *see also California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.,* 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("as many a curbstone philosopher has observed, everything is related to everything else."). Under such circumstances, the "preemption claims turn on Congress' intent," not the literal application of "relate to." *Travelers,* 514 U.S. at 655. The First Circuit, however, specifically chose not to apply this common sense approach to similar preemption language in the FAAAA, stating quite clearly that it is up to the Supreme Court, and not the First Circuit, to do so. (App. 16). The Court should take the opportunity to do so here.

Just as there is "nothing in the language of [ERISA] or the context of its passage indicat[ing] that Congress chose to displace general health care regulation, which

historically has been a matter of local concern," *Travelers,* 514 U.S. at 661, so too there is nothing in the language or context of the FAAAA's passage suggesting Congress enacted that law to displace state contraband delivery laws. As noted by this Court, the FAAAA was intended to preempt "the State's economic authority . . . , 'not restrict' the preexisting traditional police power over" safety, *City of Columbus,* 536 U.S. at 439, and obviously public health as well. The conferees referred to this Court's decision in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), which dealt with similar "relating to" language in the Airlines Deregulation Act (ADA), 49 U.S.C. § 1305(a)(1), as setting forth the level of preemption, but in subsequent pages the conferees repeatedly explained that preemptive effect related to "economic" regulations. H.R. Conf. Rep. No. 103-677, at 83, 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756, 1258-60. The report went on to explain that the committee's intent was not to preempt state authority to regulate such areas as safety and hazardous material, which is only a "partially identified," not "all inclusive" list, so long as the state regulation is not a "guise for . . . economic regulation." H.R. Conf. Rep. No. 103-677, at 83, 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756. Regulation in such areas "is not a price, route or service and thus is unaffected." H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. Finally, the conferees noted that several states, including Maine, had none of the problematic laws that were intended to be preempted, H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1757, 1758. At that time, Maine had numerous contraband delivery laws on the books. *See* note 1, *supra.*

Thus, it is clear that when it used the broad phrase "related to a price, route, or service," Congress did not intend it to be applied literally – and boundlessly – to preempt state public health laws regulating retailers and carriers regarding delivery of dangerous substances such as tobacco. This Court already has approved of state laws regulating the sale and distribution of tobacco to children, *Lorillard*, 533 U.S. at 552, 571, and state laws requiring adult signature and identifying markings for the delivery of alcohol, *Granholm v. Heald*, 544 U.S. at 490. So long as the state law is not intended to regulate the economics of the carriers, such as setting rates or establishing tariffs, there is no preemption under the FAAAA.

Had the First Circuit applied the correct analysis in this case, it would have found that none of the provisions of Maine law at issue were preempted. Section 1555-C(3)(C) requires retailers to use a delivery carrier that provides age verification and signature services in order to prevent delivery of tobacco to children. First, these are not *economic* regulations – they are intended only to protect the health of children – and therefore are not embraced by the FAAAA's "related to" language. Moreover, this provision does not require a carrier to do anything – it merely requires that a *retailer* use a service that is provided by carriers. As noted, the only carrier to present record evidence, UPS, stated that it offers a type of delivery confirmation, adult-signature-required service, for an additional nominal fee of either $1.75 or $2.75. All section 1555-C(3)(C) requires, therefore, is that retailers use a carrier that chooses to provide the required service. It is difficult to see how that regulates the "service" provided by carriers.

The First Circuit's decision appears to be founded on the notion that this regulation of retailers somehow coerces rival carriers to compete to provide such options, and therefore is "related to" a service. (App. 24). Such a boundless reading of a "related to" preemption provision is precisely what this Court rejected in the ERISA line of cases. Its effect, as a practical matter, is to eliminate any state ability to control how retailers deliver tobacco, alcohol and other substances, a result clearly at odds with pronouncements of this Court and the intent of Congress.

The First Circuit's holding regarding section 1555-D fares no better. On the one hand, the court found that the first part of section 1555-D – which prohibits the knowing delivery of tobacco – is not preempted because that could not possibly have been the intent of Congress. (App. 25-27). On the other hand, the court held that the Maine provision imputing knowledge to a carrier from tobacco markings and labels – the only identified means to establish a *knowing* delivery – *is* preempted. (*Id.* at 27-28). The appeals court acknowledged the "tension" in its decision and the "practical" difficulties for the State to prove its case. (*Id.* at 28-29). Simply put, if a State cannot impute knowledge to a carrier from a tobacco marking or label – even though UPS stated that it already checks the outside of packages for other markings, labels and signs of damage – the "practical" difficulties of enforcing Maine's law are in reality insurmountable.

If the First Circuit were true to its reading of "related to," it would have struck down the first part of section 1555-D as well, but even that court realized Congress could not have intended to bar the states from controlling contraband. Instead, the appeals court upheld *in theory* a state's authority to regulate delivery of tobacco, but struck

down the only means to exercise that authority. As that authority rests upon the state's health-related police powers, and not economic regulation, the appeals court decision not only is unworkable but is in direct contravention of this Court's holdings and Congress' intent.

III. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL AS LOWER COURTS.

The First Circuit's view of FAAAA preemption is markedly at odds with that of the Ninth and Second Circuits, as well as several lower courts. In *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), the Ninth Circuit concluded that certain California prevailing wage laws, which were alleged to increase prices by 25 percent and to compel rerouting of equipment, were not preempted by the FAAAA. Plaintiffs argued that the FAAAA preempted the state prevailing wage law because it "directly affects, and therefore is 'related to' the prices, routes, and services of" plaintiffs. *Id.* at 1189. The Ninth Circuit found that California's wage laws were "state action in a field long regulated by the states," and do not "fall[] into the 'fields of laws' regulating prices, routes, or services," finding that nowhere in the FAAAA is there any "mention of Congress's intent to occupy the field of general prevailing wage laws." *Id.* at 1189 & n.6. Obviously, the First Circuit takes the opposite view of the FAAAA – although there is no mention of a Congressional intent to preempt state public health laws, the appeals court held that such an intent is presumed from the "related to" language.

In reviewing the legislative history, the Ninth Circuit noted that Congress identified 41 jurisdictions "which regulated intrastate prices, routes and services, followed by ten jurisdictions which did not regulate in those areas." *Id.* at 1187, relying upon H.R. Conf. Rep. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 1758. Seven of the latter ten jurisdictions, including Maine, had prevailing wage laws at the time of FAAAA's enactment. *Id.* at 1187 & n.3. The appeals court found this constitutes "indirect evidence that Congress did not intend to prevent" prevailing wage laws, a "perception reinforced by the absence of any *positive* indication in the legislative history that Congress intended preemption in this area of traditional state power." *Id.* at 1188. Similarly, Maine was identified by the conferees as a state with no problematic laws; although Maine had substance delivery laws on the books when the FAAAA was enacted (*see* note 1, *supra*), the First Circuit ignored this key consideration.

The appeals courts also disagree regarding the interplay between the interpretations of the similar "related to" preemption language of the FAAAA, Airline Deregulation Act ("ADA"), and ERISA. The Ninth Circuit read *Morales* and *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 234-35 (1995), both of which dealt with the ADA, as not establishing a rigid and boundless rule of preemption, and incorporated into its FAAAA analysis this Court's practical approach toward preemption found in subsequent ERISA cases "to preserve the proper and legitimate balance between federal and state authority." *Mendonca,* 152 F.3d at 1188-89. The First Circuit read *Morales* and *Wolens* as requiring courts only to "focus . . . on the *effect* that the state law has on . . . operations," and, as noted previously,

specifically declined to apply this Court's ERISA analysis to the FAAAA. (App. 15-20).

Subsequently, in *Ace Auto Body & Towing, Ltd. v. City of New York,* 171 F.3d 765 (2d Cir. 1999), the Second Circuit dealt with the scope of the FAAAA's tow truck exception to preemption, deciding that certain New York City towing regulations were not preempted by the FAAAA. That appeals court, like the Ninth Circuit, began with the basic proposition that a state's historic police powers are not superseded unless that was the "clear and manifest purpose of Congress." *Id.* at 771. The Second Circuit found that FAAAA preempts *economic* regulation, and applied the "common sense" approach towards preemption from its ERISA cases. *Id.* at 773-74. Again, the First Circuit takes the opposite approach.

Three lower courts have directly found tobacco contraband and delivery laws not to be preempted by the FAAAA. In *New York State Motor Truck Assoc. v. Pataki,* 2004 U.S. Dist. Lexis 25519 (S.D. N.Y. 2004), the court rejected a claim that the FAAAA facially preempted New York's law mandating, *inter alia*, that if the carrier transported cigarettes to a home or residence, the carrier is presumed to know that such person was not a statutorily authorized recipient. In *Ward v. New York,* 291 F. Supp. 2d 188 (W.D. N.Y. 2003), brought by tobacco retailers and manufacturers, the court denied a motion for a temporary restraining order against enforcement of that law, concluding plaintiffs' FAAAA preemption claim was not likely to succeed. The courts concluded that Congress was concerned with "state economic regulation," not public health laws. *Pataki,* 2004 U.S. Dist. Lexis 25519, at *16; *Ward,* 291 F. Supp. 2d at 209-10. The *Pataki* court put it best, holding "there is nothing within the body of the federal

law or in the legislative history suggesting Congress intended to usurp the states' power to regulate the manner in which cigarettes are shipped into their borders in order to protect their citizenry from the pernicious effects of tobacco which negatively impacts on the states' economy." *Pataki,* 2004 U.S. Dist. Lexis 25519, at *21.

Finally, in *Robertson v. State of Washington Liquor Control Board,* 10 P.3d 1079 (Wash. App. Ct. 2000), the court rejected a claim that Washington's law governing the forfeiture of unstamped cigarettes was preempted by the FAAAA. Using reasoning similar to that of the New York district courts, the Washington court upheld the Washington law even though it did have an impact on the use of plaintiff's truck to haul contraband cigarettes, noting that if the FAAAA preempted state laws prohibiting the "service" of transporting contraband, "a motor carrier would be exempt from forfeiture for transporting a methamphetamine lab, poached game, or contraband cigarettes." *Id.* at 858. The First Circuit's decision draws that obvious and correct conclusion into question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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